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

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By Kariuki Muigua*

1.0 Introduction

This paper casts a critical look at the state of the legal and institutional framework governing arbitration in Kenya. It further explores the extent to which the said framework has provided the requisite infrastructure needed for the successful practice of Arbitration. The paper also discusses the place of International Commercial Arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined; opportunities for improvement are analysed. The discourse ends with an analysis of what Kenya and indeed the East African region needs to do to enhance the practice of International Commercial Arbitration and to make it a regional hub for the same.

2.0 Background

Arbitration is one of the Alternative Dispute Resolution (ADR) Mechanisms which involve a neutral third party in the settlement of disputes. Arbitration has been described as a private consensual process where parties in dispute agree to present their grievances to a third party for settlement.[1] Perhaps more descriptive is Lord Justice Raymond's definition in which he defined an arbitrator as 'a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them and arbitrators are so called because they have arbitrary power: for if they observe the submission and keep within their due bonds their sentences are definite from which there lies no appeal.[2]

Arbitration matters in Kenya are mainly governed by the *Arbitration Act*[3] and the Rules therein. However, arbitration is also conducted under the *Civil Procedure Act*[4]. Section

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[1] Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.
[2] B. Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*, (Sweet & Maxwell, London, 2003), p. 21.
[3] 1995, Act No. 4 of 1995(Amended in 2009)
[4] Cap 21, Laws of Kenya.

59C (1) of the Act provides that *a suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral*.[5] The provision also provides that where an award is reached under the section and the same is entered as the court's judgement, no appeal shall lie against it. Further, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under order of a court and other alternative dispute resolution mechanisms. It provides that parties can apply to court to have a matter referred to arbitration.[6] It provides for the procedural guidelines therein. Section 59D of the Act further demonstrates the courts' supportive role in arbitration and ADR mechanisms in the pursuit of justice. It provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court*.[7] This is an appreciation of ADR mechanisms in facilitating access to justice by ensuring that parties get to settle their matters.

The practice of arbitration in Kenya has also been enhanced through Article 159 of the current Constitution of Kenya, 2010 (hereinafter the constitution)[8] which provides for promotion of alternative forms of dispute resolution as one of the guiding principles of the Kenyan courts while exercising judicial authority. These forms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The above move is aimed at the realization of Article 48 of the constitution which places a mandatory obligation on the State to ensure access to justice for all persons and, if any fee is required, such should be reasonable and should not impede access to justice. One of the ways that this objective can be achieved is through the promotion and practice of arbitration as one of the means of access to justice by the public.

Arbitration as one of the Alternative Dispute Resolution Mechanisms (ADR) is not a new concept to the Kenyan People and Kenyan legal regime in general. Indeed the current law on Arbitration, *Arbitration Act*[9], has had two predecessors which are the colonial Arbitration Ordinance of 1914 which was more or less a replica of the English Arbitration Act of 1889 and the now repealed *Arbitration Act*, Cap 49. These two Acts gave immense powers to courts with little or no regard to the parties' autonomy.

In 1968, a locally drafted Act was enacted in the form of *Arbitration Act*, Cap 49 and was drafted along the English *Arbitration Act* of 1950. This was later repealed by the current *Arbitration Act*, Act No. 4 of 1995. This Act was substantially amended in 2009 and now it

[5] S.59C(1), Cap 21, Laws of Kenya
[6] R. 46, Civil Procedure Rules, 2010
[7] Section 59D, Cap 21
[8] Government Printer, Nairobi, 2010

reflects the main principles of the UNCITRAL Model law to which Kenya is a signatory[10]. These are amongst others, minimal court intervention in matters of arbitration.[11]

3.0 Legal and Institutional Framework on Arbitration in Kenya

3.1 Arbitration Act, No. 4 of 1995

As already noted elsewhere in this paper, the substantive law governing arbitration matters in Kenya is the *Arbitration Act* [12](hereinafter the Act). The preamble to the Act provides that it is an 'Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes'. Regarding the scope of the Act, section 2 thereof provides that except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration. 'Arbitration' is defined under section 2 to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitration between states has been defined as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.[13] Parties must voluntarily agree to be bound by the decision to be given by the arbitrator according to the law or if so agreed other considerations after a full hearing, such decision is enforceable at law.

