

# Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration

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**Kariuki Muigua\***

## ***Abstract***

*This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration, that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts.*

*This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice.*

*The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing frameworks and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.*

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\*PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Lecturer at the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and the Chairperson CIArb (Kenya Branch).

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# **Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration**

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## **1. Introduction**

This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration, that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts.

This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice. It is unlikely that any of the Member States may be willing to give up on their legal system and adopt one practised in another State, solely for the interests of EAC. Based on this, this discourse makes a case for commercial arbitration as a potent mechanism of managing commercial disputes amongst the EAC Member States and any legal persons doing business in any of these countries.

The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing framework and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.

## **2. Background to the Eastern Africa Integration**

The East African Community (EAC) is a regional intergovernmental organisation of the Republics of Kenya, Uganda, Tanzania, Rwanda and Burundi, with its headquarters in Arusha, Tanzania. The East African Community (EAC), first established in 1967, disintegrated in 1977, due to lack of strong political will, lack of strong participation of the private sector and civil

society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address the situation.<sup>1</sup>

The EAC was re-established by the *East African Community Treaty* which was signed on 30th November 1999 and entered into force on 7<sup>th</sup> July 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to the EAC Treaty on 18<sup>th</sup> June 2007 and became full members of the Community with effect from 1<sup>st</sup> July 2007.<sup>2</sup>

The Member States stand to benefit greatly in terms of economic development from the integration of Eastern Africa region. It is noteworthy that the countries in the East African Community (EAC) are among the fastest growing economies in sub-Saharan Africa, making significant progress toward financial integration, including harmonization of supervisory arrangements and practices and the modernization of monetary policy frameworks.<sup>3</sup> Regional integration expands the possibility for an increased flow of both intra-regional and inter-regional Foreign Direct Investment (FDI) due to the expanded market created by the borderless (or less restricted) trade across the member countries.<sup>4</sup>

The four Pillars of the regional integration include Customs Union, Common Market, Monetary Union and Political Federation.<sup>5</sup> These are meant to enhance the efficiency and performance of the Eastern Africa region as an economic bloc. The East African region

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<sup>1</sup> *Treaty For The Establishment Of The East African Community* (As amended on 14th December 2006 and 20th August 2007), Preamble.

<sup>2</sup> Ibid.

<sup>3</sup> Drummond, P, et. al., *The East African Community: Quest for Regional Integration*, International Monetary Fund, January 2015.

<sup>4</sup> Ali I. Abdi, A.I. and Seid, E.H., 'Assessment of Economic Integration in IGAD', *The Horn Economic and Social Policy Institute (HESPI) Policy Papers No. 13/2*, August 2013. P.7.

Available at <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH0b09.dir/doc.pdf> [Accessed on 7/02/2015].

<sup>5</sup> Uganda 'Umoja', *Quarterly Update on the East African Community*. Edition 6 October – December 2014. P. 19. Available at [http://www.meaca.go.ug/index.php/publications/cat\\_view/54-umoja.html](http://www.meaca.go.ug/index.php/publications/cat_view/54-umoja.html) [Accessed on 29/01/2015]. The Customs Union came into effect in 2005 and it allows East Africa to operate as a free trade area where Partner States reduce or eliminate taxes on goods originating from their countries and have a common tariff on goods imported from outside the participating Countries. The common market became effective on 1<sup>st</sup> July 2010 and objective is to provide the region with a single economic space within which business and labour will operate in order to stimulate investment. The Monetary Union was signed on November 2013 with a view to transform the East African economy to operate with a common currency. Political federation is said to be in its last stages and under this, the EAC Partner States are expected to have a regional political Union and harmonized operations.

prospects a future that will have the region operating as a regional economic bloc with a common market and possibly a common currency.

This will come with other benefits such as increased regional cross-border business and commercial investment. The EAC seeks to set up a prosperous, competitive, secure, stable and politically united East Africa; and provide platform to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.<sup>6</sup>

These potential benefits may however be curtailed by the disputes, including commercial disputes, that are bound to come with the increased regional trade and investment or even conflict of interest amongst the Member States. It has been observed that for effective liberalisation of trade and investment in any region, the role of competent dispute settlement mechanisms is vital.<sup>7</sup> Regional integration is not an end in itself but is an instrument to support a strategy of economic growth and development.<sup>8</sup> Development is not feasible in a conflict situation. Conflicts and disputes ought to be managed effectively and expeditiously for development to take place.<sup>9</sup>

The national legal systems are usually grounded on legislation and/or policy statements, which may include judicial and regulatory frameworks. This approach mainly uses the adjudication and arbitration processes to settle arising conflicts. However, litigation has been criticized in many forums as one that does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the region have encountered a number

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<sup>6</sup>*Treaty for the Establishment of the East African Community*, Art.5.

<sup>7</sup> Maniruzzaman, A.F.M., 'International Commercial Arbitration in the Asia Pacific: Asian Values, Culture and Context', *Journal of International Affairs*, Vol. 6, No. 3, July-December 2002, pp. 61-63, p.61.

<sup>8</sup> Iglesias V.E., "Twelve Lessons from Five Decades of Regional Integration in Latin America and the Caribbean." *Presentation to the Conference Celebrating the 35<sup>th</sup> Anniversary of the Institute for the Integration of Latin America and the Caribbean (INTAL), Buenos Aires, November 27-28, 2000.* p. 2. Available at <http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/iglesias-12lessons.pdf> [Accessed on 09/02/2015].

<sup>9</sup> Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. *Paper Presented At Strathmore Annual Law Conference 2014 held On 3rd & 4th July 2014 at Strathmore University Law School, Nairobi.* P.2. Available at <http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis>

of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.<sup>10</sup>

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.<sup>11</sup> Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. As such, national courts are not very popular with the international commercial community when it comes to settling commercial disputes due to the alien laws and fear of bias.

Arbitration is thus preferred to litigation when it comes to settlement of international commercial disputes due to its advantages over litigation, such as, parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexible; cost-effective; confidential; speedy and the result is binding.<sup>12</sup>

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers a more viable mechanism in dealing with commercial disputes. This is informed by the international community's desire to create a multinational treaty regime for international commercial transactions that is based on the private law principle of autonomy of contract – party autonomy– and, specifically, two of the most important creations of autonomy of contract: first, agreements to submit disputes that might arise during the course of a commercial relationship to binding private arbitration; second, contractual terms designating the law that will apply to such disputes.<sup>13</sup>

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<sup>10</sup>*Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8<sup>th</sup> & 9<sup>th</sup> March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

<sup>11</sup> Ojwang, J.B., —The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development, *Kenya Law Review Journal* 19 (2007), pp. 19-29 at p.29

<sup>12</sup> Muigua, K., 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya'. The Chartered Institute of Arbitrators-Kenya, *Alternative Dispute Resolution Journal*, Volume 1 Number 1 (2013), pp. 43-78 at p. 61.

<sup>13</sup> McConaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, pp. 11-12.

