

# **Reawakening Arbitral Institutions for Development of Arbitration in Africa**

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**Paper Presented at the Arbitration Institutions in Africa Conference, 2015**

**Theme:** The Role of Arbitration Institutions in the Development of Arbitration in  
Africa

May 2015

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# Reawakening Arbitral Institutions for Development of Arbitration in Africa

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## Abstract

*This paper examines the current trends, successes and challenges facing the arbitration institutions in Africa. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner is not left behind in entrenching the practice of arbitration in settling international commercial disputes. The author analyses the international arbitration institutions in the East African region with a view to highlighting the state of legal and institutional frameworks for the effective determination of international disputes through arbitration.*

*The discussion highlights some of the emerging trends with regard to the users of international arbitration in the region. The ultimate goal is to recommend ways of reawakening arbitral institutions for development of arbitration in the East African region and Africa as a whole.*

## 1. Introduction

With increased globalisation, arbitration has become the preferred mechanism for settling international disputes.<sup>1</sup> Actually, it has been argued that international arbitration should grow in tandem with the globalisation of trade.<sup>2</sup> Arbitration has thus gained popularity over time amongst the business community due to its advantages over litigation. One of the most outstanding benefits 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

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<sup>1</sup> S.D. Franck, "The Role of International Arbitrators," p.1. Available at <https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf> [Accessed on 27/04/2015].

<sup>2</sup> P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators*, United Kingdom, February 2014, pp.10-13 at p.10; See also Court's comment in the American case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) where the Court stated that: "the expansion of [American] business and industry will hardly be encouraged if, notwithstanding solemn contracts, [we] insist on a parochial concept that all disputes must be resolved under [our] laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

realizing justice in the best way achievable. Further, it has been observed that among the primary advantages of international arbitration are its finality and the relative ease of enforcement of arbitral awards throughout the world.<sup>3</sup>

Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.<sup>4</sup> It is in this recognition of international arbitration as one of the most viable approaches to international disputes management that structures/institutions for arbitration are being established across the continent.

This discussion focuses on their commonalities and differences, scope and quality of their services with a view to identifying the challenges, if any, that hinder their effectiveness towards placing the institutions at the forefront of dispute management in Africa and subsequently suggest the best ways to overcome them. The author focuses on the current trends, development of domestic and international arbitration in the East African region and highlights the successes, failures and the way forward for arbitration in the region.

The scope of the paper is therefore limited to arbitration in Kenya, Tanzania, Uganda, Rwanda and Burundi, being the Member States for the East African Community. The discourse briefly highlights the legal and institutional frameworks in the foregoing countries and examines their effectiveness in developing arbitration in the region. Finally, there are recommendations on improving the same for effective arbitration practice in the region.

## **2. Institutional Arbitration in Africa**

Increased globalization has brought about the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions thus resulting in emergence of transnational dispute management mechanisms. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced,

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<sup>3</sup> W.L. Kirtley, "Bringing Claims and Enforcing International Arbitration Awards against Sub-Saharan African States and Parties," *The Law and Practice of International Courts and Tribunals* 8 (2009) pp.143-169, p. 143.

<sup>4</sup> K.P. Sauvart and F. 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://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf> [Accessed on 27/04/2015].

neutral and credible body administers the process.<sup>5</sup> One of the most preferred approaches is international arbitration which has more popularity over litigation due to 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. 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.

### **3. Commercial and International Arbitration in the East African Region**

#### **3.1 Kenya**

The scope of the Kenya's *Arbitration Act* extends to cover both domestic and international arbitration. This is provided for under section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of this Act shall apply to domestic arbitration and international arbitration*. Section 3(2) defines what arbitration is domestic arbitration while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.

Arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya; and at the time when proceedings are commenced or the arbitration is entered into; where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; or where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya; or where the arbitration is between an individual and a body corporate firstly, the party who is an individual is a national of Kenya or is habitually resident in Kenya; and secondly, the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.<sup>6</sup>

Arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places is situated outside the state in which the parties have their places of business:

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<sup>5</sup> "Africa ADR – a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> [Accessed on 27/04/2015]; See also Article 33 of the United Nations Charter.

<sup>6</sup> Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

firstly, the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or secondly, any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.<sup>7</sup>

The *Arbitration Act 1995* generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act defines arbitration as contemplated in the scope of the Act to mean any arbitration whether or not administered by a permanent arbitral institution. There exist a few arbitral institutions in the country that have been established under specific regimes and are therefore mandated with conducting arbitration under such laws. This is because the *Arbitration Act, 1995* does not establish a sole arbitral institution and its provisions therefore apply to institutional and sole arbitrators operating under other Rules. However, other institutions exist under different regimes of law in Kenya.