In Kenya, arbitration is generally subject to statutory control to the extent provided for in the Act. For a dispute to be settled through arbitration there must be a prior arbitration agreement. Section 3 of the Act defines 'arbitration Agreement' to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'

The parties in arbitration therefore need not have any pre-existing contractual relationship under the Act. Section 4(1) provides for the forms of arbitration agreement. It recognises that the agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. However, it is mandatory that the agreement be in writing as per section 4(2) of the Act. The section attempts a definition of "writing". It could be contained in a document signed by the parties or an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provides a record of the agreement. An agreement could also be contained in an exchange of statements of claim

[10] Kenya acceded to the law in 1989 but with reservation on reciprocity.
[11] Section 10, Arbitration Act, No. 4 of 1995
[12] Act No. 4 of 1995
[13] R.M.M Wallace, *International Law*; A student Introduction, (Sweet and Maxwell, London, 1997), p. 282

and defence in which the existence of the agreement is alleged by one party and not denied by the other.[14]

3.1.1 Powers of Courts under the Act: Theory and practice

Section 10 of the Act provides for the extent of court intervention in arbitration proceedings. It provides that *except as provided in this Act, no court shall intervene in matters governed by this Act*. On the face of it, the Act seems to keep to the minimal the number of instances when the national courts will intervene in arbitral matters. However, there are exceptions provided for under the Act where courts will come in either to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. Herein below is a summary of some of the other powers that have been granted to the national court with regard to arbitration proceedings:

(a) Power to determine the number of arbitrators

Section 11(1) of the Act gives High court the power to determine the number of arbitrators if parties fail to agree on the same.

(b)Power to set aside appointment of arbitrator and to appoint an arbitrator

Section 12 of the Act gives the court the power to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s).

(c) Power to grant Interim Measures of Protection

Section 7 of the Act gives the High Court the power to grant interim measures of protection where a party so requests. However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application.

(d) Power to decide on an application by a party for challenging an arbitrator

Section 14(1) of the Act grants the High Court the power to decide on an application by a party in arbitration proceedings challenging an arbitrator.

(e) **Power to decide on the termination of the mandate of an arbitrator**

Section 15(2) grants the High Court powers to decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so.

(f)Powers to stay legal proceedings

Section 6 of the Act confers the High court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration.

[14] S. 4(2), No. 4 of 1995

(g) **Determination of jurisdiction of tribunal**

Section 17 gives the High court the powers to make the final decision on the question of jurisdiction of the arbitral tribunal.

(h) **Court assistance in taking evidence**

Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.

(i) **Power to set aside arbitral awards**

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Section 35(1) is to the effect that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the Court will not act in such matters unless a discontented party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award.

Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.[15]

The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was also observed in the Kenyan case of *Nancy Nyamira & Another V Archer*

[15] S. 35(2) (b), Act No. 4 of 1995

Dramond Morgan Ltd[16], where it was observed that '*...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act*'.

(j) **Power to determine questions of law arising in domestic arbitration**

Section 39(1) of the Act confers the High Court the power to determine any question of law arising in the course of the arbitration if a party makes an application in that regard. Further, an appeal by any party may be made to the court on any question of law arising out of the award for determination. However, this section is to the effect that prior to any application being made, parties must have agreed that such applications can be made to the court. This is an illustration of limited court powers in the matter and the court will rarely act on its own motion.

3.1.2 Recognition and Enforcement of arbitral awards

Section 36(1) confers the High Court powers to recognize and enforce domestic arbitral awards as binding upon application by parties for the same. Section 36(2) provides for the recognition of international arbitral awards as binding and enforceable in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.[17] The Convention, in principle, applies to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations:

> When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether

[16] Civil Suit 110 of 2009, [2012]eKLR

[17] Section 36 (5), Act No. 4 of 1995, (Act No. 11 of 2009, s. 27) "*(5) In this section, the expression "**New York Convention"** means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.*

contractual or not, which are considered as commercial under the national law of the State making such declaration.[18]

The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.[19]

In the Kenyan case of *Glencore Grain Ltd V TS.S.S Grain Millers Ltd*,[20] an international award that was entered in England and the applicant sought to have it recognised and enforced by Kenyan Courts. However, the courts were not willing to enforce the same on technical grounds of non compliance. The award took more than ten years before recognition and enforcement could be realized.