It is against this background that this paper explores the viability of international commercial arbitration as a means to foster the Eastern Africa integration through effective management of commercial disputes in in the region for enhanced economic development of the Member States.

### **3. Legal and Institutional Framework on Commercial Arbitration in Eastern Africa**

This section is limited to Kenya, Tanzania, Uganda, Rwanda and Burundi being the Member States of the East African Community.<sup>14</sup> The discussion briefly examines the legal and institutional framework on international commercial in each of these Member states. It is important to point out that all the five Member States have some form of legal and institutional framework on arbitration in place, albeit some of them underdeveloped. Most of these States' frameworks are not specifically on commercial arbitration which is the concern of this paper, but they do contemplate the practice of commercial arbitration in these countries.

#### **3.1 Kenya**

Kenya's legal system is based on the English Common Law system resultant from its British colonial history. The *Arbitration Act*<sup>15</sup> governs the arbitration process in Kenya. Parties to a dispute can, by way of a written agreement refer their disputes to arbitration.<sup>16</sup> 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>17</sup> Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act*, 1995 provides for court intervention on limited grounds. One such instance is where the Arbitration Act expressly provides for intervention of the court under section 10.<sup>18</sup> The courts are however still involved in the arbitral process and can actually be used to bog down the same.<sup>19</sup> Courts can intervene on a number of grounds to set aside the arbitral award. The most common ground is public policy. The High Court of Kenya may set

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<sup>14</sup> The Treaty for Establishment of the East African Community, Art. 3.

<sup>15</sup> No. 4 of 1995 (As amended in 2009)

<sup>16</sup> S. 4, No. 4 of 1995.

<sup>17</sup> *Ibid*, S. 3(a).

<sup>18</sup> *Ibid*, S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'.

<sup>19</sup> See generally Muigua, K., 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and after Arbitration in Kenya'. *Kenya Law Review 2008-2010*. Available at <http://kenyalaw.org/kl/index.php?id=1923>; see also [http://www.kmco.co.ke/attachments/article/80/080\\_role\\_of\\_court\\_in\\_arbitration\\_2010.pdf](http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf)

aside the award where it finds the award is in conflict with the public policy of Kenya.<sup>20</sup> Public policy is however vague and has not yet been clearly defined. In the Kenyan case of *Christ for All Nations vs. Apollo Insurance Co. Ltd*<sup>21</sup>, the Court stated that 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: Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. This therefore leaves the matter to the discretion of the courts to determine what entails public policy of Kenya.

In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, Kenya is a State Party to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)*<sup>22</sup> and to *International Convention on the Settlement of Investment Disputes (ICSID)*<sup>23</sup>. The Kenyan *Arbitration Act*, 1995 provides that international arbitration awards are to be recognised 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*.<sup>24</sup> (Emphasis ours) This clears doubt as to Kenya's stand on enforcing international arbitration awards and all that remains is the national courts' goodwill.

Under the *Civil Procedure Act*<sup>25</sup> there are provisions dealing with the use of both mediation and arbitration.<sup>26</sup> The *Civil Procedure Act* gives the court jurisdiction to refer any dispute to Alternative Dispute Resolution (ADR) mechanisms where parties have agreed or where the court considers it appropriate.<sup>27</sup> Further, where all parties agree, the court has

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<sup>20</sup> S. 35(2) (b), No. 4 of 1995.

<sup>21</sup> [2002] 2 EA 366

<sup>22</sup> The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (the "New York Convention"). Adopted by the United Nations Conference on International Commercial Arbitration on 10<sup>th</sup> June 1958.

<sup>23</sup> *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967).

<sup>24</sup> S. 36(2)

<sup>25</sup> Cap 21, Laws of Kenya.

<sup>26</sup> See generally Section 59, Civil Procedure Act, Cap 21; See also Order 46, Civil Procedure Rules 2010 (Legal Notice No. 151 of 2010).

<sup>27</sup> ss. 59, 59B and 59C, Cap 21.



jurisdiction to refer any matter in difference between the parties to arbitration.<sup>28</sup> However, these provisions are mainly applicable to domestic arbitration.

The *Nairobi Centre for International Arbitration Act 2012*<sup>29</sup>, which was enacted in January 2013, established an independent institution, the Nairobi Centre for International Arbitration (NCIA) for commercial arbitration based in Nairobi. Its functions are set out in the Act as *inter alia* to: to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; 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.<sup>30</sup>

This Centre places Kenya on a better platform to engage with other regional international commercial arbitration centres in promoting international commercial arbitration in the region and the ultimate increase in investments and trade for enhanced economic development in the region.

The Chartered Institute of Arbitrators Kenya Branch, established in 1984, is one among the branches of the Chartered Institute of Arbitrators, which was formed in 1915 with headquarters in London. It promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and Adjudication. It has affiliations with arbitration bodies and institutions in other countries across the world and with the London Court of International Arbitration and the International Chamber of Commerce in Paris.<sup>31</sup>

The 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. The branch has also been involved in training of Arbitrators in East, West and

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<sup>28</sup> Order 46, R. 1, *Civil Procedure Rules* 2010.

<sup>29</sup> No. 26 of 2013, Laws of Kenya.

<sup>30</sup> S. 5.

<sup>31</sup> The Chartered Institute of Arbitrators Kenya Branch website, [http://www.ciarkkenya.org/About\\_Us.html](http://www.ciarkkenya.org/About_Us.html) [Accessed on 16/02/2015]

Southern Africa respectively. The institute thus plays a major role in promoting international commercial arbitration not only in the Eastern Africa region but also in Africa as a whole.<sup>32</sup>

The Kenyan legal and institutional framework has the potential to advance international commercial arbitration for the integration of Eastern Africa. However, this framework has not been streamlined with EAC policies on deepening integration. This needs to be done if any meaningful progress is to be achieved. Even as Courts play their role as provided for in Kenya's *Arbitration Act*, Kenyan Courts ought to have due regard to the regional interests of maximizing investment and trade in the region through attracting more foreign investors. Minimal and objective courts' intervention in international commercial arbitration in the region will go a long way in fostering regional integration through international commercial arbitration.

### 3.2 Tanzania

Tanzania's legal system is based on the English Common Law system derived this system from its British colonial legacy. It has been argued that although there are two arbitration bodies in Tanzania, arbitration is not yet popular among the Tanzanian business community.<sup>33</sup> The two arbitration bodies, each with their own set of rules on arbitration proceedings are equipped to deal with domestic and international arbitrations.<sup>34</sup> The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the *Societies Act*<sup>35</sup> and the National Construction Council (NCC) is a statutory body created under the *National Construction Council Act*<sup>36</sup>, which sponsors and encourages arbitration as a means of settling disputes within and outside the construction industry regardless of the subject matter of the dispute.<sup>37</sup>

The Tanzanian *Arbitration Act*<sup>38</sup> was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent out of court<sup>39</sup> as well as

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<sup>32</sup> *Ibid.*

<sup>33</sup> 'Tanzania', *Arbitration in Africa*, June 2007. P. 2. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 4/02/2015].