### **3.1.1 Chartered Institute of Arbitrators-Kenya Branch (CIArb-K)**

The Chartered Institute of Arbitrators (Kenya Chapter) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, United Kingdom which was founded in 1915 with headquarters in London. It is registered under the *Societies Act*.<sup>8</sup> It promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and adjudication. The Kenya Branch, now with over 700 members, has a wide pool of knowledgeable and experienced Arbitrators and facilitates their appointment.<sup>9</sup> The Institute also runs a secretariat with physical facilities for Arbitration and other forms of ADR. To further support the process of Arbitration and ADR, the Branch has published the Arbitration, Adjudication and Mediation Rules. The arbitrators are governed by the Chartered Institute of Arbitrators Arbitration Rules when conducting the arbitral proceedings.<sup>10</sup>

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<sup>7</sup> Section 3(3) (Act No. 11 of 2009, s. 2)

<sup>8</sup> Cap 108, Laws of Kenya

<sup>9</sup> The Chartered Institute of Arbitrators Kenya Branch Website, available at <http://ciarbkenya.org/> [Accessed on 08/05/2015]

<sup>10</sup> Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, December 2012

### 3.1.2 Nairobi Centre for International Arbitration (NCIA)

The institution was established under the Nairobi Centre for International Arbitration Act as seen earlier in this paper. Its functions are set out in section 5 of the Act as inter alia to: first, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;<sup>11</sup> second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;<sup>12</sup> third, ensure that arbitration is reserved as the dispute resolution process of choice;<sup>13</sup> fourth, develop rules encompassing conciliation and mediation processes.<sup>14</sup> Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;<sup>15</sup> 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;<sup>16</sup> to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;<sup>17</sup> 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;<sup>18</sup> to establish a comprehensive library specializing in arbitration and alternative dispute resolution;<sup>19</sup> to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;<sup>20</sup> to provide advice and assistance for the enforcement and translation of arbitral awards;<sup>21</sup> to provide procedural and technical advice to disputants;<sup>22</sup> to provide training and accreditation for mediators and arbitrators;<sup>23</sup> educate the public on arbitration as well as other alternative dispute resolution mechanisms;<sup>24</sup> and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the

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<sup>11</sup> S.5(a), No. 26 of 2013

<sup>12</sup> Ibid, S. 5(b)

<sup>13</sup> Ibid, s.5(c)

<sup>14</sup> Ibid, s. 5(d)

<sup>15</sup> Ibid, s.5(e)

<sup>16</sup> Ibid, s. 5(f)

<sup>17</sup> Ibid, s.5(g)

<sup>18</sup> Ibid, s. 5(h)

<sup>19</sup> Ibid, S.5(i)

<sup>20</sup> Ibid, S.5(j)

<sup>21</sup> Ibid, S.5(k)

<sup>22</sup> Ibid, S.5(l)

<sup>23</sup> Ibid, S.5(m)

<sup>24</sup> Ibid, S.5(n)

Centre achieve its objectives,<sup>25</sup> *inter alia*. The Centre is administered by a Board of Directors provided for under section 6 of the Act. Section 9 of the Act provides for the appointment of a Registrar by the Board of Directors. Section 9 (3) mandates the Registrar to oversee the day to day management of the affairs and staff of the Centre and shall be the secretary to the Board.

There is also an Arbitral Court established under section 21 of the Act which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.<sup>26</sup> Section 10 of the Act confers the Registrar with the powers to oversee the business of the court including enforcement of decisions of the Court. The Court has a President and two Deputy Presidents and the Registrar. The Court also has fifteen other members all of whom are leading international arbitrators.<sup>27</sup> The Centre has the capacity to handle domestic and international arbitration. It is hoped this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration.

### **3.1.3 Centre for Alternative Dispute Resolution (CADR)**

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition of ADR in Article 159 of the current Constitution of Kenya, 2010, it is hoped that this Centre will enhance the services of ADR mechanisms in dispute settlement in Kenya.<sup>28</sup> Its Membership is drawn from the Chartered Institute of Arbitrators (Kenya branch).<sup>29</sup>

### **3.1.4 Kenya National Chamber of Commerce and Industry (KNCCI)**

The Kenya National Chamber of Commerce and Industry (KNCCI), is a non-profit, autonomous, private sector institution and membership based organization.<sup>30</sup> It was established in 1965 from the amalgamation of the then three existing Chambers of Commerce: the Asian, African and European chambers, to protect and develop the interests of the business community. It works in close collaboration with the Government, stakeholders and business development

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<sup>25</sup> Ibid, S.5(o)

<sup>26</sup> S. 22, No. 26 of 2013.

<sup>27</sup> Ibid, S. 21(2)

<sup>28</sup> The Centre was registered under the *Companies Act* Cap 486 of the Laws of Kenya as Company limited by guarantee.

<sup>29</sup> CI Arb-K members become automatic members of CADR.

