

Effectiveness of Arbitration Institutions in East Africa

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Abstract

International arbitration in East Africa, and to a larger extent Africa in general, still lags behind when compared to the rest of the world. There is not much that has been going on by way of international arbitration in the region. This is despite the existence of arbitral institutions which have been established under various legal regimes, with a mandate to carry out and promote international arbitration in the specific countries and the region as a whole. The author, in this paper, critically examines the status of international arbitration within the East African Community region. The paper also analyses the state of arbitral institutions with a view to determining their effectiveness in marketing the regional practitioners in the international arena and ultimately transforming the region as the preferred destination for international arbitration.

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1.1 Introduction

The focus of this paper is: to examine the arbitration centres/institutions in East Africa and their role in transforming arbitration in East Africa; so to examine the effectiveness of these institutions and how they can better collaborate in sharing their regional space.

This paper examines the current trends, successes and challenges facing the arbitration institutions in East 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.

With increased globalisation, arbitration has become the preferred mechanism for settling international disputes.¹ Actually, it has been argued that international arbitration should grow in tandem with the globalisation of trade.² Arbitration has thus gained popularity over time amongst members of 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 national courts, thus boosting parties confidence of

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¹ Franck, S.D., "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].

² Cresswell, P., "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators*, United Kingdom, February 2014, pp.10-13, 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."

realising justice in the best way achievable.³ 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.⁴

Countries and various regions around the world have thus embarked on promoting international arbitration as the best mechanism for resolving international disputes.⁵ It is in this recognition of arbitration as one of the most viable approaches to disputes management and resolution that structures or 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 this 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 in part one and examines their effectiveness in developing arbitration in the region in part two. Finally, there are recommendations on improving the same for effective arbitration practice in the region in part three.

³ I have argued 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. As it relates to Kenya, I have also noted that parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. John McLaughlin has also 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. (Muigua, K., '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', 14; See generally, Muigua, K., *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010); McLaughlin, JT., "Arbitration and Developing Countries," *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232, 212.

⁴ Kirtley, W.L., "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.

⁵ *Sauvant K.P. & Ortino, F., 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].

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 the emergence of transnational dispute management mechanisms. The mechanisms now universally used for dispute management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.⁶ One of the most preferred approaches is 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 arbitration is concerned.

3. Commercial and International Arbitration in the East African Region

3.1 Kenya

Kenya's Arbitration Act⁷ is based on the UNCITRAL Model Law on International Commercial Arbitration (1985),⁸ which 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.⁹ The Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.¹⁰ All these aspects of the Model Law informed the drafting of the Kenyan law, with little or no variation in form and content in the domestic law. One of the significant differences is that while the Model Law is limited in its application to international commercial arbitrations, Kenya's Arbitration Act covers 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

⁶ "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, 24 October 1945, 1 UNTS XVI.

⁷ Arbitration Act, Cap 4 laws of Kenya (No. 11 of 2009), as amended by the Amending Act No. 11 of 2009, L.N. 48/2010. Revised Edition 2012 [2010].

⁸ United Nations documents A/40/17, annex I and A/61/17.

⁹ 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

¹⁰ Ibid.

shall apply to domestic arbitration and international arbitration”. Section 3(2)¹¹ defines domestic arbitration while section 3(3)¹² stipulates the requisite conditions for an arbitration to qualify as an international one. Thus, the Act makes an attempt at promoting both domestic and international arbitration in the country.

The *Arbitration Act 1995* generally provides for arbitral proceedings and the enforcement of 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’. This definition was borrowed from the Model Law as provided for under Article 2(a) therein. The liberal definition adopted by the Model Law may have been informed by the General Assembly’s objective of establishing a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations.¹³ Thus, enacting a domestic law that promotes the practice of both domestic and international arbitration may be construed as a strategy to promote Kenya as a competitive international business partner. The Act’s omission on provisions relating to the institutional framework on arbitration is however glaring. It is noteworthy that the *Arbitration Act, 1995* (2009) does not establish or endorse a sole arbitral institution in the country and its provisions, therefore, apply to institutional and ad hoc arbitrations conducting under other rules, as well. There are various institutions that exist under different regimes of law in Kenya, as discussed hereunder.