<sup>34</sup> *Ibid.*, p. 5; See also Rana, R., 'The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday's Tools?', in Chartered Institute of Arbitrators, Kenya, *Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014. Pp. 229-237 at p.230.

<sup>35</sup> cap 337, Laws of Tanzania.

<sup>36</sup> (No. 20 of 1979, cap 162).

<sup>37</sup> *Ibid.*

<sup>38</sup> Cap 15, Laws of Tanzania (2002 Revised Edition)

<sup>39</sup> (ss. 3-26)

provisions on court-annexed arbitration.<sup>40</sup> Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*<sup>41</sup>, made under the Arbitration Act.<sup>42</sup> It has been noted that the arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL model law and has never been changed to take into account its provisions.<sup>43</sup> Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992.<sup>44</sup>

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Act.<sup>45</sup> It has also been observed that the Tanzanian national Courts have immense powers to intervene on any matter of law in an arbitration proceeding.<sup>46</sup> As such, party autonomy is restricted thus severely affecting investors' confidence in the Tanzania's law on arbitration.

It has been argued that as a general rule: the more reliably a nation's national courts honour written arbitration agreements and refuse to hear claims within the scope of an arbitration agreement, the more clearly defined and limited the possible occasions of judicial involvement in arbitration proceedings; and the more reliably a nation's national courts recognize and enforce arbitration awards without reviewing or "second guessing" the merits of the award-the better the business climate and reputation of the nation as a preferred destination for foreign direct investment.<sup>47</sup> Currently, Tanzania cannot be said to have clearly defined and limited occasions of judicial involvement in arbitration proceedings. Courts do set aside arbitral awards and interfere

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<sup>40</sup>Tanzania's Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings (see Schedule 2 of the Code).

<sup>41</sup> (Published in Government Notice 427 of 1957).

<sup>42</sup>*Arbitration in Africa*, June 2007, *op. cit.* p.5.

<sup>43</sup>*Ibid.* p.6.

<sup>44</sup>Kapinga, W., et. al., 'Getting the Deal through - Arbitration- Tanzania', Chapter 2014, p. 406. Available at [https://www.academia.edu/9872218/Getting\\_the\\_Deal\\_Through\\_-\\_Arbitration\\_-\\_Tanzania\\_Chapter\\_2014](https://www.academia.edu/9872218/Getting_the_Deal_Through_-_Arbitration_-_Tanzania_Chapter_2014) [Accessed on 4/02/2015].

<sup>45</sup> Rana, R., 'The Tanzania Arbitration Act: meeting the Challenges of Today with Yesterday's Tools?' *op. cit.* p.231.

<sup>46</sup> *Ibid*; See also generally, Mkumbukwa, N.S., 'Is The Commercial Court Jealous Of Arbitration?' Available at [http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration\\_-Commercial-Court-Roundtable-8th-Oct.-2009.pdf](http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration_-Commercial-Court-Roundtable-8th-Oct.-2009.pdf) [Accessed on 14/02/2015]; Kepher, K., 'Procedural Laws Of Commercial Arbitration In Tanzania: An Analysis'. ISSN 2321 – 4171. Available at <http://jsslawcollege.in/wp-content/uploads/2013/12/PROCEDURAL-LAWS-OF-COMMERCIAL-ARBITRATION-IN-TANZANIA-AN-ANALYSIS.pdf> [Accessed on 14/02/2015].

<sup>47</sup> McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *op. cit.* p. 14.

with arbitration on grounds that are fluid and this makes the practice of international commercial arbitration in Tanzania unreliable.

The country's laws on arbitration have also been criticised as archaic and in need of urgent reforms.<sup>48</sup> It is perhaps the only country in the region with very outdated laws.

In light of the foregoing, Tanzanian authorities need to reform the country's laws on arbitration in line with the international best practices and harmonise them with the objectives of the Eastern Africa integration process. Arbitration practice in Tanzania ought to be afforded more autonomy and independence from unnecessary national courts interference, as this is the only way that international commercial arbitration in Tanzania can take root and spur development in the country and the region. The reforms are especially necessary due to the anticipated inflow of foreign investments in oil and gas in the region.

### 3.3 Uganda

Uganda was a British colony and thus English legal system and law are predominant in Uganda. Its legal system is based mainly on English Common Law. The laws applicable in Uganda are statutory law, common law, doctrines of equity and customary law when it does not conflict with statutory law.<sup>49</sup>

The Ugandan *Arbitration and Conciliation Act*<sup>50</sup> was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.<sup>51</sup> Its provisions on arbitration apply to both domestic arbitration and international arbitration.<sup>52</sup> Perhaps a little uniqueness about the Ugandan law on arbitration is its provisions on conciliation.<sup>53</sup> The Ugandan Act states that except as provided in the Act, no court is to intervene in matters governed by the Act.<sup>54</sup> The national Courts may assist in taking evidence<sup>55</sup>, setting aside arbitral award<sup>56</sup> and recognition and enforcement of the arbitral award.<sup>57</sup>

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<sup>48</sup> Bitekeye, A., 'TZ arbitration laws outdated, new statutes a must', *The Citizen*, Tuesday, April 30 2013. Available at <http://www.thecitizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html> [Accessed on 14/02/2015].

<sup>49</sup> *Judicature Act*, Cap 13, Laws of Uganda.

<sup>50</sup> CAP 4, Laws of Uganda.

<sup>51</sup> *Ibid*, Preamble.

<sup>52</sup> *Ibid*, S. 1.

<sup>53</sup> Part 5 (ss. 48-66).

<sup>54</sup> *Ibid*, S. 9.

<sup>55</sup> *Ibid*, s. 27.

However, the Ugandan *Arbitration and Conciliation Act*, provides for grounds upon which the High Court may set aside an arbitral award upon application by a party. The Act provides that recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This may be made only if the party making the application furnishes proof that—a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or the arbitral award is not in accordance with the Act.<sup>58</sup>

The award may also be set aside where the court finds that—the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or the award is in conflict with the public policy of Uganda.<sup>59</sup> This presents the same hindrances as in the Kenyan jurisdiction.

The Act establishes the Centre for Arbitration and Dispute Resolution (CADRE).<sup>60</sup> This Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or Alternative Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and

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<sup>56</sup> *Ibid*, s. 34.

<sup>57</sup> *Ibid*, ss. 35 & 36.

<sup>58</sup> *Ibid*, s.34(2)(a).

<sup>59</sup> *Ibid*, s. 34(b).