<sup>30</sup> Kenya National Chamber of Commerce and Industry website, visit <http://www.kenyachamber.or.ke/> [Accessed on 9/05/2015].



organizations internationally. It is an affiliate member of the International Chamber of Commerce and Industry (ICC), the G 77 Chamber of Commerce and Industry, Pan African Chamber of Commerce and Industry (PACCI), the Common Market for Eastern and Southern Africa (COMESA), the East African Chamber of Commerce, Industry and Agriculture (EACCIA), and the East African Business Council (EABC), among others.<sup>31</sup>

KNCCI works towards promoting, protecting and developing commercial, industrial and investment interests of members in particular and those of the entire business community in general. They aim at influencing development policies, strategies and support measures so as to achieve the best economic climate for these varied interests.<sup>32</sup> It thus follows that the Chamber would be involved in effective mechanisms of handling business and commercial related disputes. The Chamber operates through a Committee form of management, with several Standing Committees, although the operations are essentially executed by the Chamber Secretariat. The Legislation and Local Authorities Committee is charged with *inter alia*, domestic and international arbitration and International Chambers of Commerce (ICC) matters.<sup>33</sup>

The Chamber can therefore play a significant role in promoting institutional arbitration in the region.

### 3.2 Tanzania

The Tanzanian *Arbitration Act*<sup>34</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>35</sup> as well as provisions on court-annexed arbitration.<sup>36</sup> Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*,<sup>37</sup> made under the Arbitration Act.<sup>38</sup> It has been noted that the arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL

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<sup>31</sup> Ibid.

<sup>32</sup> Kenya National Chamber of Commerce and Industry, 'Vision, Mission and Objectives,' available at <http://www.kenyachamber.or.ke/the-chamber/mission-vision> [Accessed on 9/05/2015].

<sup>33</sup> Kenya National Chamber of Commerce and Industry, 'Operations of the Chamber,' available at <http://www.kenyachamber.or.ke/the-chamber/chamber-operations> [Accessed on 9/05/2015].

<sup>34</sup> Cap 15, Laws of Tanzania (2002 Revised Edition).

<sup>35</sup> Ibid, ss. 3-26

<sup>36</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>37</sup> Published in Government Notice 427 of 1957.

<sup>38</sup> 'Tanzania', *Arbitration in Africa*, June 2007. p. 5.

Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 27/04/2015].

model law and has never been changed to take into account its provisions.<sup>39</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>40</sup> It has been argued that the arbitration system in Tanzania lacks active and competent arbitration institutions and practitioners to facilitate arbitration process for the construction disputes.<sup>41</sup> It is noteworthy that there are two main institutions that carry out institutional arbitration and they are discussed herein below.

### **3.2.1. Tanzania Institute of Arbitrators (TIA)**

The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the Societies Act (cap 337).<sup>42</sup> Together with the National Construction Council, TIA act as facilitators, enabling the parties (in consultation with their arbitrators) to set ad hoc rules on the procedures which will bind them.<sup>43</sup> They also jointly arrange short professional courses and examination for arbitrators and then compile a list of arbitrators available for proceedings.<sup>44</sup>

### **3.2.2. National Construction Council (NCC)**

This is a statutory body created under the *National Construction Council Act*.<sup>45</sup> The Council is mandated with *inter alia*; promoting and providing strategic leadership for the growth, development and expansion of the construction industry in Tanzania with emphasis on the development of the local capacity for socio-economic development and competitiveness in the changing global environment; and facilitating efficient resolution of disputes in the construction industry.<sup>46</sup> The arbitration services of this institution are mainly available to persons in the construction industry although it also offers its services to persons outside the industry albeit at a lower scale.<sup>47</sup>

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<sup>39</sup> *Ibid.* p.6.

<sup>40</sup> W. Kapinga, *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 27/04/2015].

<sup>41</sup> G. Mandepo, "Resolving Construction Disputes Through Arbitration - An Overview of Tanzanian Legal Framework," p. iv. Available at <https://www.scribd.com/doc/104535725/66/Tanzania-Institute-of-Arbitrators> [Accessed on 03/05/15]

<sup>42</sup> Cap 337, Laws of Tanzania.

<sup>43</sup> 'Tanzania', *Arbitration in Africa*, June 2007. *Op cit* p. 5.

<sup>44</sup> *Ibid.*

<sup>45</sup> No. 20 of 1979, cap 162.

<sup>46</sup> National Construction Council (NCC) Functions, available at <http://www.ncc.or.tz/functions.html> [Accessed on 27/04/2015].

<sup>47</sup> *Ibid.*

For a vibrant institutional framework on international arbitration in Tanzania, much more needs to be done to project these two institutions into international arena and change the idea that they deal with arbitration on domestic matters only or even the perception that they are industry-specific. These way users of arbitration in Tanzania can confidently approach them for international arbitration services.

### 3.3 Uganda

Uganda's *Arbitration and Conciliation Act* 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>48</sup> Its provisions on arbitration apply to both domestic arbitration and international arbitration.<sup>49</sup> The national Courts may assist in taking evidence,<sup>50</sup> setting aside arbitral awards<sup>51</sup> and recognition and enforcement of the arbitral awards.<sup>52</sup>

#### 3.3.1. Centre for Arbitration and Dispute Resolution (CADRE)

Uganda's *Arbitration and Conciliation Act* establishes the Centre for Arbitration and Dispute Resolution (CADRE).<sup>53</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 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>54</sup>

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<sup>48</sup> CAP 4, Laws of Uganda, Preamble.

