



**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**FACILITATING INTERNATIONAL ARBITRATION IN KENYA:  
A GENERAL ANALYSIS OF ARBITRATION IN THE COUNTRY AND  
INTERNATIONAL ARBITRATION IN OTHER SELECTED COUNTRIES**

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF THE MASTER OF LAWS (LL.M) DEGREE**

**DECLARATION**

I hereby declare that this Research Paper is my original work and has not been submitted, and it is not currently being submitted in any other University.

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## **ACKNOWLEDGEMENT**

To all those who held my hand in this tough journey, I am grateful.

## **LIST OF ABBREVIATIONS**

1. ADR- Alternative Dispute Resolution
2. CFA - French Arbitration Committee
3. CPC- *Code de Procédure Civile* (French Civil Procedure Code)
4. DAC - Departmental Advisory Committee on Arbitration Law
5. ICC - International Chamber of Commerce
6. ICSID- International Centre for Settlement of Investment Disputes
7. NCIA - Nairobi Centre for International Arbitration Act
8. UNCITRAL - United Nations Commission on International Trade Law
9. USD-United States Dollars

## **LIST OF STATUTES AND REGULATIONS**

1. The Constitution of the Republic of Kenya
2. The Kenyan Arbitration Act, No. 4 of 1995
3. The English Arbitration Act 1996
4. The Kenyan Civil Procedure Rules 2010
5. *Le Code de Procédure Civile* (French Civil Procedure Code)
6. The Nairobi Centre for International Arbitration Act, No. 26 of 2013
7. The Nairobi Centre for International Arbitration, Arbitration Rules 2015

## **LIST OF INTERNATIONAL INSTRUMENTS**

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
2. The Convention on Settlement of Investment Disputes between States and Members of Other States 1965
3. The United Nations Commission on International Trade (UNCITRAL) Rules

## LIST OF CASES

1. *Adopt a light v. Magnate Ventures Ltd and 3 Others* (2009) Eklr.
2. *Agence Transcongolaise des Communications-Chemin de fer Congo (ATC-CFCO) v Compagnie Minière de l'Ogooue-Comilog S.A* (Case No 95/80283 of 1997).
3. *Charles Njogu Lofty v. Bedouin Enterprises Ltd* Civil Appeal No. 253 of 2003.
4. *Christ for All Nations v. Apollo Insurance* (2002) 2 EA 366.
5. *Compagnie l'Alliance v. Prunier* (Cass. civ. 10 July 1843).
6. *Costa de Marfil Naviera v. Compagnie Marchande de Tunisie* (Paris Court of appeal, Rev. Arb. 1961.25).
7. *Edwards v. Aberayon Insurance Society* (1875) 1 Q.B.D 563.
8. *Glencore Grain Limited v. TSS Grain Millers Limited* (2002) 1 KLR 606.
9. *Heyman v. Darwins Ltd* (1942) A.C. 356.
10. *Hilmarton v Omnium* (Case No 92-15.137) (23 March 1994).
11. *Joab Henry Onyango Omino v. Lalji Meghji Patel & Co. Ltd* Civil Appeal No.119 of 1997 (UR).
12. *Nurdin Jivraj v. Sadruddin Hashwani* (2010) EWCA Civ 712.
13. *O'Callaghan v. Coral Racing Limited* (Reported in The Times, 26<sup>th</sup> November 1998).
14. *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* (1983) 1 All ER 34.
15. *Premium Nafta Products Ltd v. Fili Shipping Co. Ltd & others* (2007) UKHL 40.
16. *Renu Saghar Power Co. v. General Electric* (1994) AIR 1960.
17. *Re Olympia Oil & Cake Co., and MacAndrew, Moreland & Co* (1918)2 K.B. 771.
18. *S.A. Fibre Excellence v. S.A.S. Tembec* (2<sup>nd</sup> December 2014).

19. *SARL Carthago Films v SARL Babel Productions* (Revue de l'Arbitrage 2001 at page 543).
20. *Seyani Brothers & Co. v. Zakhem Construction (K) Ltd* (Miscellaneous Cause No.212 of 2006 Milimani) (UR).
21. *Société PT Putrabali Adyamulia v Société Rena Holding* Case No 05-18.053 (29 June 2007).
22. *Zanzi v J. de Coninck* (Case No 96-21.430) (5 January 1999).



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## **ABSTRACT**

*Arbitration in general is not a new concept in Kenya. However, the country is not a famous international arbitration venue unlike other countries such as France and England, which are reputed seats for international arbitration. The Nairobi Centre for International Arbitration Act (“the NCIA”) came into force on 25<sup>th</sup> January 2013 as a move to promote Nairobi as a reputable destination for international arbitration.*

*Although this is a commendable move, there are a number of issues to be addressed before the country achieves the desired status of a favorable international arbitration destination. For instance, there may be challenges that arbitrators in international arbitrations have faced while conducting arbitrations under the Arbitration Act Number 4 of 1995. Such challenges can offer vital lessons of the issues that may arise in the practice of international arbitration, which need to be addressed if the process is to succeed in the country.*

*Furthermore, countries which are more established seats of international arbitration are good examples that the country can emulate in its quest to become a reputable seat of international arbitration. Therefore, this research looks at the challenges that may have affected international arbitration in Kenya from the perspective of the general arbitration experience and determines whether the NCIA has addressed them. It also studies the practice of international arbitration in some more established countries to determine the lessons that Kenya can learn from those countries.*

*Finally, the research concludes by making proposals that can be adopted based on analysis of the research findings, which if implemented may assist in the quest to make the country a reputable destination in the area of international arbitration.*

## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 Background

Alternative Dispute Resolution (ADR) generally comprises all the methods by which disputes are resolved privately other than through litigation in public courts.<sup>1</sup> However, in Kenya the courts of law are not necessarily detached from ADR but also play a facilitative role. In fact, the Constitution of Kenya 2010 recognizes the need for the courts to promote ADR. <sup>2</sup>It provides that courts and tribunals while exercising their judicial authority shall promote alternative forms of dispute resolution including arbitration.

ADR techniques fall into two types, i.e. those that attempt to persuade the parties to settle the dispute and those that culminate in a binding decision.<sup>3</sup> As far as the former category is concerned, there are processes such as mediation, conciliation, mini-trial and neutral listener agreement.

There is no universally accepted definition of Arbitration.<sup>4</sup> This can be attributed to the fact that arbitration is conducted differently and subjected to different rules in different legal systems.<sup>5</sup> Every jurisdiction may apply its own interpretation of what may or may not be referred to arbitration, who may arbitrate and how the process may be conducted.<sup>6</sup> For example, arbitration was defined by Hirst L.J in *O'Callaghan v. Coral Racing Limited*<sup>7</sup> as a procedure to determine legal rights and obligations of parties judicially with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court in law. It has also been defined as the reference of a dispute or difference between

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<sup>1</sup> <http://www.duhaime.org/LegalDictionary/A/AlternativeDisputeResolution.aspx>

(last accessed on 27<sup>th</sup> January 2015).

<sup>2</sup> Article 159(2) (c).

<sup>3</sup> Andrew Tweedale and KerenTweedale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) at page 4 paragraph 1.03.

<sup>4</sup> Ibid at page 33 paragraph 2.01.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Reported in The Times, 26<sup>th</sup> November 1998.

no less than two persons for determination, for hearing of both sides in a judicial manner by another person or persons other than a court of competent jurisdiction.<sup>8</sup>

It is a private consensual process in which a dispute is referred by the parties to a neutral third party for settlement.<sup>9</sup> Arbitration is a process that culminates in a binding decision. The person to whom the dispute is referred to is known as an arbitrator or arbitral tribunal. The word tribunal is used even where there is one arbitrator.<sup>10</sup> Arbitration has several characteristics.<sup>11</sup> First, there is a written agreement entered into by the parties, to refer any dispute that may arise between them in the course of their dealings, to arbitration for settlement, which confers on the respective arbitrator or arbitral tribunal, jurisdiction to hear and determine the dispute. If the agreement is invalid or unenforceable, arbitration cannot succeed.<sup>12</sup> The arbitration agreement is a renunciation by an individual of his or her right to seek redress before a court of law.<sup>13</sup>

When an arbitration agreement is incorporated into a contract, it will survive the termination of the contract unlike other clauses which become void upon the contract's termination.<sup>14</sup> Therefore, an arbitration agreement is considered autonomous and severable from the main contract.<sup>15</sup> It is known as the principle of separability and has been recognized in both civil law and common law countries.

In England where the Kenyan arbitration law was borrowed from, the principle was first discussed by the Court of Appeal in the case of *Heyman v. Darwins Ltd*<sup>16</sup> which involved a breach of contract. Lord MacMillan observed inter alia concerning the breach "...The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract..."

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<sup>8</sup> Enid A. Marshall, Gill: *The Law of Arbitration* (4<sup>th</sup> Edition Sweet & Maxwell 2001) at page 3.

<sup>9</sup> Farooq Khan, "Alternative Dispute Resolution", A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

<sup>10</sup> Alan Redfern et al. op.cit at page 5 paragraph 1-06.

<sup>11</sup> Andrew Tweedale and Keren Tweedale op.cit at page 34 paragraph 2.04.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid at page 35 paragraph 2.05.

<sup>14</sup> Ibid at paragraph 2.06.

<sup>15</sup> Ibid.

<sup>16</sup> (1942) A.C. 356.

It was later acknowledged in the case of *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal (The Hannah Blumenthal)*<sup>17</sup> where Lord Diplock noted that an arbitration clause is collateral to the contract it features in. Its obligations differ from the primary obligations of the parties under the said contract and it survives termination of the said contract.<sup>18</sup>

Secondly, there is an arbitrator or arbitral tribunal. This is the person, body or panel that will hear and determine the dispute in question. The arbitrator or arbitral tribunal is obliged to be fair and impartial so that justice is not only done, but seen to be done.<sup>19</sup> The parties may choose a tribunal or come up with a process by which the tribunal may be appointed.<sup>20</sup> They may also decide which rules will govern the arbitration process. The tribunal selection process may be found in the arbitration agreement or in the rules agreed upon by the parties.<sup>21</sup>

Thirdly, there has to be a dispute between the parties. This is the disagreement between the parties, which necessitates the intervention of a third party. The dispute is essential to the arbitration process, without which arbitration will have no basis. In *Collins v. Collins*,<sup>22</sup> Romilly MR attempted to distinguish arbitration from other processes by observing inter alia, "...but unless a difference has actually arisen, it does not appear to me to be arbitration." However, it is important to note that not all disputes will necessitate arbitration proceedings. In this regard, disputes that have no legal basis e.g. wagering contracts cannot be referred to arbitration.<sup>23</sup>

Finally, it is a quasi-judicial process. The arbitral tribunal is required to arrive at a decision in accordance with the law chosen by the parties. The arbitral award is usually final and binding on the parties. Once the award is made, the arbitral tribunal becomes *functus officio* regarding the matters it has decided.<sup>24</sup>

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<sup>17</sup>(1983) 1 All ER 34.

<sup>18</sup>Ibid at page 50.

<sup>19</sup> Andrew Tweedale and Keren Tweedale op.cit at page 34 paragraph 2.04.

<sup>20</sup> Ibid at page 36 paragraph 2.07.

<sup>21</sup> Ibid.

<sup>22</sup>(1858) 26 Bear 306 at page 312.

<sup>23</sup> Andrew Tweedale and Keren Tweedale op.cit at page 509 paragraph 16.44.

<sup>24</sup> Ibid at page 38 paragraph 2.12.



Arbitration is a tailor made process fashioned by the parties. The parties to the process are at liberty to agree on the choice of arbitrators and the scope of the parties' submissions. The parties are also free to agree on the seat of arbitration and the language to be used in the arbitration proceedings.<sup>25</sup> It is a process preferred by parties because of reduced formality and perceived less expense as compared to the court process, though the cost effective perception will depend on how the process is actually conducted.<sup>26</sup>

Furthermore, the parties can involve experts or specialists to arbitrate in technical disputes, the parties enjoy privacy of the proceedings, the arbitration process is faster than litigation and decisions are widely recognized and are enforceable.<sup>27</sup> Lord Hoffman in *Premium Nafta Products Ltd v. Fili Shipping Co. Ltd & Others*<sup>28</sup> observed that arbitration can provide elements of neutrality, as regards location, governing law and constitution of the tribunal which makes it attractive in international commerce.

On the other hand, there are critics who view arbitration as a rudimentary process because the dispute is referred to ordinary people whose only qualification is being chosen by the parties in dispute.<sup>29</sup> Arbitration has also been criticized for being prone to wastage of time especially where technicalities are raised at the preliminary stages, it also lacks summary procedures available in litigation which enable parties to expedite the conclusion of cases. It has also been criticized for the difficulty in consolidation of similar disputes without the consent of the parties. Furthermore, the decisions arrived at are at times considered to be below the parties' expectations.<sup>30</sup>

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<sup>25</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) at page 1.

<sup>26</sup> Andrew Tweedale and Keren Tweedale op. cit at page 39 paragraph 2.14.

<sup>27</sup> Jacob K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (International Journal of Humanities and Social Science Vol.1 No.6, June 2011 pages 219 – 241) at page 222.

Available at <http://www.ijhssnet.com/journals/Vol.1.No.6;June.2011/25.pdf>

(last accessed on 27th June 2015).

<sup>28</sup>(2007) UKHL 40.

<sup>29</sup>Alan Redfern et al. op.cit at page 2 paragraph 1-03.

<sup>30</sup> David St. John Sutton, Judith Gill and Mathew Geary, *Russel on Arbitration* (Sweet and Maxwell 2007) at pages 13-14.

There is an advanced form of arbitration, called international arbitration. It involves resolution of disputes between parties with different legal and cultural backgrounds. It is a relaxed process with no national flags or other symbols of state authority.<sup>31</sup> There are no ushers or wigs but the process involves the parties across the table in a hired venue. To the outsider, the scene may appear to be a business conference.<sup>32</sup>

There are several laws or rules that apply to the process. There is the law that governs the recognition and enforcement of the arbitration agreement, the law governs the arbitration proceedings, the substantive law that is applied to resolve the dispute and the law that governs the recognition and enforcement of the arbitral award.<sup>33</sup>

International arbitration may take different forms ranging from arbitration between individuals, between states or between states and individuals.<sup>34</sup> In the case of individuals, it can occur in disputes involving companies, joint ventures or other legal entities if such entities enter into legally enforceable contracts incorporating arbitration agreements.<sup>35</sup>

The parties who intend to settle their disputes through international arbitration should consider several things as they draft the arbitration agreement.<sup>36</sup> First, they should consider the seat of arbitration.<sup>37</sup> This is the place where the international arbitration proceedings will be conducted. They should appreciate that the law of the seat of arbitration will govern the procedural formalities of the arbitration proceedings.

The parties should also choose the law that will be applied in the arbitration proceedings. This law will be used to interpret the contracts that the parties may have entered into and determine the issues in dispute.<sup>38</sup>

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<sup>31</sup> Alan Redfern et al. op.cit at page 1 paragraph 1-03.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid pages 1-2 paragraph 1-01.

<sup>34</sup> Andrew Tweedale and KerenTweedale op.cit. at page 40 paragraph 2.16.

<sup>35</sup> Ibid at paragraph 2.17.

<sup>36</sup> Justin L. Heather, "*An Introduction to International Arbitration*" at page 2 .Available at [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_aba\\_annual/2\\_2.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/2_2.auth_checkdam.pdf). (last accessed on 14<sup>th</sup> February 2015).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

It is also important for parties to agree on how the arbitral tribunal will be composed in terms of the number of arbitrators, their qualifications and how they will be selected.<sup>39</sup>In many cases, arbitrations are conducted by either one or three arbitrators.<sup>40</sup>Although it may be cheaper to have a single arbitrator, it is advisable in complex arbitration disputes to have three arbitrators because they may bring their diverse experiences in the arbitration proceedings as well as ensuring a majority decision.<sup>41</sup>

Parties to international arbitration usually choose a seat of arbitration that is in a different country from their individual countries. They also choose an arbitral tribunal comprising of arbitrators of different nationalities from their own so as to ensure neutrality in the proceedings and prevent bias by the arbitrators.<sup>42</sup>

There are instances where parties may impose some prior conditions to be fulfilled before international arbitration can be conducted. Parties may agree that arbitration will be the last resort. For example, they could agree that should a dispute arise, they will first explore other dispute resolution mechanisms such as negotiating in good faith. They could further agree that if negotiations fail, they will resort to mediation before commencement of arbitration proceedings.<sup>43</sup>

The parties may specifically provide for confidentiality in the arbitration agreement. This may be necessary where it may be necessary to disclose sensitive information in the arbitration proceedings. The provision for confidentiality may not be necessary where parties select arbitration rules that provide for confidentiality.<sup>44</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Clayton Utz, “*A Guide to International Arbitration*” at pages 8-9 available at <https://www.claytonutz.com/ArticleDocuments/178/Clayton-Utz-Guide-to-International-Arbitration-2012.pdf.aspx?Embed=Y> (last accessed on 14<sup>th</sup> February 2015).

<sup>41</sup> Ibid.

<sup>42</sup> Aiste Sklenyte “*International Arbitration: the Doctrine of Separability and Competence-Competence Principle*” a dissertation in MSc of EU Business and Law submitted at the Aarhus School of Business in 2003 at page 7 available at <http://pure.au.dk/portal/files/2372/000126197-126197.pdf>. (last accessed on 14<sup>th</sup> February 2015).

<sup>43</sup> Justin L. Heather op.cit at page 2.

<sup>44</sup> Clayton Utz op.cit at page 9.

The parties may provide for the scope of matters that may be referred to arbitration. They may agree that all disputes that may arise in the performance of their contractual obligations should be referred to arbitration.<sup>45</sup> In determining the scope, it is important to consider arbitrability of the disputes i.e. which disputes can be referred to arbitration because not all disputes should be referred to arbitration. Criminal matters for example are not usually referred to arbitration.<sup>46</sup> They are usually prosecuted by state in which the crimes were committed.

Parties should also decide whether the international arbitration will be ad hoc or institutional in nature. Institutional arbitration is usually conducted under the auspices or supervision of an arbitral institution.<sup>47</sup> On the other hand, parties to ad hoc arbitration agree to arbitrate without designating any institution to conduct the arbitration. Parties will choose an arbitrator or arbitrators, who will settle the dispute without any assistance or supervision from any institution.<sup>48</sup>

There are advantages of either choice. In institutional arbitration, the institution administers the proceedings ensuring that administrators are appointed in a timely manner, the arbitration is conducted within reasonable time and the applicable fees are paid in advance.<sup>49</sup> Furthermore, the institution's comprehensive rules are applied and enforcement of the award may be easier due to an institution's widespread recognition.<sup>50</sup> On the other hand, parties in an ad hoc arbitration enjoy flexibility in the process and incur lesser costs.<sup>51</sup>

International arbitration is a practical process that is sustained by national laws and international treaties. In the case of Kenya for example, we have the Arbitration Act,<sup>52</sup> the New York Convention,<sup>53</sup> the Washington Convention<sup>54</sup> and the United Nations

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<sup>45</sup> Ibid at page 7.

<sup>46</sup> Ibid.

<sup>47</sup> Aiste Sklenyte op.cit at page 18.

<sup>48</sup> Ibid.

<sup>49</sup> Margaret L. Moses, op.cit at page 9.

<sup>50</sup> Ibid.

<sup>51</sup> [http://www.setty-lawfirm.com/page.asp?page\\_parent=707](http://www.setty-lawfirm.com/page.asp?page_parent=707) (last accessed on 14<sup>th</sup> February 2015).

<sup>52</sup> Act No. 4 of 1995 as amended by the Arbitration (Amendment) Act No. 11 of 2009.

<sup>53</sup> 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>54</sup> 1965 Convention on Settlement of Investment Disputes between States and Members of Other States.