<sup>60</sup> *Ibid*, s. 67.

experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.<sup>61</sup>

Noteworthy are the provisions on enforcement of New York Convention awards.<sup>62</sup> The Act provides that when seized of an action in a matter in respect of which the parties have made an arbitration agreement referred to in section 39<sup>63</sup>, the court is to, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>64</sup> Further, any New York Convention award which would be enforceable under the Act is to be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, setoff or otherwise in any legal proceedings in Uganda; and any references in the Act to enforcing a foreign award is to be construed as including references to relying on an award.<sup>65</sup> Also important are the provisions that where the court is satisfied that a New York Convention award is enforceable under the Act, the award is to be deemed to be a decree of that court.<sup>66</sup>

The Act also has provisions on the enforcement of an arbitral award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention”).<sup>67</sup> Any person seeking enforcement of an ICSID Convention award is to be entitled to have the award registered in the court subject to proof of the prescribed matters and to the other provisions of the Act.<sup>68</sup> Ugandan Courts are willing to enforce ICSID

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<sup>61</sup> *Ibid*, s. 68.

<sup>62</sup> *Ibid*, Part 3 (ss. 39-44).

<sup>63</sup> S. 39(1) is to the effect that a “New York Convention award” means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a State (other than Uganda) which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958. ss. (2) thereof further states that an award is to be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.

<sup>64</sup> S. 40.

<sup>65</sup> S. 41.

<sup>66</sup> S.43.

<sup>67</sup> Part 4 (ss. 45-47).

<sup>68</sup> S. 46(1).

Convention awards and only stay execution of any ICSID Convention award registered under the Act if there is proof of such application.<sup>69</sup>

These provisions demonstrate Uganda's willingness to adopt and uphold international best practices in international arbitration. This is important for the foreign investors, who require some confidence in national courts' willingness to enforce foreign arbitral awards when called upon to do so.

Arbitration in Uganda has the potential to boost commercial arbitration for Eastern Africa integration. Uganda can benefit from regional cooperation on setting up infrastructure on international commercial arbitration. It is important to point out that CADRE in Uganda plays a more active role in domestic arbitration than possibly any other institution in any of the EAC Member countries. International commercial arbitration would however require minimal intervention by the institution especially in areas of making appropriate rules, administrative procedure and forms for effective performance of the arbitration, establishing and enforcing a code of ethics for arbitrators. This is because where Parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore cooperate with the other EAC Member States in coming up with a transnational commercial arbitration framework for the region and streamline its domestic framework with the same.

### **3.4 Rwanda**

Rwanda has had considerable improvement in the investment climate and this has positioned the country as an ideal investment destination.<sup>70</sup> The implication has been that both domestic and cross border deals have increased, with an emerging need to use arbitration and other friendly ways of commercial disputes resolution.<sup>71</sup>

Rwanda has been a party since 1979 to the *Washington Convention on the Settlement of Investment Disputes*, which provides for protection for investors and direct arbitral recourse against the State. On November 3, 2008, Rwanda became the 143<sup>rd</sup> country to accede to the

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<sup>69</sup> S. 47.

<sup>70</sup> Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4. Available at [http://www.kiac.org.rw/IMG/pdf/web\\_annual\\_report.pdf](http://www.kiac.org.rw/IMG/pdf/web_annual_report.pdf) [Accessed on 09/02/2015].

<sup>71</sup> Ibid.

*Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). The Convention entered into force for Rwanda on January 29, 2009.<sup>72</sup>

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body.<sup>73</sup> It is noteworthy that until the establishment of the Kigali International Arbitration Centre (KIAC), there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.<sup>74</sup>

Rwanda's framework on international arbitration coupled with its membership to various international instruments on international commercial arbitration places it in a favourable position. With alignment of this framework to the EAC policies, Rwanda can competitively participate in commercial arbitration in the region in a way that fosters regional integration, attracting foreign and national investors to the region.

### **3.5 Burundi**

The Burundian legal system is largely based on German and Belgian civil codes and customary law, with the constitution guaranteeing the independence of the judiciary.<sup>75</sup> Commercial and investment disputes are normally settled by commercial courts, which have original and appellate jurisdiction.<sup>76</sup> Further, in 2005, the code on judicial competence<sup>77</sup> introduced provisions on arbitration.

In 2007, the Burundian Government created a centre for arbitration and mediation to deal with commercial and investment disputes.<sup>78</sup> In 2009, *Investment Code of Burundi*<sup>79</sup> was enacted with its purpose being to encourage direct investments in Burundi.<sup>80</sup> This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. The Burundian Investment Code was enacted with the aim of simplifying the existing legislation and harmonising the country's investment legislation with the frameworks

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<sup>72</sup> 'Rwanda Accedes to UN Convention on Commercial Arbitration', UN NEWS CENTRE, Nov. 3, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention> [Accessed on 09/02/2015].

<sup>73</sup> Law No 51/2010 Of 10/01/2010, Laws of Rwanda.

<sup>74</sup> Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4

<sup>75</sup> The judiciary is regulated by the law *Code of Organization and Judicial Competence of 17 March 2005*, promulgated pursuant to Article 205 (3) of the 2005 Burundi Constitution.

<sup>76</sup> A&JN Mabushi, 'Investment Guide, Burundi'. P.27. Available at [www.africalegalnetwork.com/wp-content/uploads/2014/09/Burundi.pdf](http://www.africalegalnetwork.com/wp-content/uploads/2014/09/Burundi.pdf) [Accessed on 06/02/2015].

<sup>77</sup> Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

<sup>78</sup> Ibid.

<sup>79</sup> Law No. 1/24 of 10 September 2008 Establishing The Investment Code Of Burundi.

<sup>80</sup> Ibid, Art. 2.



applicable in other countries within the East African Community (Kenya, Uganda, Tanzania and Rwanda).<sup>81</sup> Burundi is also a member of the *International Centre for Settlement of Investment Disputes* (ICSID).<sup>82</sup>

In 2014, Burundi became the 150<sup>th</sup> state party to the *New York Convention* 1958. Burundi however made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The Convention was to come in force in the country on 21 September 2014 thus enabling arbitral awards made in Burundi to be enforceable in all states that are party to the New York Convention, and awards made in other states to be enforceable in Burundi.<sup>83</sup> The implication of Burundi’s ratification is that all the EAC Member States are now party to the New York Convention and it is expected to improve the confidence of foreign investors in not only Burundi, but also East Africa generally.<sup>84</sup>

It is also worth mentioning that Burundian Investment Code contains provisions regarding the settlement of disputes between investors and the state.<sup>85</sup> If such disputes are not settled, investors have the choice of litigation before a court or arbitration. If the investment has been made with Burundian capital, the choice of arbitration will be limited to internal arbitration. If, the investment does not involve the resulting from the application of the present investment code between the Government and the investor, the investor will be able to opt for internal arbitration or international arbitration.<sup>86</sup> However, when the investor takes recourse to

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<sup>81</sup> De Backer, S. and Binyingo, O., ‘A new investment code for a new Burundi’. P. 1. Published in IFLR1000 – edition 2008.

Available at

[http://www.mkono.com/pdf/A%20new%20Investment%20Code%20for%20a%20new%20Burundi%20\\_2008.pdf](http://www.mkono.com/pdf/A%20new%20Investment%20Code%20for%20a%20new%20Burundi%20_2008.pdf) [Accessed on 08/02/2015].