3.1.3 Grounds for refusal of recognition or enforcement

Section 37 provides for grounds upon which the High Court may decline to recognise and/or enforce an arbitral award at the request of the party against whom it is invoked, if that party furnishes to the High Court proof of: party's incapacity; legally invalid arbitration agreement; party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made. The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence. Further, an award arising out of matter not capable of settlement by arbitration under the Kenyan law or one whose recognition or enforcement would be against public policy will not be recognised or enforced by the Court. [21]

[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Reservations, Available at http://interarb.com/nyc/reservations Accessed on 11th May, 2013
[19] Ibid.
[20] Civil Case 388 of 2000 [2012] eKLR
[21] S. 37(1)(vii), No. 4 of 1995

3.1.2 Court Practice

Although the Act provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one where on the one hand courts seem to recognise and acknowledge that arbitration should bear minimum court interference while on the other hand they appear to violate this important objective of the Act of minimal court interference. This is especially well demonstrated when it comes to the issue of recognition and enforcement of arbitral awards.

The court has no legal right to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara*.[22] Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.[23]

The court of Appeal in this case held that it was wrong for the High court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The position clearly indicates that courts will not interfere with arbitration unnecessarily. Courts in their facilitative role have affirmed that the provisions of section 36 are mandatory. However, other cases give conflicting signs. This is especially where courts decline enforcement of awards on grounds of public policy. This may cause delay in enforcement of awards. In the foregoing case of Hinga, the Court of Appeal observed that had the superior court played a supportive role as contemplated in Section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided. The Court also stated that '*it follows therefore all the provisions invoked except Section 35 and 37 do*

[22] Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR
[23] Ibid.

not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd*** *1989 KLR 1.'*

In the Indian case of *Renusagar Power Company Ltd vs. General Electric Company* (1994) AIR 860, the Supreme Court of India observed;

> *"While observing that "from the very nature of things the expressions 'public policy', 'opposed to public policy' or 'contrary to puplic(*sic*) policy' are incapable of precise definition", this court has laid down: . . . Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."(*Emphasis added)

In Kenya, public policy was defined by Ringera J (as he then was), in ***Christ For All Nations vs. Apollo Insurance Co. Ltd***[24] in the following words: -

> *"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:*
>
> *a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
> *b) inimical to the national interest of Kenya; or*
> *c) Contrary to justice and morality."*

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a dispute commercial parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.[25] Further, International

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[24] [2002] 2 EA 366
[25] Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, *International Arbitration Insights*, 18 June 2008,

arbitration has been regarded as being very effective in the international business arena since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations and the awards can only be challenged on very limited grounds.[26]

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 economic development for Kenya and the region. However, all is not lost because as recently as January, 2013 a new Act was enacted as an effort to lay a further legal framework for international arbitration in Nairobi, Kenya.[27]

3.2 *Nairobi International Centre for Arbitration Act*, No 26 of 2013

Nairobi International Centre for Arbitration Act, No 26 of 2013 is an Act of Parliament to provide for the establishment of a regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.[28]

This legislation may have been borne out of the recognition that Nairobi is yet to become an attractive destination for foreign investors seeking the services of international institutional arbitrators. Lack of an elaborate legal and institutional framework on arbitration and excessive court interference in arbitration matters may be cited as some of the contributory factors to this phenomenon. To correct this situation, the *Nairobi International Centre for Arbitration Act* was enacted. It establishes the Nairobi Centre for international arbitration.[29]

As an attempt to safeguard the spirit and purpose of this Act, section 3 of the Act provides that '*where there is any conflict or inconsistency between this Act and the provisions of any other Act in matters relating to the purpose of this Act, this Act shall prevail'*. This purpose is set out in the preamble to the Act. Section 5 of this Act provides for the functions of the established Centre as inter alia to: firstly, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;[30] secondly, administer domestic and international arbitrations as well as alternative dispute resolution techniques

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Available at http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/2008

[26] Ibid.

