

School for Advanced Legal Studies – Faculty of Law

UNIVERSITY OF CAPE TOWN

From Litigation to Arbitration:

**Promoting International Commercial Arbitration Through
Harmonisation in the East African Community**

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DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Signed by candidate

Sophie Nakueira

ABSTRACT

Important scholarship argues that adopting modern arbitration laws is a necessary requirement for promoting a region as a suitable venue for holding international commercial arbitration and attracting Foreign Direct Investment. This thesis takes a next step. With its main focus on the East African Community, the thesis advocates the need for placing developing countries' dispute resolution mechanisms in the broader context of economic development. It argues that there is a need for legal reform of the old arbitration legislation in the region. Furthermore, it posits that adopting a uniform statute on international commercial arbitration is essential to achieving the economic goals of the East African Community.

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ABBREVIATIONS

AALCC- Asian African Legal Consultative Committee

ADR- Alternative Dispute Resolution

EAC – East African Community

ICC-International Chamber of Commerce

FDI - Foreign Direct Investment

FTA- Free Trade Agreement

LCIA-London Court of International Arbitration

MNC- Multi National Corporations

NYC- New York Convention

OHADA- Organisation pour l'Harmonisation en Afrique du Droit des Affaires

OHBLA-Organisation for the harmonisation of Business laws in Africa.

AU- African Union

UAA- Uniform Arbitration Act

UN- United Nations

UNCITRAL- United Nations Commission on International Trade Law

NIEO- New International Economic Order

TABLE OF CONTENTS

DECLARATION	ii
ABSTRACT.....	iii
ACKNOWLEDGEMENT	iv
ABBREVIATIONS	v
Chapter 1	1
Introduction.....	1
1.1. What is international commercial arbitration?.....	2
1.2. International Commercial Arbitration in the EAC.....	3
1.3. Why Promote International Commercial Arbitration in the EAC	4
1.4. Method of Study.	5
1.5. Structure and Argument of the Thesis	6
Chapter 2.....	8
IMPORTANCE OF ARBITRATION IN INTERNATIONAL COMMERCE.....	8
2.1. Introduction.....	8
2.2. International Business and Commercial Transactions: Importance of Dispute Clause.....	8
2.3. Arbitration over litigation: ‘The Popularity of Arbitration as a Choice’	12
2.3.1. Arbitration as an Alternative to Litigation: Relevant Considerations.	13
2.4. The Current state of Arbitration in the East African Community	18
2.5. Importance of the Seat of Arbitration	24
Chapter 3.....	27
LEGAL REFORM AND ECONOMIC DEVELOPMENT	27
3.1 Introduction.....	27
3.2. Why Arbitration has not developed in the East African Community.	27
3.3. Impact of Arbitration on Economic Development in the East African Community.	36
3.3.1. Legal Reform and Economic Development: What are the links?.....	37
3.4. Impact of those problems on the choice of East Africa as a desirable venue for international commercial arbitration.....	40
3.5. Rationale for Legal Reform	42
Chapter 4.....	48
THE CHOICE BETWEEN OHADA’S UAA AND THE MODEL LAW	48
4.1. Introduction.....	48
4.2. Arbitration Legislation: Options for the East African Community	49
4.3 Factors to Consider When Comparing OHADA and UNCITRAL Model Law	52
4.4. UNCITRAL Model Law and the OHADA Uniform Arbitration Act: A Comparison.....	53

4.5. The Model Choice: Why Countries in the East African Community Should Adopt the Model Law.	56
Chapter 5.....	60
HARMONISATION: LESSONS FOR THE EAST AFRICAN COMMUNITY	60
5.1. Introduction.....	60
5.2. Why Harmonise Arbitration Laws?.....	61
5.3. The Need for Harmonisation of Arbitration Laws in the East African Community.	63
5.4. Adopting the Model Law: How the EAC countries can translate the Model Law in their National Legislations.....	64
5.5. Harmonisation of National Arbitration Laws: Possible challenges.....	66
Chapter 6.....	70
THE WAY FORWARD	70
6.1. CONCLUSION.....	72
BIBLIOGRAPHY.....	75

Chapter 1

Introduction

“Gentlemen, I fervently trust that before long the principle of arbitration may win such confidence as to justify its extension to a wider field of international differences.”

Henry Campbell- Bannerman (1836-1908).

When Henry Campbell-Bannerman made the above statement, he predicted the future of arbitration with astonishing certainty. To borrow Bannerman’s words, arbitration has indeed ‘extended’ to such a ‘wide field of international differences’ that it has now established itself as the preferred method for resolving international commercial disputes.¹ Over the past couple of years, arbitration has become the most popular choice for resolving cross-border disputes such as commercial and investment ones.² Due to the increase in cross-border commercial arbitrations, the international business community thought it best to develop rules on arbitration that would be internationally accepted.³

This thesis looks into the state of international commercial arbitration in the East African Community and the factors affecting its growth in the region.