¹¹ S. 3(2)- An 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— (a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; (b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya; (c) where the arbitration is between an individual and a body corporate— (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya: or (d) 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.

¹² S. 3(3)- An arbitration is international if—(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; (b) one of the following places is situated outside the state in which the parties have their places of business— (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or (ii) 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 (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

¹³ Preamble to the Model Law on international Commercial Arbitration.

a. Chartered Institute of Arbitrators-Kenya Branch (CI Arb-K)

The Chartered Institute of Arbitrators (Kenya branch) 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. The Kenya branch is registered under the *Societies Act*.¹⁴ It promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation, Conciliation, Neutral Evaluation, Expert Determination and adjudication.¹⁵ The Kenya Branch, now with over 700 members, has a wide pool of knowledgeable and experienced arbitrators and facilitates their appointment.¹⁶ The Chartered Institute of Arbitrators, Kenya Branch, also runs a Secretariat with physical facilities in Kenya for Arbitration and other forms of ADR, located at Kindaruma Lane, Nicholson Drive, Off Ngong Road, in Nairobi. To further support the processes of arbitration and ADR (as a collective for the processes of mediation, conciliation and negotiation), the Branch has published Arbitration Rules.¹⁷ Arbitrators are governed by the Rules when conducting the arbitral proceedings referred to the Institute. Thus, it offers a platform for its registered members to conduct arbitration while depending on the Branch Arbitration Rules for guidelines.

However, it is debatable as to whether it is an arbitration institution in the strict sense, considering that it was constituted as an organisation with one of the objects being to ‘generally promote, encourage and facilitate the practice of settlement of disputes by arbitration and alternative means of dispute resolution other than resolution by the courts.’¹⁸

b. Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration (NCIA) was set up through the office of the Attorney General under the auspices of the Asian-African Consultative Organization (AALCO).¹⁹ This was as a result of a Memorandum of Understanding (MoU) between AALCO and the Government of Republic of Kenya which was signed on 3 April 2006 during the Forty-Fifth Annual Session of AALCO held in the Headquarters in New Delhi to establish a fifth Centre

¹⁴ Cap 108, Laws of Kenya

¹⁵ The Chartered Institute of Arbitrators Kenya Branch Constitution, Clause 2.

¹⁶ The Chartered Institute of Arbitrators Kenya Branch Website, Directory of Members, available at <http://www.ciarbkenya.org/membership.html> [Accessed on 08/01/2016].

¹⁷ Chartered Institute of Arbitrators, *Arbitration Rules*, December 2012.

¹⁸ The Chartered Institute of Arbitrators Kenya Branch Constitution, Clause 2(i) (a).

¹⁹ Asian-African Legal Consultative Organization, *Report on the AALCO's Regional Arbitration Centres*, para. 23, p.5.

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in Nairobi.²⁰ It is the third African Centre set up with the help of AALCO after the Cairo Regional Centre for International Commercial Arbitration, Egypt, and Lagos Regional Centre for International Commercial Arbitration, Lagos, Nigeria.²¹

Nairobi Centre for International Arbitration (NCIA) was established under the Nairobi Centre for International Arbitration Act, 2013.²² 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;²³ second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;²⁴ third, ensure that arbitration is reserved as the dispute resolution process of choice;²⁵ fourth, develop rules encompassing conciliation and mediation processes.²⁶

The Centre is administered by a Board of Directors provided for under Section 6 of the Act. The Board is already in place, with its membership drawn from Kenya, Rwanda and Uganda. 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 to act as the secretary to the Board. The Centre's offices are located at the Cooperative House, Haile Selassie Avenue, Nairobi. The Centre has a boardroom and it has already started

²⁰ Asian-African Legal Consultative Organization, *Report on the AALCO's Regional Arbitration Centres*, AALCO/51/ABUJA/2012/ORG 3, para. 7, p. 2.

²¹ The other two Centres established under the auspices of the Asian-African Legal Consultative Organisation (AALCO) include Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Kuala Lumpur, Malaysia and Tehran Arbitration Centre in Tehran, Iran.

²² Act No. 26 of 2013, Laws of Kenya.

²³ S.5 (a), No. 26 of 2013.

