

Nurturing International Commercial Arbitration in Kenya

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Abstract

This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.

1.0 Introduction

This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.

2.0 International Commercial Arbitration in Kenya: Legal and Institutional Framework

It is noteworthy that international arbitrations take place within a complex and vitally important international legal framework that comprises *inter alia*: contemporary international conventions, national arbitration legislation, and institutional arbitration rules, all of which provide a specialized and supportive enforcement regime for most

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international commercial arbitrations and international investment arbitrations¹.

Further, it has been observed that the international legal regimes for international commercial and investment arbitrations have been established, and progressively refined with the express goal of facilitating international trade and investment by providing a stable, predictable, and effective legal framework in which these commercial activities may be conducted³. This is justified on the ground that enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.⁴

The basic legal framework for international commercial arbitration was established in the first decades of the twentieth century, with the 1923 Geneva Protocol and 1927 Geneva Convention, the enactment of national arbitration legislation that paralleled these instruments and the development of effective institutional arbitration rules.⁵ Further, the current legal regime for international commercial arbitration was developed in significant part during the second half of the twentieth century, with countries from all parts of the globe entering into international arbitration conventions (particularly the New York Convention) and enacting national arbitration statutes designed specifically to facilitate the arbitral process; at the same time, national courts in most states gave robust effect to these legislative instruments, often extending or elaborating on their terms.⁶

It is in recognition of this fact that Kenya, being a key player in international trade and a preferred international investments destination has put in place a legal framework for the recognition and promotion of international commercial arbitration. Arbitration in Kenya is generally governed by the *Arbitration Act*⁷ and the Arbitration Rules therein. However, it is worth mentioning that although the words international commercial arbitration are not expressly provided for under the domestic laws on arbitration in Kenya, its inclusion can be inferred from the Arbitration Act, 1995⁸. This is because section 3(1) of the Act defines “arbitration” to mean *any arbitration whether or not administered by a permanent*

¹ *Introduction to International Arbitration*, page 1.

Available at <http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf> [Accessed on 08/10/2021]

² *Ibid.*

³ *David L. Threlkeld & Co. v. Metallgesellschaft Ltd*, 923 F.2d 245, 248 (2d Cir. 1991) as quoted in *Introduction to International Arbitration*, op.cit. Page 1.

⁵ *Ibid*

⁶ *Ibid*

⁷ 1995, Act No. 4 of 1995(Amended in 2009) [Revised Edition 2019.] Government Printer, Nairobi

⁸ Introduced by Arbitration Amendment Act No. 11 of 2009, s. 2.

arbitral institution. Even more significant is section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of the Act shall apply to domestic arbitration and international arbitration (emphasis added)*.

Section 3(3) defines an international arbitration as one where: *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; one of the following places is situated outside the state in which the parties have their places of business – the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or any place where a substantial part of the obligations of the commercial relationship (emphasis added) 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*.

The inclusion of the phrase commercial relationship in the definition of international arbitration can be construed to mean that the Kenyan *Arbitration Act* contemplates international commercial arbitration. In addition to enacting the *Arbitration Act, 1995* for domestic and international arbitrations, in legislation that was promulgated in 1995, Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC)⁹ and to *International Convention on the Settlement of Investment Disputes* (ICSID)¹⁰ both of which deal with international commercial arbitration.

Section 36(2) of the *Arbitration Act* provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the *New York Convention*¹¹ or any other convention to which Kenya is signatory and relating to arbitral

⁹ The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. The 1958 New York Convention is an important convention in the recognition and enforcement of foreign arbitral awards and this is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

¹⁰ 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967)

¹¹ The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. 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 contractual or not, which are considered as commercial under the national law of the State making such declaration. The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.

awards¹².