The central question which this thesis seeks to answer is: to what extent do outdated laws impact on economies of countries in the East African Community. Another related question is: to what extent do outdated laws make the East African Community an undesirable place to host international commercial arbitrations?

¹ Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.1. Also See Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) Oxford University Press, Inc., New York. p.1.

² The European & Middle Eastern Arbitration Review 2008, The International Journal of Public and Private Arbitration available at <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/72/preface> [Dec 3 2008].

³ *ibid*

1.1. What is international commercial arbitration?

For the purposes of this thesis, arbitration means the ‘process whereby a third party determines a dispute between two or more parties in the exercise of a jurisdictional mandate entrusted to him by the [disputing] parties.’⁴ The power entrusted to the arbitrator, in addition to the binding force of his award, distinguishes arbitration from other forms of Alternative Dispute Resolution (ADR).⁵ Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration gives a generally accepted definition of what an international Arbitration entails.⁶ According the UNCITRAL Model Law, an international arbitration is one where:⁷

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States: or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(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 country.

The intended scope of commercial arbitration for the purposes of this thesis is borrowed from a note to Article 1 (1) of the UNCITRAL Model Law which was prepared by the drafters:

The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following

⁴ Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) Oxford University Press, Inc., New York. p.3.

⁵ *ibid.*

⁶ Article 1(3) (a)-(b) of the UNCITRAL Model Law on International Commercial Arbitration, (hereinafter, the ‘Model Law’ or ‘UNCITRAL Model Law’).

⁷ *ibid.*

transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works.....carriage of goods or passengers by air, sea, rail or road.⁸

This thesis shall use the term ‘international’ broadly in reference to arbitration proceedings with a foreign element. For instance, an arbitration involving parties having their place of business in different states who hold arbitration proceedings in one of those states or another country will be described as an international arbitration.⁹ Another scenario may be that parties whose places of business are in the same country may opt for arbitration in a third state.¹⁰

1.2. International Commercial Arbitration in the EAC

The East African Community is a regional organisation comprising of the republics of Kenya, Uganda, Tanzania, Rwanda and Burundi.¹¹ This regional organisation aims at increasing cooperation among partner states in the economic field among other areas.¹² Indeed, a look at these countries’ economic policies¹³ leaves no doubt that they are open to foreign investment and want to encourage foreign investment.

Unfortunately, despite their favourable investment packages, these countries’ dispute resolution mechanisms for international commercial disputes are still wanting. Of the five countries that are members of the East African Community, only Uganda and Kenya have updated legislation on international commercial arbitration.¹⁴ Sadly, having the latest laws on international arbitration has not promoted the use of

⁸ Cited in Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) Oxford University Press, Inc., New York at p.5.

⁹ Richard Garnett, ‘International Arbitration Law: Progress towards Harmonisation. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf) [Jan 12, 2009].

¹⁰ *ibid.*

¹¹ <http://www.eac.int/> [Jan 31, 2009].

¹² *ibid.* The EAC has ambitions to ‘widen and deepen’ cooperation in the political and social fields as well. This thesis will however limit its scope to the economic field.

¹³ According to the 2008 Investment Climate of Burundi, the government of Burundi’s official policy towards foreign direct investment is ‘generally free of restrictions on potential investors and designed to promote direct investment. Available at <http://www.state.gov/e/eeo/ifd/100833.html> [Feb 16, 2008]. Rwanda is also reported to have a welcoming foreign investment package in both policy and practice. Uganda as well is said to have a favourable investment package according to the Investment Climate reports conducted by the United States.

¹⁴ Rwanda has only recently updated its law on arbitration and conciliation. It came into force in March 2008.

international arbitration in Uganda or Kenya. In fact it is reported that most parties opt for arbitration outside the region because of outdated laws on arbitration or poorly conducted proceedings.¹⁵ There is a general lack of growth of international commercial arbitration in the region even among those countries that have adopted modern legislation on the matter.

1.3. Why Promote International Commercial Arbitration in the EAC

Despite the ever expanding literature on the evolution of international commerce and the effectiveness of international commercial arbitration as a dispute resolution tool, a thorough discussion of the legal developments in the context of international commercial arbitration in the East African Community is missing. My thesis seeks to fill this gap.

With the liberalisation of market structures, trade and investment transactions have expanded substantially to include the participation of parties and state entities from different jurisdictions.¹⁶ Unfortunately the very countries that are in dire need of gaining equality in international trade are the same countries that have had little to no participation in the process of formulating 'modern rules of application in the field of international commercial arbitration'.¹⁷ Countries in the East African Community cannot afford to ignore the field of international commercial arbitration especially now that there is a Customs Union signed in the region.¹⁸ Therefore, those countries that have outdated legislation on arbitration need to reform their laws in that field or at a minimum adopt the necessary laws that will meet the needs of the international business community.¹⁹

¹⁵ www.mkono.com. According to Mkono and Co Advocates, most parties opt for ICC or LCIA arbitrations because of the poorly conducted arbitration proceedings in Tanzania.

