

# Promoting International Commercial Arbitration in Africa

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## **ABSTRACT**

*This paper examines the state of international commercial arbitration in Africa. It explores the legal and institutional framework governing international commercial arbitration in Africa and the extent to which such framework has provided the requisite infrastructure needed for the successful practice of international Arbitration in Africa. The paper also discusses the place of international commercial arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined; opportunities for improvement are analyzed. The discourse ends with an analysis of what Kenya and generally the African continent needs to do to enhance the practice of international commercial arbitration and to make it a centre for the same.*

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## 1. INTRODUCTION

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable.<sup>1</sup>

Arbitration has thus gained popularity over time as the choice approach to conflict management especially by the business community due to its obvious advantages over litigation. Perhaps the most outstanding advantage of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.<sup>2</sup>

However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. This is due to a number of factors as identified by various writers, which this write-up discusses in brief herein below. However, it is imperative to note at the earliest that the importance of international commercial arbitration as the most viable approach to international disputes is being recognized and basic structures/institutions for arbitration are being established across the continent. This paper addresses the issue of international commercial arbitration in Africa, the challenges facing the same and the opportunities that exist for its promotion.

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<sup>1</sup> *Alternative Dispute Resolution Methods*, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document14/DocSeries14.pdf](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf)

<sup>2</sup> Karl P. Sauvant and Federico Ortino, *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

## 2. THE IDEAL OF ARBITRATION IN AFRICA

Commercial disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. International trade disputes are also as unavoidable. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.<sup>3</sup>

The recognized international arbitral institutions were initially based in Europe, but in recent years, there has been considerable growth of such institutions throughout the world. Some recent examples are China, Russia, India, Singapore and Dubai. International trade and commerce is enhanced by the growth of these institutions.<sup>4</sup>

International commercial arbitration in Africa exists through institutions such as Africa ADR which is the arbitral link between those who invest in Africa, and those who trade in Africa; between the business communities of Africa and abroad and between the international community<sup>5</sup>. Africa ADRs mandate is to foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce<sup>6</sup>.

The referral of African disputes to European arbitral authorities for settlement is prohibitively expensive and unsatisfactory. Such referral also points to an explicit admission that the structure of arbitration in Africa has failed. International trade agreements should take the initiative of adopting a clause that sees any arising disputes referred to arbitration in Africa. The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes. The system is cost efficient with venues in close proximity thus offering convenience. International commercial

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<sup>3</sup> “Africa ADR – a new African Arbitration Institution”, available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> Accessed on 1<sup>st</sup> November, 2013

<sup>4</sup> Ibid

<sup>5</sup> <http://www.africaadr.com/> Accessed on 1<sup>st</sup> November, 2013

<sup>6</sup> Ibid

arbitration in Africa should thus be credible and efficient. The existence of such a system has the capacity to boost cross-border trade and investment.<sup>7</sup>

### **3. CHALLENGES FACING THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICA**

#### **3.1 The Choice/Appointment of International Arbitrators by Parties**

Despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators. This is further complicated by the fact that most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless under very limited and special circumstances. Arbitration is intended to be a voluntary process. However, it is not uncommon to see parties disagree on the appointment of an arbitral tribunal or attempt to obstruct the appointments to delay the arbitration<sup>8</sup>. This factor thus portrays Africa to the outside world as a place where there are no arbitrators with sufficient knowledge and expertise to be appointed as international arbitrators.

#### **3.2 Lack of or Inadequate Legal and Institutional Framework/Capacity on Arbitration**

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Africa. Some African states have for a long time lacked an established legal framework on international

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<sup>7</sup> Africa ADR – a new African Arbitration Institution, Op. Cit.