The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award¹³. These grounds include where a party furnishes proof to the High Court that a party to the arbitration was under some incapacity, the arbitration agreement is not valid under the law to which the parties have subjected it, the 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 and the the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.¹⁴ The High Court may also refuse recognition or enforcement of an arbitral award where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.¹⁵

3.0 Extent of Court Intervention in arbitration

The Kenyan Arbitration Act has as far as possible attempted to reflect the international best practices in international commercial arbitration. For instance, Section 10 of the Act states that *except as provided in this Act, no court shall intervene in matters governed by this Act*. The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world.¹⁶ The English Arbitration Act provides that *'in matters governed by this Act the court should not intervene except as provided by this Act¹⁷.'* Further, the UNCITRAL Model Law on International Commercial Arbitration provides that *'in matters governed by this law, no courts shall intervene except where so provided in this law¹⁸.'*

Thus, it has rightly been observed that *the role of courts should therefore be merely facilitative*

¹² The importance of the arbitration clause in an agreement is that any court proceedings commenced are stayed pending the settlement of the dispute by arbitration. An arbitral award can be enforced by the leave of the High Court of Kenya in the same way any court order or decree is enforced.

¹³ Arbitration Act, No.4 of 1995, Sec. 37; For a further discussion on the role of court, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012.

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ Muigua.K., *Arbitration Law and the Right of Appeal in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf> (accessed on 09/10/2021)

¹⁷ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c)

¹⁸ UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.

*otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act.*¹⁹

Courts in Kenya have pronounced themselves on the issue of judicial intervention in arbitration. The Supreme Court of Kenya in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*²⁰, stated as follows:

[52] *We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, "the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process." It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "expeditious and efficient way of handling commercial disputes."*

[53] *Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the "finality and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.*

Further, the Supreme Court of Kenya in *Geo Chem Middle East -vs- Kenya Bureau of Standards*²¹ decided as follows:

41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to

¹⁹ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015).

²⁰ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*, Petition No. 12 of 2016, (2019) eKLR

²¹ *Geo Chem Middle East -vs- Kenya Bureau of Standards*, Petition No. 47 of 2019 (2020) eKLR

follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.

A similar position was also held by the Supreme Court in *Cape Holdings Limited -vs- Synergy Industrial Credit Limited*²² where the Supreme Court reiterated the decision in *Geo Chem Middle East -vs- Kenya Bureau of Standards* (supra) and refused to entertain an appeal emanating from the Court of Appeal, where the Court of Appeal had assumed jurisdiction and delivered a consequential judgment in conformity with the principles established in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (Supra).

The precedent flowing from the above decisions highlights the extent of court intervention in arbitration in Kenya. The Arbitration Act envisages a narrow window of court intervention within the confines of sections 35 and 39. However, the Act also allows intervention by the High Court to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. 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.

Section 11(1) of the Act confers the High court the power to *determine the number of arbitrators* if parties fail to agree on the same. Regarding the appointment of arbitrators, Section 12 of the Act confers the court the power to *appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s)*. Section 7 of the Act confers 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. 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*. Further, Section 15(2) grants the High Court powers to

²² Cape Holdings Limited -vs- Synergy Industrial Credit Limited, Application No.5 of 2021

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.

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

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 implication here is that the Court will not act in such matters unless a dissatisfied party invites it to do so. The grounds which the applicant must prove 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*²³.

Kenya has enacted an Act of Parliament in an effort to nurture international commercial arbitration in the country²⁴. The object of the *Nairobi Centre for International Arbitration Act* is 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 among other purposes²⁵. The Act establishes a centre known as the Nairobi Centre for International Arbitration²⁶. The functions of the Centre include to *inter alia: promote, facilitate and encourage the conduct of international commercial arbitration in accordance*

²³ Arbitration Act, No.4 of 1995, S. 35(2) (b)

²⁴ Nairobi Centre for International Arbitration Act, No 26 of 2013, Government Printer, Nairobi

²⁵ Ibid, Recital

²⁶ Ibid, Sec 4

*with this Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute resolution process of choice*²⁷. Also noteworthy is the fact that the Act establishes a Court to be known as the Arbitral Court²⁸. The Court is to 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 and its decisions are to be final*²⁹. These provisions are useful in guaranteeing confidentiality and non-interference ordinary national courts. Also significant is the provision 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 to matters governed by the Act*³⁰.