²⁴ *ibid*, S. 5(b)

²⁵ *ibid*, s.5(c)

²⁶ *ibid*, s. 5(d) Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;²⁶ 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;²⁶ to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;²⁶ 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;²⁶ to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;²⁶ to provide advice and assistance for the enforcement and translation of arbitral awards;²⁶ to provide procedural and technical advice to disputants;²⁶ to provide training and accreditation for mediators and arbitrators;²⁶ educate the public on arbitration as well as other alternative dispute resolution mechanisms;²⁶ 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. (s.5)

taking up matters.²⁷ The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015,²⁸ are to apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration.²⁹

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.³⁰ 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 is also to have fifteen other members all of whom should be leading international arbitrators. The Act is silent on the criteria to be used in appointing the members. However, it is expected that the membership will also be drawn from both domestic and international practitioners so as to enhance the capacity of the institution. The Centre has the capacity to handle domestic and international arbitration.

c. Centre for Alternative Dispute Resolution (CADR)

The Centre for Alternative Dispute Resolution is another registered where 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.³¹ Its Membership is drawn from the Chartered Institute of Arbitrators (Kenya branch).³² Currently, the Centre operates from the Chartered Institute of Arbitrators (Kenya branch) offices. The Centre differs from CIArb-K in that it is not a branch of any other institution and it is expected that in due course it will build capacity to act as an arbitral institution not just an association of professionals interested in arbitration and ADR.

²⁷ Nairobi Centre for International Arbitration, 'First Arbitration conducted at the NCIA boardroom,' available at http://ncia.or.ke/index.php?option=com_phocagallery&view=category&id=1:first-arbitration&Itemid=1263

²⁸ Legal Notice No. 255, *Kenya Gazette Supplement No. 210*, 24th December, 2015.

²⁹ *Ibid*, Rule 3.

³⁰ S. 22, No. 26 of 2013.

³¹ The Centre was registered under the *Companies Act* Cap 486 of the Laws of Kenya as Company limited by guarantee.

³² CIArb-K members become automatic members of CADR.

3.2 Tanzania

The Tanzanian *Arbitration Act*³³ was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent³⁴ as well as provisions on court-annexed arbitration.³⁵ Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*,³⁶ made under the Arbitration Act.³⁷ Tanzania is also a member of the International Centre for Settlement of Investment Disputes (ICSID)³⁸, and a signatory to the 1923 Geneva Protocol on Arbitration Clauses,³⁹ the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), and UNCITRAL Model Law of 1985 with its amendment of 2006.⁴⁰ It is however, noteworthy 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.⁴¹ 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 1992.⁴²

The current Arbitration Act of Tanzania does not follow the provisions of the ICSID and New York conventions. This is despite the fact that Tanzania is a signatory to the convention on the Recognition and Enforcement of Arbitration Awards (1958 New York convention). An international arbitration award will be deemed enforceable once it is filed and recognized by the

³³ Cap 15, Laws of Tanzania (2002 Revised Edition).

³⁴ *ibid*, ss. 3-26

³⁵ 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).

³⁶ Published in Government Notice 427 of 1957.

³⁷ S. 20, Chapter 15, Laws of Tanzania.

³⁸ Established pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between states and nationals of other states. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 Mar. 1965, 575 UNTS 159.

³⁹ Geneva Protocol, 1923: Protocol On Arbitration Clauses Signed At A Meeting Of The Assembly Of The League Of Nations Held On The Twenty-Fourth Day Of September, Nineteen Hundred And Twenty-Three, Entry Into Force, 28 July 1924, in accordance with article 6.

⁴⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.

⁴¹ For instance, Art. 7(2) of the New York Convention states that 'the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.' Despite this provision, Fourth Schedule to the Tanzania Arbitration Act still provides for their recognition.