[27] *Nairobi International Centre for Arbitration Act*, No 26 of 2013

[28] See preamble to the Act.

[29] S. 4(1), No. 26 of 2013, '*There is established a centre to be known as the Nairobi Centre for International arbitration'*

[30] Section 5(a), No. 26 of 2013

under its auspices;[31] and thirdly, maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives.[32]

On the issue of independence from interference by national courts, this Act establishes an independent tribunal whose decisions on matters of arbitration under the Act shall be final and binding. Section 21(1) provides for the establishment of a Court to be known as the Arbitral Court. Section 22(1) of the Act provides that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. Section 22(2) further provides that a decision of the Court in respect of a matter referred to it shall be final.

Regarding the applicable law to matters before the Arbitral Court, Section 23 of the Act provides for the application of Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications in line with the rules of procedure of the arbitral Court.

Section 24 of the Act provides that *nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms*. This Section 24 is advantageous in a number of ways. Firstly, the court as a result is able to oversee the exercise of a wider number of ADR mechanisms thus enhancing party autonomy. Where the Court sends the parties away at the request of one of them, it is a sign of recognition of the autonomy of the parties in the process with regard to reaching a consensus on the matter. Secondly, the cost involved may be minimized since the charges applicable to the various ADR services are different depending on the professionals involved. Less serious matters can therefore be referred to less formal processes. Thirdly, the time spent in reaching a consensus may be reduced thus enhancing expediency in settlement of disputes. Some of these mechanisms are non coercive and may thus lead to 'win win' solutions to commercial disputes and eventual resolution on terms that parties can live with.[33]

3.3 Institutional Framework

There are a few institutions in the country that have been established under specific regimes and are therefore mandated with conducting arbitration under such laws. It is noteworthy that

[31] Section 5(b), No. 26 of 2013
[32] Section 5(g), No. 26 of 2013
[33] Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter six, pp79- 88

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.

3.3.1Chartered Institute of Arbitrators-Kenya Branch

The Chartered institute of Arbitrators (Kenya Chapter) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, which was founded in 1915 with headquarters in London. 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 300 registered members, has a wide pool of knowledgeable and experienced Arbitrators and facilitates their appointment. 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' Rules when conducting the arbitral proceedings.

This Institute thus plays an important role in the promotion of ADR in Kenya and the region.

3.3.2 Nairobi Centre for International Arbitration

This 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;[34]second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;[35] third, ensure that arbitration is reserved as the dispute resolution process of choice;[36] fourth, develop rules encompassing conciliation and mediation processes.[37] Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;[38] 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;[39] to maintain

[34] S.5(a), No. 26 of 2013
[35] Ibid, S. 5(b)
[36] Ibid, s.5(c)
[37] Ibid, s. 5(d)
[38] Ibid, s.5(e)
[39] Ibid, s. 5(f)

proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;[40] 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;[41] to establish a comprehensive library specializing in arbitration and alternative dispute resolution;[42] to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;[43] to provide advice and assistance for the enforcement and translation of arbitral awards;[44] to provide procedural and technical advice to disputants;[45] to provide training and accreditation for mediators and arbitrators;[46] fourteenth, educate the public on arbitration as well as other alternative dispute resolution mechanisms;[47] 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[48], *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.[49] 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.[50] This greatly enhances its competence in handling international arbitration.

3.3.3 Centre for Alternative Dispute Resolution

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition

[40] Ibid, s.5(g)
[41] Ibid, s. 5(h)
[42] Ibid, S.5(i)
[43] Ibid, S.5(j)
[44] Ibid, S.5(k)
[45] Ibid, S.5(l)
[46] Ibid, S.5(m)
[47] Ibid, S.5(n)
[48] Ibid, S.5(o)
[49] S. 22, No. 26 of 2013

[50] Ibid, S. 21(2)

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.