Commission on International Trade (UNCITRAL) Arbitration Rules<sup>55</sup> which were revised in 2010. We also have the recently enacted Nairobi Centre for International Arbitration Act (NCIA)<sup>56</sup> and its rules were promulgated thereafter.<sup>57</sup>

The preamble of the NCIA states that the Act was enacted to provide for the establishment of a regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. It was enacted so as to make Nairobi an attractive destination for foreign investors who require the services of international institutional arbitrators.<sup>58</sup>

## 1.2 Statement of the Problem

A survey conducted in 2014 to determine the five most popular international arbitration venues demonstrated that London was the most popular city, followed by Paris, Geneva, New York with Stockholm ranking fifth place.<sup>59</sup> Furthermore, a 2015 survey conducted by Queen Mary University of London in partnership with the re known law firm of White & Case, found inter alia that London and Paris had been the most popular venues of international arbitration over the previous five years.<sup>60</sup> Finally, another survey conducted in 2016 on ICC arbitrations, noted that the United States, France and Switzerland were the most chosen venues for ICC arbitration, with New York as the most popular seat within

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<sup>55</sup> These rules were promulgated pursuant to the United Nations General Assembly's resolution 31/98 of 15<sup>th</sup> December 1976 which recommended the use of Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

<sup>56</sup> Act No. 26 of 2013, which came into force on 25<sup>th</sup> January 2013.

<sup>57</sup> The NCIA rules were effected in 2015.

<sup>58</sup> 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*", at page 10. Available at

<http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf> (last accessed on 16<sup>th</sup> February 2015).

<sup>59</sup> Berwin Leighton Paisner, "*International Arbitration Research based report on choice of venue for international arbitration*" at page 11. Available at

[http://www.blplaw.com/download/BLP\\_International\\_Arbitration\\_Survey\\_2014\\_FINAL.pdf](http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf) (last accessed on 27<sup>th</sup> July 2016).

<sup>60</sup> "*International Arbitration Dominates Global Dispute Resolution; London and Paris lead the way as most popular venues, but Asian cities are closing the gap*" available at

<https://www.solicitorsjournal.com/news/legal-profession/courts/24162/international-arbitration-dominates-global-dispute-resolution> (last accessed on 2nd March 2017).

the United States.<sup>61</sup> From these surveys, neither did Nairobi feature as one of the five most popular seats of international arbitration nor Kenya rank as one of the five most chosen venues for ICC arbitration.

Evidently, Kenya has not been a popular venue, despite having a Constitution which has been cited as one of the most progressive Constitutions in the region and the world. In fact the Constitution promotes ADR mechanisms including arbitration subject to certain conditions.<sup>62</sup>

It is noteworthy that prior to the enactment of the NCIA, the only statute that governed international arbitration was the Arbitration Act.<sup>63</sup> Notwithstanding the coming into force of the NCIA, the Arbitration Act may still apply as the NCIA does not have provisions for enforcement or challenging an award made pursuant to an international arbitration conducted under the Nairobi Centre for International Arbitration (“the Centre”). In such a case it may be argued that recourse will be to the provisions of the Arbitration Act hence the Act applies to both institutional and ad hoc international arbitration by default. The Arbitration Act distinguishes domestic from international arbitration.<sup>64</sup>

An arbitration is domestic, if the arbitration agreement provides for arbitration in Kenya and at the time of commencement of proceedings, if the parties are individuals, they are citizens of Kenya or habitually resident in Kenya. If the parties are corporate entities, they should have been incorporated in Kenya or their central management and control is exercised in Kenya. If the parties are an individual and a corporate entity, the individual at the material time should either be a citizen or a habitual resident of Kenya while the corporate entity should either have been incorporated in Kenya or its central management and control is in Kenya. Lastly, the place of substantial performance of commercial obligations or the place the dispute is most closely connected to, is Kenya.

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<sup>61</sup> “*New York Tops Popularity Ranking as Seat for International Arbitration*” available at <https://nyiac.org/nyiac-news/new-york-tops-popularity-ranking-as-seat-for-international-arbitration/> (last accessed on 2<sup>nd</sup> March 2017).

<sup>62</sup> Article 159(2) (c) as read with Article 159(3) of the Constitution.

<sup>63</sup> Number 4 of 1995.

<sup>64</sup> Sections 3(2) as read with 3(3).

Arbitration is international if the parties have at the time of concluding the arbitration agreement, places of business in different countries. It is also international if the parties' place of business is in a different state from that of the arbitral seat, of substantial performance of the obligations in the parties' commercial relationship or the one having the closest connection to the dispute. Finally, arbitration is international if the parties concur that the subject matter of arbitration relates to different states.

From these definitions, it is clear that the Arbitration Act deals with both domestic and international arbitrations where the seat, the place that is closest connected to the dispute or of substantial performance of the obligations in a contractual relationship is Kenya.

Therefore, the same principles and processes have applied to Kenyan arbitrations, whether domestic and international, noting that the Arbitration Act does not distinguish the provisions that apply to domestic arbitration from those governing international arbitration. It can therefore also be argued that a study of how arbitration is generally conducted in Kenya under the Arbitration Act will inevitably encompass the international arbitration process.

Evidently, different sectors of our economy such as the financial sector, hospitality sector, transport sector and tourism sector will benefit if the country is a popular venue for international arbitration. The parties in international arbitrations will transact through Kenyan banks, as they withdraw funds from their accounts or make payments to the Centre. They will also spend money as they travel around the country during breaks in the proceedings, to visit the various tourist attractions in the country. Lastly, they will also be obliged to stay in the hotels, during the duration of the international arbitration proceedings.

Nevertheless, Kenya's failure to feature globally as a major player in international arbitration, notwithstanding the enactment of the NCIA, means that the said sectors of the economy will continue to lose out on opportunities for growth. The financial sector may miss out on additional revenues, associated with increased banking transactions of the parties to international arbitration proceedings, in the course of the proceedings. The transport sector may lose out on the opportunity to create more jobs and increase revenues which may have been possible due to an increase in customers drawn from the international

arbitration proceedings. The hospitality industry may miss the opportunity to improve the occupancy rates in hotels, due to an increase in the number of visitors coming to the country to engage in international arbitration and to stay during the course of the proceedings.

Therefore, there is need to find out what needs to be done to strategically position the country in the international arbitration community, so that the country's economy can start reaping the appurtenant benefits.

Since experience is the best teacher, it is prudent to first establish how international arbitration has been conducted in Kenya, based on the practice of arbitration in general, so as to determine whether the enactment of the NCIA as a means of placing our country on the international arbitration platform, has been beneficial in terms of addressing any challenges that may have been witnessed in the Kenyan arbitration proceedings.

The study also seeks to go further and learn from the practice of international arbitration in some of the more established countries, which have excelled in the said surveys and if need be, to make proposals that Kenya can implement in order to become a reputable seat of international arbitration and reap the appurtenant benefits.

### **1.3 Research Questions**

- a) What are the challenges encountered in international arbitration in Kenya, based on the general arbitration experience in the country?
- b) Whether the NCIA has addressed such challenges?
- c) What lessons can Kenya learn from the practice of international arbitration in some of the countries that are more established seats of international arbitration?
- d) What proposals can be made to improve the conduct of international arbitration in Kenya from the experience in more established countries?



## **1.4 Objectives of the Study**

This study aims to achieve the following goals:

- a) to determine the challenges encountered in international arbitration in Kenya, based on the general arbitration experience in the country;
- b) to determine whether the NCIA has dealt with such challenges;
- c) to determine how international arbitration is conducted in more established seats of international arbitration; and
- d) to recommend proposals if any, that may assist in improving the status of Kenya as a hub for international arbitration.

## **1.5 Hypotheses**

- a) Kenya has addressed the challenges affecting international arbitration.
- b) Kenya needs to learn from the experience of some of the most popular seats of international arbitration in the world.
- c) Kenya may need to amend some of its existing laws to improve the practice of international arbitration.

## **1.6 Literature Review**

The enactment of the NCIA is an appreciation that the country has in the past not performed well in terms of hosting international arbitrations, hence the need to establish facilities that will encourage the international business community to refer their disputes to the country for settlement.

In order to determine the appropriate steps that will propel the country in the right direction, it is important to take stock of what the scholars have written concerning arbitration in

general, as well as international arbitration in Kenya and also identify any existing gaps in the available knowledge that will necessitate further research.

Different local and regional scholars have provided in their works, different perspectives on the topics of domestic arbitration and international arbitration. They have analyzed the contentious provisions in the country's subsisting legal frame work. Paul Ngotho extensively discusses Section 6(1) of the Arbitration Act, which prohibits a stay of court proceedings pending arbitration once a party has entered appearance.<sup>65</sup> The paper seeks to demonstrate that a party to a dispute relinquishes the right to resolve the dispute through arbitration once the party has entered appearance and concludes by recommending a deletion of this contentious provision.

He has also written a paper in which he discusses the factors that promote Kenya as a venue for international arbitration.<sup>66</sup>In the paper, he discusses Kenya's selling points such as the constitutional provisions which promote ADR, the Arbitration Act 1995 which is a replication of the UNCITRAL Model Law 1985, the 1989 ratification of the New York Convention, competent judges and a pool of highly qualified arbitrators. It also has many hotels, financial institutions and favourable climate.

Jacob Gakeri analyses the process of arbitration in Kenya in terms of the history and the legal set up.<sup>67</sup>He examines how some communities resolved disputes according to their customs in pre-colonial times, the framework governing international arbitration, the applicable law on arbitration law prior to and after 1995. He argues that when the arbitration law was enacted in the colonial era, there was no attempt to align the arbitration laws to existing local customs which explains why arbitration has not been a popular dispute settlement mechanism in the country ever since. He concludes by inter alia

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<sup>65</sup> Paul Ngotho, "*The Bastard provision in Kenya's Arbitration Act.*" Available at <http://www.ngotho.co.ke/TheBastard.pdf> (last accessed 16th February 2015).

<sup>66</sup> Paul Ngotho, "*Nairobi as a Centre of International Arbitration.*" Available at <http://arbitrateatlanta.org/wp-content/uploads/2014/11/Nairobi-as-a-Centre-of-International-Arbitration.pdf> (last accessed on 27th June 2015).

<sup>67</sup> Jacob Gakeri op.cit.

advocating for the institutionalization of ADR mechanisms in terms of policy formulation, legislation and formal recognition of arbitration as a profession.

Paul Musili Wambua has written on the challenges of implementing ADR in Kenya.<sup>68</sup>In the article, he generally discusses ADR and its governing legal framework in the country. He proceeds to discuss the challenges facing ADR and proposes several reforms such as decentralization of operations by the Chartered Institute of Arbitrators into the counties as well as legislative reforms to improve the implementation of the ADR mechanisms in Kenya.

Kariuki Muigua has written widely on arbitration both in Kenya and in the continent. As far as Kenya is concerned, he discusses the entire process of domestic arbitration in light of the Arbitration Act, the powers of the court during the arbitration process and the enforcement of the arbitral award.<sup>69</sup>He has also analyzed court annexed arbitration in the context of the underlying legal framework being the Constitution of Kenya, Section 59 of the Civil Procedure Act and the Order 46 of the Civil Procedure Rules.<sup>70</sup> Furthermore, he has compared the Act with the English Arbitration Act of 1996 in terms of some of the key provisions in both Acts and the powers of the court in the arbitration process. He also highlights the points of departure in both Acts.<sup>71</sup>

The scholar has also written on the challenges of conducting arbitration in Kenya and proceeds to point out the lessons that can be applied to international arbitration, in order for the country to become a favorable international arbitration destination.<sup>72</sup>

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<sup>68</sup> Paul Musili Wambua, *The Challenges of implementing ADR as an Alternative Mode of Access to Justice in Kenya* (Chartered Institute of Arbitrators in Kenya Journal on Alternative Dispute Resolution, Volume 1 Number 1 © 2013) at pages 15-35.

<sup>69</sup> Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers 2012).

<sup>70</sup> Kariuki Muigua, “*Court Annexed ADR in the Kenyan Context*”. Available at <http://www.kmco.co.ke/index.php/publications/106-court-annexed-adr-in-the-kenyan-context> (last accessed on 27<sup>th</sup> June 2015).

<sup>71</sup> Kariuki Muigua, “*The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-vis Arbitration Act 1996 of United Kingdom*”. Available at <http://www.kmco.co.ke/index.php/publications/the-arbitration-acts-a-review-of-arbitration-act-1995-of-kenya> (last accessed on 27<sup>th</sup> June 2015).

<sup>72</sup> Kariuki Muigua op.cit note 58.

He has generally examined the state of international commercial arbitration in Africa.<sup>73</sup>In this paper, he discusses possible reasons why international commercial arbitration has failed in the continent yet there are arbitral institutions that have been established. He also looks at arbitration in Kenya and proposes some measures that can be taken to raise the profile of the African continent in the international commercial arbitration circles.

He has also written on the effect of Article 159 of the Constitution in promoting ADR in Kenya.<sup>74</sup>In this paper, he analyses the constitutional provisions on ADR and access to justice. He also generally discusses the various ADR mechanisms, the challenges facing the practice of ADR in the country and also looks at the prospects of ADR. He also suggests that the country should adopt some ADR models utilized in other countries.

Peter Mutuku Mbithi discusses the conduct of international commercial arbitration in Kenya and seeks to determine whether arbitration is a suitable alternative to resolving commercial disputes in the country.<sup>75</sup> He also discusses the legislations enacted from the colonial times until the recent past e.g. the Arbitration Ordinance, the Arbitration Act (Cap 49), the Arbitration Act of 1995, the NCIA of 2013 as well as the applicable legal conventions such as the New York Convention. He discusses the court's power in the arbitration process. He also discusses arbitration in South Africa and Mauritius and compares arbitration in both countries. He also looks at the opportunities and challenges to arbitration in Kenya and proposes several amendments to the Arbitration Act and NCIA.

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<sup>73</sup> Ibid.

<sup>74</sup> Kariuki Muigua, *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*. Available at <http://www.kmco.co.ke/index.php/publications/113-heralding-a-new-dawn-achieving-justice-through-effective-application-of-alternative-dispute-resolution-mechanisms-adr-in-kenya> (last accessed on 27th June 2015).

<sup>75</sup> Peter Mutuku Mbithi, *“International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Disputes in Kenya?”* A Master of Laws dissertation submitted at the University of Cape Town in February 2014 available at [https://open.uct.ac.za/bitstream/item/13276/thesis\\_law\\_2014\\_mbithi\\_pm.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/13276/thesis_law_2014_mbithi_pm.pdf?sequence=1) (last accessed on 27<sup>th</sup> June 2015).

Regionally, Edward Nii Adja Torgbor engages in a comparative study of the arbitration process in Kenya, Nigeria and Zimbabwe.<sup>76</sup> In the dissertation, he lays the foundation of the study by analyzing applicable legal instruments concerning arbitration in Africa. He then delves in detail, into the common challenges that affect the arbitration process right from the interpretation and enforcement of the agreement to arbitrate, the appointment of arbitrators, delaying tactics by parties in terms of all manner of interim applications and the actual recognition and enforcement of arbitral awards.

He proceeds to suggest remedies for the challenges such as the formulation of a code of sanctions to ensure parties' commitment to the arbitration process and compliance with the arbitrator's directives in the course of the said process. He also suggests a revision of the entire process of recognition and enforcement of arbitral awards to make it less cumbersome.

Internationally, there are some reports that were generated by the law reform committees of different countries, as they sought to come up with their own international arbitration laws based on the UNCITRAL Model Law. An example is Singapore's 1993 report by the Law Reform Sub-Committee on the review of arbitration laws.<sup>77</sup> It begins by a brief recap of the sub-committee's activities, then proceeds to set out the provisions of the draft bill to domesticate the UNCITRAL Model Law.

It then provides a list of recommendations including the adoption of the UNCITRAL Model Law, application of the principle of reciprocity enshrined in the New York convention as well as the exclusion of consolidation in international arbitration proceedings. It also includes a summary of the sub-committee's deliberations on various provisions of the UNCITRAL Model Law, including the distinction between domestic and

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<sup>76</sup> Edward Nii Adja Torgbor, "A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya" A PhD dissertation submitted at the University of Stellenbosch in March 2013. Available at [https://ir1.sun.ac.za/bitstream/handle/.../torgbor\\_comparative\\_2013.pdf?...2](https://ir1.sun.ac.za/bitstream/handle/.../torgbor_comparative_2013.pdf?...2) (last accessed on 27<sup>th</sup> June 2015).

<sup>77</sup> Report is titled "Law Reform Committee: Sub-committee on Review of Arbitration Laws Report" Available at [http://www.singaporelawwatch.sg/legal/lgl/html/freeaccess/lrcr/review\\_of\\_arbitration\\_laws.pdf](http://www.singaporelawwatch.sg/legal/lgl/html/freeaccess/lrcr/review_of_arbitration_laws.pdf) (last accessed on 17<sup>th</sup> March 2018).

international arbitration, extent of court intervention, interim awards and public policy. It concludes by proposing the legislation of the draft bill.

Another example is the 1998 South African Law Commission report, on a proposed international arbitration law.<sup>78</sup>It takes stock of the statutes that were in application during the apartheid years, namely the Arbitration Act, Number 42 of 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act, Number 40 of 1977. Since the statutes were promulgated at a time when the country was politically isolated, the report observed the need to update them as they were outdated.

It generally proposes a draft bill that adopts the UNCITRAL Model Law, improves the provisions of the 1977 statute. It also recommends the adoption of the Washington (ICSID) Convention, in order to encourage foreign investment. The report also gives a brief history of the commission's activities and discusses the provisions of the draft bill in relation to the country's two statutes, the UNCITRAL Model Law, New York and Washington conventions and the statutes of other countries including Zimbabwe, New Zealand and England. It also proposes in its conclusion, the incorporation of the transition provisions in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 into the proposed law.

Kariuki Muigua's paper<sup>79</sup> is almost similar to this research, in terms of analyzing the challenges facing international commercial arbitration in Kenya based on the general arbitration experience in the country. It also includes proposals for reform. However, there are some differences. This research focuses on international arbitration in general, not international commercial arbitration as per Kariuki Muigua's paper. Furthermore, Kariuki Muigua's paper does not discuss international commercial arbitration in other countries, unlike this research which also includes a comparative study of the practice of international arbitration in more established jurisdictions. Therefore, this research seeks to determine the

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<sup>78</sup> Report is titled "*South African Law Commission Project 94 Arbitration: An International Arbitration Act for South Africa*" Available at [http://salawreform.justice.gov.za/reports/r\\_prj94\\_july1998.pdf](http://salawreform.justice.gov.za/reports/r_prj94_july1998.pdf) (last accessed on 17th March 2018).

<sup>79</sup> Kariuki Muigua op.cit note 58.

lessons (if any), that Kenya can learn from other countries, in its quest to become a reputable seat of international arbitration.

There are also minor similarities between this research, Edward Torgbor's and Peter Mbithi's research. We all study arbitration in Kenya and in other countries. However, Edward Torgbor mainly compares Kenya and in two other African countries i.e. Nigeria and Zimbabwe. Likewise, Peter Mbithi compares Kenya with other African countries namely Mauritius and South Africa. However, my research will focus on Kenya and European countries that are most popular seats in international arbitration.

### **1.7 Justification of the Research**

The Kenyan economy is likely to benefit as a whole, if international disputes are steadily referred to Nairobi for arbitration. This is because the disputants will also require support services offered by other sectors of the economy such as hospitality, banking and transport pending the resolution their disputes. Furthermore, Nairobi will also come to be known as a reputed seat of justice in the global circles as the references to the city for international arbitration gradually increase, which will consequently raise its profile in the region and in the world as a whole. In this regard, it is important for the country to promulgate robust laws that efficiently and effectively deal with the international arbitration process. This research will seek to determine how effective the current laws are and propose necessary amendments.

### **1.8 Theoretical Framework**

This research is anchored on the sociological school associated with notable scholars including Eugene Ehrlich, Roscoe Pound, Emile Durkheim, Rudolf von Jhering and Auguste Comte. The sociological school analyses the role of the law in the society in terms of what it has achieved, what it is achieving and what it should achieve.<sup>80</sup>It does not view

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<sup>80</sup> Etudaiye Muhtar Adeiza, *The Relevance of the Sociological School of Jurisprudence to Legal Studies in Nigeria (Readings in Jurisprudence and International Law published by the Department of Jurisprudence and International Law, University of Ilorin, Nigeria 217-237)* at page 218. Available at <https://www.unilorin.edu.ng/publications/etudaiye/The%20Relevance%20of%20The%20Sociological%2>

law as abstract and out of touch with the realities of daily life.<sup>81</sup> It is concerned with law in action not as it is contained in the statute books.<sup>82</sup>

Hering posited in his most famous work, “*Der Zweck im Recht*”<sup>83</sup> that every individual acts in order to attain something.<sup>84</sup> The law is an instrument of serving the needs of the society.<sup>85</sup> The purpose of the law is to further and protect the interests of society.<sup>86</sup> He further argues that in every society there are conflicting interests and the state can achieve harmony by using its coercive power to reconcile them.<sup>87</sup> Notwithstanding the state’s coercive power, the individual has altruistic impulses that prompt him to comply with the law.<sup>88</sup>

Eugene Ehrlich in his work, “The Fundamental Principles of the Sociology of Law” argued that to understand a society’s legal regime, you not only look at the letter of the law but also to look at the society’s customs and practices in general in order to find the ‘living law’, which may not be written.<sup>89</sup> He further distinguished norms of decision from norms of conduct. Norms of decisions were understood to mean court findings while norms of conduct meant customs or usages that have developed over time and eventually become law by legislation.<sup>90</sup> However, there are instances where a considerable time may lapse before the customs are formally legislated into law and in such cases, the customs may

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[0School%20of%20Jurisprudence%20To%20Legal%20Studies%20in%20Nigeria.pdf](#) (last accessed on 25<sup>th</sup> June 2105).