<sup>8</sup> Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

commercial arbitration.<sup>9</sup> The existing one annexed arbitration to court, a factor that cannot promote international commercial arbitration. The existing provisions if any barely mentioned international commercial arbitration with a specified framework on the same. Some of those states may also not be parties to all or some important multilateral treaties relevant to international dispute resolution. This has denied the local international arbitrators the fora to showcase their skills and expertise in international commercial arbitration. For instance, the arbitration law in South Africa is not drafted along the UNCITRAL<sup>10</sup> model law lines and varies substantively with laws in other jurisdictions<sup>11</sup>. Another example of a country with archaic arbitration laws is Tanzania, whose Principal Arbitration Act was enacted on 22 May 1932. It is also not drafted in line with UNCITRAL model law.<sup>12</sup> These two jurisdictions are an example of the situation in some African countries and this discourages foreigners from seeking arbitration services in Africa.

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

### **3.3 Varying Cultures between Disputants**

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences. These differences may be in reference to economic, political and/or legal developments thus creating varying opinion of issues, prejudices and conflicts of interests especially in

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<sup>9</sup> Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at <http://www.mcgill.ca/files/isid/LDR.2.pdf>

<sup>10</sup> UNCITRAL *Model Law on International Commercial Arbitration* (1985)

<sup>11</sup> Arbitration in Africa, August 2011, South Africa, Available at <http://www.nortonrosefulbright.com/files/south-africa-25761.pdf>

<sup>12</sup> Arbitration in Africa, Tanzania, June 2007. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>

international economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.<sup>13</sup>

### **3.4 Lack of or Inadequate Marketing**

There has not been zealous marketing of Africa as a centre for international commercial arbitration. Many people outside Africa still carry with them the perception that Africa does not have adequate/any qualified international commercial arbitrators. They have therefore not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption.<sup>14</sup>

### **3.5 Uncertainty in Drafting**

There is the need to draft the arbitration clause in an unambiguous manner to avoid misinterpretation of same as this have always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres.<sup>15</sup>

### **3.6 Interference by National Courts**

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. There are the instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or the award is against public policy. Court

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<sup>13</sup> See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at <http://cdp.binghamton.edu/papers/social-effects-full.pdf>

<sup>14</sup> Hogan Lovells, 'Arbitrating in Africa'. Available at [http://www.hoganlovellsafrica.com/uploads/Publications/Arbitrating\\_in\\_Africa\\_-\\_Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/uploads/Publications/Arbitrating_in_Africa_-_Hogan_Lovells_March_2013.pdf)

<sup>15</sup> Drafting of arbitration clause will depend on what law informs it. For instance jurisdictions that have embraced UNCITRAL Model Law will adopt this law while those that are not signatories may have different laws informing the same. This may result in conflict in the understanding of such a clause.



interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such commercial disputes.

Courts have, in the recent past, enforced the provisions of the Arbitration Act with exceptional diligence thus lending more credence to the arbitral process. However, this alone cannot enhance arbitration.<sup>16</sup> Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by this Act. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are expressly contemplated under the Model Law. However, courts have increasingly interfered in arbitration on grounds of public policy. The Act provides for international arbitration and this places Kenya in a favorable position as far as international arbitration is concerned. However, it is not very clear to foreigners as to when the Courts may interfere as the Act is too general in stating that the courts will not interfere except as it is provided for under the Act.<sup>17</sup> The Act does not however define clearly the instances of such intervention and it leaves such interpretation to the courts. For instance, one of the instances of court intervention is where the arbitral award is against public policy. However, the definition of such public policy is not clear and it's subject to court interpretation.<sup>18</sup> In Kenya, public policy was defined by Ringera J (as he then was), in *Christ For All Nations vs. Apollo Insurance Co. Ltd*<sup>19</sup> in the following words: -

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<sup>16</sup> Gakeri, J, *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 Available at <http://ir.library.strathmore.edu/fileDownloadForInstitutionalItem.action;jsessionid=9E5FF2EC6DBB95D872EA5AD81AAB740A?itemId=375&itemFileId=329> Accessed on 12<sup>th</sup> November, 2013

<sup>17</sup> S.10, No. 4 of 1995

<sup>18</sup> This was discussed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara* (Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR). Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.