⁴² 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 [Accessed on 27/04/2015].

local domestic court, subject to the provisions of the Arbitration Act of Tanzania.⁴³ Courts have attempted to promote and avoid interfering with arbitration in the country, although much more needs to be done by way of promoting institutional arbitration in the country. In *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v. Tanzania Electric Supply Company Limited (Tanzania)*,⁴⁴ it was held that the intervention by the national courts is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts. The Petitioner, TANESCO sought to resist the enforcement of the Final Award by the International Chamber of Commerce (ICC), on among other grounds, misconduct of the arbitrators by erroneously interpreting some of the provisions in the Public Procurement Act, 2004. Although the petition was dismissed with costs on the need for finality of arbitral awards and sanctity of agreement to arbitrate, the decision was later appealed to the Court of Appeal of Tanzania. It is noteworthy that there are two main arbitration institutions that administer arbitration references in Tanzania.

a. Tanzania Institute of Arbitrators (TIA)

The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the Societies Act of Tanzania (cap 337).⁴⁵ Together with the National Construction Council, TIA acts as facilitator, enabling the parties (in consultation with the parties' arbitrators) to agree ad hoc rules on the procedures which will bind them.⁴⁶ The institution has its own bespoke set of arbitration rules which it uses in conducting both domestic and international arbitration proceedings. They also jointly arrange short professional courses and examination for arbitrators and then compile a list of arbitrators available for proceedings.⁴⁷

b. National Construction Council (NCC)

This is a statutory body created under the *National Construction Council Act*.⁴⁸ 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

⁴³ S. 17, Arbitration Act, Cap 15, Laws of Tanzania; See also Kapinga, W.B., 'Registration and Enforcement of Arbitral Awards in Tanzania,' *The European, Middle Eastern and African Arbitration Review*, 2013. Available at <http://www.mkono.com/pdf/Tanzania2013.pdf>

⁴⁴ *Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539.

⁴⁵ Cap 337, Laws of Tanzania.

⁴⁶ 'Tanzania', *Arbitration in Africa*, June 2007, 5. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 27/04/2015].

⁴⁷ *ibid*.

⁴⁸ No. 20 of 1979, cap 162, Laws of Tanzania.

development of local capacity for socio-economic development and competitiveness in the changing global environment; and facilitating efficient resolution of disputes in the construction industry.⁴⁹ 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.⁵⁰

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

Organising more international arbitration forums where the local international arbitrators get to meet industry players and potential clients coupled with the institutions appointing local arbitrators to conduct international arbitrations may be some of the ways that may boost their profile. Despite the rigidity of the national framework on arbitration, it is important for the two institutions to ensure that their rules reflect international best practices so as to win the confidence of the international community and the users of international arbitration. They should be flexible enough to allow the parties considerable freedom to agree upon the lawyers to represent them, the procedure to be followed, the language of the arbitration and the tribunal to decide their dispute.⁵¹ However, due to the important role played by substantive law as far as recognition and enforcement are concerned, they should also push for review of the national framework to make it more receptive to international arbitration. This way, users of arbitration in Tanzania (and beyond) can confidently approach them for international arbitration services.

3.3 Uganda

Uganda's *Arbitration and Conciliation Act*⁵² was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Act also defines the law relating to conciliation of disputes.⁵³ Its provisions on arbitration apply to both domestic arbitration and international arbitration.⁵⁴ The national Courts

⁴⁹ National Construction Council (NCC) Functions, available at <http://www.ncc.or.tz/functions.html> [Accessed on 27/04/2015].

⁵⁰ *ibid.*

⁵¹ See Latham & Watkins, *Guide to International Arbitration*, (2015 Latham & Watkins), p. 17.

⁵² 2000, Cap 4, Laws of Kenya.

⁵³ CAP 4, Laws of Uganda, Preamble.

⁵⁴ *ibid.*, S. 1.

may assist in taking evidence,⁵⁵ setting aside arbitral awards⁵⁶ and recognition and enforcement of the arbitral awards.⁵⁷ Uganda is also a contracting state to the New York Convention⁵⁸ having assented to the same on 12 Feb 1992.⁵⁹

a. Centre for Arbitration and Dispute Resolution (CADRE)

Uganda's *Arbitration and Conciliation Act* establishes the Centre for Arbitration and Dispute Resolution (CADRE).⁶⁰ The Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and forms for effective performance of arbitration, conciliation or Alternative Dispute Resolution processes; 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.⁶¹

This is the main arbitral institution in Uganda. Despite the existence of the Centre, available data paints a picture where even the international investors in the country do not trust the Centre to carry out arbitration competently. For instance, in *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v. Republic of Uganda*,⁶² a dispute relating to a production sharing agreement between the Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited (“the Claimants”) and the Government of Uganda (Respondent) concerning the exploration, development and production of petroleum was forwarded to the International Centre for Settlement of Investment Disputes (“ICSID”). The request was for arbitration for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”).