<sup>81</sup> Felice Batlan, *Law and the Fabric of Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture* (*Southern California Interdisciplinary Law Journal*, Vol. 15:235 of 2006 Pages 235-284) at Page 248. Available at <http://weblaw.usc.edu/why/students/orgs/ilj/assets/docs/15-2%20Batlan.pdf> (last accessed on 27<sup>th</sup> June 2015).

<sup>82</sup> Ibid.

<sup>83</sup> The Purpose of the Law.

<sup>84</sup> Etudaiye Muhtar Adeiza op.cit at page 223.

<sup>85</sup> M.D.A Freeman, *Lloyd’s Introduction to Jurisprudence* (8<sup>th</sup> Edition Thomson Reuters (Legal) Limited 2004) at page 838.

<sup>86</sup> R.W.M. Dias, *Jurisprudence* (4<sup>th</sup> Edition London Butterworths 1976) at page 586.

<sup>87</sup> Etudaiye Muhtar Adeiza op.cit note 85.

<sup>88</sup> Ibid.

<sup>89</sup> R.W.M. Dias op.cit at page 588.

<sup>90</sup> Etudaiye Muhtar Adeiza op.cit at page 224.



have evolved further.<sup>91</sup> Consequently, the law making process becomes continuous in its attempt to keep up with the latest customs and usages.<sup>92</sup>

This research identifies with the arguments of Rudolf von Jhering and Eugene Ehrlich. A dispute may arise in any contract between parties, where there is a breach of a contractual term.<sup>93</sup> Where the contract happens to have an arbitration agreement or clause, parties will submit the dispute to the arbitrator in the stipulated seat for arbitration. As earlier noted, arbitration is a private consensual process in which a dispute is referred by the parties to a neutral third party for settlement.<sup>94</sup> Where the parties to the dispute are nationals or citizens of different countries, the dispute settlement process becomes international arbitration.<sup>95</sup>

Kenya has not been a popular seat for international arbitration. Therefore, the NCIA was passed so as to promote the country as a desirable international arbitration venue. However, the enactment of the NCIA is not enough for our dream to be realized. Since the Arbitration Act had been the only statute governing both domestic and international arbitration prior to the enactment of the NCIA, it is important to understand what may have contributed to the country's unpopularity as an international arbitration seat under the Arbitration Act. Therefore, a study of how international arbitration has been conducted in the country based on the country's general arbitration experience, will reveal the challenges that may have contributed to the country's failure to feature among the most popular seats of international arbitration. In this regard, this study will begin from the same point, as Kariuki Muigua's paper, which has discussed the same.<sup>96</sup>

However, an analysis of the practice international arbitration in our country is not enough. It is also necessary to study other countries which are more popular seats of international arbitration, to determine how the process is conducted in such countries and the lessons that Kenya can learn from them, so that if implemented locally would raise the country's

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Owen Hodge Lawyers "*Contractual Disputes*" Available at <https://www.owenhodge.com.au/commercial-litigation/contractual-commercial-disputes/> (last accessed 25<sup>th</sup> August 2018).

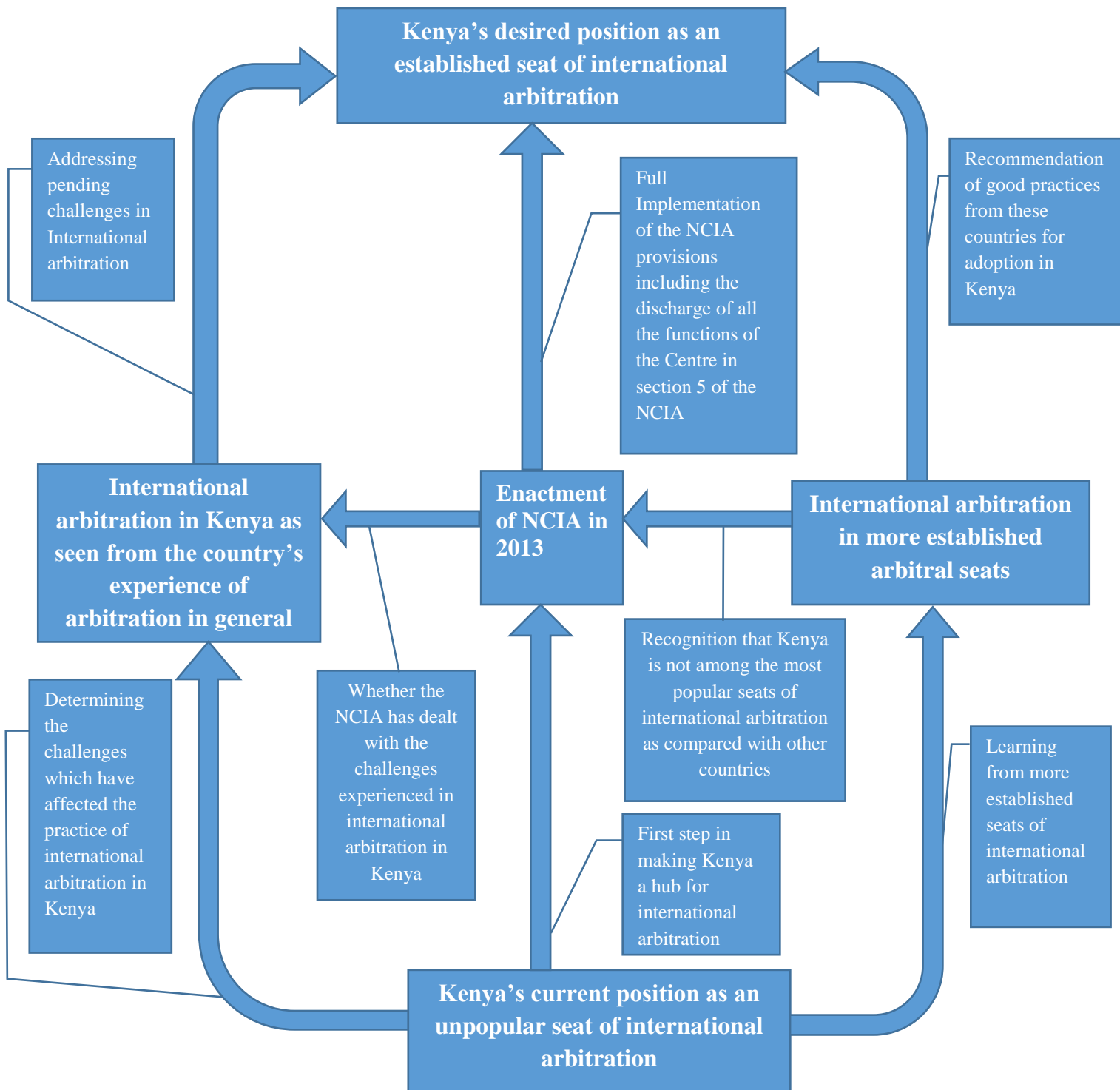
<sup>94</sup> Farooq Khan, op.cit.

<sup>95</sup> Alan Redfern et al. op.cit. note 31.

<sup>96</sup> Kariuki Muigua op. cit note 58.

profile and make it more attractive to foreign investors shopping for a suitable venue to refer their disputes for settlement in Kenya.

### 1.9 Conceptual Framework



### **1.10 Methodology**

This research will rely on both primary and secondary sources of data. Questionnaires will avail information on the challenges of conducting domestic arbitration in Kenya that persons who have been involved in the process have encountered.

Library research and internet research will be the secondary sources of data. Library research will be conducted to determine what different authors have written on arbitration in general and international arbitration.

Internet research will enable access to additional information where legal texts are unavailable, do not discuss an issue or do not address it adequately. It will also facilitate a comparative study of Kenya and other jurisdictions, because it is not possible to travel to other countries for this research due to current resource constraints.

### **1.11 Limitations of the study**

The sources of data are likely to have their own limitations. The respondents of the questionnaires may not all be responsive or forthcoming with information. Library and internet research as secondary sources of data have their own shortcomings, as it cannot be conclusively stated that all books and articles containing the relevant information will be available in the library or on the internet. Lastly, the authenticity of the material found on the internet may not be entirely vouched for.

### **1.12 Chapter Breakdown**

The research is structured as follows:

**CHAPTER ONE** is the introductory chapter and generally discusses the proposed research and the contributions it seeks to make to the existing body of knowledge.

**CHAPTER TWO** generally discusses international arbitration in Kenya, based on the country's experience in the practice of arbitration in general. It also determines whether

there are any challenges encountered, whether the NCIA has addressed them and to what extent.

**CHAPTER THREE** discusses the practice of international arbitration in some of the more established seats of international arbitration.

**CHAPTER FOUR** deals with research findings and their analysis.

**CHAPTER FIVE** has the summary and recommendations.

## CHAPTER TWO

### 2.0 INTERNATIONAL ARBITRATION IN KENYA AS SEEN FROM THE COUNTRY'S GENERAL ARBITRATION EXPERIENCE

#### 2.1 Introduction

This chapter traces the general historical development of arbitration in Kenya. It looks at how dispute settlement mechanisms akin to arbitration were practiced by some ethnic communities prior to the advent of colonialism.

It also analyses the laws that have over time, anchored the practice of arbitration in the country right from the Orders in Council that formed the basis for the colonial master's application of English law to their Kenyan colony, to the current Constitution which was promulgated in the year 2010 .

It further proceeds to thematically discuss the practice of arbitration in Kenya under the Arbitration Act, as a sample for the country's international arbitration experience in order to understand why the country has not been a popular international arbitration destination. It also takes an evaluative step to examine whether challenges that may have affected the process have been addressed by the NCIA, which was enacted to promote international arbitration in the country. It concludes by considering whether there are any unaddressed challenges and analyses the implications of letting them remain unchecked.

#### 2.2 Historical background

Kenyan scholars have argued that arbitration as an ADR mechanism can be traced to the pre-colonial era.<sup>97</sup> Among the Agikuyu, minor household disputes were resolved by the head of the house.<sup>98</sup> The extended family known as the *Mbari* was involved in all aspects of life including farming and marriage matters concerning the family members.<sup>99</sup> A council

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<sup>97</sup> Jacob Gakeri op.cit at page 222.

<sup>98</sup> Ibid.

<sup>99</sup> Sarah Kinyanjui, "*Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya*" at page (Tribal Law Journal Vol.10 pages 1-16) at page 7 available at <http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf>(last accessed on 15th August 2015).

of elders known as *Kiama Kia Mbari*, determined disputes between members of the same *Mbari* but the *Kiama Kia Mwaki* heard disputes involving members of different *Mbaris*.<sup>100</sup>

The elders would determine the matter and the party at fault would be ordered to pay compensation usually in the form of livestock.<sup>101</sup> Decisions were mostly unanimous and where the decisions were challenged, another sitting would be organized to finally determine the matter.<sup>102</sup>

The Pokot and Marakwet had a council of Elders known as the *Kokwo*, comprising of men who were very knowledgeable of the history and culture of their communities.<sup>103</sup> They were also good orators which enabled them resolve differences among community members using cultural figures of speech where necessary.<sup>104</sup> On the other hand, the Kamba resolved disputes using the council of elders known as *Nzama*.<sup>105</sup> Each elder came from a village known as *Utui*.<sup>106</sup> The wrongdoer's intention was immaterial and the offender would be compelled to pay compensation as soon as commission of the offence had been established.<sup>107</sup> If the claim was challenged, it would be referred to the *Nzama* for determination.

English law was introduced in Kenya through the promulgation of the 1900 and 1907 Orders in Council.<sup>108</sup> The first formal legislation concerning arbitration in the country was the Arbitration Ordinance of 1914, which was based on the English Arbitration Act of 1889

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<sup>100</sup> Ibid at page 8.

<sup>101</sup> Jacob Gakeri op.cit at page 222.

<sup>102</sup> Ibid.

<sup>103</sup> Eugene Owino Wanende, "*Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya*", A thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in Environmental Law of the University of Nairobi in November 2013 at page 27. Available at

[http://erepository.uonbi.ac.ke/bitstream/handle/11295/60007/Wanende\\_Assessing%20the%20role%20of%20traditional%20justice%20systems%20in%20resolution%20of%20environmental%20conflicts.pdf?sequence=3](http://erepository.uonbi.ac.ke/bitstream/handle/11295/60007/Wanende_Assessing%20the%20role%20of%20traditional%20justice%20systems%20in%20resolution%20of%20environmental%20conflicts.pdf?sequence=3) (last accessed on 15th August 2015).

<sup>104</sup> Ibid.

<sup>105</sup> Peter Mutuku Mbithi op.cit at page 8.

<sup>106</sup> Ibid.

<sup>107</sup> Sarah Kinyanjui op. cit at page 5.

<sup>108</sup> Jacob Gakeri op.cit at page 221.

which enabled the courts' to control the arbitration process.<sup>109</sup> Although the English statute was amended in 1950, the courts powers in relation to the arbitral process were retained.<sup>110</sup>

Kenya signed the ICSID Convention on 24<sup>th</sup> May 1966 and ratified the convention on 2nd February 1967.<sup>111</sup> The Convention established the ICSID as a forum for the settlement of investment disputes between states and nationals of other countries.<sup>112</sup> The Arbitration Act (Chapter 49 Laws of Kenya) which came into force on 22<sup>nd</sup> November 1968 was unpopular with arbitrators because it allowed excessive court interference of the arbitration process which resulted in delays and expensive proceedings.<sup>113</sup> For example, Section 22 empowered the High Court to compel the arbitrator to identify a question of law in the course of arbitration proceedings as a special case for the court's exclusive determination which was interpreted as subordinating arbitration to court's supervision.<sup>114</sup> Kenya adopted the 1958 New York Convention on 10<sup>th</sup> February 1989 to facilitate the recognition and enforcement of foreign arbitral awards.

The Arbitration Act Number 4 of 1995 repealed the 1968 statute. It was adopted in order to facilitate arbitration proceedings and processes that are recognized worldwide.<sup>115</sup> The Arbitration Act was amended in 2009.

The Constitution of Kenya empowers the Kenyan courts to promote ADR mechanisms in the discharge of their judicial authority.<sup>116</sup> The formal recognition of ADR mechanisms in the highest law of the country has raised their profile and the courts can exploit them to reduce the backlog of cases in the judicial system.

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (last accessed on 15th August 2015).

<sup>112</sup> Article 1 of the ICSID Convention. Available at [https://icsid.worldbank.org/en/Documents/resources/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf) (last accessed on 15th August 2015).

<sup>113</sup> Jacob Gakeri op cit. at page 227.

<sup>114</sup> Ibid.

<sup>115</sup> Njoroge Regeru, "*Recognition and Enforcement of Arbitral Awards*" (Arbitration Law and Practice in Kenya, Law Africa Publishing 2011 pages 121-156) at page 123.

<sup>116</sup> Article 159 (2) (c).

As earlier noted, the NCIA was enacted in the year 2013. The Nairobi Centre for International Arbitration (the “Centre”) is established under Section 4 of the NCIA as a body corporate with perpetual succession. Its headquarters are in Nairobi.<sup>117</sup>It has comprehensive objectives including promoting, facilitating or administering facilitating international commercial arbitrations, developing rules for ADR mechanism like conciliation and mediation, organizing international conferences and training seminars for arbitrators and scholars, collaboration with other agencies and non-state actors to formulate, implement, enforce and review ADR policies, laws and action plans, cooperate with other regional and institutional agencies to achieve its objectives and conduct civic education on ADR mechanisms.<sup>118</sup>

The Centre is administered by a board of directors comprising of thirteen persons including Government officers i.e. the Attorney General or his representative, the Principal Secretary in the ministry responsible for matters of justice or his representative and the Chief Registrar of the High Court of Kenya or his representative.<sup>119</sup>

The NCIA also establishes the Arbitral Court under Section 21. It shall comprise of a President, two deputies, fifteen persons who are leading international arbitrators and the Registrar all of who shall serve for a term of five years, renewable once for a further five year term.<sup>120</sup> The court will have original and appellate jurisdiction to hear all arbitration matters referred to it pursuant to the NCIA or other Act.<sup>121</sup>Its decision shall be final.<sup>122</sup>

### **2.3 Requirements concerning the arbitration agreement**

The Arbitration Act prescribes certain requirements concerning the arbitration agreement.<sup>123</sup>The agreement must be in writing, though may be in the form of an arbitration clause in a contract or an entirely separate agreement. The agreement is in writing if it is contained in a document signed by the parties or in an exchange of correspondence that

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<sup>117</sup> Section 4 (3).

<sup>118</sup> Section 5.

<sup>119</sup> Section 6 of the NCIA.

<sup>120</sup> Sections 21(2) and (3).

<sup>121</sup> Section 22(1).

<sup>122</sup> Section 22(2).

<sup>123</sup> Section 4.



provide a record of the agreement. It is also in writing if it is contained in pleadings, in the sense that it is averred in a statement of claim one and not controverted by the defence thereto.

#### **2.4 Jurisdiction and role of court**

The High Court of Kenya has jurisdiction to deal with matters concerning arbitration under the Arbitration Act. The Act in Section 10 seeks to restrict the court's involvement in the arbitral process. This as a reinforcement of the principle of party autonomy, which enables the parties to arbitration proceedings to take charge of their dispute settlement process. The ensuing paragraphs will discuss the powers of the court in the arbitral process.

The court can stay legal proceedings by a party to an arbitration agreement or claiming under such a party, if the court is satisfied that such an agreement exists and the dispute is arbitrable. Furthermore, the applicant should not have taken measures to reply to the claim in the legal proceedings because such a move may be construed as an acknowledgement that the court in which the dispute has been referred to, is the proper forum to address the dispute.<sup>124</sup>

Although courts do not have any power to compel parties to refer their dispute or disputes to arbitration for settlement, they are obligated to uphold the arbitration agreement. This has been evident in some cases, where the courts have demonstrated respect for the parties' preferred choice of resolving disputes through arbitration. In *Joab Henry Onyango Omino v. Lalji Meghji Patel & Co. Ltd*,<sup>125</sup> the court observed that "Once parties to an agreement have chosen to determine their disputes through a domestic forum other than resorting to the ordinary courts of law, that choice should not be brushed aside."

The essence of referring parties to their preferred dispute settlement mechanism was captured in the case of *Niazsons (K) Ltd v. China Road and Bridge Corporation Kenya*<sup>126</sup> where Justice Bosire observed that "it is the policy of the law that concurrent proceedings before two or more fora is disapproved." The latest time for applying for stay of legal

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<sup>124</sup> Ibid.

<sup>125</sup> Civil Appeal No.119 of 1997 (UR).

<sup>126</sup> Civil Appeal No.157 of 2000.

proceedings by a party to an arbitration agreement is at the time of entering appearance as observed in the Court of Appeal case of *Charles Njogu Lofty v. Bedouin Enterprises Ltd.*<sup>127</sup>

The court is allowed upon the application of a party to the arbitration proceedings, to grant interim measures of protection<sup>128</sup> as well as appoint an arbitrator where the other party fails or delays to appoint the said arbitrator.<sup>129</sup> The court can also set aside the appointment of an arbitrator whose appointment has been made in default, where a party challenging the appointments demonstrates good reason as to why he did not appoint the arbitrator in time or failed to do so.<sup>130</sup>

The court can determine the suitability of an arbitrator whose appointment has been challenged due to bias or non-qualification.<sup>131</sup> It is also empowered to finally determine any dispute concerning the withdrawal of an arbitrator<sup>132</sup> as well as the relief and entitlement of an arbitrator.<sup>133</sup>

The court can also conclusively determine whether an arbitral tribunal has jurisdiction to entertain the dispute pursuant to the arbitration agreement between the parties.<sup>134</sup> This power was demonstrated in the case of *Adopt a light v. Magnate Ventures Ltd and 3 Others*<sup>135</sup> where the Court of Appeal observed inter alia "...Under the section: the arbitral tribunal may rule on its own jurisdiction ..."