<sup>19</sup> [2002] 2 EA 366

*“Although public policy is a most broad concept incapable of precise definition...an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:*

- a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
- b) inimical to the national interest of Kenya; or*
- c) Contrary to justice and morality.”*

Though public policy has been defined in the Kenyan context<sup>20</sup>, the lack of a clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem of Kenya but the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot*,<sup>21</sup> the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.<sup>22</sup> Nearer home, the Ugandan *Arbitration and Conciliation Act*, 2000 (Ch 4)<sup>23</sup> provides under section 34 for grounds upon which the High Court may set aside an arbitral award. It provides that the Court may set aside the award if it finds that it is against the public policy of Uganda.

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. In some or

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<sup>20</sup> Ibid

<sup>21</sup> Civil Appeal 3343/2005 - 12 October 2011

<sup>22</sup> Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, *Clayton Utz Insights*, 08 December 2011, Available at [http://www.claytonutz.com/publications/edition/08\\_december\\_2011/20111208/india\\_a\\_widening\\_scope\\_to\\_avoid\\_enforcement\\_of\\_foreign\\_awards.page](http://www.claytonutz.com/publications/edition/08_december_2011/20111208/india_a_widening_scope_to_avoid_enforcement_of_foreign_awards.page) Accessed on 18<sup>th</sup> October, 2013

<sup>23</sup> Available at

[http://arbitrationlaw.com/files/free\\_pdfs/Uganda%20Arbitration%20and%20Conciliation%20Act.pdf](http://arbitrationlaw.com/files/free_pdfs/Uganda%20Arbitration%20and%20Conciliation%20Act.pdf) Accessed on 23<sup>rd</sup> October, 2013

most jurisdictions around the world, “Public policy” is said to include procedural questions as well as questions relating to substantive law.<sup>24</sup>

Justice Murphy in the Australian case of *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214 (2 November 2012) laid out some guiding principles in relation to “public policy”. These included *inter alia*: Under the Model Law, the expression “public policy” has a greater and different role in relation to setting aside an award in the court of supervisory jurisdiction (art 34(2)(b)(ii)), than it does in relation to refusal to enforce an award in the court of enforcement (art 36(1)(b)(ii)), in that an order refusing enforcement is effective only in the State where enforcement is sought, whereas an order setting aside an award prevents its enforcement in all countries which have signed up to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)*; The plain words of s19(b) of the International Arbitration Act of 1974 of Australia unambiguously declare that if *any* breach of natural justice occurs in connection with the making of an award then, for the purposes of arts 34(2)(b)(ii) and 36(1)(b)(ii), the award is in conflict with or contrary to the public policy of Australia. This is despite authority around the world indicating that a Convention award is only in conflict with or contrary to public policy if it offends fundamental notions of justice and fairness; Nonetheless, it is important to keep in mind that arts 34(2) (b) (ii) and 36(1) (b) (ii) provide that a court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy. That is, the powers to set aside an award or refuse enforcement are discretionary; and The proper exercise of the court’s discretion requires that it has regard to the objects of the IAA set out in s2D and the matters set out in s39 (2), namely the fact that arbitration is intended to be an efficient, enforceable and timely method of settling commercial disputes, and that arbitral awards are intended to provide certainty and finality; Although the decisions of the courts in Convention countries are not binding, there is an obvious

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<sup>24</sup> James Whittaker, et al., *Principles relating to public policy in the International Arbitration Act*, 29 November 2012, Available at [www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/](http://www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/) Accessed on 23<sup>rd</sup> October, 2013

importance to taking them into account, in order to achieve some international uniformity in the meaning and operation of “public policy”.<sup>25</sup>

Until and unless internationally accepted criterion for determining public policy is agreed upon, public policy as a ground for setting aside arbitral awards in international commercial arbitrations remains an obstacle to the blossoming of international arbitration in Africa.