<sup>49</sup> *Ibid*, S. 1.

<sup>50</sup> *Ibid*, s. 27.

<sup>51</sup> *Ibid*, s. 34.

<sup>52</sup> *Ibid*, ss. 35 &36.

<sup>53</sup> *Ibid*, s. 67.

<sup>54</sup> *Ibid*, s. 68.

This is the main arbitral institution in the country. It is therefore necessary to have more institutions in Uganda as well as improve information dissemination in order to promote international arbitration in the country.

### **3.4 Rwanda**

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 143rd country to accede to the *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>55</sup>

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body which carries out mediation, adjudication and arbitration.<sup>56</sup>

#### **3.4.1 Kigali International Arbitration Center (KIAC)**

Kigali International Arbitration Center (KIAC) was established as an independent body which carries out mediation, adjudication and arbitration. The Centre has a panel of domestic and international arbitrators.<sup>57</sup> Parties to KIAC arbitrations are free to nominate their arbitrators, subject to by the Centre in accordance with the KIAC Rules. However, when KIAC is called upon to appoint an arbitrator, it does so primarily from its panel of arbitrators.<sup>58</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>59</sup>

KIAC holds a potent potential to promote development of international arbitration in the region and Africa as a whole.

### **3.5 Burundi**

In 2007, the Burundian Government created a Centre for Arbitration and Mediation to deal with commercial and investment disputes.<sup>60</sup> In 2009, *Investment Code of Burundi*<sup>61</sup> was enacted with

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<sup>55</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 28/04/2015].

<sup>56</sup> Law No 51/2010 Of 10/01/2010, Laws of Rwanda.

<sup>57</sup> Kigali international Arbitration Centre website, available at <http://kiac.org.rw/spip.php?rubrique25> [Accessed on 26/04/2015].

<sup>58</sup> *Ibid.*

<sup>59</sup> Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4

its purpose being to encourage direct investments in Burundi.<sup>62</sup> This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi.

In 2014, Burundi became the 150th 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>63</sup>

International commercial arbitration in Burundi is thus supported by the legal framework. The framework casts a ray of hope for arbitration in Burundi and beyond.

#### **4. Challenges**

A number of challenges affect the effectiveness of the East African regional international arbitral centres and thus affect their popularity amongst the users of their services in the region.

##### **4.1 Confidentiality Requirements**

The fact that arbitration is a private process makes it enjoy confidentiality, an important aspect in private matters. Unlike litigation where there is official law reporting, arbitral awards or proceedings are never published without the parties’ approval. It has been argued that while confidentiality is an important aspect of international commercial arbitration, there should be adoption of a presumption that arbitral awards should be made publicly available, unless both parties object.<sup>64</sup> This argument is based on the justification that the benefits of greater transparency in arbitration brought about by the publication of awards often outweigh concerns for confidentiality.<sup>65</sup> The *Arbitration Act*<sup>66</sup> which is the principal law regulating arbitration in

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<sup>60</sup> Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

<sup>61</sup> Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi.

<sup>62</sup> *Ibid*, Art. 2.

<sup>63</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 29/04/2015].

<sup>64</sup> C.G. Buys, “The Tensions between Confidentiality and Transparency in International Arbitration,” *American Review of International Arbitration*, Vol. 14, No. 121, 2003. Available at SSRN: <http://ssrn.com/abstract=1330243> [Accessed on 27/04/2015].

<sup>65</sup> *Ibid*. It is however important to point out that the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors, publishes its arbitral awards and has always published information on the institution, conduct, and disposition of proceedings administered by the Centre. Article 48(5) of ICSID’s constituent

Tanzania does not provide for confidentiality. If the parties want the proceedings or the award to remain confidential, they should enter into a confidentiality agreement between themselves and the arbitrators.<sup>67</sup> In such a scenario, if parties do not sign such an agreement, it is therefore possible to publish the outcome of the matter with obvious impact on the perceived advantage of confidentiality. This trend may soon affect the way arbitration is viewed and carried out considering that it emanates from the users of arbitration services and not the arbitrator or a third party. Normally, arbitrators cannot take such steps as to violate confidentiality requirement on their part. For instance, Rule 8 of the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members* provide that a member must abide by the relationship of trust which exists between those involved in the dispute and (*unless otherwise agreed by all the parties*, or permitted or required by applicable law), both during and after completion of the dispute resolution process, must not disclose or use any confidential information acquired in the course of or for the purposes of the process. This position is thus similar to the Tanzanian one where parties can decide to go public on their award.