Further, the court may assist the tribunal in taking evidence and determine any dispute concerning the apportionment of costs in arbitration.<sup>136</sup> Lastly, the court can set aside an arbitral award where the applicant proves any one of the recognized grounds for doing

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<sup>127</sup> Civil Appeal No. 253 of 2003.

<sup>128</sup> Section 7.

<sup>129</sup> Section 12.

<sup>130</sup> Ibid.

<sup>131</sup> Section 14.

<sup>132</sup> Section 15.

<sup>133</sup> Section 16A.

<sup>134</sup> Section 17.

<sup>135</sup> (2009) eKLR.

<sup>136</sup> Sections 28 and 32B.

so.<sup>137</sup>The court is also required to recognize and enforce foreign arbitral awards but is entitled to refuse such recognition on certain grounds.<sup>138</sup>

The extent of courts' involvement in arbitration matters is not restricted to the High Court. The Court of Appeal can entertain an appeal from a High Court's decision where parties have agreed beforehand, that an appeal may be made to the said court before the award is delivered. Alternatively, the said court may grant leave for the appeal after holding the opinion that the matter involves a point of law of general importance, whose determination substantially affects the rights of one or more parties.<sup>139</sup>However, this avenue for appeal is only restricted to domestic arbitration.

## **2.5 Form, contents and enforcement of an arbitral award**

The award has to comply with the requirements of Section 32 of the Act. The arbitral award should be in writing and signed by the arbitrator or arbitrators. Where there are several arbitrators, the signatures of the majority will suffice provided the reasons are given as to why the others did not sign it. It shall also provide the date, seat and reasons unless parties agree to dispense with them or it is an award made pursuant to a settlement. The tribunal may make a partial award addressing some of the issues between the parties. In such a case, the requirements of the award under the Act will also apply to the partial award.

If the award requires corrections to be made or lacks clarity, the application should be made within three months from the date the arbitral tribunal made the corrections or clarified the contents of the award to the said party who had requested it to do the same.<sup>140</sup>

A party seeking to enforce an award must file in court the original award and the arbitration agreement or their certified copies. If the award and agreement are in a foreign language, their English translations should be submitted together with the translator's certificate.

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<sup>137</sup> Section 35 (2) avails the grounds that the court can rely upon to set aside an arbitral award.

<sup>138</sup> Section 37(1) (a) sets the grounds for the court's refusal to recognize or enforce a foreign award.

<sup>139</sup> Section 39(3).

<sup>140</sup> Section 35(3).

## **2.6 Grounds for setting aside an arbitral award and/or non-recognition of a foreign award**

The court can rely on several grounds, to set aside an arbitral award. It has to be demonstrated to the court that first, a party did not have capacity to enter into an arbitration agreement or the agreement itself is invalid under the laws of the place the parties have subjected it to or the laws of Kenya, second that the party seeking to set aside the order wasn't properly notified of the appointment of the arbitrator, proceedings or was otherwise unable to present his case.

The third ground for setting aside is where the arbitral award deals with a dispute not contemplated under the terms of reference or exceeds the scope of reference to arbitration. Fourth, it is shown that the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties. Fifth, where fraud, bribery undue influence or corruption influenced the award. Lastly, the court can also set aside an award where it concludes that the subject matter of the dispute is not arbitrable in Kenya or the award contravenes Kenyan public policy.

The grounds for non-recognition of a foreign award, are almost similar to the foregoing save for one extra ground. A party challenging the recognition of a foreign award, may also demonstrate that the award has not yet become binding on the parties or has been set aside by a court in whose country or law the award was made.

One of the most contentious grounds in which the court can set aside an award or refuse to recognize and enforce a foreign award is on the basis of public policy.<sup>141</sup> Public policy is a wide concept, with no defined scope. However, guidelines for public policy considerations are set out in the authoritative case of *Christ for All Nations v. Apollo Insurance*.<sup>142</sup>

In that case, Justice Ringera (as he then was) borrowed from the principles laid out in the famous Supreme Court of India case of *Renu Saghar Power Co. v. General Electric*<sup>143</sup> and observed “...I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition or that

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<sup>141</sup> Sections 35 (2) (b) (ii) and 37(1)(b)(ii) of the Act.

<sup>142</sup> (2002) 2 EA 366.

<sup>143</sup> (1994) AIR 1960.

of common law judges used to say, it is an unruly horse. An award could be set aside under Section 35(2)(b) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either inconsistent with the Constitution or other laws of Kenya whether written or unwritten; inimical to the national interests of Kenya, contrary to justice or morality...”

The consideration of public policy was later exemplified in the case of *Glencore Grain Limited v. TSS Grain Millers Limited*<sup>144</sup> where the court observed inter alia that recognition and enforcement of the arbitral award was contrary to public policy since the subject matter of arbitration was maize that had been certified unfit for human consumption.

## **2.7 Forum and timelines for challenging an award**

An application to set aside an arbitral award should be made by a party to the High Court, within three months from the date the party received the award. This was enforced in the case of *Seyani Brothers & Co. v. Zakhem Construction (K) Ltd*<sup>145</sup> where Justice Okwengu observed inter alia that “...an application for setting aside an arbitral Award under Section 35(3) of the Arbitration Act cannot be made after three months from the date on which the party making this Application has received the arbitral Award...”

## **2.8 Challenges facing arbitration in Kenya**

The practice of arbitration in Kenya has for a long time been plagued by the lack of popularity as a dispute settlement mechanism.<sup>146</sup> There is a predominant belief in our society that disputes should be resolved in court rather than employ ADR mechanisms to resolve them.<sup>147</sup> This may explain why there is a huge backlog of cases in the Kenyan courts.<sup>148</sup>

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<sup>144</sup> (2002) 1 KLR 606.

<sup>145</sup> Miscellaneous Cause No.212 of 2006 (Milimani) (UR).

<sup>146</sup> Kariuki Muigua op.cit note 74 at page 18.

<sup>147</sup> Ibid.

<sup>148</sup> The immediate former Chief justice (Justice Willy Mutunga) launched the “Old cases Clearance Initiative” in February 2014 with a view to clear the over 30,000 cases and appointed a special team of 14 judicial officers to deal with the cases, some of which have been pending in the judiciary, some dating back to the 1960s’ as per the report in <http://www.capitalfm.co.ke/news/2015/07/kenyan-courts-clear-13000-case-backlog/> (last accessed 12<sup>th</sup> August 2015).

Arbitration is a private consensual process which allows parties that have agreed to refer any dispute between them to a private person or persons for settlement whenever such a dispute or disputes arise. Since arbitration is a private process the arbitrator or arbitral tribunal may not possess the requisite powers to ensure compliance with the arbitrators or tribunal's directives pursuant to the arbitral process. In this regard parties to a dispute tend to prefer litigation since courts have coercive power which they can exploit to compel a party or parties to take the necessary measures so as to redress the wrongful act committed.<sup>149</sup> This is evidenced by the fact that the successful party in the arbitration is obliged to apply to the court for recognition and enforcement pursuant to Section 36 of the Arbitration Act.

Although arbitration had been cited as a cheaper alternative to litigation in dispute settlement, the reality on the ground is that the process is becoming very expensive.<sup>150</sup> In fact, it has been argued by some practitioners that arbitration is not cheap since it is intended to be a process by which commercially oriented persons bring their disputes before likeminded persons for a decision.<sup>151</sup>

Parties are required to cater for various expenses throughout the arbitration process including the arbitrator's fees, advocates fees, expert witnesses' fees where applicable, hiring fees for the arbitration facilities, stenographer's fees where parties resolve to appoint one.<sup>152</sup> The reports relied upon in the course of the proceedings such as expert reports may also need to be commissioned.<sup>153</sup> Other expenses incurred by the arbitrator such as travel, accommodation and out of pocket expenses are also borne by the parties.<sup>154</sup> The arbitration process may also become more expensive when parties refer the matter to court since additional fees such as filing fees for applications and advocate's attendance fees for the court proceedings may also be payable.

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<sup>149</sup> Kariuki Muigua op.cit note 146.

<sup>150</sup> Ibid at page 19.

<sup>151</sup> J.B. Havelock, "*Costs and Interest*" (Arbitration Law and Practice in Kenya, Law Africa Publishing 2011 pages 157-194) at page 157.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid at pages 164-165.

Despite the description of arbitration as a fast dispute settlement process, it is actually turning to be a protracted process due to delaying tactics of the parties.<sup>155</sup> A party may raise all manner of objections concerning pertinent arbitration issues, in a bid to frustrate the process. For example, a party may challenge the existence, legality and interpretation of the arbitration agreement with a view to delaying or preventing the commencement of arbitration proceedings.

Section 4 of the Arbitration Act essentially stipulates that an arbitration agreement must be in writing but can take the form of a clause in a contract or a separate agreement. The validity of the arbitration agreement is also ascertained by determining whether the respective parties gave their consent to the arbitration agreement.<sup>156</sup> In order to determine whether consent was obtained, it is necessary to analyze the content and clarity of the agreements.<sup>157</sup>

A party can also challenge the arbitrability of the dispute in order to frustrate arbitration proceedings and the outcome thereof. This can be done in various ways by a party to a dispute such as opposing an application for stay of legal proceedings to facilitate arbitration of a dispute, making an application in the course of arbitration to stay the proceedings for lack of jurisdiction by the arbitral tribunal over the said dispute or applying to set aside the arbitral award for non-arbitrability.<sup>158</sup> A challenge on arbitrability can be on the basis of whether the particular dispute can be settled through arbitration, which is a legal matter or whether the dispute falls within the scope.<sup>159</sup>

A party can also challenge the competence of the arbitrator. The party may claim that arbitrator does not have the necessary qualifications or attributes to oversee the arbitration process.<sup>160</sup> This may arise in instances where the arbitration agreement specifies the criteria for an arbitrator's appointment in terms of qualifications or experience. Therefore, a party with the opinion that an arbitrator does not possess the stipulated qualifications, may

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<sup>155</sup> Kariuki Muigua op.cit note 146.

<sup>156</sup> Edward Nii Adja Torgbor op.cit at page 156.

<sup>157</sup> Ibid at page 158.

<sup>158</sup> Ibid at pages 205 to 206.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid at page 196.

oppose the appointment on the basis that the arbitrator is not competent to discharge his duties. The impartiality of the arbitrator may also be challenged.

An arbitrator is expected to be impartial though there is no definition of what impartiality entails.<sup>161</sup> However it is understood to mean neutrality.<sup>162</sup> A proposed arbitrator is obliged to disclose any facts that may raise justifiable doubts as to his neutrality before the proceedings commence. Therefore, a party will only be entitled to allege the arbitrator's bias on the basis of having discovered facts after commencement of the arbitration proceedings, which may reasonably cast doubt as to the arbitrator's neutrality.

The problem of court interference has also been compounded by the involvement of advocates especially as arbitrators. There has been the view that they tend to complicate the process by unnecessarily observing the strictures of law and procedure, yet arbitration was meant to be a parallel dispute settlement system to litigation. Therefore, it has slowly taken the form of litigation since there may be reliance of the civil procedure rules in the arbitration process. The arbitrators may entertain all manner of applications, grant adjournments or stay proceedings pending court intervention which at times may not be fair in the circumstances.

Given the latitude expressed in Section 10 of the Arbitration Act and the various instances provided thereafter in the said Act in which courts can intervene in arbitration proceedings, the courts have been entertaining all manner of applications from parties who are intent on defeating justice.<sup>163</sup> This has occasioned delays in some arbitration matters which have resulted in the proceedings taking longer than expected to conclude.

The issuance of the arbitral award is not final, since a party can apply to the High Court for the award to be set aside on certain grounds<sup>164</sup> Furthermore, a party may seek leave and appeal to the Court of Appeal on the basis that there is a point of law of general importance involved and its determination will substantially affect the rights of one or more of the

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<sup>161</sup> Ibid at page 188

<sup>162</sup> Ibid.

<sup>163</sup> Kariuki Muigua op.cit note 149.

<sup>164</sup> Section 35 as read with section 37 of the Arbitration Act.



parties.<sup>165</sup> It has been argued that these delays are slowly eroding the confidence that parties may have had in arbitration as an ADR mechanism.<sup>166</sup>

The number of qualified arbitrators in Kenya is few.<sup>167</sup> This may be attributed to the few institutions training arbitrators in the country.<sup>168</sup> Perhaps it may also be attributed to a perception that arbitrators must only be lawyers because arbitration is a dispute settlement process. The scarcity of qualified arbitrators has caused the practicing ones to be overwhelmed by workload since there are a lot of arbitrations to be conducted by few practitioners.<sup>169</sup> This may also affect the quality of the awards made which may lead to court proceedings to set aside the awards since a party to any arbitration proceedings may feel that the arbitrator has not given the necessary time and attention to the matter and has rendered an unsatisfactory award which necessitates the challenge.

## **2.9 Questionnaire findings**

The attached questionnaire was administered in 2015. Seven individuals comprising of judges of the High Court, advocates and arbitrators were requested to respond to the questionnaire. Out of the seven, five agreed and submitted their responses. They included two judges, advocates and an arbitrator. Some of the advocates had even participated in arbitrations either as arbitrators or counsel for one of the parties in the proceedings. The questionnaire was intended to give a firsthand account of the experience of arbitration in Kenya, as compared to the existing literature on the same.

Not all respondents had read the NCIA, though all had been involved in arbitration in the country. The judges were in agreement that the process had become a protracted one, with many applications hence assuming the character of litigation. Furthermore parties were even reluctant to comply with the process and accept the final award. It was suggested that parties should adhere to the arbitration agreement and avoid unnecessary applications. It was also proposed that the High Court should be the final forum for all arbitration related

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<sup>165</sup> Section 39(3).

<sup>166</sup> Ibid.

<sup>167</sup> Kariuki Muihua op.cit note 74 at pages 17-18.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

matters including applications. Other recommendations included the training of arbitrators, to improve their skills and setting up adequate facilities so as to address the issue of costs of arbitration.

One arbitrator interestingly said that he had encountered no challenge, in the arbitration process. As far as NCIA's response to the challenges was concerned, he opined that the statute was still in its formative stage hence it was premature to gauge its efficacy. He also averred to the need to set up more facilities and further observed that as a promotion mechanism, the government should incorporate NCIA arbitration clauses in its contracts. He also advocated for aggressive marketing of the country as a venue for international arbitration.

The remaining two respondents had served both as arbitrators and party representatives. One cited jurisdictional challenge, non-cooperative respondents and parties who delay in settling the arbitrator's fees, as the main hurdles encountered in the process. In terms of promoting the country as a venue, he urged the unrestricted access of the arbitration process by lawyers and non-lawyers from other jurisdictions. He also urged the court to exercise restraint and not interfere with arbitral awards unnecessarily.

The other noted that the process is not cheap. He also observed that the limitation of grounds for challenging awards as another challenge. He proposed that the award should be appealable, as a matter of right. He did not address the issue of NCIA as he had not read the Act.

## **2.10 How has the NCIA attempted to deal with the challenges?**

The NCIA came into force 17 years after commencement of the Arbitration Act.<sup>170</sup> Although the NCIA establishes the Centre, the statute does not specify that the Centre shall have exclusive jurisdiction concerning international arbitration in Kenya. Moreover, an international arbitration conducted under the auspices of the NCIA may also be subject to the application of the Arbitration Act as far as enforcement or challenging the award is

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<sup>170</sup> The Arbitration Act came into force on 2<sup>nd</sup> January 1996 while the commencement date for the NCIA was 25<sup>th</sup> January 2013.

concerned, as neither the NCIA nor the NCIA Arbitration Rules 2015 provide the procedure for enforcement of an award made by the Centre. It also does not stipulate the procedure and grounds for challenging the said award.

Therefore, the NCIA is not the only statute governing international arbitration in Kenya. In this regard, it is necessary to examine how the NCIA has attempted to address the challenges that have affected international arbitration under the Arbitration Act, as the two statutes complement each other.

As earlier noted arbitration has not been a popular dispute settlement mechanism in Kenya.<sup>171</sup> Therefore, the Centre has been charged with the task of popularizing the dispute settlement process in several ways, as seen in section 5 of the Act. First, it is supposed to promote and encourage arbitration in the country.<sup>172</sup> It is also required to ensure that arbitration is reserved as the preferred dispute mechanism.<sup>173</sup> The Centre should also organize international conferences and seminars to assist in marketing the country as a reputable arbitral destination.<sup>174</sup> In this regard, it held an international investment conference in Nairobi between 4<sup>th</sup> and 6<sup>th</sup> December 2016, titled “*Investing in Africa. The New ADR frontier*,” with delegates including Attorney Generals of African countries and eminent jurists.<sup>175</sup>

The Centre is also required to cooperate with regional and international institutions in the discharge of its functions under the NCIA with a view to attaining its objectives.<sup>176</sup> This will ensure that our country is regionally recognized as a desirable international arbitration destination with adequate facilities.

The Centre is also supposed to provide civic education on arbitration so that the public is aware of the available ADR mechanisms at their disposal including arbitration.<sup>177</sup> This will

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<sup>171</sup> Kariuki Muigua op.cit note 74

<sup>172</sup> Section 5 (a).

<sup>173</sup> Section 5 (c).

<sup>174</sup> Section 5(e).

<sup>175</sup> <http://ncia.or.ke> (last accessed 4<sup>th</sup> July 2016).

<sup>176</sup> Section 5(g).

<sup>177</sup> Section 5 (n).

ultimately raise the stature of ADR mechanisms as means of settling disputes that are worth pursuing as alternatives to litigation.

The NCIA has partially attempted to address the challenge of protracted arbitration proceedings. It has established the Arbitral Court with original and appellate jurisdiction over arbitral matters that are referred to it.<sup>178</sup> In an attempt to bring finality to international arbitration proceedings, the Act expressly states that the decisions of the said court shall not be subject to appeal.<sup>179</sup> Delay in international arbitration proceedings can be caused by several factors including endless applications to the court, contentions by a party to the proceedings various aspects e.g. the validity of the arbitration agreement or suitability of arbitrators. It can also be caused by appeals to set aside the award. Therefore it is a partial solution because it only attempts to make the decisions of the Arbitral court conclusive.

However, the establishment of the Arbitral Court and the fact that its decision is final is bound to raise other challenges. First, the Act is not clear whether the Arbitral Court is an independent court or whether it has the status of a High Court. If it is an independent court, how does it relate with the High Court which has jurisdiction to handle arbitration related matters. Second, it is also unclear whether a party dissatisfied with the Arbitral Court's decision made when it has exercised its original jurisdiction can appeal since the court's decisions are supposed to be final.

The NCIA has acknowledged the need for training of arbitrators in order to increase the number of qualified arbitrators in the country. This is evident from the fact that the Centre also has the mandate of training and accrediting arbitrators and mediators in the country.<sup>180</sup> This will have a two pronged effect. First, it will solve the issue of scarcity of the arbitrators which is currently plaguing the practice of arbitration in Kenya. It will also ensure the availability of a critical mass of arbitrators which may attract foreign investors to establish enterprises in the country or nominate the country as the arbitral seat in their commercial

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<sup>178</sup> Section 21 as read with Section 22 (1).

<sup>179</sup> Section 22(2).

<sup>180</sup> Section 5(m).

agreements, which will cause the reference of disputes for settlement as and when they arise.

In order to accredit the arbitrators that may serve on both the Centre's domestic and international panels, an NCIA Arbitrators Panel Standard which stipulates the qualifications, mode of application and fees payable for such accreditation has been separately developed. This will in the long term standardize the arbitration services rendered in the country since the Panel Standard will serve as a reference point or goal for prospective NCIA arbitrators to strive towards. With the said standardization, the country may attract investor confidence as a venue in which the highest level of professionalism is exhibited in the conduct of international arbitrations.

There has also been the development of the NCIA Code of Conduct for Arbitrators. It basically consists of principles that arbitrators should uphold in the discharge of their functions including integrity and fairness, full disclosure, propriety and independence in decision making. These principles are meant to serve as a clarion call to arbitrators on the Centre's panel, to a higher standard of professionalism, thereby raising the level of practice to above par hence making the country an attractive destination regionally and globally.