<sup>82</sup> A&JN Mabushi, ‘Investment Guide, Burundi’. *Op. cit.* p. 27.

<sup>83</sup> Herbert Smith Freehills Dispute Resolution, ‘Burundi becomes 150th state party to the New York Convention’. Available at <http://hsfnotes.com/arbitration/2014/09/03/burundi-becomes-150th-state-party-to-the-new-york-convention/> [Accessed on 06/02/2015].

<sup>84</sup> Ibid. The U.S. Supreme Court noted in *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1973): The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. (<http://www.jdsupra.com/legalnews/revisiting-the-new-york-convention-as-bu-23338/>).

<sup>85</sup> Titre iv, Law No. 1/24 Of 10 September 2008 Establishing The Investment Code Of Burundi.

<sup>86</sup> De Backer, S. and Binyingo, O., *op. cit.* p. 2.

international arbitration, he must do so in accordance with arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID) as applicable at the time of execution of the investment, which gave rise to the dispute.<sup>87</sup>

It is noteworthy that the Burundian Code does not have provisions harmonising it with the regional initiatives, which should be the case in order to reflect Burundi's entry into the EAC, which opens up major economic opportunities for investors that could be better exploited if the legal framework were modernised and harmonised.<sup>88</sup> This is especially important considering that the *Vision Burundi 2025*<sup>89</sup> provides for regional integration as one of its main pillars in order to benefit from regional integration to increase and diversify its economy.<sup>90</sup> It acknowledges that Burundi's robust and speedy economic growth will necessarily result from its successful integration at both the regional and sub-regional levels.<sup>91</sup>

The Vision 2025 also requires that in order to make a success of its integration with the regional groups that entail hope for its population, Burundi should undertake the reforms necessary in order to rehabilitate its macroeconomic framework, to set up a favorable environment for businesses, in order to attract foreign investors and to stimulate the Burundian private sector.<sup>92</sup> Arguably, this can be achieved through enhancing the practice of international commercial arbitration in Burundi. Burundi can put in place legal and institutional framework on international commercial arbitration as a step towards facilitating harmonised approach to international arbitration in the region for enhanced investment and trade and ultimately economic growth.

Considering its relatively young economy, Burundi can greatly benefit from employing measures aimed at setting in place appropriate rules, administrative procedure and forms for

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<sup>87</sup> Art. 17.

<sup>88</sup> United Nations Conference on Trade and Development, Unofficial, edited translation of Chapter IV of the Investment Policy Review of Burundi (French original), 2010. P. 4.

Available at [http://unctad.org/en/docs/diaepcb200917ch4\\_en.pdf](http://unctad.org/en/docs/diaepcb200917ch4_en.pdf)

<sup>89</sup> Vision Burundi 2025,

available at [http://www.burundiconference.gov.bi/IMG/pdf/VisionBurundi2025\\_short\\_en.pdf](http://www.burundiconference.gov.bi/IMG/pdf/VisionBurundi2025_short_en.pdf)

<sup>90</sup> Vision Burundi 2025, pp. 39-40.

<sup>91</sup> Ibid, p. 39.

<sup>92</sup> Ibid, p. 40.

effective performance of international commercial arbitration, qualifying and accrediting arbitrators, providing administrative services and other technical services in aid of arbitration and general sensitization of the public on international commercial arbitration. This will go a long in building capacity and afford the country the ability to engage competitively with the other EAC Members.

#### **4. Barriers to International Commercial Arbitration in EAC**

It is noteworthy that while Kenya, Uganda and Tanzania share a common legal system (Common law), Rwanda and Burundi have the civil law system. This state of affairs presents difficulties due to the different legal procedures and practices where national laws are used in settlement of commercial disputes. Further, these countries have very different economies, and levels of development. This comes with its fair share of challenges and the developing countries have been advised that they need to devise regulatory and judicial mechanisms that transcend traditional methods of economic exchange within local communities and that instead facilitate exchange with strangers from outside the countries-strangers who often bring with them very different commercial customs and legal traditions.<sup>93</sup>

It is suggested that developing countries need to develop legal institutions: that are not dependent on existing public institutions (which often are either nonexistent or unreliable); that are capable of operating independently of existing public institutions; and that, preferably, are allowed to operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions.<sup>94</sup>

Cross-border trade in goods and services has triggered commercial disputes across the East African region. Establishing national commercial courts alone may not be very effective in reducing delays in resolving commercial disputes due to the differing legal systems. It has been suggested in previous regional conferences that as a region, EAC needs to reform arbitration

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<sup>93</sup> McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *op. cit.* p. 11.

<sup>94</sup> *Ibid*, p. 11.

process in courts to ensure parties involved in a commercial dispute obtain justice promptly since investor confidence is bolstered if the justice system is transparent and fast.<sup>95</sup>

#### **4.1 Choice of Law in Court Proceedings**

Considering the different legal systems in the EAC countries, any court proceedings in a particular country presents a handicap due to the varying procedural rules and practices. It is noteworthy that different laws provide for different time frames for approaching court to have the award set aside. For instance, in Uganda, an application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award.<sup>96</sup> However, in Kenya, the period is set at three months.<sup>97</sup> Such differences in domestic laws may present difficulties when it comes to transnational commercial arbitration. Therefore, even as parties make choice of applicable law such factors ought to be considered.

#### **4.2 Limitations on the Application of National Law in Court Proceedings and in Arbitration**

From the foregoing discussion, it is clear that most the countries in the region have sought to abide by the international arbitration best practices especially on limiting court intervention. However, in some countries such as Tanzania, the extent of Courts' intervention is still unclear and this may therefore hinder development of international commercial arbitration in the region. In the past Courts in Kenya have also exploited the various grounds for court intervention provided for in the Act to interfere with the arbitration process in Kenya.<sup>98</sup>

#### **4.3 Public Policy**

In almost all jurisdictions in Eastern Africa, public policy is one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. However, courts have adopted a different approach to public policy, especially with regard to national public policy.

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<sup>95</sup> Kenya Private Sector Alliance (KEPSA) chairman Vimal Shah, as quoted in Tralac, 'Special courts expected in East Africa to arbitrate commercial disputes'. Available at <http://www.tralac.org/news/article/6342-special-courts-expected-in-east-africa-to-arbitrate-commercial-disputes.html> [Accessed on 07/02/2015].

<sup>96</sup> S. 34(3), the Arbitration and Conciliation Act.

<sup>97</sup> Act No. 4 of 1995, s. 35(3).

<sup>98</sup> See generally, Muigua, K., 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya', op. cit.

In Kenya, Public policy is not only problematic at the national level but also at the international level. For instance, it has been observed that there is a general agreement that it is even more difficult to formulate the definition of international public policy than that of national public policy.<sup>99</sup> In fact, international public policy plays an important function not only in the exclusion of the application of some national rules but it can also influence the decision of arbitrators when fundamental notions of contractual morality or basic interests concerning international trade are involved.<sup>100</sup> It is meant to protect interests, which cross borders, and is applicable in international cases.<sup>101</sup> To this extent, specific domestic public policy may not be applicable to international commercial arbitration.