### **3.7 Taking Care of Fundamentals**

The concern has been that there are some countries in Africa that were/are not parties to the international laws on arbitration and particularly the New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC) of 1958 which would guarantee the enforcement of arbitral awards and the International Convention on the Settlement of Investment Disputes (ICSID).<sup>26</sup> This impedes the practice of international commercial arbitration.

### **3.8 Control of Costs**

There have not been very clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is more often than not left to the particular institutional guidelines, which institution may not be favorable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However,

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<sup>25</sup> Ibid

<sup>26</sup> The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966.

The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.

these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.<sup>27</sup>

### **3.9 Keeping the Process Moving**

International commercial disputants often resort to arbitration for its advantages over litigation which include speed. However, due to the other concerns as already discussed above, foreigners are not usually sure whether and how fast the process would be. This may make them be wary of engaging African arbitrators since they are out to save on time.

### **3.10 Perception of Corruption/ Government Interference**

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy.

The Global Corruption Barometer 2013 is the world's largest public opinion survey on corruption. According to a Transparency International (TI) survey released in Berlin, Kenya ranked number 4 among countries with the highest cases of bribery in the world. The survey concluded that 7 out of 10 Kenyans interviewed by TI-Kenya had given a bribe in the preceding 12 months.<sup>28</sup> The report cited corruption to be especially rampant in dealings with key public institutions and services. According to the report, the police lead in the list of the most corrupt institution in Kenya. They are then followed by Parliament, Judiciary, the civil service and political parties. A grim image is painted to the international community regarding the governance system in place in Kenya. This hinders the expansion of the scope of international commercial arbitration as the view is propagated that justice is impossible to achieve in Africa.

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<sup>27</sup> See CI Arb Kenya Website Available at [www.ciarbkenya.org](http://www.ciarbkenya.org) Accessed on 12<sup>th</sup> November, 2013

<sup>28</sup> Available at <http://www.the-star.co.ke/news/article-127501/kenya-ranks-fourth-bribery-index-ti> Accessed on 2<sup>nd</sup> November, 2013

### **3.11 Bias against Africa**

Without a shred of doubt, racism still exists in society. It rears its ugly head in day to day life. Recently, South Korea's top tobacco firm, KT&G was forced to pull down adverts for its new "This Africa" brand of cigarettes. This happened after complaints were presented that the use of images of apes dressed as humans was racist. The African Tobacco Control Alliance called for the posters to be withdrawn citing their offensive nature.<sup>29</sup>

An American Court ruled recently that Kenya is insecure and unsafe while determining the issue of a Kenyan mother who intended to travel into the country with her 22-month old daughter. The application to bar her from travelling with her child was made by her former husband and granted by the court. The husband cited the terrorist attack at Westgate shopping mall. The husband even went further to state that Kenya is home to child traffickers, kidnappers and malaria outbreaks.<sup>30</sup>

The existent bias as briefly outlined above renders Africa's image as a corrupt and uncivilized continent. The business association and interaction of Africa with the outside world is thus downplayed and kept at a minimum. The end result is a weaker business environment culminating in a weaker international arbitration environment

### **3.12 Institutional Capacity**

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by legal frameworks as well as handling the commercial arbitration matters. Much need to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

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<sup>29</sup> "Korea firm to remove chimp ad", Daily Nation, Thursday October 24, 2013, Nairobi, Kenya

<sup>30</sup> "Kenya unsafe for US child, rules court", Daily Nation, Tuesday October 22, 2013, Nairobi, Kenya Available at <http://mobile.nation.co.ke/News/Kenya-unsafe-for-US-child--rules-court/-/1950946/2043586/-/format/xhtml/-/qbqgh7z/-/index.html> Accessed on 2<sup>nd</sup> November, 2013

### 3.13 Endless Court Proceedings

Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending<sup>31</sup>. This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

### 3.14 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.<sup>32</sup> Courts often refer to “public policy” as the basis of the bar.<sup>33</sup> The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may either be subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute<sup>34</sup>. Certain disputes may involve such sensitive public policy or

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<sup>31</sup> Kariuki Muigua, *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>