It can also be argued that the fact that the Government of Kenya is bound by the Act,<sup>181</sup> creates other forums for settling international arbitration disputes involving the Government namely the Centre and the Arbitral Court, in addition to others such as the ICSID in Washington D.C in the United States of America.

## **2.11 Conclusion**

From the foregoing it is noteworthy that not all challenges have been addressed. For example, the NCIA is silent on the issue of expense in arbitrations. It can be attributed to the fact that there are several factors that contribute to such high costs including arbitrator's fees, the cost of hiring the venue for arbitration, the number of sittings in the arbitration

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<sup>181</sup> Section 26.

process or the expert witnesses, fees all of which are not fixed but vary from one case to another.

If we examine the arbitrator's fees and administrative costs for instance, the least amount an arbitrator can charge as fees in an international arbitration is USD1,000 with administrative costs being USD700.<sup>182</sup> Where an emergency arbitrator is required, the applicable arbitrator's fees are USD10,000 with the administrative costs set at USD1,000.<sup>183</sup> Evidently, these charges are very high for the average citizen.

The NCIA establishes the General Fund, to cater for the capital and recurrent expenditure of the Centre incurred in the discharge of its functions.<sup>184</sup> The sources of this fund shall include money received from grants and donations, parliamentary appropriations, foreign aid or assistance from bilateral and multilateral agencies. Therefore, there is need to adequately fund the Centre, so that several affordable facilities are put up, to serve the public. This may likely reduce the costs of arbitration since the costs of hiring the facilities will be reduced due to increased supply. Currently, the Centre is based at Co-operative Bank House, Haile Selassie Avenue Nairobi. In future, there may be need for expansion or setting up of branches, to make the services of the Centre more accessible.

The increased funding will also help in organizing more civic education campaigns and trainings for arbitrators. This will not only increase the popularity of arbitration in general, but will increase the number of professionals hence popularizing the country as an arbitration friendly destination.

The NCIA is also silent on the issue of the court interference in arbitration proceedings. As a matter of fact, the creation of the Arbitral Court can be argued as a further entrenchment of the judicial system in arbitration, which should essentially be a private consensual process. This argument is viable where the words "Arbitral Court" are understood in their ordinary meaning of a judicial forum. Furthermore, the fact that the court (ordinarily understood as a judicial forum) has original jurisdiction, buttresses the judicial

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<sup>182</sup> Part 3 of the First Schedule of the NCIA rules 2015.

<sup>183</sup> Ibid.

<sup>184</sup> Section 17.

entrenchment argument because parties to an arbitration argument will have the option of directly referring the dispute to the said court in the first instance, for settlement.

This will be contrary to the essence of arbitration as an ADR mechanism which entails settlement of dispute without resorting to litigation. Perhaps to limit judicial interference in the arbitration process, there should be only one judicial body being the High Court or the Arbitral Court, empowered to intervene in the arbitration process. Furthermore, the right to appeal to the Court of Appeal should be dispensed with so as to ensure finality in the whole process at the High Court. The High Court should address all legal issues, including important points of law, so that parties have nowhere else to appeal to, thus bringing the matter to a close once the High Court or Arbitral Court as the case may be, makes its final determination.

There is need to legally cater for the above challenges otherwise they may discourage people from opting to settle disputes through arbitration. If there is no attempt to come up with a legal framework to provide cost guidelines on arbitration proceedings, the arbitrators and advocates for the parties may continue charging prohibitive fees which may not be affordable to ordinary citizens, who would have readily referred the dispute to arbitration had the costs been affordable.

This may reinforce the perception that arbitration is a preserve of wealthy disputants. This perception if not dispelled may contribute to the gradual relegation of arbitration in favor of litigation ultimately sabotaging the country's attempts to raise its profile as a notable arbitral destination since it is not possible to sustain an image of what you are not.

The challenge of court interference may also adversely affect arbitration in the country. If the situation persists, a reasonable person may not see the need to opt for ADR mechanisms including arbitration, if the court will end up being involved in the dispute anyway. Such a person may just opt for litigation which the party may rest assured, will not involve another forum apart from court. This will most likely translate into orderly proceedings which culminating in a binding decision. Litigation may end up being more attractive for cost effectiveness since there may not be duplicity of proceedings. This is informed by the fact that litigation is all inclusive and all pertinent issues that may arise in the course of such

proceedings will be addressed by the court without necessarily consulting an external forum.

It has been noted that the Government is bound by the NCIA. In this regard, the Government can further promote the country as a venue for international arbitration by negotiating where possible, to have NCIA arbitration clauses in the contracts it enters into. This will ensure that the disputes that may arise in the performance of the contracts, are settled via arbitration, with the seat in Nairobi and the Centre as the forum for dispute settlement.

The development of the Arbitrators Standard and the Code of Conduct will uphold high standards of arbitration practice in the country. It will also address some of the concerns that may be raised during the process, including compromise or bias of the arbitrator since the arbitrators will be required to uphold integrity, fairness and be independent in the exercise of their mandate. Perhaps the arbitrators may be need to put parties who make such allegations to strict proof and impose penalties where no basis is established. This will discourage unfounded accusations and improve public confidence in the process as well as expediting the process since it will encounter fewer hitches.

Finally, the application of the standard will also contribute to the increase in the number of arbitrators in the country because it does not lock out non-lawyers from joining the Centre's panel. Anyone with a degree from a recognized university, belongs to a recognized professional body, has arbitration training and experience may apply to join the Centre's panel.



## CHAPTER THREE

### 3.0 INTERNATIONAL ARBITRATION IN SOME SELECTED COUNTRIES

#### 3.1 Introduction

The enactment of the NCIA was meant to promote Nairobi as a venue for international arbitration. In order to realize this objective, it is important to learn from the experience of other countries that are more established seats of international arbitration to ascertain which practices we should emulate. This is also necessary in non-institutional arbitration, where the laws of the venue usually govern the arbitration proceedings.

As earlier noted, a study undertaken in 2014 on the popularity of arbitration venues ranked London as the most popular city, with Paris, Geneva, New York, Stockholm following suit.<sup>185</sup> Furthermore, the 2015 Queen Mary University of London survey confirmed London and Paris's dominance as most popular international arbitration seats in the period from 2010-2015.<sup>186</sup> The study also revealed that Hong Kong and Singapore were upcoming venues, with Singapore registering the greatest improvement.<sup>187</sup> Furthermore, the United States was as of 2016, the busiest seat for ICC arbitrations with New York as the most popular venue in the country.<sup>188</sup>

Going by these surveys, London and Paris seem to be the two most popular venues of international arbitration. Furthermore, both France and England have ratified the New York convention, on the recognition and enforcement of foreign awards just like Kenya. Therefore, in addition to their popularity as arbitral destinations, their ratification of the New York Convention is a common denominator against which the recognition and enforcement of foreign awards can be studied in relation to ours.

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<sup>185</sup> Berwin Leighton Paisner op. cit note 59.

<sup>186</sup> <https://www.solicitorsjournal.com/news/legal-profession/courts/24162/international-arbitration-dominates-global-dispute-resolution> op. cit note 60.

<sup>187</sup> Ibid.

<sup>188</sup> <https://nyiac.org/nyiac-news/new-york-tops-popularity-ranking-as-seat-for-international-arbitration/> op. cit note 61.

In light of the foregoing observations, this chapter will study how international arbitration has been conducted in both France and England, in order to determine what may be making these countries attractive seats of international arbitration.

## 3.2 France

### 3.2.1 Historical Background

The practice of arbitration in France, can be traced back to adoption of the *Code de Procédure Civile* (“CPC”) in 1806 and the 1807 *Code de Commerce*, which limited the application of arbitration some commercial disputes such as maritime insurance disputes.<sup>189</sup> Only existing disputes could be referred to arbitration, by agreement of the parties since arbitration agreements concerning disputes that may arise in future were prohibited.<sup>190</sup> Article 1006 of the 1806 Code provided that “an agreement of compromise that does not specify the matters in dispute and the names of the arbitrators is void.”<sup>191</sup>

Article 1006 was interpreted in the case of *Compagnie l'Alliance v. Prunier*,<sup>192</sup> where it was held that an arbitration clause concerning a future dispute was unenforceable since the subject matter of such a dispute could not be ascertained at the time the parties were entering such an agreement.<sup>193</sup> In 1923, the Geneva Protocol on Arbitration Clauses in Commercial Matters was adopted by France.

From 1925 to 1975, different laws concerning arbitration were passed. France promulgated its current constitution in 1958. However, the constitution has no provisions for ADR mechanisms. Internationally, France ratified several arbitration conventions such as the

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<sup>189</sup> Jean de la Hosserye et al., Arbitration in France, at page 333 available at [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_FRANCE.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf) (last accessed 21<sup>st</sup> August 2015).

<sup>190</sup> Ibid.

<sup>191</sup> Arthur Taylor Von Mehren, “*International Commercial Arbitration: The Contribution of French Jurisprudence*” (Louisiana Law Review Vol. 46 No. 5 May 1986 pages 1045 to 1059) at page 1046 available at <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4988&context=lalrev> (last accessed 21<sup>st</sup> August 2015).

<sup>192</sup> Cass. civ. 10 July 1843.

<sup>193</sup> Arthur Taylor Von Mehren op.cit at page 1047.

New York Convention,<sup>194</sup> the 1961 European Convention on International Arbitration<sup>195</sup> and the ICSID Convention.<sup>196</sup>

The beginning of the 1980s witnessed major reforms in the country's arbitration laws when two major decrees were passed i.e. Decree Number 80-354 of 1980 on domestic arbitration and Decree Number 81-500 concerning international arbitration.<sup>197</sup> These decrees were meant to reinforce autonomy in arbitration proceedings and limit judicial interference in arbitration proceedings.<sup>198</sup> They also empowered arbitrators to rule on arbitration aspects such as the validity of the arbitration agreement and their jurisdiction.<sup>199</sup> In 2001, the arbitrability provisions in domestic arbitration were amended to expand the scope from commercial matters to include disputes regarding professional activity.

In 2011, the country's laws were once again amended via Decree Number 2011-48 (the New Decree) to codify principles enunciated by existing case law and introduced some innovative features such as estoppel by conduct.<sup>200</sup> The genesis of the 2011 reforms can be traced back to the year 2006, when the French Arbitration Committee (CFA) issued the first draft of the proposed amendments.<sup>201</sup> The French ministry responsible for justice came up with another draft in 2009, which was amended severally before the final version was adopted.<sup>202</sup>

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<sup>194</sup> In force since 24<sup>th</sup> September 1959.

<sup>195</sup> Ratified on 21<sup>st</sup> August 1967.

<sup>196</sup> Ratified on 16<sup>th</sup> December 1966.

<sup>197</sup> Jean de la Hossieraye et al., at page 334.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid at page 335.

<sup>201</sup> Emmanuel Gaillard, "*France Adopts a New Law on Arbitration*" (New York Law Journal Vol. 245 No.15 of 24<sup>th</sup> January 2011) at page 1 available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-article-France-Adopts-New-Law-On-Arbitration-File-Attachment/IA012411FranceAdoptsNewLawOnArbitrationegaillard.pdf> (last accessed 21<sup>st</sup> August 2015).

<sup>202</sup> Ibid.

It broadened the parties' autonomy to the arbitration process thereby enhancing the country's reputation as an arbitration friendly destination.<sup>203</sup> It should be noted that France has not adopted the UNCITRAL Model Law of 1985.<sup>204</sup>

Since the French constitution is silent on ADR, recourse on arbitration matters is made to the CPC. International arbitration is governed by Articles 1504 to 1527 of the CPC. French law distinguishes between domestic and international arbitration, in the sense that it provides for domestic arbitration and international arbitration separately.<sup>205</sup> However, French law is unique because domestic arbitration provisions are directly applied into international arbitration, hence there are some common provisions applicable to both domestic and international arbitration.<sup>206</sup>

It is interesting to note that the basis of distinguishing whether arbitration is domestic or international is the extent of the economic interest in the dispute. Therefore, arbitration is international if it relates to international trade interests.<sup>207</sup> This position was noted in the Court of Appeal case of *SARL Carthago Films v SARL Babel Productions*<sup>208</sup> where it was observed that the distinction between domestic and international arbitration is not dependent on the location of the arbitral seat, intention of the parties or their nationalities.

An elaboration of what "international trade interests" are, was made in an earlier Court of Appeal case of *Agence Transcongolaise des Communications-Chemin de fer Congo (ATC-CFCO) v Compagnie Minière de l'Ogooue-Comilog S.A.*,<sup>209</sup> to mean the tangible or intangible transfer of goods, services or funds across borders.

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<sup>203</sup> Nicolas Bouchardie and Celine Tran, "Arbitration in France" at page 3 available at <https://www.international-arbitration-attorney.com/wp-content/uploads/Arbitration-in-France.pdf> (last accessed 21<sup>st</sup> August 2015).

<sup>204</sup> Ozlem Susler, "Jurisdiction of Arbitration Tribunals in France" at page 14 available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ozlem\\_susler](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ozlem_susler) (last accessed 21<sup>st</sup> August 2015).

<sup>205</sup> Emmanuel Gaillard op.cit.

<sup>206</sup> By virtue of Article 1506 of the CPC.

<sup>207</sup> Article 1504 of the CPC.

<sup>208</sup> *Revue de l'Arbitrage* 2001 at page 543 (This is the 'Arbitration Review' Journal which reports on selected arbitration cases).

<sup>209</sup> Case No 95/80283 of 1997.

### 3.2.2 Requirements concerning the arbitration agreement

In France, there are no formal requirements for an arbitration agreement in international arbitration.<sup>210</sup> This liberal approach was established in the case of *Costa de Marfil Naviera v. Compagnie Marchande de Tunisie*.<sup>211</sup> Furthermore, it was held in the case of *Zanzi v J. de Coninck*<sup>212</sup> that arbitration agreements are presumed to be valid and it is the onus on the party who alleges their invalidity to prove so.

### 3.2.3 Jurisdiction and role of court

The *Tribunal de Grande Instance* (TGI) which is the equivalent of our High Court, has exclusive jurisdiction in matters concerning international arbitration.<sup>213</sup> The president of the tribunal is officially known as *Juge d'Appui* (supporting judge) and issues orders to facilitate the arbitration process such as appointment of arbitrators where parties fail to do so,<sup>214</sup> ruling on the validity of the arbitration clause,<sup>215</sup> extension of the duration of arbitration proceedings or issuing orders for the enforcement of arbitral awards.<sup>216</sup> Where arbitrations are administered by institutions such as the ICC, the courts will not intervene in the matters but will leave the issue to be decided by the administering authority.<sup>217</sup>

The TGI has several powers in relation to international arbitration in France. First, it can grant an order for interim or conservatory measures, upon application by a party to arbitration proceedings.<sup>218</sup> The application may be allowed notwithstanding the non-constitution of an arbitral tribunal.

There is no default number of arbitrators, stipulated by French law. Parties are free to agree on the number of arbitrators. Therefore the TGI may also appoint an arbitrator where

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<sup>210</sup> Article 1507.

<sup>211</sup> Paris Court of appeal, *Rev. Arb.* 1961.25.

<sup>212</sup> Case No 96-21.430 (5 January 1999).

<sup>213</sup> Ozlem Susler op.cit at page 13.

<sup>214</sup> Emmanuel Gaillard op.cit at page 1

<sup>215</sup> Jones Day Commentary, "Arbitration in France: the 2011 reform at page 3 available at <http://www.jonesday.com/files/Publication/b9ce7786-7e7e-47b9-a628-bc2a9361e704/Presentation/PublicationAttachment/d609618d-63cc-43e9-a0e7bc6ae3b7663e/Arbitration%20in%20France.pdf> (last accessed 21<sup>st</sup> August 2015).

<sup>216</sup> *Ibid.*

<sup>217</sup> Emmanuel Gaillard op.cit note 210.

<sup>218</sup> Article 1506 as read with Art 1449.

parties to the arbitration cannot agree on the choice of the arbitrator and the arbitration is not institutional.<sup>219</sup> If the arbitral tribunal should comprise of three arbitrators and a party fails to appoint an arbitrator within a month of receiving the other parties request to do so, or if the two arbitrators appointed by either party fail to settle on the choice of the third arbitrator within one month of acceptance of their appointments, the TGI may also intervene.<sup>220</sup>

The supporting judge may appoint an arbitrator or resolve any other dispute concerning the procedure for constituting the arbitral tribunal, where there are more than two parties to the arbitration who cannot agree on the said procedure and the arbitration is not administered.<sup>221</sup> However, the supporting judge will declare that no appointment needs to be made where the arbitration agreement is void or inapplicable.<sup>222</sup>

The arbitral tribunal shall be complete upon the arbitrators' acceptance of their mandate. Prior to such acceptance, an arbitrator should declare any circumstance that may impair his independence or impartiality. The obligation of disclosure extends to the post appointment period. The arbitrators are required to carry their mandate until conclusion unless they become incapacitated or a legitimate reason is advanced as to why they should not act.

Any dispute on the materiality of the reason advanced, should be settled by the supporting judge within a month of the refusal to act or resignation.<sup>223</sup> The supporting judge will also settle disputes relating to removal of arbitrators where the parties fail to unanimously consent on the same and the arbitration is not administered by anybody.<sup>224</sup> Lastly, the supporting judge may also extend the duration of arbitration proceedings where parties fail to agree on the same.<sup>225</sup>

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<sup>219</sup> Article 1506 as read with Article 1452.

<sup>220</sup> Ibid.

<sup>221</sup> Article 1506 as read with Articles 1453 and 1454.

<sup>222</sup> Article 1506 as read with Articles 1455.

<sup>223</sup> Article 1506 as read with Articles 1456 and 1457.

<sup>224</sup> Article 1506 as read with Article 1458.

<sup>225</sup> Article 1506 as read with Article 1463.

An application to the supporting judge may be made either by a party to the proceedings or the arbitral tribunal. The application shall be expeditiously dispensed with and the judge's determination shall not be appealed, except where the decision relates to the judge's declaration that no arbitrator should be appointed because the arbitration is manifestly void or inapplicable.<sup>226</sup>

The arbitral tribunal is entitled to choose the applicable law to the dispute in question. It is also entitled to apply trade usages to the said dispute.<sup>227</sup> It may also grant interim measures and rule on evidentiary matters pertaining to the proceedings.<sup>228</sup> French law expressly provides that the proceedings shall be confidential.<sup>229</sup>

The *Cour d'Appel* (Court of Appeal) hears matters that may be appealed from the TGI.<sup>230</sup> It also entertains applications for setting aside an award or non-recognition of a foreign award.<sup>231</sup> Above the appellate court is the *Cour de Cassation* (Supreme Court of France) which is the highest court with jurisdiction to determine arbitration disputes.<sup>232</sup>

### **3.2.4 Form, contents and enforcement of an arbitral award**

The arbitral award should comply with several requirements. It should describe the parties, in terms of their names and domiciles. It should also include the names of counsel if the parties were legally represented. The arbitrators' names, date and place where the award was made should also be specified. Lastly, it should provide a summary of the respective claims and arguments of the parties as well as the reasons on which it was made.<sup>233</sup> As soon as the tribunal delivers the award, the matters adjudicated become *res judicata*.<sup>234</sup> The parties are notified of the award by service, a process locally known as *signification*.<sup>235</sup>

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<sup>226</sup>Article 1506 as read with Article 1460.

<sup>227</sup> Article 1511.

<sup>228</sup> Article 1506 as read with Articles 1468 and 1469.

<sup>229</sup> Article 1506 as read with Article 1479.

<sup>230</sup> Ozlem Susler op.cit at page 12

<sup>231</sup> Articles 1523 and 1526

<sup>232</sup> Ozlem Susler op.cit note 230.

<sup>233</sup> Article 1506 as read with Articles 1481 and 1482.

<sup>234</sup> Article 1506 as read with Articles 1484 and 1485.

<sup>235</sup> Ibid.