The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions.<sup>102</sup>

Court interference intimidates investors since they are never sure what reasoning the particular national court might adopt should it be called upon to deliberate on such commercial disputes. In some or most jurisdictions around the world, “Public policy” is defined to include procedural questions as well as questions relating to substantive law.<sup>103</sup>

One of the impediments to be overcome in using international commercial arbitration in fostering Eastern Africa integration is harmonizing what entails public policy as a ground for setting aside arbitral awards in international commercial arbitrations.

#### **4.4 The Doctrine of Arbitrability**

Arbitrability is also one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. Arbitrability refers to the determination of the type of disputes that can be settled through arbitration and those that are the domain of the national

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<sup>99</sup> Harmathy, A., ‘New Experiences of International Arbitration, with special emphasis on legal debates between parties from Western Europe and Central and Eastern Europe’. *Electronic Journal of Comparative Law*, vol. 11.3 (December 2007), p. 12. Available at <http://www.ejcl.org> [Accessed on 16/02/2015].

<sup>100</sup> *Ibid.*

<sup>101</sup> Adeline, C., ‘Transnational Public Policy in Civil and Commercial Matters’. *Law Quarterly Review*, 128, pp. 88-113, 2012.

<sup>102</sup> Cairns, D.J.A., ‘Transnational Public Policy and the Internal Law of State Parties’. April 27, 2007. p. 2. Available at <http://www.cremades.com/pics/contenido/File634523788247688756.pdf> [Accessed on 16/02/2015].

<sup>103</sup> Whittaker, J. 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 16/02/2015]

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>104</sup> Courts often refer to “public policy” as the basis of the bar.<sup>105</sup>

The problem arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may be either 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>106</sup>. Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they might be dealt only by the courts, for instance criminal law.<sup>107</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>108</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*.<sup>109</sup> Article 159 of the Constitution provides that in the exercise of judicial authority by Courts and tribunals are to 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 are 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.

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<sup>104</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 16/02/2015].

<sup>105</sup> Ibid, page 1

<sup>106</sup> Available at [www.paneurouni.com/files/sk/fp/ulohy.studentov/2rocnikmgr/arbitrability-students-version.pdf](http://www.paneurouni.com/files/sk/fp/ulohy.studentov/2rocnikmgr/arbitrability-students-version.pdf)

<sup>107</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>

<sup>108</sup> Government Printer, 2010, Nairobi, Kenya

<sup>109</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

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

In 2014, while ratifying the *New York Convention* 1958, Burundi made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The arbitrability of non-commercial matters under international arbitration in Burundi is therefore debatable.

The issue is how the parties to an arbitration agreement would deal with the question of arbitrability while exercising their party autonomy. What would happen where a subject matter is arbitrable in one jurisdiction and non-arbitrable in another? Would the courts uphold the arbitration agreement in such circumstances? This is especially difficult where either of the parties did not know that the subject matter for which they intend to subject to arbitration is non-arbitrable in another jurisdiction. It is therefore important that the question of arbitrability of a subject matter be addressed to ensure that when parties are entering an arbitration agreement they have the correct information. One of the factors contributing to this state of affairs is the lack of uniformity in the laws, application and indeed application of arbitration laws in different countries as well as different arbitral tribunals and institutions.<sup>110</sup>

It is noteworthy that in Uganda, the Centre for Arbitration and Dispute Resolution (CADRE) makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts.<sup>111</sup> This is a positive step towards helping parties avoid difficulties that may arise if they were to have their subject matter declared non-arbitrable when the dispute has already arisen. A harmonised legal and institutional framework would go a long way in ensuring that arbitrability does not become a hindering factor in conducting international commercial arbitration in Eastern Africa region. The other option would be to go the Burundian way of having express provisions to the effect that only commercial disputes of certain nature are to be subjected to arbitration.<sup>112</sup>

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<sup>110</sup> Muliisa, P., ‘Arbitrability of tax disputes in international commercial arbitration: The case of Uganda, The’. The Centre for Energy, Petroleum and Mineral Law and Policy. Available at <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=32229> [Accessed on 16/02/2015].

<sup>111</sup> Kakooza, A.C., ‘Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects’ *op. cit.* p. 5.

<sup>112</sup> In 2014, while ratifying the *New York Convention* 1958, Burundi made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law.

#### **4.5 Scope of the Courts' Control of Arbitral Awards/Governments' Interference**

In the Ugandan case of *East African Development Bank vs Ziwa Horticultural Exporters Ltd*<sup>113</sup> it was observed that: “Sec. 6<sup>114</sup> of the *Arbitration and Conciliation Act*, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration.” This shows the Ugandan courts' support for arbitration although at the risk of such discretion being misused. Under section 5(1) of the Ugandan Act on Arbitration and Conciliation, the Court should exercise its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed.

Sometimes matters will be litigated all the way to the highest court on the law of the land in a bid to set aside what are considered unsatisfactory awards by either of the parties. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending<sup>115</sup>. This delays justice and waters down the perceived advantages of arbitration and ADR in general. Setting up tribunals or courts with finality in their arbitral decisions and operating free of national courts interference can effectively deal with this impediment.

#### **4.6 Institutional Capacity**

There exists a problem on the capacity of existing institutions to meet the demands for international commercial arbitration. There is still much more needs to be done in order to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitating international commercial arbitration. The East Africa Court of Justice (EACJ) also needs to be better equipped to enable it handle international commercial arbitration, as its status currently cannot arguably handle such matters especially in light of the conflicting laws and policies in the Member countries.

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<sup>113</sup> High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000.

<sup>114</sup> (present sec. 5)

<sup>115</sup> Muigua, K., *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)



## 5. Opportunities for International Commercial Arbitration in Fostering Eastern Africa Integration

Due to the legal hurdles associated with national courts, international commercial arbitration, with its potential advantages, emerges as a viable mechanism of handling the potential commercial disputes that may arise in the course of commercial transactions amongst the EAC Member States.

Experience in other regional economic communities is a demonstration that international commercial arbitration can be used foster Eastern Africa integration and to enhance the regional harmonisation of disputes management mechanisms in commercial practices among the Member States. The Organization for the Harmonization of Corporate Law in Africa<sup>116</sup> is a regional international organisation that groups together 16 African states, mainly of the Francophone area. Its aim is to harmonize the legal and judicial systems specifically in the field of business and corporate law of member States.<sup>117</sup>

The OHADA seeks to restore the confidence of foreign investors and facilitate economic exchanges among the member States by providing them with a set of common and simple laws that suit modern economies, promoting arbitration as a discrete and speedy dispute settlement system in trade-related disputes, improving the training of the judges and the court clerks, preparing for future regional economic integration.<sup>118</sup>

The Common Court of Justice and Arbitration (CCJA) is both a judicial court and an arbitration institution responsible for supervising the administration of arbitration proceedings in OHADA member states.<sup>119</sup> In cases concerning OHADA law, the CCJA takes precedence over member states' courts.<sup>120</sup> The *Uniform Act on Arbitration* (the Uniform Act) governs any arbitration in an OHADA member state, whether the arbitration involves parties from an OHADA country or from a foreign State, and it is framed on the UNCITRAL Model Arbitration

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<sup>116</sup> (Organisation pour l'harmonisation du droit des affaires en Afrique (OHADA))

<sup>117</sup> OHADA, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, available at <http://www.pict-pecti.org/courts/OHADA.html> [Accessed on 10/02/2015]

<sup>118</sup> Ibid.