For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR)

<sup>32</sup> Laurence Shore “Defining ‘Arbitrability’-The United States vs. the rest of the world”, *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>, Accessed on 15<sup>th</sup> October, 2013

<sup>33</sup> Ibid, page 1

<sup>34</sup> Available at [www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf](http://www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf), Accessed on 8<sup>th</sup> November, 2013

national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.<sup>35</sup>

It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current Constitution of Kenya, 2010<sup>36</sup>, which elevates the status of Alternative Dispute Resolution (ADR). In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the Arbitration Act No. 4 of 1995 (As amended in 2009)<sup>37</sup>. Article 159 of the Constitution provides that in the exercise of judicial authority by Courts and tribunals shall be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.

However, this remains to be seen especially due to the subjection of the same to repugnancy clause.

#### **4. INTERNATIONAL COMMERCIAL ARBITRATION UNDER KENYAN LAW**

In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, in legislation that was promulgated in 1995, Kenya has acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)<sup>38</sup> and to International Convention on the Settlement of Investment Disputes (ICSID). Kenya became

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<sup>35</sup> Katarína Chovancová, *Arbitrability*, Extract, page 1, Institute of International and European Law, Available at <http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf> Accessed on 22<sup>nd</sup> October, 2013

<sup>36</sup> Government Printer, 2010, Nairobi, Kenya

<sup>37</sup> Kariuki, F, "Redefining "Arbitrability": Assessment of Articles 159 & 189 (4) of the Constitution of Kenya", *Alternative Dispute Resolution*, The Chartered Institute of Arbitrators, Kenya Journal Volume 1, Number 1, 2013. ISBN 978-9966-046-02-4

<sup>38</sup> The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.



a signatory to ICSID on May 24, 1966, deposited its instruments of ratification on Jan. 3, 1967 and subsequently, the Convention came into force on Feb. 2, 1967.<sup>39</sup>

The 1958 New York Convention is an important convention in the recognition and enforcement of foreign arbitral awards and this is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.<sup>40</sup>

The *Arbitration Act*, No. 4 of 1995 (As amended in 2009) governs the arbitration process in Kenya. Under this law parties to a dispute can by way of a written agreement refer their disputes to arbitration.<sup>41</sup> This can be done in agreements via an arbitration clause which stipulates that any dispute arising therefrom shall be referred to arbitration. Arbitration is international if *inter alia* the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states<sup>42</sup>.

The importance of an arbitration clause in an agreement is that any court proceedings commenced are stayed pending the settlement of the dispute by arbitration. An arbitral award can be enforced by the leave of the High Court of Kenya in the same way any court order or decree is enforced.<sup>43</sup>

Section 36(2) of the Kenyan *Arbitration Act*, 1995 provides that international arbitration awards shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

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<sup>39</sup> International Centre for Settlement of Investment Disputes, 'List Of Contracting States And Other Signatories Of The Convention' (as of May 20, 2013), Available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> Accessed on 23<sup>rd</sup> October, 2013

<sup>40</sup> See international Council for Commercial Arbitration (ICCA), *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (with the assistance of the Permanent Court of Arbitration Peace Palace, The Hague (2011)

<sup>41</sup> Section 4, No. 4 of 1995

<sup>42</sup> Section 3(a), No. 4 of 1995

<sup>43</sup> Section 36, No. 4 of 1995

If applied correctly, Kenyan law therefore has the potential to further international commercial arbitration.

## **5. WAY FORWARD**

There is a need to employ mechanisms that will help promote and demonstrate Africa to the outside world as a place endowed with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators. Promotion of arbitration alongside tourism would also be one effective strategy (Arbi-tourism).