A party may apply to the arbitral tribunal to interpret or correct any clerical or typographical errors within three months of notification of the award. The tribunal may also make an additional award where it did not rule on a claim.<sup>236</sup> Where a tribunal cannot be reconvened, the matter will be dispensed by the court, as if there had been no arbitration.<sup>237</sup>

A party seeking to enforce an international arbitral award must furnish the TGI with the original award and the arbitration agreement, or certified copies of the documents.<sup>238</sup> If the award is not in the French language, a translation must be availed.<sup>239</sup>

The application should be filed in the TGI of the place where the award was made, in cases where the international arbitration was conducted in France.<sup>240</sup> Where proceedings were conducted and an award made abroad, the TGI in Paris has exclusive jurisdiction to entertain such applications.<sup>241</sup> An enforcement order (*exequatur*) is issued by the TGI, when the application is allowed. These proceedings are not adversarial.<sup>242</sup>

### **3.2.5 Grounds for setting aside an arbitral award and/or non-recognition of a foreign award**

In France, the award in international arbitration may be set aside by way of appeal, on several grounds. They are namely, where the tribunal erred on its jurisdiction or was improperly constituted. The tribunal's disregard of its mandate or violation of due process can also serve as a basis for setting aside the award. An award can also be set aside where its recognition or enforcement will contravene international public policy.<sup>243</sup>

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<sup>236</sup> Article 1506 as read with Article 1485.

<sup>237</sup> Ibid.

<sup>238</sup> Article 1515.

<sup>239</sup> Ibid.

<sup>240</sup> Article 1516.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Article 1520.



An award made abroad may be denied recognition and enforcement based on the same grounds applied to international awards made in France.<sup>244</sup> It should be noted however, that the grounds stipulated in the New York Convention do not necessarily bind French courts in their determination of whether to recognize and enforce a foreign award in international arbitration.<sup>245</sup>

French courts have failed to uphold the provisions of Article V(1)(e) which states that an award may not be recognized and enforced if it has not become binding on the parties or has been set aside by a competent authority of the country in which it was made or under whose laws it was made.<sup>246</sup> This position has been informed by their observation that the said ground is not included in the relevant provision of the French law hence the French law prevails.<sup>247</sup>

Furthermore, French courts have justified their position by observing that an international award is not part of any national order. This was stated the case of *Hilmarton v Omnium* where the *Cour de Cassation* stated regarding an award that had been made in Switzerland “...is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy”<sup>248</sup>

This position was confirmed by the *Cour de Cassation* in the case of *Société PT Putrabali Adyamulia v Société Rena Holding* where it held that “An international arbitral award which is not anchored in any national legal order is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.”<sup>249</sup>

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<sup>244</sup> Article 1525.

<sup>245</sup> Nicolas Bouchardie and Celine Tran op. cit at page 19.

<sup>246</sup> Ibid.

<sup>247</sup> Article 1520 provides the grounds for refusing to recognize an award and the provision in the New York Convention is not among them.

<sup>248</sup> Case No 92-15.137 (23 March 1994).

<sup>249</sup> Case No 05-18.053 (29 June 2007).

Although an action to set aside an award or prevent recognition and enforcement of the award does not suspend the award, the president of the appellate court may stay or set conditions if the enforcement could severely prejudice the rights of one of the parties.<sup>250</sup>

### **3.2.6 Forum and timelines for challenging an award**

This is done by applying to the Court of Appeal of the place the award was made within a month of notification of the award bearing the enforcement order.<sup>251</sup> Courts will not allow applications to set aside arbitral awards based on grounds that should have been raised in the arbitration proceedings, but were not.

In the case of *S.A. Fibre Excellence v. S.A.S. Tembec*,<sup>252</sup> the Paris Court of Appeal disallowed an application by one of the parties to set aside an arbitral award on the basis that the arbitral tribunal was not properly constituted. One of the three arbitrators in the ICC arbitration had resigned on the basis of conflict of interest after the pleadings had been closed and the award submitted to the Court of International Arbitration (CIA) for scrutiny. However, the award had not been issued and the parties were given the opportunity to share their thoughts on whether the arbitration should be concluded with the two arbitrators, but no party said anything. The Court of Appeal justified its decision saying that the applicant's failure to challenge the constitution of the arbitral tribunal before conclusion of the proceedings amounted to a waiver of the right to object hence the parties could not cite the ground at a later stage.

Where the order to enforce the award is denied, a party may appeal the court's decision to the Court of Appeal, within a month of service of the order.<sup>253</sup> A party may also appeal against an order recognizing or failing to recognize or denying enforcement of an award made abroad, within one month of notification of the order.<sup>254</sup> The Court of Appeal will

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<sup>250</sup> Article 1526.

<sup>251</sup> Article 1519.

<sup>252</sup> Judgment was delivered on 2<sup>nd</sup> December 2014. Summary of the case available at <https://www.dlapiper.com/en/northamerica/insights/publications/2015/03/international-arbitration-newsletter-q1-2015/use-it-or-lose-it-french-courts/> (last accessed 21<sup>st</sup> August 2015).

<sup>253</sup> Article 1523.

<sup>254</sup> Article 1525.

base its determination on the same grounds the Tribunal considered, before upholding or quashing the enforcement order issued by the Tribunal.

### 3.3 England

#### 3.3.1 Historical Background

Arbitration is said to have been conducted before the establishment of the English courts as far back as the year 1224, when traders and merchants began settling their disputes through arbitration.<sup>255</sup>

England unlike other states does not have a codified constitution, but a collection of statutes, court decisions and conventions.<sup>256</sup> The first English legislation concerning arbitration was passed in 1698.<sup>257</sup> The statute was passed due to the legislature's appreciation of the increasing importance of arbitration in an expanding economy, as well as the prevalence of merchants to settle disputes out of courts because the existing legislation did not adequately reflect the commercial practices under which the merchants conducted business.<sup>258</sup>

The Act noting party autonomy in commercial disputes should be recognized by the courts, provided inter alia "it shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel ...for which there is no other remedy but by personal action or suit in equity, by arbitration to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His

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<sup>255</sup>Grace Xavier "Evolution of Arbitration as a legal institutional and the inherent powers of the court: Putrajaya Holdings SDN. BHD V. Digital Greens SDN. BHD" Asian Law Institute Working Paper Series No. 9, February 2010 at page 2 available at <https://law.nus.edu.sg/asli/pdf/WPS009.pdf> (last accessed 1<sup>st</sup> September 2015).

<sup>256</sup>Richard Blackburn, "Britain's Unwritten Constitution" available at <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> (last accessed 17th April 2018).

<sup>257</sup> Earl S. Wolaver, "The Historical Background of Commercial Arbitration" University of Pennsylvania Law Review December 1934 pages 132-146) at pages 143-144 available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review)(last accessed 1<sup>st</sup> September 2015).

<sup>258</sup> G Ellenbogen, "English Arbitration Law and Practice" pages 656-678) at page 659 available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2544&context=lcp> (last accessed 1<sup>st</sup> September 2015).

Majesty's Courts of Record which the parties shall choose...”<sup>259</sup>It also recognized the need for arbitration proceedings to be conducted in a fairly and proper manner when it provided that “any arbitrage or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity....”<sup>260</sup>

There was further progress made in English legislation in promotion of arbitration. For example, the English Civil procedure of 1833 enabled arbitrator to administer oaths, made the defiance of an arbitrator’s order as a contempt of court and safeguarded the arbitrator’s position by ensuring that an arbitrator’s authority could only be revoked with the leave of court.<sup>261</sup>

Courts first demonstrated recognition of the arbitration agreement in the landmark case of *Scott v. Avery*<sup>262</sup>. In this case, parties to an insurance contract had agreed that any dispute that may arise, will first be referred to arbitration, before a suit can be instituted in court.<sup>263</sup> The House of Lords in declaring the arbitration clause valid, observed that although parties to a contract cannot completely exclude the jurisdiction of the courts, they can enter agree that they will only refer the matter to court after it has been handled by arbitrators.

This decision was also referred to case of *Edwards v. Aberayon Insurance Society*<sup>264</sup> where Brett J. in observing the limitation of courts where parties have entered into an arbitration agreement, stated that “The true limitation of *Scott v. Avery* seems to me to be ... that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for the breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind which do not go to the root

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> 5 H. L. Cas. (1856) at page 811, 10 Eng. Rep. 1121 (H. L. 1856).

<sup>263</sup> G Ellenbogen, op.cit at page 659

<sup>264</sup> 1 Q. B. D. (1875) at page 563.

of the action . . . such stipulation prevents any action being maintained until the particular facts have been settled by arbitration.”

Although there was legislative progress concerning arbitration in England, parties in arbitration proceedings still encountered some procedural challenges. For example, where there was need for the revision of the award, parties were compelled to commence the proceedings afresh since an arbitrator had become *functus officio* upon delivery of the award.<sup>265</sup> However, the challenge was addressed by the Common Law Procedure Act of 1854, which provided that an arbitrator would only become *functus officio* upon delivery of a valid award.<sup>266</sup> In 1889, the Arbitration Act was passed, which scholars have observed that the statute’s main undoing was the excessive powers it granted the courts, which enabled them to control the arbitration process.<sup>267</sup>

As time went by, courts in England continued to enforce not only the arbitration agreement but also expressed reluctance to interfere with the arbitral award, except in compelling circumstances. This was demonstrated in the matter of *Re Olympia Oil & Cake Co.* and *MacAndrew, Moreland & Co.*<sup>268</sup> where Scrutton L. J observed “I have long held a strong view as to the position which the court should adopt with regard to arbitrations. In old days there were comparatively few arbitrations and those were of a subordinate nature. Now a great part of the disputes relating to the commercial business of the country is referred to commercial arbitrators, who deal with them according to substance rather than form. In my view it would be very undesirable if many of the old rules of a somewhat technical character were invoked for the purpose of interfering with decisions of commercial arbitrators where no injury in the matter of substance has been done by the form in which those commercial arbitrators have expressed their decisions. The system which some litigants seem to favour of having, in addition to two hearings before the arbitrators and the appeal tribunal, as many hearings as they can get in the law Courts, is one which we ought

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<sup>265</sup> Kariuki Muigua op. cit note 71 at page 21.

<sup>266</sup> Ibid.

<sup>267</sup> Jacob K. Gakeri, op.cit at page 221.

<sup>268</sup>[1918] 2 K.B. 771 at page 778.

not to encourage. Hence I approach the decision of this case with a desire not to interfere with the award of commercial arbitrators unless I am satisfied that substantial injustice has \*been done apart from a question of form.”

The 1889 Act was amended by the Arbitration Clauses (Protocol) Act of 1924 to enforce a League of Nations protocol that discouraged parties who are nationals of contracting states from filings suits where their contracts contained arbitration clauses.<sup>269</sup> Further amendments were made in 1934 in consideration of the recommendations made by the committee headed by Justice MacKinnon leading to the enactment of a new statute in 1950, which ended up consolidating the existing arbitration law in the country.<sup>270</sup> The 1950 Act was subsequently amended in 1975 and 1979 and complemented by case law, which had been developed in the course of time.<sup>271</sup> England ratified the New York Convention on 24<sup>th</sup> September 1975.<sup>272</sup>

In the 1980’s, the Department of Trade and Industry established the Departmental Advisory Committee on Arbitration Law (DAC) under the leadership of Lord Mustill.<sup>273</sup> The DAC recommended the wholesale adoption of the 1985 Model law in the form of a new Act with the same language and structure as the UNCITRAL law.<sup>274</sup> The DAC published several bills and by the time the last bill was published in December 1995 and adopted, it was headed by Lord Justice Saville who had succeeded Lord Mustill.<sup>275</sup>

The current law governing international arbitration where the seat is in England, Wales or Northern Ireland is the Arbitration Act of 1996.<sup>276</sup> The Act came to force on 31<sup>st</sup> January

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<sup>269</sup> G Ellenbogen op. cit at page 658.

<sup>270</sup> Ibid.

<sup>271</sup> Guy Pendell and David Bridge, Arbitration in England and Wales (CMS Guide to Arbitration Vol 1 pages 299 to 313) at page 299. Available at [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_ENGLAND%20WALES.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf) (last accessed 1<sup>st</sup> September 2015).

<sup>272</sup> <http://www.newyorkconvention.org/countries> (last accessed 1<sup>st</sup> September 2015).

<sup>273</sup> Guy Pendell and David Bridge op.cit.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Norton Rose, Arbitration in Europe (England and Wales) November 2007 at page 6 available at <http://www.nortonrosefulbright.com/files/england-25789.pdf> (last accessed 1<sup>st</sup> September 2015).

1997.<sup>277</sup> Although the Act is based on the Model law, it has not wholly adopted the said law but differs in some respects. Unlike the Model Law which only applies to international arbitration, the Act applies to both local and international arbitration.<sup>278</sup> The Act also states the principles that govern the law as well as provides for appeals on points of law.<sup>279</sup> The 1996 Act consolidated the arbitration legislation and also codified the existing case law.<sup>280</sup> It also increased the autonomy of the parties to the arbitral proceedings, reinforced powers of the arbitral tribunals and restricted judicial intervention in arbitration proceedings.<sup>281</sup>

The purpose of the 1996 Act was aptly captured in the case of *Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co*,<sup>282</sup> where Mance LJ observed “Parliament has set out, in the Arbitration Act 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of public and of basic fairness.”

Despite the extensive freedom given to parties to agree on various aspects governing their arbitration proceedings, the Act lists mandatory provisions which apply to every arbitration conducted in England and which such proceedings are subject to.<sup>283</sup> They include the provisions concerning the stay of proceedings, immunity of an arbitrator, court’s power to remove an arbitrator or to determine a preliminary point of law as well as the general duties of the tribunal and the parties.

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<sup>277</sup> Guy Pendell and David Bridge op.cit.

<sup>278</sup> Jayne Bentham and Basil Woodd-Walker, “*Arbitration Practice and Procedures in the UK (England and Wales): Overview*” at page 2. Available at <http://uk.practicallaw.com/4-502-1378?source=relatedcontent> (last accessed 1<sup>st</sup> September 2015).

<sup>279</sup> Ibid.

<sup>280</sup> Guy Pendell and David Bridge op.cit.

<sup>281</sup> Ibid.

<sup>282</sup> (2004) EWCA Civ 314 at paragraph 31.

<sup>283</sup> Schedule 1 of the Act.

### **3.3.2 Requirements concerning the arbitration agreement**

The arbitration agreement must be in writing.<sup>284</sup> An agreement is considered to be in writing if it is made in writing irrespective of whether it has been signed by the parties, if captured in an exchange of communication or if it is evidenced in writing.<sup>285</sup> Furthermore, the input of a third party is considered when determining whether an agreement is written because an agreement in any other form will also be taken as written, if recorded by a third party upon the instruction of one of the parties to the agreement.<sup>286</sup> An agreement is also said to be said to exist if alleged in written submissions by a party and the allegations are not denied by the other.<sup>287</sup>

### **3.3.3 Jurisdiction and role of court**

Legal proceedings pertaining to the arbitration in England are not restricted to the High Court. County courts may also deal with such proceedings where the Lord Chancellor so directs, pursuant to the provisions of Section 105 of the Arbitration Act. In fact, the Lord Chancellor may make an order allocating arbitration proceedings between the High Court and County Courts or specifying which proceedings may only be commenced either in the High Court or county court.<sup>288</sup> However, the Lord Chancellor is obligated to consult the Lord Chief Justice of England and Wales before making the order.<sup>289</sup> Nevertheless, a competent court has several powers concerning the arbitration process as provided below.

A party to an agreement can apply to the court where legal proceedings have been instituted, to stay those proceedings in order to facilitate arbitration of the dispute.<sup>290</sup> However, the applicant must have first taken steps to acknowledge the claim or to respond to it. A party to the arbitration agreement is entitled to apply for stay irrespective of whether other applicable dispute resolution procedures have been exhausted. The

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<sup>284</sup> Section 5.

<sup>285</sup> Section 5 (2).

<sup>286</sup> Section 5(4).

<sup>287</sup> Section 5(5).

<sup>288</sup> Section 105(2).

<sup>289</sup> Section 105(3A).

<sup>290</sup> Section 9.



application will be disallowed if the agreement is null and void, inoperative or incapable of taking effect.<sup>291</sup>

The court is empowered to extend time for any aspect relating to arbitration where parties had agreed on a certain time frame for the proceedings.<sup>292</sup> In this instance, a party has to demonstrate that he has exhausted all the avenues for recourse, available in the arbitration proceedings. Further, the court will extend time if satisfied that there are special unanticipated circumstances, warranting such extension and the other party's conduct justifies the issuance of such an order.<sup>293</sup>

It is also interesting to note that the statute of limitations applies to arbitrations in England, notwithstanding the fact that arbitration is an ADR mechanism which should not be dictated by the same rules or timelines as litigation.<sup>294</sup> Under English law, contractual matters have a limitation period of six years from the date a party breached the contract.<sup>295</sup> Claims in tort have a limitation period of six years from the date damage was suffered but in any event, not more than fifteen years from the date the negligent act was committed.<sup>296</sup>

Parties are free to agree on the numbers and the procedure of appointing arbitrators. If a party is required to appoint an arbitrator fails to do so even after notice from the other party, the other party may appoint an arbitrator in default.<sup>297</sup> However, such an appointment is not final since the defaulting party may apply to the court to set aside such an appointment.

The court is also empowered to appoint an arbitrator where parties fail to agree on what should be done where the appointment procedure has failed and the parties have request

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<sup>291</sup> Section 9(4).

<sup>292</sup> Section 12.

<sup>293</sup> Section 12(2).

<sup>294</sup> Section 13.

<sup>295</sup> Jayne Bentham and Basil Woodd-Walker op. cit at page 2.

<sup>296</sup> Ibid.

<sup>297</sup> Section 17.

the court to intervene.<sup>298</sup>The appointment made by the court will have the same effect as if it had been made by the parties.<sup>299</sup> The court may in lieu of appointment, give directions as to what should be done or even revoke an appointment that may have been made. The decisions of the court may be appealed with leave.<sup>300</sup>

The English Act allows judges of the Commercial Court to accept appointments as arbitrators if they consider it fit to do so having regard to the circumstances of the case.<sup>301</sup>However, the judges' acceptance is subject to the approval of the Lord Chief Justice and the fees payable shall be paid into the High Court.<sup>302</sup>

In England, it has been held in the case of *Nurdin Jivraj v. Sadruddin Hashwani* that an arbitrator is not an employee of the parties.<sup>303</sup>In this case, the parties had entered into a joint venture agreement for investment in real estate. The agreement contained an arbitration clause stipulating that in the event of a dispute, an arbitrator of the Ismaili faith will be appointed to resolve it. There were some contentious issues several years after the parties had terminated the joint venture and Mr. Hashwani appointed an arbitrator by the name of Sir Anthony Coleman to oversee the arbitration. Mr. Jivraj successfully challenged the appointment in the High Court on the basis that it violated the arbitration agreement since the arbitrator did not belong to the stipulated religious community.

Mr. Hashwani appealed the decision to the Court of Appeal on the basis that insisting on appointing an Ismaili arbitrator would contravene the anti-discrimination legal provisions in force particularly the Employment Equality (Religion and Belief) Regulations 2003. The Court of Appeal accepted Mr. Hashwani's argument and overturned the High Court's decision. However, the Supreme Court set aside the decision of the Court of Appeal and upheld the High Court's finding that arbitrators are not employees of the parties hence anti-discrimination laws do not govern their appointment.

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<sup>298</sup> Sections 18 (1) to (3).

<sup>299</sup> Section 18(4).

<sup>300</sup> Sections 17(4) and 18 (5)

<sup>301</sup> Section 93.

<sup>302</sup> Ibid.

<sup>303</sup> (2010) EWCA Civ 712.

The English Act provides for umpires.<sup>304</sup> Parties may agree on an umpire and his role. The umpire is required to attend the arbitration just like the arbitrators and access all the materials that the arbitrators obtain. The umpire will step in, when the arbitrators notify the parties that they are unable to agree on any matter pertaining to arbitration. In such a case, the umpire will determine the matter as if he was the sole arbitrator.

Therefore, the court may upon application by a party, appoint an umpire where arbitrators do not agree on any matter pertaining to arbitration or where they fail to notify parties that they cannot agree. The court's decision may be appealed where leave is granted.<sup>305</sup>

The court may upon application by a party, order the removal of an arbitrator where the arbitrator is unqualified, where circumstances raise justifiable doubts concerning his capacity or impartiality or where he has failed to conduct the arbitration with reasonable dispatch.<sup>306</sup> The arbitral tribunal can continue with the proceedings pending determination of the application. The arbitrator concerned is entitled to appear before the court to defend himself. An arbitrator is also free to resign his appointment and may after notifying the parties, apply to the court to grant him relief from liability or make an appropriate order concerning his fees.<sup>307</sup> Leave is required to appeal the decision of the court.<sup>308</sup>

The court can hear and determine an application on a preliminary point concerning the arbitral tribunal's substantive jurisdiction.<sup>309</sup> In such a case, the tribunal's proceedings will be suspended until the court's determination. The application will only be admitted where all parties to the arbitrations agree or if they don't agree, where it is made with the tribunal's permission and the court is satisfied that there will be a saving of costs, there has been no

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<sup>304</sup> Section 21.