⁵⁵ *ibid*, s. 27.

⁵⁶ *ibid*, s. 34.

⁵⁷ *ibid*, ss. 35 & 36.

⁵⁸ The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

⁵⁹ See <http://www.newyorkconvention.org/countries>

⁶⁰ *ibid*, s. 67.

⁶¹ *ibid*, s. 68.

⁶² ICSID Case No. ARB/13/25.

Although, later on the Parties jointly informed the Tribunal that they had reached a settlement agreement and requested that the Tribunal issue an order taking note of the discontinuance of the proceeding pursuant to Rule 43(1) of the ICSID Arbitration Rules, a number of things were clear from the facts of the case. Noteworthy from the case is that none of the appointed arbitrators was of African origin. The three arbitrators as appointed by parties were: a national of the United States and Switzerland; a national of Bangladesh; and a national of the United States. Even arbitrators from Uganda were evidently missing from the list of appointees.

While acknowledging parties' autonomy in choice of arbitrators, it is a matter of great concern that African arbitrators are not considered competent to handle such matters. The above scenario thus raises the issue of bias and it is not limited to Uganda but it is reflected across the region. 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.⁶³ 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.⁶⁴

The place of the proceedings also was not anywhere in the African Continent but London, England. This is despite the existence of a number of Centres for international arbitration in Africa in such places as Rwanda, Egypt, Nigeria and Mauritius. The reason may have been the same age old concern on the suitability of African arbitrators to represent companies or even governments in such disputes, where developing states, for one reason or another, mostly prefer to appoint their

⁶³ LexisNexis and Mayer Brown International LLP, "Arbitration in sub-Saharan Africa," 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 [Accessed on 27/04/2015]

⁶⁴ Rule 1(2) & (8).

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non-nationals as arbitrators, citing amongst other reasons or excuses, lack of individuals with sufficient clout, knowledge, exposure and contacts to be appointed as international arbitrators.⁶⁵

It has been observed that “[a]n established and well-organized arbitral institution can do much to ensure the smooth progress of an international arbitration even if the parties themselves- or their legal advisers- have little or no practical experience in the field.⁶⁶ CADRE may, therefore, have to do more especially with regard to qualification and accreditation of arbitrators to ensure that they can competently handle international arbitration and win the confidence of investors and other consumers of international arbitrators in the country and beyond. This includes ensuring that the arbitrators get platforms to showcase and advertise their skills for potential appointments. Notably, this may apply to the other countries in East African region and beyond.

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, 2009.⁶⁷

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.⁶⁸ Rwanda also has a national arbitration law based on the Model Law – *Law No. 51/2010 of 10/01/2010 Establishing the Kigali International Arbitration Centre and Determining its Organisation, Functioning and Competence*.⁶⁹ This Act is a modern arbitration law, based on the UNCITRAL Model Law on International Commercial Arbitration.⁷⁰ Rwanda has one arbitration institution that operates independently and has its set of arbitration rules and facilities.

⁶⁵ Asouzu, A.A., ‘Some Fundamental Concerns and Issues about International Arbitration in Africa,’ *African Development Bank Law Development Review*, Vol. 1, p. 81, 2006, p.84.

⁶⁶ Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edition, London: Sweet & Maxwell 1991, p. 155 (As quoted in Asouzu, A.A., ‘Some Fundamental Concerns and Issues about International Arbitration in Africa,’ *African Development Bank Law Development Review*, Vol. 1, p. 81, 2006, p.86).

⁶⁷ 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].

⁶⁸ Law No 51/2010 Of 10/01/2010, Laws of Rwanda.

⁶⁹ Official Gazette n°09 bis of 28/02/2011.