There is also the need to put in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This ranges from legislating comprehensive law on international commercial arbitration as well as setting up world class arbitration centres around Africa. However, all is not lost as recently Kenya set up the Nairobi Centre for International Arbitration (NCIA). This was established under the *Nairobi Centre for International Arbitration Act*, No. 26 of 2013<sup>44</sup>. Its functions are set out in section 5 of the Act as *inter alia* to: first, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; second, to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; third, to ensure that arbitration is reserved as the dispute resolution process of choice; fourth, to develop rules encompassing conciliation and mediation processes. Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars; to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; to in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data; to establish a

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<sup>44</sup> Government Printer, 2013, Nairobi, Kenya

comprehensive library specializing in arbitration and alternative dispute resolution; to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; to provide advice and assistance for the enforcement and translation of arbitral awards; to provide procedural and technical advice to disputants; to provide training and accreditation for mediators and arbitrators; fourteenth, educate the public on arbitration as well as other alternative dispute resolution mechanisms; and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives, *inter alia*.

There is also the Kigali International Arbitration Centre (KIAC)<sup>45</sup>. These together with the existing institutions are a step in the right direction towards promoting Africa as a choice international arbitration centre. In Kenya, there is the Centre for Alternative Dispute Resolution (CADR) that is a company limited by guarantee. CADR is an initiative by The Chartered Institute of Arbitrators, Kenya and was incorporated in May, 2013. Its objective is to establish and maintain a regional Dispute Resolution Centre in the country. Under CADR, referred disputes may be settled by arbitration, or conciliation or mediation. Further to this, CADR provides a channel of communication between arbitrators and parties to the arbitration and also between the parties themselves. In relation to the notion of international commercial arbitration, CADR is mandated organize, supervise, run and operate international arbitrations, conciliations and related dispute settlement in Kenya or elsewhere. The incorporation of CADR is undoubtedly a further initiative towards promoting international commercial arbitration in Kenya as well as Africa as a whole.<sup>46</sup>

This will not only afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration but may also attract international clients from outside Africa. It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions. These include: modern arbitration rules; modern and efficient administrative and technological

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<sup>45</sup> See Kigali International Arbitration Centre Website available at [www.kiac.org.rw/](http://www.kiac.org.rw/) Accessed on 11<sup>th</sup> November, 2013

<sup>46</sup> See CIArb Kenya Website, Op. Cit.

facilities; Security and safety of documents; Expertise within its staff; and some serious degree of permanence.<sup>47</sup>

There is a need to set up more regional centres for training of international commercial arbitrators in Africa. This will not only ensure a bigger number of qualified international commercial arbitrators in Africa but will also deal with the challenges that might come with a situation where some African countries are not parties to international treaties on arbitration and the model law, a factor that might otherwise be a disadvantage to international commercial arbitrators from such countries. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malawi. If more African institutions take up such roles, then this would greatly enhance international commercial arbitration in Africa.<sup>48</sup>

Joint annual conferences would also be a good marketing tool for African international commercial arbitrators as well as African arbitration centres. This should be backed by a joint website (or any other viable platform) where the existing regional arbitration centres in Africa are listed with their full description for the world to see. The profiles of all qualified international arbitrators (names forwarded by home country member institutions) should also be displayed in such platforms. There is also need for the existing institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the existing institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. There is need for all African centres and institutions to do the same to promote international commercial arbitration in Africa.

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<sup>47</sup> Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21<sup>st</sup> Century through Arbitration & ADR* Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at < [http://eprints.soas.ac.uk/5300/1/Arbitrators\\_and\\_Institutions\\_in\\_Africa.pdf](http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf)>

<sup>48</sup> See CIArb Kenya Website, Op. Cit.

The law of arbitration recognizes that the role of the court in arbitration is inevitable and almost universally provides for it. The law also appreciates the need to limit court intervention in arbitration to a basic minimum.<sup>49</sup> This will subsequently boost the confidence of foreigners in the African Arbitration institutions. Effective and reliable application of international commercial arbitration in Africa has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This will not only enhance international commercial arbitration in Africa but also economic development for Africa as a continent.