<sup>305</sup> Section 21(6).

<sup>306</sup> Section 24.

<sup>307</sup> Section 25.

<sup>308</sup> Section 24(6).

<sup>309</sup> Section 32.

delay and there is a good reason why the matter should be determined by the court. The court's decision will only be appealed where leave is granted.<sup>310</sup>

Courts can also exercise general powers to support the arbitration tribunal's proceedings.<sup>311</sup> They can summon witnesses, order the preservation of evidence, make appropriate orders relating to the property which is subject to arbitration proceedings and grant interim injunctions. The court is also empowered to determine preliminary points of law that relate to arbitration, which may substantially affect the rights of parties.<sup>312</sup> In this case, the application to the court should be made by the parties and the court will have to be satisfied that the application has been made expeditiously and the outcome will result in cost saving, before determining the matter.

The court may also extend the time for making an award, where such timelines have been prescribed in the arbitration agreement and all extension avenues under the arbitration have been exhausted.<sup>313</sup> The application to the court may be made by the tribunal itself or a party to the arbitration proceedings and the court will only grant the order where it is satisfied that substantial injustice would be done if it doesn't allow the application. The decision of the court can only be appealed where leave is granted.<sup>314</sup>

### **3.3.4 Form, contents and enforcement of an arbitral award**

Parties are free to agree on the form and date of the arbitral award. If they fail to do so, the award must be in writing, signed by the arbitrators, state the reasons, the date and place where made. The parties can also agree concerning how notification of the award will be made.<sup>315</sup> Arbitral awards are enforced by obtaining leave of the court.<sup>316</sup> Judgment is entered where leave is given.

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<sup>310</sup> Section 32(6)

<sup>311</sup> Section 44.

<sup>312</sup> Section 45.

<sup>313</sup> Section 50.

<sup>314</sup> Section 50(5).

<sup>315</sup> Section 52.

<sup>316</sup> Section 66.

A party may appeal on a point of law arising out of an award, except where the parties have agreed otherwise.<sup>317</sup> The appeal shall be brought only upon the agreement of the parties or with the leave of the court. The application for leave shall identify the question of law to be determined as well as the grounds under which the leave should be granted. Upon appeal, the court may confirm the award, vary the award, remit the award to the tribunal for reconsideration or set aside the award in whole or part.<sup>318</sup> This decision may be appealed further with the leave of the court, though the decision not to grant leave for a further appeal may not be appealed.

Where parties have not agreed on any timeframe, the tribunal may correct any accidental omission, clerical error or ambiguity in the award, within 28 days from the date of the award or from the date of the application for the same.<sup>319</sup> An additional award concerning any claim that was not addressed in the initial award, may be made within 56 days of the date of the original award or such other time as the parties agree.<sup>320</sup>

### **3.3.5 Grounds for setting aside an arbitral award and/or non-recognition of a foreign award**

A party to the proceedings may upon notice to the tribunal and parties, apply to the court to challenge the award on the basis that the tribunal does not have substantive jurisdiction. This application does not prevent the tribunal from making a further award but the court may decide to confirm, vary or set aside the award.<sup>321</sup>

An award can also be challenged on the basis of a serious irregularity on the tribunal, the proceedings or the award.<sup>322</sup> In order to justify such a challenge, a party can claim *inter alia* that the tribunal did not act fairly, did not deal with the issues at hand or conducted proceedings unprocedurally. The party can also base the challenge on the fact that the award does not comply with the formal requirements or was procured fraudulently. The

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<sup>317</sup> Section 69.

<sup>318</sup> *Ibid.*

<sup>319</sup> Section 57(5).

<sup>320</sup> Section 57(6).

<sup>321</sup> Section 67.

<sup>322</sup> Section 68.

court in determining the matter may remit the award to the tribunal for reconsideration, set aside the award or declare it as being of no effect. It should be noted that the court will only set aside or declare the award as non-effectual if it considers it improper to remit the matters for reconsideration.

The recognition and enforcement of foreign awards is governed by Part III of the Act.<sup>323</sup> A foreign award made under the New York Convention is recognized as binding upon the parties who were party to the arbitration proceedings and a party can enforce the award with the court's leave.<sup>324</sup> Once the court grants leave, it will enter judgment on the terms of the award.<sup>325</sup>

The party seeking recognition and enforcement of a foreign award must produce the original award and the arbitration agreement or their duly authenticated copies. Where the documents are in a foreign language, duly translated copies certified by the translator or a diplomatic consular agent must be availed. However recognition and enforcement of the award may be refused on certain grounds.<sup>326</sup> Recognition and enforcement of a foreign award may be denied where a party was under some legal incapacity, the arbitration agreement was void as per its governing law or the law of the place the award was made, where a party was neither properly notified of an arbitrators appointment nor of the proceedings or otherwise unable to present his case or if the award did not deal with or considered matters out of the scope of the arbitration agreement.

Furthermore, recognition and enforcement will also be denied where the composition or the arbitration procedure contravened the arbitration agreement or the law of the place where arbitration was conducted, where the award has not become binding or has been suspended by a competent authority of the place where it was made. Lastly, the award may not be recognized and enforced if it deals with a non-arbitrable matter or is contrary to public policy.

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<sup>323</sup> Sections 99 to 104.

<sup>324</sup> Section 101.

<sup>325</sup> Ibid.

<sup>326</sup> Sections 102 and 103.

### **3.3.6 Forum and timelines for challenging an award**

The English Act does not expressly provide that the High Court has specific jurisdiction to entertain applications to set aside arbitral awards or for the non-recognition of foreign awards in international arbitration. However, it provides that applications seeking to challenge the enforcement of arbitral awards or to appeal the same, should be made within twenty eight days from either the date of the award or where the award was reviewed, from the date of the review.<sup>327</sup>

### **3.4 Conclusion**

The foregoing study has discussed the practice of international arbitration in some selected countries. The thematic discussion has revealed some similarities and differences in approach that these countries have, in relation to Kenya. These similarities and differences will be discussed in the same context, in the next chapter.

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<sup>327</sup> Section 70 (3).

## CHAPTER FOUR

### 4.0 RESEARCH FINDINGS AND ANALYSIS

#### 4.1 Introduction

Ordinarily, a fact finding mission is expected to reveal pertinent information relating to the subject matter of the study. Having studied the practice of arbitration in some of the most reputable seats, one should analyze the findings in order to determine whether there are any valuable lessons we can learn as a country in order to enhance our country's visibility and standing as a desirable arbitral destination. This chapter will proceed to analyze the findings concerning the practice of international arbitration in France and England, in relation to our own experience. The discussion will follow the same thematic order of the preceding chapter.

#### 4.2 Requirements concerning the arbitration agreement

In France, there are no formal requirements for an arbitration agreement in international arbitration.<sup>328</sup> The English position on the other hand is in consonance with the Kenyan requirement that the arbitration agreement should be in writing, whether in a formal agreement, an exchange of correspondence or in pleadings.<sup>329</sup>

#### 4.3 Jurisdiction and role of court

The *Tribunal de Grande Instance* (TGI) which is of comparable status to the Kenyan High Court, has exclusive jurisdiction in matters concerning international arbitration in the course of the proceedings.<sup>330</sup> Similarly, the Kenyan High Court has sole jurisdiction to handle matters under the arbitration Act. However, the Nairobi Centre for International Arbitration Act (NCIA) establishes the Arbitral Court, with exclusive original and appellate jurisdiction over matters under the NCIA.<sup>331</sup> Therefore, it is not clear how the Arbitral Court relates to the High Court.

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<sup>328</sup> Article 1507.

<sup>329</sup> Section 5 of the English Arbitration Act as read with Sections 4(2) and (3) of the Kenyan Act

<sup>330</sup> Ibid.

<sup>331</sup> Sections 21 and 22 of the NCIA



On the other hand, the English High Court is not the exclusive forum for handling arbitration matters under the English Arbitration Act. The County Courts may also entertain arbitration proceedings.<sup>332</sup> The Lord Chancellor is required in consultation with the Lord Chief Justice, to distinguish which proceedings may be handled by the High Court as opposed to the County Courts.

The powers concerning the courts during the arbitration proceedings in the three countries are largely similar. They include appointment of arbitrators where parties default, ruling on validity of the arbitration clause, issuing interim orders in the course of the proceedings, determining applications concerning the jurisdiction of arbitral tribunals, suitability or removal of arbitrators, issuing orders concerning the enforcement of arbitral awards.

However, there are some differences. An example is the application of the statute of limitations to arbitrations in England, despite the fact that arbitration is a private ADR process hence should not be bound or influenced by laws and timelines imposed on litigation procedures and processes.<sup>333</sup> It is also interesting to note that judges of the English commercial court may be appointed as arbitrators, with approval from the Lord Chief Justice.<sup>334</sup> There are no corresponding provisions in French and Kenyan arbitration laws.

Furthermore, English law provides for umpires in the arbitration process.<sup>335</sup> A party may apply to the court to appoint an umpire, where the arbitrators are unable to agree on a matter before the arbitration proceedings. The umpire will attend the arbitration proceedings just like the parties, but will step in where there is an impasse among the arbitrators and determine the issue in question, as if the umpire was the sole arbitrator. French and Kenyan arbitration statutes do not expressly provide for umpires. However, it is noteworthy that under Order 46 of the Kenyan Civil Procedure Rules 2010, umpires are recognized.<sup>336</sup>

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<sup>332</sup> Section 105

<sup>333</sup> Section 13.

<sup>334</sup> Section 93

<sup>335</sup> Section 21.

<sup>336</sup> Order 46 rule 4.

The said Order applies to arbitration by an order of the court. Basically, a party to a suit may at any stage thereof, before pronouncement of the judgment apply to the court to refer the matter to arbitration. Accordingly, the court in its order referring the matter to arbitration may provide for the appointment of an arbitrator or empower the arbitrators to appoint the umpire, so as to determine any issue where the arbitrators differ. Umpires are neither provided for under the Kenyan Arbitration Act nor the NCIA.

Lastly, English law expressly provides for appeal of decisions of the court made during the arbitration process, where the leave of court is obtained. Such decisions include the decision concerning the appointment of arbitrators where parties fail to do so, the appointment of umpires, the removal of arbitrators, the substantive jurisdiction of the arbitral tribunal or the extension of time for making the award where timelines are specified in arbitration proceedings.<sup>337</sup>

The foregoing can be contrasted with the Kenyan position, where the High Court's decision, concerning the appointment of arbitrators or the tribunal's jurisdiction, is final.<sup>338</sup> Another difference is that the Kenyan High Court has no express jurisdiction concerning the appointment of umpires or the extension of stipulated timelines, except where such arbitration is a reference from the court under Order 46 of the Civil Procedure Rules. Even so, there is no provision for appeal of such orders of the court.

In France, the only decision of the supporting judge that may be appealed during the arbitration proceedings, is the finding that no arbitrator should be appointed where parties have failed to do so, because the arbitration agreement is void or manifestly inapplicable.<sup>339</sup>

Furthermore, unlike the Kenyan and English positions, a French tribunal's ruling concerning its jurisdiction is final hence may not be challenged in court.<sup>340</sup> However, French courts like English courts may extend the time limits that were stipulated in

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<sup>337</sup> Sections 18 (5), 21(6), 24(6), 32(6) and 50.

<sup>338</sup> Sections 12(8) and 17(7).

<sup>339</sup> Article 1506 (2) as read with Articles 1455 and 1460.

<sup>340</sup> Article 1506(3) as read with Article 1465.

arbitration proceedings.<sup>341</sup> The Kenyan arbitration statutes are silent on the court's power to extend stipulated timelines.

As far as the award is concerned, it may be appealed purely on a point of law in England. A party may appeal with the agreement of the other parties or with leave of the court. The court after hearing the appeal may either confirm, vary or set aside the award. It may also refer the matter back to the tribunal for reconsideration. Such a decision may be appealed further only with the leave of the court, though the court's decision not to grant leave may not be appealed.<sup>342</sup>

In France on the other hand, an appeal does not lie purely on a point of law touching on the award, but as a matter of course. It is the stipulated procedure for challenging the enforcement of any award made in international arbitration proceedings conducted in the country, or for the recognition of a foreign award.<sup>343</sup> In Kenya on the contrary, only questions of law arising out of domestic arbitration may be appealed.<sup>344</sup>

#### **4.4 Form, contents and enforcement of an arbitral award**

There is agreement among the three countries that the arbitral award shall specify date, place where the award was made and the reasons on which it was made. It shall also be signed by a majority of the arbitrators.<sup>345</sup> Although the Kenyan and English laws do not expressly provide that the names of the arbitrators, names of counsel and a summary of the respective claims and arguments by the parties should be included in the award, they usually feature in the prose of the award.

There is also concurrence that the arbitral tribunal may upon application by a party to the proceedings, interpret or rectify any clerical or typographical errors in the award. However, the timelines for the doing so differ. In Kenya for example, a party may apply within thirty

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<sup>341</sup> Ibid

<sup>342</sup> Section 69.

<sup>343</sup> Articles 1523 and 1525.

<sup>344</sup> Section 39

<sup>345</sup> Article 1506 as read with Articles 1481 and 1482. It is also compared with Section 52 of the English Act and Section 32 of the Kenyan Act.

days of receipt of the arbitral award, apply to the arbitral tribunal to rectify errors. The tribunal shall after giving the other party to the proceedings fourteen days to comment on the request, proceed to act on the request within thirty days of expiry of the fourteen day period whether or not such comments have been received.<sup>346</sup>

In England, the application must be made within twenty eight days of the date of the award. The tribunal may after proceeding to give the other party reasonable notice of such application, make such clarification or rectification within twenty eight days of the date of the application or within such other timelines as the parties may agree.<sup>347</sup> Lastly in France, the application for clarification or rectification of an arbitral award may be made within three months of notification of the award and such clarification or rectification shall be made within three months of the application.<sup>348</sup>

The same differences feature in relation to the tribunal's power to make an additional award, on any claim that may have been omitted from the initial award. In Kenya, a party may upon notice and within thirty days of receiving the arbitral award, apply to the tribunal to make the additional award. Where such a request is justified, the tribunal may within sixty days of such an application make the additional award.<sup>349</sup>

In England, an additional award may be made within fifty six days of the date of the initial award, though the parties may agree otherwise.<sup>350</sup> In France however, a party may apply for such an additional award, within three months of notification of the award and additional award shall be made within three months such application.<sup>351</sup>

There is a consensus that in enforcement of the arbitral award in France and Kenya, a party must produce the original award and the arbitration agreement, or certified copies of the

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<sup>346</sup> Sections 34(1) to (3).

<sup>347</sup> Sections 57(4) and (5).

<sup>348</sup> Article 1506 as read with Article 1486.

<sup>349</sup> Sections 34(4) and (5).

<sup>350</sup> Section 57 (6).

<sup>351</sup> Article 1506 as read with Article 1486.

documents. If the documents are in a foreign language, certified translations must be availed.<sup>352</sup> However, the English Act is silent on this point, as it only provides that enforcement of an awards is undertaken by seeking the leave of the court, after which judgment will be entered on the terms of the award.<sup>353</sup> It is only in the recognition and enforcement of foreign awards, does the statute provide for the production of the original award and the arbitration agreement, or certified copies of the same.<sup>354</sup>

#### **4.5 Grounds for setting aside an arbitral award and/or non-recognition of a foreign award**

There are some similarities in the grounds for setting aside arbitral awards in international arbitration, such as where the tribunal disregarded its jurisdiction or the stipulated procedure in arbitration. However, there are also some differences. French law for example expressly provides that an arbitral award in international arbitration, may not be enforced where the court finds that such enforcement will be contrary to the country's international public policy.<sup>355</sup> Kenyan and English law on the other hand, do not expressly provide for international public policy, but only recognize setting aside on the basis of the respective countries' public policy.<sup>356</sup>

It should also be noted that whereas the French and Kenyan statutes enumerate distinct grounds for setting aside the arbitral award, the English Act provides for two main basis under which the foregoing grounds fall. The two instances are the tribunal's lack of substantive jurisdiction and a serious irregularity on the tribunal, the proceedings or the award.<sup>357</sup> Therefore, the said grounds are subsets of these two instances.

Concerning the recognition of foreign arbitral awards, the grounds for setting such awards differ among the three countries despite the fact all of them have ratified the convention.

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<sup>352</sup> Article 1515 as compared with Section 36 (3) and (4) of the Kenyan Arbitration Act.

<sup>353</sup> Section 66.

<sup>354</sup> Section 102.

<sup>355</sup> Article 1520(5).

<sup>356</sup> Section 35(2)(b)(ii) of the Kenyan Act as compared with Section 68(2)(g) of the English Act.

<sup>357</sup> Article 1520 of the French law, Section 35(2) of the Kenyan Act and Sections 67 and 68 of the English Act.

The greatest similarity however, is between English and Kenyan statutes, though the ground that the making of the award was induced by fraud, bribery, corruption or undue influence, though present in the Kenyan Act, is absent in the English law.<sup>358</sup>

As far as French law is concerned, there are several grounds that do not apply, as compared with the other two countries.<sup>359</sup> They are the non arbitrability of a dispute under national law and the fact that the award has not become binding on the parties or has been set aside by a competent authority of the country in which it was made or under whose laws it was made.<sup>360</sup> Lastly, the ground that the award was induced by fraud, bribery, corruption or undue influence, which features in the Kenyan law, is also absent in French law.<sup>361</sup>

#### **4.6 Forum and timelines for challenging an award**

The courts that entertain applications for setting aside of arbitral awards or the non-recognition of foreign are not necessarily the same, in the three countries. The applicable timelines also differ. In France for example, the Court of Appeal of the place the award was made has jurisdiction to deal with applications for setting aside of arbitral awards within a month of notification of the award.<sup>362</sup> In Kenya on the other hand, a party seeking to set aside an arbitral award, should apply to the High Court within three months of receiving the award.<sup>363</sup>

In England however, there is no express provision in the English statute as to which is the exclusive forum, though a party seeking to set aside an award, should do so within twenty eight days of the date of the award. If the award was reviewed or appealed, the application should be made within twenty eight days from the date of notification of the final outcome.<sup>364</sup>

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<sup>358</sup> Section 37(1)(a) of the Kenyan Act as compared with Section 103(2) of the English Act

<sup>359</sup> Ibid as read with Articles 1520 and 1525 of French Law

<sup>360</sup> Ibid

<sup>361</sup> Articles 1520 and 1525 of French Law as compared with Section 37(1)(a)(iv) of Kenyan law.

<sup>362</sup> Article 1519.

<sup>363</sup> Sections 35(1) and (3)

<sup>364</sup> Section 70(3)

As far as applications for the non-recognition of foreign awards in France are concerned, the same timelines stipulated in challenging the enforcement of arbitral awards apply. On the contrary, there are no specified timelines in both Kenya and England concerning these matters.

#### **4.7 Conclusion**

It is evident that the statutes of the two countries have different provisions from the Kenyan statute. Some of these provisions offer unique insights which can be assimilated into Kenyan law, in order to improve the practice of practice of arbitration in the country. They will be discussed as part of the recommendations to be made in the following chapter.

## **CHAPTER FIVE**

### **5.0 SUMMARY AND RECOMMENDATIONS**

#### **5.1 Introduction**

This study sought to determine the challenges encountered in the practice of international arbitration through the lens of arbitration in general, noting that the substantive law for both domestic and international arbitration prior to the enactment of the NCIA, was the same i.e. the Arbitration Act. It proceeded to examine the provisions of the NCIA in the context of whether or not they will be instrumental in addressing the said challenges.

Furthermore, several lessons have also been learnt in the comparative exercise between the Kenyan experience and that of more popular international arbitration destinations, namely France and England, whose cities i.e. Paris and London rank highly among the preferred destinations in the world. In conclusion therefore, this final chapter will focus on recommendations in light with the discoveries of the preceding chapters, which hopefully if implemented, will raise the stature of our country as one of the new frontiers in international arbitration.