<sup>119</sup> Girard Gibbs LLP and Lazareff Le Bars AARPI, 'The Organization for the Harmonization of Business Law in Africa (OHADA) & the Common Court of Justice and Arbitration (CCJA)'. Available at <http://www.internationalarbitrationlaw.com/arbitral-institutions/ohada/> [Accessed on 10/02/2015]

<sup>120</sup> Ibid.

Law.<sup>121</sup> Its purpose is to promote arbitration as an efficient means to settle disputes. However, it is noteworthy that the Uniform Act does not limit arbitration to commercial and professional matters; individuals and corporate bodies alike may refer their dispute to arbitration.<sup>122</sup>

Indeed, there are jurisdictions where domestic courts support international commercial arbitration. This was demonstrated in the Mauritian case of *Mall Of Mont Choisy Limited v Pick 'N Pay Retailers (Proprietary) Limited & Ors*<sup>123</sup> where the Supreme Court of Mauritius was to decide on the validity of an arbitration agreement. The Claimant brought an action in the Supreme Court seeking sums under an agreement to develop and lease a shopping Centre in Mauritius. The defendant made an application under section 5 of *International Arbitration Act* 2008 to refer the matter to arbitration, because an arbitration clause in the lease over the property covered the dispute. Section 5 provides that where proceedings are started in a Mauritian court and it is asserted that the dispute is covered by an arbitration agreement, the matter is to be referred immediately to the Supreme Court. Unless the party denying the arbitration agreement can show before the Supreme Court, on a prima facie basis, a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court will refer the case to arbitration.<sup>124</sup>

The Claimant asserted that the lease, including the arbitration clause, had not become binding because it had been signed only as a holding measure by one director, while negotiations continued. The Supreme Court decided to refer the dispute to arbitration. The court decided that a non-interventionist approach should be taken on a section 5 application. The test of a “very strong probability” in section 5 is “a very high one”. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.<sup>125</sup> Courts in Mauritius are thus supportive of international arbitration in Mauritius and do not seem eager to interfere with the process.

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<sup>121</sup> Girard Gibbs LLP and Lazareff Le Bars AARPI, *OHADA Uniform Act of Arbitration*. Available at <http://www.internationalarbitrationlaw.com/ohada-uniform-act/> [Accessed on 10/02/2015]

<sup>122</sup> Ibid.

<sup>123</sup> 2015 SCJ 10.

<sup>124</sup> Bagshaw, D., ‘Mauritius Supreme Court hands down two judgments on international arbitration’, February 2015. Available at <http://www.lcia-miac.org/news/mauritius-supreme-court-hands-down-two-judgments.aspx> [Accessed on 18/02/2015].

<sup>125</sup> Ibid.

This is just an example of how regional judicial bodies and in some instances domestic courts can be utilized in fostering regional integration through international arbitration of trade and investment disputes. The EACJ jurisdiction on arbitration<sup>126</sup> needs to be enhanced to enable the Court effectively handle international commercial arbitration in the region. Arbitration through EACJ would be cheaper considering that it does not charge fees for arbitration matters lodged from the Eastern Africa region. The other viable option would be to set up an independent body similar to OHADA with a unique uniform law that would apply to transnational commercial arbitration matters from the region. This may help overcome the legal barriers arising from the differing legal systems in the region and bring about certainty as to what rules and procedures would be applicable to a transnational commercial dispute subjected to arbitration.

## **6. Building Legal Bridges**

It has been argued that regional integration alone is not enough to spur growth but the EAC needs an investment climate—including a business regulatory environment—that is well suited to scaling up trade and investment and can act as a catalyst to modernize the regional economy.<sup>127</sup> Improving the investment climate in the EAC has therefore been seen as an essential ingredient for successful integration—the foundation for expanding business activity, boosting competitiveness, spurring growth and, ultimately, supporting human development.<sup>128</sup> Weak judicial systems can undermine trust, reducing the scope of commercial activity while efficient and transparent courts encourage new business relationships; speedy trials are essential for small enterprises because they may lack the resources to stay in business while awaiting the outcome of a long court dispute.<sup>129</sup>

Harmonisation of trade laws and commercial practices has been hailed as an important ingredient of regional integration, without which meaningful economic integration cannot be

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<sup>126</sup> Art. 32.

<sup>127</sup> World Bank, *Doing Business in the East African Community 2013: Smarter Regulations for Small and Medium-Size Enterprises*. Washington, DC: World Bank Group, 2013. P. 1.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid, p. 55.

achieved.<sup>130</sup> In fact, in relation to the Southern African Development Community (SADC), it has been argued that conflicts and divergences arising from the laws of different SADC States in matters relating to trade, arbitration and enforcement of judgments would rank among the major barriers to intra-regional cooperation and integration that SADC countries would confront as they moved towards establishing a free trade area in the region.<sup>131</sup> SADC Member States were able to overcome these barriers and today SADC may arguably be said to be a success.

It has been noted that international Commercial Arbitration is highly relevant to business and trade, because investors prefer to put capital into countries with high political stability, legal certainty, and strong markets. Without these three conditions, investors lack assurance that contractual arbitration clauses will lead to nationally enforceable resolutions of any disputes that may arise in the course of business supported by internationally accepted legal norms and principles.<sup>132</sup>

Indeed, the important role of international commercial arbitration in international market integration has been acknowledged and it is capable of being used as an important means of confidence building among foreign investors and the host countries in the context of economic cooperation at the regional level.<sup>133</sup>

Apart from boosting trade and investment in the Eastern Africa region, international commercial arbitration if used as the preferred mode of dispute settlement can also be a useful tool in fostering mutual trust, peaceful co-existence and good neighbourliness and cooperation for mutual benefit. This is because a 'good' dispute settlement mechanism prepares the basis for consultation and arbitration, and makes sure that 'sanctions are used only as a measure of last resort'.<sup>134</sup> Such a mechanism also provides a way of preventing disputes being settled by expression of political and economic power.<sup>135</sup>

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<sup>130</sup> Ndulo, Muna, "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" in A.A. Yusuf (ed.), *African Yearbook of International Law*, Volume 4, Issue 1, Paper 60. pp.195-225 at p.211.

<sup>131</sup> Ibid, p.196.