4.0 Challenges Facing the Practice of International Commercial Arbitration in Kenya

4.1 Inadequate Legal and Institutional Framework on international commercial Arbitration

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Kenya³¹. This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Progress has made towards addressing this challenge such as the enactment of the Nairobi Centre for International Arbitration Act and the subsequent establishment of the Nairobi Centre for International Arbitration under section 4 of the Act. However, 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 matters³². Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

²⁷ Ibid, Sec 5

²⁸ Ibid, Sec 21

²⁹ Ibid, Sec 22

³⁰ Ibid, Sec 23

³¹ Muigua. K, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf> [Accessed on 08/10/2021];

³² 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, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf> (accessed on 08/10/2021)

4.2 Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators³³. 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 interests³⁴. This portrays Africa to the outside world as a place where there are no qualified arbitrators to be appointed as international commercial arbitrators.

4.3 Inadequate Marketing

Kenya and the African continent in general have been portrayed as less developed in terms of handling international commercial arbitration, and little has been done in marketing of Kenya as a centre for international commercial arbitration³⁵. Many people outside Africa still carry with them the perception that Africa does not have adequate qualified international commercial arbitrators. They have therefore not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption³⁶.

4.4 Uncertainty in Drafting Arbitration Clauses

There is the need to draft the arbitration clause in a clear manner to avoid misinterpretation. Uncertainty in drafting arbitration clauses has always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres³⁷. There is also need to ensure

³³ See generally, Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', *African Development Bank, Law for Development Review*.

Available at <https://www.mcgill.ca/files/isid/LDR.2.pdf> [Accessed on 08/10/2021].

³⁴ Daele. K., & De Reya. M, 'Africa's track record in ICSID proceedings' *Kluwer Arbitration Blog*, 30 May 2012, available at <http://kluwarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid-proceedings/> [Accessed on 08/10/2021].

³⁵ Muigua. K., Promoting International Commercial Arbitration in Africa', op. cit. page 15.

³⁶ Lovells.H, 'Arbitrating in Africa'. Available at http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-Hogan_Lovells_March_2013.pdf [Accessed on 08/10/2021].

³⁷ Drafting of arbitration clause will depend on what law informs it. For instance, jurisdictions that have embraced UNCITRAL Model Law will adopt this law while those that are not signatories may have different laws informing the same. This may result in conflict in the understanding of such a clause.

that the instances of court intervention are kept to the minimum so as to boost the confidence of commercial disputants in the willingness of courts to uphold the outcome of the international commercial arbitrations held in the country.

4.5 Interference by National Courts

Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act³⁸. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are contemplated under the Model Law.

However, it has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings³⁹. Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending⁴⁰. This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

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

4.6 Uncertainty of Costs

It has been observed that arbitration is now a service industry, and a very profitable one at that with the arbitral institution, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale⁴¹. There have not been very

³⁸ Arbitration Act, No.4 of 1995, S 10

³⁹ Muigua.K., *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>

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

⁴⁰ Ibid

⁴¹ Lord Mustill, *Arbitration: History and Background* (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 10. Available at <http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlineMaterials/2012/internationalCommercialArbitration/Mustill1989.pdf> [Accessed on 08/10/2021].

clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability⁴².

4.7 Perception of Corruption

A bleak image is painted to the international community regarding the governance system in place in Kenya. This hinders the expansion of the scope of international commercial arbitration as the view is taken to imply that justice is impossible to achieve in Africa. Further, it has been argued that at times governments are also perceived to be interfering with private commercial arbitration matters⁴³. 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.⁴⁴

4.8 Bias against Africa

With racism still existing in society, Africa has borne the blunt of it with the bias rendering Africa's image as a corrupt and uncivilized continent. 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 choice⁴⁵.

5.0 Way Forward

In the face of globalisation, it is important that international trade and investment take place with minimal interference by territorial barriers such as unnecessary domestic courts' intervention⁴⁶. It has been asserted that the settlement of disputes between parties

⁴² See CI Arb Kenya Website Available at www.ciarkkenya.org [Accessed on 08/10/2021].

⁴³ 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, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf> (accessed on 08/10/2021)

⁴⁴ Ibid

⁴⁵ Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001. PP. 5-6 Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf> [Accessed: 08/10/2021].

⁴⁶ See generally United Nations, Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992. Available at

to an international transaction, arbitration has clear advantages over litigation in national courts. The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges⁴⁷. In contrast with international commercial arbitration parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria*⁴⁸ of a trade. They can also appoint a person of their choice having expert knowledge in the field⁴⁹. Thus, it is argued that these and other advantages are only potential until the necessary legal framework can be internationally secured, at least providing that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision⁵⁰.