#### **5.2 Where are we as a country?**

Arguably, the practice of international arbitration in Kenya has been plagued by several challenges, which may have caused the country to lag behind as a desirable venue. It has been noted that arbitration has not been a popular dispute settlement mechanism in the country.<sup>365</sup> Although it has been touted as cheaper and faster than litigation, it has also been noted with concern that the process has progressively become protracted due to court interference and is also becoming expensive.<sup>366</sup> The low number of qualified arbitrators has also been noted as another challenge facing the process.<sup>367</sup>

Faced with these challenges, the NCIA was enacted with the intention of promoting Nairobi as a strategic venue for international arbitration. The Nairobi Centre for

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<sup>365</sup> Kariuki Muihua op.cit note 74 at page 18.

<sup>366</sup> Ibid at page 19.

<sup>367</sup> Ibid at pages 17-18.



International Arbitration (“the Centre”) established under the NCIA, is required to popularize arbitration in several ways, as seen its functions.<sup>368</sup> It is required to promote and encourage arbitration in the country, to ensure that arbitration is reserved as the preferred dispute mechanism, to organize international conferences and seminars to assist in marketing the country as a reputable arbitral destination.

The Centre is also supposed to cooperate with regional and international institutions in the discharge of its functions, as well as to engage in civic education on arbitration so that the public is aware of the available ADR mechanisms at their disposal including arbitration. Further, it should train and accredit arbitrators.

### **5.3 Has the comparison with other countries been beneficial?**

Indeed, the thematic study of international arbitration in both France and England has been informative, as several things stand out. First, it is rather interesting to note that there is no prescribed format for an arbitration agreement in France.<sup>369</sup> In fact, as held in the case of *Zanzi v J. de Coninck*,<sup>370</sup> there is a presumption on the existence of the arbitration agreement hence the onus shifts on the party challenging such existence, to prove so. This is an arbitration friendly approach, which makes reference of matters to arbitration easier. In any case, a party to court proceedings does not have to produce a written document, compliant with a stipulated format to prove to the court that indeed a valid arbitration agreement exists to warrant a stay of such proceedings in favour of arbitration.

Second, the nomenclature of some of the legal officials interacting with the international arbitration in France, deserves a mention. It is noteworthy that the judge who entertains interlocutory applications during the arbitration process is known as *juge d’appui* i.e. supporting judge. This title is a subconscious reminder to the parties, that the role of the court and judge in the international arbitration process is facilitative. It may also serve as a guide to the court not allow itself to be used to interfere with or scuttle the arbitration process, but to issue orders which complement the arbitral tribunal’s functions.

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<sup>368</sup> Section 5.

<sup>369</sup> Article 1507.

<sup>370</sup> Case No 96-21.430 (5 January 1999).

Third, there is multiplicity of forums in France, as the TGI which is equivalent to the Kenyan High Court, handles all the interlocutory applications made during the arbitration process. It also issues the enforcement order upon the application once the award has been delivered. The Court of Appeal on the other hand, deals with challenges to the enforcement of an award or the recognition of foreign awards.<sup>371</sup>

Fourth, France as compared to Kenya, has fewer grounds for challenging international arbitration awards, whether in terms of enforcement of locally delivered awards or recognition of foreign ones. It has been noted that the grounds of arbitrability and the fact that the award has not become binding or has been set aside by a competent authority of the country in which the award was made, or proceedings conducted, do not apply to international arbitrations in France. Furthermore, if an award is contrary to international public policy, it will either be set aside or not recognized if it is foreign. Therefore, fewer grounds of challenging awards, translate to fewer possibilities for interfering with the arbitration process, which makes the arbitration process more desirable.

Concerning England, the following observations have been made. First, there is no specific forum that has the exclusive jurisdiction to deal with international arbitration issues, in the course of such proceedings. In fact, the Lord Chancellor is required in consultation with the Lord Chief Justice, to allocate arbitration proceedings between the High Court and the County Courts.<sup>372</sup>

Second, court intervention in arbitration proceedings is perverse, as many court decisions in interlocutory proceedings may be appealed to a higher court, with leave. They include the decisions on the appointment of arbitrators, the appointment of umpires, the removal of arbitrators, the jurisdiction of the arbitral tribunal or on the applicable timelines of the arbitration proceedings.<sup>373</sup>

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<sup>371</sup> Articles 1523 and 1525

<sup>372</sup> Section 105(3A)

<sup>373</sup> Sections 18 (5), 21(6), 24(6), 32(6) and 50.

Third, it is also interesting that the judges of the commercial court may be appointed as arbitrators with the approval of the Lord Chief Justice. The fees are paid to the High Court as part of court fees, instead of paying them directly to the said judges for their services.

Fourth, umpires are also recognized under English law. They serve as an additional buffer for the integrity of the arbitration process, as they step in where they attend the arbitration sittings just as the parties. They only step in when the arbitrators cannot agree on any issue and decide the matter as if they were the sole arbitrators.<sup>374</sup>

Fifth, although the grounds or setting aside of awards in England are mainly, two i.e. the tribunal's lack of substantive jurisdiction and a serious irregularity on the tribunal, proceedings and award, the instances under which the above grounds can be cited are numerous. Concerning the latter ground for example, a party can allege among others, the tribunal disregarded due process, overlooked the issues before it, exceeded its powers, delivered an uncertain or ambiguous award, the award was procured by fraud or contrary to public policy.<sup>375</sup> These present multiple avenues for challenging the arbitral award hence further protracting the arbitral process.

#### **5.4 What is the way forward?**

The following recommendations should be considered as the country endeavors to position itself as an international arbitration powerhouse. First, the Centre should endeavor to effectively discharge its functions under the NCIA. This will address the current challenges such as lack of popularity and shortage of arbitrators, by ensuring that international arbitration is popularized by the Centre as an alternative dispute resolution mechanism, as by among other measures, conducting civic education to inform the public of ADR mechanisms, conducting research and disseminating the findings, establishing and maintaining a comprehensive library of arbitration literature, collaboration with regional and international institutions for the Centre to attain its objectives. The Centre will also

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<sup>374</sup> Section 21.

<sup>375</sup> Section 68(2).

have the opportunity to advertise the country by organizing international conferences, seminars and training programs pertaining to international arbitration.

The Centre should also pair up with the Brand Kenya Board (“BKB”) in order to optimize the efficacy of the marketing Kenya abroad, as the reputable seat of international arbitration. BKB is a body mandated to ensure a national brand is created and harnessed in the long term, for the benefit of the country in terms of achieving of global acclaim and preference.<sup>376</sup>BKB usually participates in international trade fairs as part of the Kenyan delegation. Therefore, BKB should cooperate with the Centre in order to incorporate information concerning the Centre in its narrative in the international trade fairs the country may participate abroad. Such liaison will be a synergetic approach that will effectively sell the country as a one stop shop for all investor needs including business, leisure and dispute settlement.

Further, the Centre will ensure that the number of qualified arbitrators is increased, by virtue of its training and accreditation activities or programmes. In order to accredit arbitrators that may serve on its panels, an NCIA Arbitrators Panel Standard that stipulates the qualifications, mode of application and fees payable for such accreditation has been separately developed .This will in the long run standardize the arbitration services rendered in the country since the Panel Standard will serve as a reference point or goal for prospective NCIA arbitrators to strive towards. With the said standardization, the country may attract investor confidence as a venue in which the highest level of professionalism is exhibited in the conduct of international arbitrations.

The NCIA Code of Conduct for Arbitrators should also be firmly upheld in the Centre’s daily activities. The Code consists of principles that arbitrators should uphold in the discharge of their functions, including integrity and fairness, full disclosure, propriety and independence in decision making. These principles will serve as a clarion call to arbitrators on the Centre’s panel, to a higher standard of professionalism, thereby raising the level of

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<sup>376</sup><http://www.brandkenya.go.ke/theboard/our-mandate> (last accessed 18th November 2015).

practice to above par hence making the country an attractive destination regionally and globally.

In the implementation of the NCIA provisions, there is need to clarify the relationship between the Arbitral Court and the High Court under the Arbitration Act. In a bid to deal with the issue of endless court proceedings alongside arbitration, the NCIA has established the Arbitral Court, with exclusive original and appellate jurisdiction, over arbitral matters that are referred to it.<sup>377</sup>The Act expressly states that the decisions of the said court shall not be subject to appeal.<sup>378</sup> Therefore it is a partial solution because it only attempts to make the decisions of the Arbitral Court conclusive.

Nevertheless, the establishment of the Arbitral Court and the fact that its decision is final is bound to raise other challenges. First, the NCIA is not clear whether the Arbitral Court is an independent court or whether it has the status of a High Court. If it is an independent court, it is not clear how it relates with the High Court, which has jurisdiction to handle arbitration related matters. Second, it is also unclear whether a party dissatisfied with the Arbitral Court's decision made when it has exercised its original jurisdiction can appeal since the court's decisions are supposed to be final. These two issues should be clarified to preempt confusion in future.

In demystifying the relationship between the Kenyan High Court and the Arbitral Court under the NCIA, the country should as a policy consideration discourage the multiplicity approach taken by France and England, whereby there are different courts in the international arbitration process. Kenya should be very much alive to the fact that even with the High Court being the single forum under the Arbitration Act, the arbitration process has been experiencing delays due to numerous court interventions in the duration of the arbitral proceedings. Therefore, having multiple venues will only worsen the situation, as more opportunities for the court's interjection would have been availed for exploitation by parties whose sole aim is to delay or defeat the arbitration process. In fact, a wiser approach would be to discard the Arbitral Court, so that it is very clear that all

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<sup>377</sup> Section 21 as read with Section 22 (1).

<sup>378</sup> Section 22(2).

matters pertaining to international arbitration in Kenya are handled by the High Court with finality.

Arbitration in our country has also been plagued with court interference. It is appreciated that the Arbitration Act has granted the court extensive powers in relation to the arbitration proceedings. Although the recourse to court is essential to ensure that the necessary directions are given and parties to the proceedings are assured of the legality of the arbitral proceedings, its downside is that it ends up interfering with the arbitration proceedings because they have to be stayed to facilitate the court to deal with the application or applications before it. Furthermore, the arbitral process as a private affair is subordinated to the legal machinery especially in situations where the arbitrator is overruled by the court.

Therefore, we should borrow the French concept of a *juge d'appui*<sup>379</sup> in dealing with the issue of court interference in Kenya. The *juge d'appui* is simply a judge in support of arbitration. The president of the TGI serves as the supporting judge and makes the necessary orders when called upon, in order to facilitate the arbitration process. It may be argued that since the court intervention pursuant to the Arbitration Act has resulted in undue interference, there is need for a paradigm shift in the courts' approach to interventions in the course of arbitration proceedings in the country. The courts should rule applications made under the Arbitration Act with the ultimate objective of facilitating the arbitration proceedings not to frustrate them.

It is also important to learn from France and review the grounds for setting aside international arbitral awards or for challenging the recognition and enforcement of foreign awards in Kenya. It has been previously noted that France has fewer grounds for challenging the award as compared with England and Kenya, which has the overall effect of minimizing the instances via which French courts may interfere with the outcome of the arbitration process. Consequently, such a review will decrease the possibilities for a Kenyan court to interfere with an international arbitration award, as the grounds for challenging the award will be minimal.

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<sup>379</sup> Article 1459 as read with Article 1506(2).

Moreover, the proposed review should further narrow down the scope of public policy under the current Kenyan legal framework. The three limbs of public policy were set out by Justice Ringera in *Christ for All Nations v. Apollo Insurance*,<sup>380</sup> first, as inconsistency with the Constitution or other laws of Kenya whether written or unwritten, second, being inimical to the national interests of Kenya or lastly, a contravention to justice or morality.

Although it was an attempt to delineate the scope, the said limbs are still very wide. For example, the first limb is in itself very extensive. It will be impossible to oppose a challenge on this basis since the constitution has a very extensive and progressive bill of rights which is granted the widest interpretation possible pursuant to Article 20(2) of the Constitution.

The second limb is also very broad as it is also a very tall order to determine the full extent of the national interests of our country. Lastly, the national legislative machinery has been on the overdrive in the recent years, with the rush to pass legislations before the periodic recesses, every other year. Therefore, there is also considerable likelihood that the chances of setting aside the award on the basis that it contravenes the provision of recent legislations which neither the arbitrators nor the parties were aware of during the proceedings, have also increased significantly.

We should also entrench umpires in our arbitration legislation, as the English have. It cannot be overlooked that umpires play a critical role in the arbitration process. They serve as the second level of intervention, where arbitrators cannot determine a particular issue. Therefore, by formally including them in legislation, it may translate to a reduction of the number of references to court for direction and/or determination, as umpires will be serving the critical of unlocking deadlocks in the arbitration process, thereby addressing some critical issues arising with finality.

Arbitrability is also another issue that needs to be further clarified in order to determine which matters are arbitrable, in Kenyan international arbitration proceedings. Although it is a basis for setting aside of an arbitral award under Section 35(b)(i) of the Arbitration Act and for refusal to enforce a foreign award under Section 37(b)(i) of the said Act, there is

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<sup>380</sup> (2002) 2 EA 366.

no clear guideline as to the extent of arbitrability of disputes under Kenyan Law. It will be very regrettable for parties to an international arbitration, to nominate the country as an arbitral seat, conduct their proceedings only for the successful party to discover at the time of enforcement that the dispute was not arbitrable under Kenyan law hence the award is unenforceable.

The specification can be done in two ways. First, the Arbitration Act could be amended to specify which matters are arbitrable. This would automatically mean that whatever does not fall within the stipulated list is not arbitrable. Alternatively, the amendment could specify which matters are not arbitrable under Kenyan Law. The latter approach will cast a wider net on the scope of arbitrability in the sense that it will imply that any matter which has not been specifically excluded is arbitrable.

It is important for the country to demonstrate to potential investors, which disputes can or cannot be arbitrated in order for the said investors to determine beforehand, whether or not they will nominate Nairobi as the arbitral seat in the event of a dispute.

It will be misleading to imply that adequate laws suffice to make a country a popular venue for arbitration. The role of infrastructure should not be downplayed when discussing this pertinent issue. It is evident that parties to a dispute will consider many factors in settling for a seat of arbitration. In addition to the applicable law, they will also consider the availability of amenities that will facilitate their stay during the period when the dispute is heard and determined by the arbitral tribunal. They will look for a venue that is easily accessible whether by air, road or rail. They may also look forward to living in decent but affordable hotels with banks within reach so as to facilitate their financial transactions as and when required.

Therefore, it is not surprising that some of the most popular venues for international arbitration such as London or Paris are major cities in first world countries, with the best infrastructure. These cities have the best hotels and conference facilities, the most efficient transportation systems as well as the major banks in the world. They have highly advanced financial systems that encourage cashless transactions because carrying cash is always considered risky.



Kenya has embarked on an ambitious infrastructure upgrading project in line with its Vision 2030 that has seen among others, the expansion of Thika Road into a superhighway and the construction of the standard gauge railway to link the port of Mombasa with the border town of Busia, which is currently underway. It has also launched Huduma Centres and the eCitizen portal, to revolutionize the delivery of government services to its citizens.<sup>381</sup>

Although Kenya has made these impressive strides over the past few years, there is room for improvement in areas such as the transportation sector since traffic jams have greatly affected transportation. Motorists and passengers usually waste a lot of valuable time while stuck in traffic. The country is still heavily reliant on the pre-colonial railway network which has not been expanded to meet modern commuter needs. Air travel has also been accessible to the few Kenyans who can afford air fare. These challenges need to be addressed to make the country attractive as an arbitral destination.

Insecurity has been a major threat in the country. It has been attributed to several factors including unemployment and terrorism. Although these is not localized to Kenya since some western capitals have the highest crime rates in the world, travel advisories occasionally issued by western governments have adversely affected our country's image abroad. These advisories have also ended up portraying Kenya as an unsafe destination. Such perceptions have directly affected important sectors of our economy such as the tourism and hospitality, which have in recent years recorded declining numbers of visitors.

The government has taken serious steps in combating insecurity. It has increased conscription of recruits into key security agencies such as the police.<sup>382</sup> It has also embarked on an ambitious campaign of equipping the agencies with additional equipment such as choppers and armored motor vehicles. Furthermore, it has rolled out a programme of installing security cameras in major cities in the Kenya, manned 24 hours at the command centre in Nairobi. Lastly, it is now possible for the Inspector General of Police to summon additional support from auxiliary forces such as the Kenya Prisons Service, the

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<sup>381</sup><http://vision2030.go.ke/> (last accessed 11<sup>th</sup> August 2018).

<sup>382</sup> Ibid.

Kenya Wildlife Service, the Kenya Forestry Service and the National Youth Service, when security demands dictate so.

Although such interventions are laudable, the country should step up and sustain its fight against crime including terrorism, which has tarnished our image abroad and served as a basis for issuance of the advisories. Since no person in his or her right mind would readily visit places that are perceived to be unsafe, reducing crime rates and incidences of terrorism can go a long way to assure investors that Kenya can be a desirable venue to hold international arbitrations because the parties have the comfort that their safety will not be in jeopardy during their sojourn in the country.

The government should increase its budgetary allocation into the Centre's General Fund. Increased financial support will catalyze the Centre's activities as it will translate into more funding for the Centre's activities including civic education campaigns, trainings for arbitrators, organization of international conferences on international arbitration and increased partnerships with regional institutions to advance the Centre's objectives. Such additional funding may also be crucial in facilitating the expansion of the Centre by the establishment of more branches countrywide.

There is also need to revise if possible, the fees and charges stipulated in the First Schedule of the NCIA Rules, if international arbitration is to become more popular among the citizenry. As previously noted, the current stipulated arbitrator's fees and administrative costs are quite high for the common man, hence unaffordable.<sup>383</sup> Perhaps, the revision can be facilitated by the expansion of the Centre, thereby establishing more facilities for use which may have the domino effect of reducing the cost of hiring the venues for international arbitrations.

The government should also persist in its resurgent war against corruption, which has seen politicians, cabinet members and senior public servants being arraigned in court to answer to graft charges. Sadly, the prevalence of corruption in any society subconsciously breeds the notion that justice is also perverted. Therefore, investors may shy away from transacting

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<sup>383</sup> Part 3 of the First Schedule of the NCIA rules 2015.

and settling their disputes in countries that are perceived as corrupt, since they may not expect to get justice anyway. Therefore, a tough war on corruption will send the unequivocal message abroad that the dispute resolution mechanisms and institutions available in Kenya are reliable, hence market the country an attractive seat of international arbitration.

The country has definitely taken some steps in the right direction but as the findings suggest, there is still room for improvement if we are to attain the status of other foreign cities as established seats of international arbitration. The challenges generally experienced in arbitration should be addressed in order to prevent their replication in the international arena, a development that may irreparably tarnish our country's reputation abroad. Furthermore, the NCIA should be implemented in order to operationalize the Centre, whose critical functions will among others, greatly assist in marketing the country and establishing a critical mass of highly competent arbitrators who are able to oversee the most complex arbitrations that circumstances may present.

Finally, it is said that no man is an island and the same applies to countries. Countries are interdependent not only economically but in other salient aspects such as socially and culturally. This is important noting that in order to join the elite club of established seats of international arbitration, we should continue learning from more advanced countries and periodically also assimilate their good practices. This will synergize the delicate balance between the corrective efforts undertaken to address local challenges and the implementation of the NCIA which has far reaching benefits, and will probably enable the country to claim its seat in the table of international arbitration.

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27. <tps://www.icdr.org/icdr/faces/s/about>

Please tick and fill as appropriate.

### QUESTIONNAIRE

1. Have you been involved in arbitration proceedings in Kenya?

Yes

No

2. If yes, in what capacity?

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3. Have you encountered any challenges in the arbitration process?

Yes

No

4. If yes, kindly expound on the challenges you have encountered?

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5. Do you think these challenges have been sufficiently addressed by the existing arbitration law?

Yes

No

6. If yes, kindly elaborate how the arbitration law has dealt with the challenges?

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7. If no, which amendments do you propose to the arbitration law in order to curb the challenges?

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8. Have you read the Nairobi Centre for International Arbitration Act Number 26 of 2013 (NCIA)?

Yes

No

9. If yes, how does it address the challenges encountered in domestic arbitration?

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10. What other issues should be addressed by law to promote Kenya as a venue for international commercial arbitration?

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11. In your opinion, are there other measures apart from legislation that can be taken to promote the country as a venue for international commercial arbitration?

Yes

No

12. If yes, please explain further.

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*Thank you for your time and feedback.*