⁷⁰ Oppong, R.F., *Legal Aspects of Economic Integration in Africa*, (Cambridge University Press, 2011), p. 240.

a. Kigali International Arbitration Center (KIAC)

Kigali International Arbitration Center (KIAC) was established as an independent body which administers mediation, adjudication and arbitration. The Centre has a panel of domestic and international arbitrators.⁷¹ Parties to KIAC arbitrations are free to nominate their arbitrators, in accordance with the KIAC Rules⁷². However, when KIAC is called upon to appoint an arbitrator, it does so primarily from its panel of arbitrators.⁷³

It is noteworthy that until the establishment of the KIAC, there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.⁷⁴

KIAC holds a potent potential to promote development of international arbitration in the region and Africa as a whole. The institution is operational and only time will tell its success in achieving its objective.

3.5 Burundi

In 2007, the Burundian Government created the Burundian Centre for Arbitration and Mediation to deal with commercial and investment disputes.⁷⁵ In 2009, *Investment Code of Burundi*⁷⁶ was enacted with the purpose of encouraging direct investments in Burundi.⁷⁷ This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. The Code guarantees foreign investors access to international arbitration.⁷⁸

In 2014, Burundi became the 150th state party to the *New York Convention* 1958. Burundi, however, made a “commerciality reservation” to the Convention. The Convention came into 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

⁷¹ Kigali international Arbitration Centre website, available at <http://kiac.org.rw/spip.php?rubrique25> [Accessed on 26/04/2015].

⁷² *Kigali International Arbitration Centre Rules*, 2012 (KIAC, 2015). Available at <http://www.kiac.org.rw/IMG/pdf/-3.pdf>

⁷³ Kigali international Arbitration Centre website.

⁷⁴ Kigali International Arbitration Center, *Annual Report July 2012-June 2013*, 4.

⁷⁵ Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

⁷⁶ Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi.

⁷⁷ *Ibid*, Art. 2.

⁷⁸ *Ibid*, Art. 17.

states to be enforceable in Burundi.⁷⁹ Burundi is also a signatory to the ICSID Convention, having assented to it on 5th November 1969.

Although, international arbitration in Burundi is supported by the legal framework, there is however, no verifiable evidence of any matters that have been handled by the Burundi Centre for Arbitration & Mediation, an indication of the slow progress in international institutional arbitration in the country.⁸⁰ Burundi Centre for Arbitration and Mediation, thus, requires to do much more in projecting its profile for the international community.⁸¹

3.6 East African Court of Justice

The East African Court of Justice (the Court), is one of the organs of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community.⁸² The East African Community is a regional intergovernmental organization comprising the Governments of Burundi, Kenya, Rwanda, Tanzania and Uganda with the aim of establishing the East African economic, social, cultural and political integration.⁸³

The Court has jurisdiction over the interpretation and application of the treaty.⁸⁴ It also has arbitral jurisdiction on matters arising from a) 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; b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or c) arising from an arbitration clause contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court.⁸⁵

⁷⁹ 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].

⁸⁰ See Ibus.com, USA International Business Publications, *Burundi Mineral & Mining Sector Investment and Business Guide: World Strategic and Business Information Library*, (Int'l Business Publications, 2013), p. 128.

⁸¹ See Baghdadli, I., et al (eds), *Breaking the Cycle: A Strategy for Conflict-sensitive Rural Growth in Burundi: Main Report, January, 2008*, (World Bank Publications, 2008).

⁸² Treaty for the Establishment of the East African Community (EAC), Adopted on November 30, 1999 at Arusha Entry into force on July 7, 2000 (Amended on 14th December, 2006 and 20th August, 2007).

⁸³ Preamble, EAC.

⁸⁴ Art. 27.

⁸⁵ Art. 32.

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The Court has East African Court of Justice Arbitration Rules, 2012,⁸⁶ made under Article 42 of the Treaty for the Establishment of the East African Community.⁸⁷ Despite the existence of the arbitration rules and competent Judges, it is not clear the number of arbitration matters that the Court has handled.⁸⁸

4. Challenges

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

4.1 Effectiveness of Arbitration as a Process

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.⁸⁹ This may create an impression that courts are entertaining litigation at the expense of arbitration, thus, scaring away any potential users of arbitration. Parties who are keen on having their disputes settled faster may avoid jurisdictions where they feel that they may be dragged in courts for longer than necessary. This has the effect of denying the local institutions a chance to handle international arbitration matters.

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 arbitration matters. Much more needs to be done to enhance their capacity

⁸⁶ East African Court Of Justice Rules Of Arbitration, EACJ, Arusha, Tanzania, March 2012.