4.0 Commercial and International Arbitration in Kenya and the Eastern Africa Region

Arbitration of international commercial disputes has become a popular practice amongst business persons and corporations. This has tremendously grown with the development of the commercial industry internationally and the concept of globalisation. Indeed it has rightly been observed that the increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business and the preferred methods of resolving international disputes, a trend that is likely to continue into the 21st Century.[51]

We have already mentioned in this paper that 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. [52]

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

[51] Vinod K. Agarwal, 'Alternative Dispute Resolution Methods' in Document No. 14 *Alternative Dispute Resolution Methods*, Chapter 1, page 2 , A Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf Accessed on 3rd May, 2013
[52] Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

following places is situated outside the state in which the parties have their places of business 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.[53]

The *Nairobi Centre for International Arbitration Act* also provides for both domestic and international arbitration under section 5 which provides for the functions of the established Centre as indicated elsewhere in this paper.

4.1 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.[54] This is a show of Kenya's commitment to adopting international best practices 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 under section 23 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.
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.

5.0 Challenges Facing the Practice of International Commercial arbitration

The challenges facing enforcement of foreign and international arbitral awards are what these provisions seek to address. These challenges are discussed herein below:

[53] Section 3(3) (Act No. 11 of 2009, s. 2)
[54] This was included in the Act through the Act No. 11 of 2009, s. 27. (2009 amendment to the Arbitration Act, 1995)

5.1National Courts Interference

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. As seen in the foregoing discussion, there are the instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or the award is against public policy. Though public policy has been defined in the Kenyan context[55], the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem of Kenya but the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot,* [56]the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.[57]

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

5.2 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.

5.3 Institutional capacity

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

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[55] *Christ for all Nations v Apollo Insurance Company ltd*, Op cit.

[56] Civil Appeal 3343/2005 - 12 October 2011

[57] Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, *Clayton Utz Insights*, 08 December 2011, 'The move towards widening the possibilities for rejecting claims for enforcement of foreign arbitral awards means that there is less certainty for those who contract with Indian companies.'

5.4 Endless court proceedings

Sometimes matters will be appealed all the way to the highest court on the law of land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending[58]**.** This delays finalisation 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.

6.0 Prospects

If the foregoing challenges are fully addressed, then Nairobi and indeed the whole region have a promising future as a regional hub for international commercial arbitration. This is especially so with the expansion of regional trade and the revival of the East African Community.[59]

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. If the regional players can come up with common regional arbitral bodies that handle arbitration matters from any of the countries and deliver decisions with finality of their awards, then arbitration will become faster as much of the time is usually lost in applications to national courts for review of the award.

The arbitration laws in the region can successfully be harmonized especially through ensuring the full incorporation and enforcement of the favourable principles found in the international arbitration Instruments. This way, the challenge of complex laws will have been dealt with.

The region should also be marketed aggressively as an international hub for international arbitration. The marketing should be done both within and beyond the region. In the region, a campaign should be launched to sensitize the key players in the Government, the judiciary, legal practitioners and business community so as to support arbitration in all possible aspects.

[58] Kariuki Muigua, *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at http://www.kenyalaw.org/klr/index.php?id=824
[59] Kariuki Muigua, Settling Disputes Through Arbitration in Kenya, Op cit. page 221.

7.0 Conclusion

Making East Africa a Hub for International Commercial Arbitration is a dream that is realizable. The legal and institutional frameworks to support international commercial arbitration must be strengthened to meet the foregoing challenges that bedevil the system.

It is important to promote international arbitration in the region as a means of strengthening the rule of law in the region and beyond.[60] The practice is also likely to boost business in the region as parties will feel that their interests are well protected in any of the countries in the region that they choose to settle any disputes in through arbitration. What is required now is the political goodwill to ensure that the legal instruments are fully implemented.

The time to realize that dream is now. The time to harness the opportunities that international commercial arbitration can deliver is now.

[60] Patricia O'Brien, *Keynote speech,* The Mauritius International Arbitration Conference, Balaclava, Mauritius, 10 December 2012 page 1

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