## 6. CONCLUSION

International commercial arbitration in Africa has been at a minimum over time compared to more advanced continental jurisdictions. This paper has examined the challenges facing the practice of international commercial arbitration in Africa. The fundamental concerns and issues about international commercial arbitration in Africa have been critically examined in the pursuit of promoting the practice. Issues relating directly to arbitration have been analyzed and in addition, peripheral matters that seem to hamper international commercial arbitration in Africa have been scrutinized. There is need for a clear framework within Africa within which international commercial arbitration can be further promoted. There are arbitral institutions already in place and this paper has discussed the same. The presence of such institutions in the continent points to an acceptance of alternative dispute resolution modes as well as the need to promote the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement. Indeed, these foreign countries and/or jurisdictions may be better endowed in alternative dispute resolution frameworks but the only way for Africa to achieve growth in terms of international arbitration begins when corporations and international businesses embrace the notion of conducting arbitration locally within the continent. There is a need to promote arbi-tourism and to put up adequate legal regimes and infrastructure for more arbitration centres in Africa as well as training centres for purposes of training international arbitrators

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<sup>49</sup> For a further discussion on the role of court, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012

in the continent. Africa definitely has the capacity to conduct rigorous and impeccable international commercial arbitration in its own right as a continent. Promoting international commercial arbitration in Africa is an imperative that is achievable. The time to showcase Africa as an ideal centre for the settlement of commercial disputes is now.

## REFERENCES

1. *Alternative Dispute Resolution Methods*, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document14/DocSeries14.pdf](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf)
2. Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at <http://www.mcgill.ca/files/isid/LDR.2.pdf>
3. Gakeri, J, '*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 Available at <http://ir.library.strathmore.edu/fileDownloadForInstitutionalItem.action;jsessionid=9E5FF2EC6DBB95D872EA5AD81AAB740A?itemId=375&itemFileId=329>
4. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)
5. Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21<sup>st</sup> Century through Arbitration & ADR* Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at [http://eprints.soas.ac.uk/5300/1/Arbitrators\\_and\\_Institutions\\_in\\_Africa.pdf](http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf)
6. International Convention on the Settlement of Investment Disputes (ICSID), March 18, 1965 and entered into force on October 14, 1966.
7. Hogan Lovells, 'Arbitrating in Africa'. Available at [http://www.hoganlovellsafrica.com/\\_uploads/Publications/Arbitrating\\_in\\_Africa\\_-\\_Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-_Hogan_Lovells_March_2013.pdf)
8. International Centre for Settlement of Investment Disputes, 'List of Contracting States and Other Signatories of the Convention' (as of May 20, 2013), Available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>

9. James Whittaker, et al., *Principles relating to public policy in the International Arbitration Act*, 29 November 2012, Available at [www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/](http://www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/)
10. Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, 2012, Glenwood Publishers Limited, Nairobi
11. ...., *Role of the Court under Arbitration Act 1995: Court Intervention before, Pending and Arbitration in Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>
12. Karl P. Sauvant and Federico Ortino, *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>
13. Katarína Chovancová, *Arbitrability*, Extract, page 1, Institute of International and European Law, Available at <http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf>
14. Laurence Shore “Defining ‘Arbitrability’-The United States vs. the rest of the world”, *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>, accessed on 15/10/2013
15. Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, *Clayton Utz Insights*, 08 December 2011, Available at [http://www.claytonutz.com/publications/edition/08\\_december\\_2011/20111208/india\\_a\\_widening\\_scope\\_to\\_avoid\\_enforcement\\_of\\_foreign\\_awards.page](http://www.claytonutz.com/publications/edition/08_december_2011/20111208/india_a_widening_scope_to_avoid_enforcement_of_foreign_awards.page)
16. Russell J. Leng and Patrick Regan, ‘Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes’, Available at <http://cdp.binghamton.edu/papers/socialeffects-full.pdf>
17. UNCITRAL *Model Law on International Commercial Arbitration* (1985) Arbitration in Africa, August 2011, South Africa, Available at <http://www.nortonrosefulbright.com/files/south-africa-25761.pdf>
18. Arbitration in Africa, Tanzania, June 2007. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>