Sometimes arbitration matters will be litigated all the way to the highest court of the law of the land in search of setting aside of awards.<sup>68</sup> This obviously affects the confidentiality requirements since more often than not the matter becomes public especially after the court's

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Convention requires the consent of both parties for any publication by ICSID of the award rendered in their case. A.R. Parra, "Enhancing transparency at ICSID," Oxford University Press's Blog, 17<sup>th</sup> February 2014. Available at <http://blog.oup.com/2014/02/enhancing-transparency-at-icsid/> [Accessed on 10/05/2015]; See also New York City Bar, "Publication of International Arbitration Awards and Decisions," *Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York*, February 2014. Available at <http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf> [Accessed on 10/05/2015].

<sup>66</sup> Cap 15, Revised Edition 2002.

<sup>67</sup> "Arbitration in Africa," Tanzania, June 2007, p. 3.

Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 27/04/2015].

<sup>68</sup> S. 35(1) of the Act. K. 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). See also *Glencore Grain Ltd V T.S.S.S Grain Millers Ltd* [2012] eKLR; Daily Nation, 'Not again! Pattni's new Sh4bn scandal,' Saturday, May 11, 2013. Available at <http://www.nation.co.ke/News/Not-again-Pattni-s-new-Sh4bn-scandal/-/1056/1849756/-/14axo7az/-/index.html> [Accessed on 09/05/2015].

The Newspaper partly read "Controversial businessman Kamlesh Pattni is set to pocket Sh4.2 billion worth of taxpayers' money if the High Court upholds a hefty award issued in his favour by an arbitrator." It went further to state "But it is the hefty award against the government authority that is likely to attract public attention given that it is *wananchi* (meaning citizens) and taxpayers who will foot the Sh4.2 billion bill."

decision which may find its way into the national or international official law reports. The effect of this is that parties thereto are left with little or no understanding of the difference between arbitration, with its perceived advantages, and litigation. While it is generally agreed that arbitration does have adversarial aspects, it is normally less adversarial than court litigation. The parties' actions may impact on arbitration in two ways. Firstly, if such parties find themselves in another dispute in future, they may decide to go straight to litigation without trying arbitration at all and this suppresses the growth of arbitration especially if they felt they did not obtain justice.<sup>69</sup> Secondly, it may have the effect of changing arbitration practice across the continent since arbitral institutions respond to the needs of the parties. This may even explain why the trust and confidentiality clauses of these institutions only bind their practitioners and not the parties and even so the practitioners can always opt out if parties so agree. As it has been observed, the role of an arbitrator is a professional role and not a business one.<sup>70</sup> For the parties, they are in business looking out for their best interests and the transnational disputes management institutions can only facilitate the process of realizing what is best for the parties. Interested parties may also put pressure on the tribunal to do away with confidentiality. A good example is an arbitration involving a Government as one of the parties of course using public funds for the same.<sup>71</sup> Public interest may require openness or accountability to the citizens. Confidentiality is thus a fluid concept as far as parties to arbitration are concerned since they greatly influence whether the matter will remain confidential or not.

## 4.2 Institutional Capacity

It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. Much more needs to be done to enhance their capacity in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to task in facilitation of international arbitration.<sup>72</sup>

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<sup>69</sup> See the case of *Airtel Networks Kenya Limited V Nyutu Agrovet Limited* [2011] eKLR.

<sup>70</sup> P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators*, *op cit* at p.13.

<sup>71</sup> See the case of *Erad Suppliers 7 General Contracts Limited v National Cereals 7 Produce Board & another* [2013] eKLR

<sup>72</sup> K. Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at



### 4.3 National Courts' Interference

It has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.<sup>73</sup> It has been argued that traditional litigation in a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes.<sup>74</sup>

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.<sup>75</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.

National courts are also not popular because as it has been argued the formal adversarial structure and the possibility of national bias can destroy the business relationships which are conducive to the smooth flow of international trade.<sup>76</sup> The intricacies of the national procedures may also be unknown to one or more of the parties.<sup>77</sup> For instance, 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>78</sup> As such, party autonomy is restricted thus severely affecting investors' confidence in the Tanzania's law on arbitration.

It has also been observed that the arbitration process is becoming more and more litigation-minded and less conciliation-minded and as such the spirit of arbitration has been

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<http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf> [Accessed on 06/07/2014].

<sup>73</sup> *Ibid*, p.6.

<sup>74</sup> J.T. McLaughlin, "Arbitration and Developing Countries," *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 212.

<sup>75</sup> See generally, K. 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>

<sup>76</sup> J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 212.

<sup>77</sup> *Ibid*.