⁸⁷ Rule 1 provides that unless the parties to arbitration agree otherwise:- (a) these Rules shall apply to every arbitration under Article 32 of the Treaty; b) the parties to any arbitration may agree in writing to modify or waive the application of these Rules; c) where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.

⁸⁸ Nsekela, H.R., 'Overview Of The East African Court Of Justice,' A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011. Available at <http://eacj.huriweb.org/wp-content/uploads/2013/09/Overview-of-the-EACJ.pdf>

⁸⁹ 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-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."

Effectiveness of Arbitration Institutions in East Africa

in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to the task in facilitation of international arbitration.⁹⁰

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 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.⁹¹ This has denied the local arbitrators the fora to put their skills and expertise in arbitration to use since disputants shun the local arbitral institutions, if any, for foreign institutions.⁹²

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.⁹³ 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.⁹⁴

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

⁹⁰ Muigua, K., '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', 14. Available at <http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf> [Accessed on 06/07/2014].

⁹¹ 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/40/17, annex I*) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985), 3.

⁹² 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 [Accessed on 05/05/2015]

⁹³ Julian D.M. Lew, 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

⁹⁴ KIAC Panel Of International Arbitrators, available at 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.

(perceived or real) added benefit of non-interference from national courts as well as ease of enforcement of awards.

East African arbitral institutions should ensure that, while it is allowed for parties to pick persons of their choice in terms of preference and expertise, they afford them a pool of qualified arbitrators from which they may consider appointment. 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. The institutions should take advantage of this to boost the visibility of the local arbitrators and the affiliated institutions in the region.

4.3 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.⁹⁵ 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.⁹⁶ In drafting the clause, a number of factors touching on the potential arbitral institutions are considered.

4.4 International Arbitration Users' Concerns

The few arbitration institutions in East Africa, as discussed above, are either still in their teething stage or struggling with making a name for themselves around the region. The institutions are either an association of professionals offering ad hoc arbitration and those that have been constituted as arbitral institutions still require to build capacity to attract international arbitration. Even where international arbitration appointments and references have been made, there is little evidence of the local institutions being involved. International arbitral institutions outside the

⁹⁵ McLaughlin, J.T, "Arbitration and Developing Countries," (n74) p. 215.

⁹⁶ See generally Ngotho, P., "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 (CADR) International Arbitration Conference held at Whitesands Beach Hotel, Mombasa, 7- 8th August, 2014. Available at <http://www.ngotho.co.ke/PathologicalArbitrationClauses.8.8.14.pdf> [Accessed on 09/05/2015].

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region are still popular with parties operating from the East African region. This includes the governments in the region and this state of affairs does little to win the trust of investors in approaching the local institutions for international arbitration services.

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.⁹⁷

Government bureaucracy is another concern especially in matters that involve Government institutions as one of the parties in the arbitration. 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. Government proceedings Acts may also 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.⁹⁸

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.

⁹⁷ See Chikwanha, A.B., 'The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development,' *Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, The Netherlands*, Theme for 2007-Development Policy and the Security Agenda for Africa: Reassessing the Relationship, available at <https://www.issafrica.org/uploads/EACANNIE.PDF> [Accessed on 27/01/2016]; Ikome, F. N., 'Africa's International Borders as Potential Sources of Conflict and Future Threats to Peace and Security,' Institute for Security Studies,' paper no. 233, May, 2012.

⁹⁸ For instance, s.21 of Kenya's Government Proceedings Act, Cap 40, Laws of Kenya Revised Edition 2015 [2012] provides for a special procedure for satisfaction of orders against the Government.

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.⁹⁹ To ensure that African parties gain confidence with African international arbitration institutions, such institutions need 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.¹⁰⁰ 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.

5. 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

⁹⁹ McLaughlin, J.T., "Arbitration and Developing Countries," (n74) p. 215.

¹⁰⁰ Carbonneau, T.E., "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].

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 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.¹⁰¹

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 the Kenya National Chamber of Commerce and Industry (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.

6. Conclusion

Effective and reliable application of international 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.

¹⁰¹ Muigua, k., 'Promoting International Commercial Arbitration in Africa', 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>

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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