There is a need to employ mechanisms that will help nurture and demonstrate Kenya to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators. There is also the need to put in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This ranges from legislating comprehensive law on international commercial arbitration as well as setting up world class arbitration centres in Kenya to complement the Nairobi Centre for International Arbitration (NCIA). There is also the Centre for Alternative Dispute Resolution (CADR) which is an initiative by the Chartered Institute of Arbitrators, Kenya and was incorporated in May, 2013. Its objective is to establish and maintain a regional

http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf [Accessed on 08/10/2021].

⁴⁷ Albert Jan van den Berg, 'The New York Arbitration Convention of 1958', T.M.C. Asses Institute, The Hague, 1981, *Kluwer Law and Taxation Publishers*. Page 1.
Available at www.newyorkconvention.org/userfiles/.../312_nyac-i-in-one-document. [Accessed on 08/10/2021].

⁴⁸ It has been rightly noted that though called the "lex mercatoria," the merchants' law was not statutory law in any country nor was it enforceable in any national Court. The "law merchant" was a more or less unwritten code representing the trade customs and trade practices habitually and uniformly observed by the merchants of every great trading city or country. As traders made their way laboriously from one country to another with their merchandise for sale or barter, with them they carried not merely their goods but also their own law. It, and not the national law of their own country or of the country in which they happened to be, applied as between them in regard to all commercial transactions. It was enforced by consular courts held in any country by itinerant consuls who accompanied groups of their own national merchants to the great fairs in that country. [See Lynden Macassey, *International Commercial Arbitration, – Its Origin, Development And Importance*, *American Bar Association Journal*, Vol. 24, No. 7 (July 1938), pp. 518-524, 581-582, page 519. Available at <http://www.jstor.org/stable/25713701> [Accessed: 09/10/2021].

⁴⁹ Ibid

⁵⁰ Ibid

Dispute Resolution Centre in the country. The CADR is a positive step towards nurturing international commercial arbitration in Kenya⁵¹. This will afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration and will also attract international clients from outside Africa. It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions. These include: modern arbitration rules; modern and efficient administrative and technological facilities; Security and safety of documents; Expertise within its staff; and some serious degree of permanence⁵².

There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malaw⁵³i. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.

There is also need for the existing institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the exiting institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. There is need for all African centres and institutions to do the same to promote international commercial arbitration in Africa.

The Kenyan law on arbitration appreciates the need to limit court intervention in arbitration to a basic minimum⁵⁴. It has been argued that the relationship between the courts and the arbitral process can be made much closer, both practically and psychologically⁵⁵. The psychological link can be strengthened by encouraging all or at least

⁵¹See CIArb Kenya Website, Op. Cit.

⁵² See Muigua.K, 'Promoting International Commercial Arbitration in Africa', op.cit. page 14; See also Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21st Century through Arbitration & ADR* Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at < http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf> 1. [Accessed on 08/10/2021].

⁵³ See CIArb Kenya Website, Op. Cit.

⁵⁴ Arbitration Act, No.4 of 1995, S 10

⁵⁵ Muigua. K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers Limited, 3rd Edition, 2017

a good number of the commercial judges and advocates to take up training in arbitration and consequently ensuring that they benefit from having prior experience of arbitration either as representative advocates or actual arbitrators⁵⁶. This will subsequently boost the confidence of foreigners in the African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration in Kenya has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously.

6.0 Conclusion

There is need to develop a clear framework in Kenya within which international commercial arbitration can be further nurtured. There are arbitral institutions already in place in Kenya as highlighted in this paper. The presence of such institutions in the country points to an acceptance of alternative dispute resolution modes as well as the need to nurture the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement⁵⁷. With the right frameworks in place, Kenya indeed has the capacity to conduct successful international commercial arbitration. Nurturing international commercial arbitration in Kenya is a necessity whose time has come⁵⁸.

⁵⁶ Lord Mustill, *Arbitration: History and Background* (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 4.

⁵⁷ Muigua.K, 'Promoting International Commercial Arbitration in Africa', op. cit. page 15.

⁵⁸ For a further discussion on the role of court, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012.

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