<sup>78</sup> See generally, N.S. Mkumbukwa, '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 27/04/2015]; K. Kepher, '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 27/04/2015].



lost.<sup>79</sup> This is especially so if many new issues are raised in the course of arbitration proceedings or in the context of proceedings before domestic courts.<sup>80</sup> Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration. This has had the effect of seeing more matters being referred to the national Courts on due to the disputants' dissatisfaction.<sup>81</sup>

The issue of Courts' interference does not however always hold true. For instance, in the Kenyan case of *Anne Mumbi Hinga v Victoria Njoki Gathara*<sup>82</sup> the Court stated that the concept of finality of arbitration awards and pro-arbitration policy is something shared worldwide by the States whose Arbitration Acts such as Kenya's have been modeled on the UNCITRAL Model Law.<sup>83</sup> It went further to state that the common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Act. It concluded by stating that the provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation.<sup>84</sup>

This position confirms that courts are not always against arbitration, at least in Kenya, although this does not reflect the state of affairs across Africa.

#### **4.4 Inadequate Legal and Institutional Framework on international commercial Arbitration**

There have been inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in some of the East African countries with some countries still having archaic laws.<sup>85</sup> This has denied the local

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<sup>79</sup> F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," *12 Nw. J. Int'l L. & Bus.* 48 (1991-1992), pp. 48-85 at p. 50.

<sup>80</sup> *Ibid.*

<sup>81</sup> K. Muigua, "Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises," p. 15. Available at <http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf>

<sup>82</sup> Civil Appeal No. 8 of 2009 [2009 eKLR].

<sup>83</sup> The Model of the United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. [The Arbitration Agreement, Kenya Law Resource, Available at <http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html> [Accessed on 28/04/2015]

<sup>84</sup> S. 10 of Kenya's Arbitration Act is to the effect that the Court shall not intervene in the arbitral process except as provided in the Act.

<sup>85</sup> K. Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>

international arbitrators the fora to display their skills and expertise in international commercial arbitration since disputants shun the local arbitral institutions, if any, for foreign institutions. There is need to ensure that African countries review and harmonise their arbitration laws so as to ensure that even as arbitration institutions emerge across Africa, they will find conducive environment for the enforcement of foreign awards if need be. One way of achieving this is adoption of UNCITRAL Model law provisions for those countries that are yet to streamline their domestic arbitration laws in line with the Model law. This is important since the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.<sup>86</sup> The justification for this harmonization is the need for improvement and it's based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.<sup>87</sup>

#### **4.5 Appointment of International Arbitrators by Parties**

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to facilitating international arbitration, 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.<sup>88</sup>

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. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests.<sup>89</sup> A good example is the Kigali International Arbitration Centre (KIAC) (and probably many others across Africa) where the panel of international arbitrators mainly consist of Non-Africans.<sup>90</sup>

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<sup>86</sup> United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,' available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) [Accessed on 05/05/2015]

<sup>87</sup> Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration (UNCITRAL Model Law on International Commercial Arbitration (*United Nations document A/40/117, annex I*) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

<sup>88</sup> *Ibid*, p. 3.

<sup>89</sup> J. Lew, 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

<sup>90</sup> KIAC Panel Of International Arbitrators, available at [http://www.kiac.org.rw/IMG/pdf/final\\_list\\_of\\_international\\_arbitrators.pdf](http://www.kiac.org.rw/IMG/pdf/final_list_of_international_arbitrators.pdf) [Accessed on 27/04/2015] 19 out of the 34 international arbitrators are Non-Africans.

Although it is important to borrow from the established institutions outside of Africa, the fact that more than half of the international arbitrators in KIAC are non-African may portray Africa to the outside world as a place where there are no qualified arbitrators (real or perceived) to be appointed as international commercial arbitrators. To the users of international arbitration in Africa, it is therefore possible to argue that it makes more sense to hold their arbitration proceedings outside Africa where the Non-African arbitrators will not only handle the matter but there is also (perceived or real) added benefit of non-interference from national courts as well as ease of enforcement of awards.

The above scenario thus raises the issue of bias. It has been observed that Parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.<sup>91</sup> This is especially true considering that the arbitral institutions normally allow the parties who submit their disputes to them to decide whether they will pick the arbitrator themselves or will allow the institution to make the choice on their behalf. For example, the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules provide that the written request for appointment of an arbitrator submitted to the Institute should include *inter alia*, if the arbitration agreement calls for party nomination of arbitrators, the name and address of the Claimant's nominee, and any particular qualification or experience which the parties wish the Arbitral Tribunal to possess.<sup>92</sup>

It is therefore arguably possible for parties to pick persons of their choice in terms of preference and expertise since the institutions (and many others across the region) have a database with their arbitrators' qualifications. This flexibility allows parties to appoint arbitrators that have specific expertise in their area of business or nature of their dispute.