<sup>132</sup> Organization of American States Secretariat for Legal Affairs Department of International Law, 'International Commercial Arbitration: Training Judicial Officers in Cross-Border Decision Enforcement'. Available at [http://www.oas.org/en/sla/dil/docs/International\\_Commercial\\_Arbitration\\_BROCHURE\\_En.pdf](http://www.oas.org/en/sla/dil/docs/International_Commercial_Arbitration_BROCHURE_En.pdf) [Accessed on 3/02/2015].

<sup>133</sup> Maniruzzaman, A.F.M., *op. cit.* p.61.

<sup>134</sup> Zorob, A., 'The Potential of Regional Integration Agreements (RIAs) in Enhancing the Credibility of Reform:

## 6.1 East Africa Court of Justice and International Commercial Arbitration

Effective regional judicial institutions are believed to perform two core tasks that can stimulate economic activity: they settle disputes in efficient and impartial ways and they coordinate the interpretation of laws and treaties. This could in turn also have broader effects on regional cooperation such as improving incentives for compliance, increasing the perceived commitment of parties to a regional integration project, and contributing to the implementation of agreements.<sup>136</sup>

It is noteworthy that the EAC Treaty provides for the establishment of organs of the Community, which include the East African Court of Justice (EACJ).<sup>137</sup> The Court is a judicial body, which is to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.<sup>138</sup> Initially, the Court is to exercise jurisdiction over the interpretation and application of the Treaty: provided that the Court's jurisdiction to interpret under this paragraph is not to include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.<sup>139</sup> The Treaty provides that a Partner State that considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty, may refer the matter to the Court for adjudication.<sup>140</sup>

Relevant to this discussion is the Court's jurisdiction on arbitration. The Court has jurisdiction to hear and determine any matter: *arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding the Treaty*

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The Case of the Syrian-European Association Agreement'. GIGA German Institute of Global and Area Studies, *GIGA Working Papers* No. 51, May 2007. P. 11. Available at [http://www.giga-hamburg.de/en/system/files/publications/wp51\\_zorob.pdf](http://www.giga-hamburg.de/en/system/files/publications/wp51_zorob.pdf) [Accessed on 10/02/2015]

<sup>135</sup> Ibid, p. 24.

<sup>136</sup> Voeten, E., 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' *Asian Development Bank Working Paper Series on Regional Economic Integration*, No. 65, November 2010. p.22. Available at [http://aric.adb.org/pdf/workingpaper/WP65\\_Voeten\\_Regional\\_Judicial\\_Institutions.pdf](http://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf) [Accessed on 10/02/2015]; See also 'COMESA Court of Justice', available at [http://about.comesa.int/index.php?view=article&catid=43%3Ainstitutions&id=83%3Acomesa-court-of-justice&format=pdf&option=com\\_content&Itemid=133](http://about.comesa.int/index.php?view=article&catid=43%3Ainstitutions&id=83%3Acomesa-court-of-justice&format=pdf&option=com_content&Itemid=133)

<sup>137</sup> Art. 9.

<sup>138</sup> Art. 23(1).

<sup>139</sup> Art. 27(1).

<sup>140</sup> Art. 28.

*if the dispute is submitted to it under a special agreement between the Partner States concerned; or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court* (Emphasis ours).<sup>141</sup> Such jurisdiction must be specifically conferred upon the Court as the Treaty provides that except where jurisdiction is conferred on the Court by the Treaty, disputes to which the Community is a party cannot on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.<sup>142</sup>

Furthermore, decisions of the Court on the interpretation and application of the Treaty are to have precedence over decisions of national courts on a similar matter.<sup>143</sup> Perhaps as an attempt to reconcile the decisions of the national courts and the East Africa Court of Justice, the Treaty states that where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.<sup>144</sup>

The East African Court of Justice, which is the main East African regional Court, needs to be supported in terms of finances and Member States' political goodwill in order to equip it for handling commercial disputes.

The EACJ jurisdiction on arbitration can be used to further the harmonisation of law and trade practices within the Community. Indeed, establishment of regional courts has been supported on grounds that it is *inter alia*, a manifestation of the role of law and judicial functions within regional integration processes in developing countries.<sup>145</sup>

Also noteworthy is the Treaty's provision that in order to promote the achievement of the objectives of the Community as set out in the Treaty, the Partner States are to take steps to harmonise their legal training and certification; and should encourage the standardisation of the judgments of courts within the Community.<sup>146</sup> The EACJ can follow in the footsteps of European

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<sup>141</sup> Art. 32.

<sup>142</sup> Art. 33(1).

<sup>143</sup> Art. 33(2).

<sup>144</sup> Art. 34.

<sup>145</sup> Kiplagat, P.K., 'Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience', *Northwestern Journal of International Law & Business*, Volume 15, Issue 3, 1994-1995. pp. 437-490 at pp. 449-450.

<sup>146</sup> Art. 126(1).

Court of Justice (ECJ), which has been very active in expanding European Union Community competences and enhancing the effectiveness of Community law, whilst it also has actively promoted the integration of Community law into national legal systems.<sup>147</sup>

These initiatives are to be hailed considering that they are aimed at ensuring minimal or no conflicts among the Member States. However, the current state of affairs in the region presents hurdles to the effective integration of the region and utilisation of court systems in managing disputes. There are economic, legal, social and political barriers that need to be addressed if the contemplated measures are to be successful.

Before the realisation of the Treaty's objectives on harmonised legal systems and equipping EACJ for international commercial arbitration, there is need to ensure that business does not come to a stop. Currently, the EACJ is more involved in handling non-economic disputes, and the State Parties may consider making use of other existing international commercial tribunals for commercial disputes in the region. The use of existing regional international commercial arbitration centres such as NCIA and KIAC presents a viable option that would be easier to address interstate commercial disputes faster and efficiently, even as the Court gets on its feet in its capacity to deal with matters of transnational commercial nature. Deeper integration in EAC cannot be effectively achieved without the establishment of a stronger institutional structure with a better enforcement mechanism for international commercial arbitration in the region. The EAC Treaty provides for the fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States as including *inter alia*: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; equitable distribution of benefits; and co-operation for mutual benefit.<sup>148</sup> The principles of political will and sovereign equality however ought to be treated carefully as they may hinder the State Parties from pursuing policies that would promote regional integration citing conflict with their national sovereignty.

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<sup>147</sup> Vos, E., 'Regional Integration through Dispute Settlement: The European Union Experience'. Maastricht Faculty of Law, *Working Paper No. 2005-7*, October 2005. P. 4; Osiemo, O., 'Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa' *Legal Issues of Economic Integration*, Vol. 41, Issue 1, 2014, pp. 87–121.

<sup>148</sup>EAC Treaty, Art. 6.

## **7. Conclusion**

International commercial arbitration is a powerful tool that can foster Eastern Africa integration through effective management of commercial disputes and this eventually translates to enhanced development in the region. Building legal bridges that facilitate the regional integration is an imperative whose time has come.



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