In relation to Non-Africans acting in African institutions, the question that arises is how well they separate the differing cultures (African and their home country's) so as to ensure that the same does not affect their effectiveness. It has been argued that Arbitration's effectiveness will always depend upon how well it satisfies the needs of the parties.<sup>93</sup> To ensure that African parties gain confidence with African international arbitration institutions, such institutions need

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<sup>91</sup> LexisNexis and Mayer Brown International LLP, "Arbitration in sub-Saharan Africa," p.1. Available at [http://www.mayerbrown.com/files/News/937b1c45-31e5-437f-bbe3-39e5f01dd1d/Presentation/NewsAttachment/6fb0a0bf-0164-4c30-a54d-63eccc1dd65f/LexisNexis\\_2012\\_arbitration-in-sub-aharan-Africa.pdf](http://www.mayerbrown.com/files/News/937b1c45-31e5-437f-bbe3-39e5f01dd1d/Presentation/NewsAttachment/6fb0a0bf-0164-4c30-a54d-63eccc1dd65f/LexisNexis_2012_arbitration-in-sub-aharan-Africa.pdf) [Accessed on 27/04/2015]

<sup>92</sup> Rule 1(2) & (8).

<sup>93</sup> J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

to ensure that they have appointed the best persons with capacity and expertise to handle the matters at hand so that parties will have their fears of inadequacy (of African arbitrators) addressed.

Cultural, economic, religious, and political differences also come into play. It has been observed that diversity - of a cultural, economic, religious, and political kind - exists not only among nation-states and in the sources and interpretation of international law, but also among the group of commentators who study the interactions of transborder actors and institutions.<sup>94</sup> It is noteworthy that an arbitration matter may have different interested parties and many players who include the arbitral panel as well as the parties. Each of the interested parties has expectations which they expect to be met in the process and they may differ based on cultural background of parties or arbitrators.

#### **4.6 The Challenge of Arbitrability**

Arbitrability is used to refer to the determination of the type of disputes that can be settled 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>95</sup> Courts often refer to “public policy” as the basis of the bar.<sup>96</sup> The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction. It has been observed that international arbitration law and its practice have become more and more complex and this has been attributed partly to changes in domestic arbitration laws.<sup>97</sup>

Arbitrability may either be subjective or objective.<sup>98</sup> Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at

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<sup>94</sup>T.E. Carbonneau, “Diversity or Cacophony? New Sources Of Norms In International Law Symposium: Article: Arbitral Law-Making,” *Michigan Journal of International Law*, Summer, 2004, 25 Mich. J. Int'l L. 1183. Available at <https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=25+Mich.+J.+Int%27l+L.+1183&srctype=smi&srcid=3B15&key=fbda375b78b7e9439f6c5b862e60a262> [Accessed on 27/04/2015].

<sup>95</sup> F. Kariuki, “Redefining Arbitrability: “ Assessment of Articles 159 & 189(4) of the Constitution of Kenya,” *Alternative Dispute Resolution Journal*, Vol.1, (CIArb (K), 2013), pp.175-189.

<sup>96</sup> *Ibid.*

<sup>97</sup> F. De Ly, “The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning,” *op cit* at p. 48.

<sup>98</sup> K.H. Böckstiegel, “Public Policy as a Limit to Arbitration and its Enforcement,” p.5. Presented at the 11<sup>th</sup> IBA International Arbitration Day and United Nations New York Convention Day “The New York Convention: 50 Years” in New York on 1 February 2008.

all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute.<sup>99</sup> National laws often restrict or limit the matters, which can be resolved by arbitration. It has been observed that certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.<sup>100</sup>

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Arbitration Act.<sup>101</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, which elevates the status of Alternative Dispute Resolution (ADR) as one of the guiding principles of the Judiciary in the exercise of judicial authority by Courts and tribunals.<sup>102</sup> 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>103</sup> However, the effectiveness of this in promoting ADR and specifically arbitration remains to be seen especially due to the subjection of the same to repugnancy clause.

#### 4.7 Recognition of International Arbitral Awards

The *Arbitration Act*, 1995 under section 36 (2) notably provides that an international arbitration award shall 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>104</sup> This is a show of Kenya's commitment to adopting international best practices

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Available at

[http://www.arbitrationicca.org/media/0/12277202358270/bckstiegel\\_public\\_policy...iba\\_unconference\\_2008.pdf](http://www.arbitrationicca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconference_2008.pdf)  
[Accessed on 09/05/2015].

<sup>99</sup> Ibid.

<sup>100</sup> See K. Chovancová, "Arbitrability (Extract)". Available at <http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf> [Accessed on 09/05/2015].

<sup>101</sup> R. Rana, '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.231.

<sup>102</sup> Article 159 of the Constitution of Kenya. They are to be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms are to 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 the Constitution or any written law.

<sup>103</sup> F. Kariuki, *op cit*; See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya.

<sup>104</sup> This was included in the Act through the Act No. 11 of 2009, s. 27. (2009 amendment to the Arbitration Act, 1995).

in arbitration and consequently existence of requisite legal infrastructure for promotion of international arbitration in the country.

The Kenyan Act on Arbitration was drafted along the lines of the Model Law. Article 35 (1) of the Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. The *Nairobi Centre for International Arbitration Act* provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.<sup>105</sup> The foregoing provisions which recognise international legal instruments on arbitration therefore place Kenya in a competitive position to engage with the other regional players in the promotion of Eastern Africa as a hub for International Commercial Arbitration.

#### **4.8 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. This impacts negatively on investor confidence and uptake of international commercial arbitration.

#### **4.9 Challenge of Arbitration Clause**

It has been argued that an arbitration clause should take into consideration the applicable law, state and attitude of concerned countries towards arbitration as well as the effect of host domestic law on arbitration proceedings and outcome so as to ensure that the parties' intentions are not defeated by technicalities.<sup>106</sup> This is because it is the arbitration clause that dictates where the proceedings will be held and the applicable law. As such, it is important to have a clear non-ambiguous clause as this will not only save time but will also save resources for the parties by way of minimized challenges to the whole process.<sup>107</sup> In drafting the clause, a number of factors touching on the potential arbitral institutions are considered.

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<sup>105</sup> *Nairobi Centre for International Arbitration Act*, S. 23.

<sup>106</sup> J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

<sup>107</sup> See generally P. Ngotho, "Pathological Arbitration Clauses in Ad Hoc Arbitrations: Kenya's Experience." Paper presented at the Chartered Institute Of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution

## **5. International Arbitration Users' Concerns**

Although the foregoing challenges affect the arbitration users' perception of arbitral institutions in Africa, their concerns go beyond these and touch on other but equally significant issues. The insecurity problem facing East Africa and Africa in general does affect the development of international arbitration in the region. Potential users shy away from Africa due to the instability and even where they have their place of business in Africa, they prefer to have their disputes settled elsewhere. The insecurity arises from persistent conflicts across the globe some of which of which are natural resource-based, political, religious and terrorism.

Government bureaucracy is another concern especially in matters that involve Government institutions as one of the parties. This may even be complicated if the proceedings are in a Government supported arbitral institution that is funded by the same Government. Naturally, there is fear or bias or excessive bureaucracy due to power differences and influence which may defeat the need for arbitration. For instance, Government proceedings Acts may require special procedures for some aspects of the process and this may clash with the established international arbitration laws and procedures. The concern may be real or perceived but there is need to ensure that the same is dealt with.

Lack of adequate Information Communication Technology (ICT) infrastructure and other relevant physical infrastructure in the existing arbitral centres is another concern. It is debatable whether the existing institutions have modern ICT equipment that facilitate efficiency in arbitral proceedings. Potential users are also concerned with the issue of institutional capacity in Africa's institutions. Institutional capacity touches on both physical infrastructure as well as arbitrators' expertise in handling diverse matters arising mainly in commercial world.

It is also noteworthy that the issue of infrastructure extends to the country as a whole since there is also need for developed support facilities such as airports, transport system, hotel facilities and the like. These are important as they help in marketing a country to the rest of the continent as well as the rest of the world.

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(CADR) International Arbitration Conference held at Whitesands Beach Hotel, Mombasa, 7- 8<sup>th</sup> August, 2014. Available at <http://www.ngotho.co.ke/PathologicalArbitrationClauses.8.8.14.pdf> [Accessed on 09/05/2015].



## **6. Way Forward**

There is a need to employ mechanisms that will help awaken arbitral institutions in Africa and demonstrate the Continent to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international matters.

Although the author has observed elsewhere that government intervention can raise fears of bias and undue influence, it is important to point out it is possible for the arbitral institutions to get support from the government while still retaining their independence. The government can extend goodwill by helping the institutions get on their feet through financial support as well as marketing while ensuring that it does not meddle with the internal affairs and overall running of the institutions. The state institutions such as courts can also play a critical role in helping the arbitral centres take their place in settlement of international institutions in the region. The assistance can be in form of supporting or facilitating enforcement of international and domestic arbitral awards as well as ensuring that there is minimal interference in the process so as to win the confidence of the potential users inside and outside the region. Parliament and Courts should also work in tandem in promoting law reforms to reflect the current trends in arbitration practice in the world.

There is also need for putting up the relevant infrastructure which includes ICT and other physical structures. This should be coupled enhanced training for purposes of capacity building. Training should start at school level as opposed to institutional professional courses as is the case with most countries. A good example is the University of Nairobi School of Law which currently offers international commercial arbitration as a course in its Masters of Law Programme (GPR 625). The students who take this course can apply directly to become members of CIArb-K at Associate level. This not only boosts the number of persons eligible to pursue arbitration at a higher level but also helps in creating awareness in the country and the region, a powerful tool for awakening arbitral institutions and boosting the development and practice of arbitration.

Government collaboration is important as in the case of NCIA and KNCCI in Kenya. KNCCI collaborates with the Government of Kenya in promoting business in the country. Some of the investors come into the African countries through government partnerships and the government can thus help sell and promote these institutions as capable of handling their disputes.



## **7. Conclusion**

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This can enhance users' confidence in arbitral institutions in the African continent and consequently awaken the seemingly dull arbitral institutions and arbitration practice in Africa.

There is hope for the future. Arbitral institutions and arbitration practice in Africa have the potential to grow and flourish. The time to awaken and nurture arbitration for a better tomorrow is now.

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