¹⁶ Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' 41 ICLQ 388 1992.

¹⁷ Clive M. Schmitthoff, 'Progressive Development of the Law of International Trade' in *Report of the Secretary General* (UN Doc. A/6396, para 210) reprinted in (1968-70) I (1) UNCITRAL Y.B.II posits that African countries have hardly participated 'in the field of harmonisation, unification and modernisation of the laws of international trade.

¹⁸ Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' 41 ICLQ 401, 1992. Sempasa argues that 'in the light of current trends towards a global market place that no trading nation can afford to neglect altogether the field of international arbitration.'

¹⁹ *ibid.*

1.4. Method of Study.

First, because the thesis posits a link between Legal reform of arbitration legislation and economic growth, Chapter 3 discusses whether or not there is a causal effect of outdated legislation on economies in general. Secondly, after establishing a link between legal reform and its impact on economies, the thesis seeks to elaborate on the importance of the type of legal reform chosen in achieving economic growth (this is discussed in chapter 4). It does so by comparing legal statutes on international commercial arbitration to find out which one would be suitable for adoption by the East African Community to better achieve the goal of economic growth. It omits the option of having the countries draft their own laws because this would be too cumbersome a process and would make harmonisation of the different arbitration laws a rather daunting task. Hence it proposes a choice between the only plausible statutes on international commercial arbitration for countries in Africa- the choice between OHADA's²⁰ Uniform Arbitration Act and the UNCITRAL²¹ Model Law on international commercial arbitration.

The thesis also suggests that harmonisation of arbitration laws or the adoption of a modern legislation on arbitration by the member countries will make the community a suitable venue for hosting international commercial arbitration proceedings.

The fact that there are many²² countries that have adopted the UNCITRAL Model Law on international commercial arbitration means that any meaningful discussion on on international commercial arbitration or harmonisation of arbitration laws must include the Model Law.²³ The number of countries that have adopted the Model Law 'constitute a large and representative geographical, legal-cultural, and economic sample of the international community.'²⁴ Thus, it is implicit that the Model Law

²⁰ Organisation pour l'Harmonisation en Afrique du Droit des Affaires (hereinafter 'OHADA' or the OHADA Treaty).

²¹ United Nations Commission on International Trade Law (hereinafter the 'Model Law').

²² For a list on the number of countries that have adopted the Model Law, please visit <http://uncitral.org> [Jan 30, 2009].

²³ The UAA has only 16 member states to date mostly French speaking countries as opposed to the Model Law which has been adopted by approximately 47 countries.

²⁴ Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) Oxford University Press Inc., New York. p.16.

represents the views of the international commercial community on various rules on how international commercial arbitrations should be conducted.

1.5. Structure and Argument of the Thesis

This thesis explores the possibility of increasing economic growth through legal reform of outdated arbitration legislation in the member countries of the East African Community. It posits that the reform of outdated arbitration laws; in particular the adoption of the UNCITRAL Model Law and the ratification of the New York Convention by the member countries will attract Foreign Direct Investment in the region. Additionally, it argues that changing outdated arbitration laws would make the East African Community an attractive venue to host international commercial arbitrations.

The thesis is divided into six chapters. After the introduction by Chapter 1, Chapter 2 discusses the risks involved in international business that make international arbitration a popular choice over litigation for resolving cross border commercial disputes. It analyses relevant considerations that parties contemplate when making the choice between litigation and arbitration for their dispute resolution clause. Further, it gives a detailed overview of the current arbitration legislation in the East African Community. It concludes with a discussion on the importance of the seat of arbitration in the 'physical' and 'legal' sense.

Chapter 3 discusses the issues hindering the growth of international commercial arbitration in East African Community. It showcases the challenges faced by lawyers in the region when dealing with matters concerning international commercial arbitration. Central to this chapter is the argument that the lack of growth of international commercial arbitration, particularly the problems plaguing its practice in the region, may discourage Foreign Direct Investment in the region. This would in turn have a negative impact on the economy of the countries in this region. This chapter posits the argument that in order to encourage economic growth in the region, there is a need for legal reform of the outdated arbitration laws.

Chapter 4 seeks to elaborate on the importance of the type of legal reform chosen in achieving the goal of economic growth and making the East African region an

attractive place for holding international commercial arbitrations. This chapter will undertake a detailed analysis of the options available to the East African Community for unifying or harmonising the divergent arbitration laws in the member countries. In particular, it will compare the Uniform Arbitration Act of OHADA and the UNCITRAL Model Law to establish which of the two arbitration legislations is suitable for adoption by the East African Community.

Chapter 5 argues that members of the East African Community need to adopt the Model Law on International Commercial Arbitration if they want to realise their economic goals. The central argument in this chapter is that apart from increasing their economic opportunities, the adoption of the Model Law would also make the East African Community an attractive venue for holding international arbitration. This is because the Model Law has greatly influenced national arbitration statutes world wide and is therefore recognised by the international business community.

Chapter 6 makes recommendations for improving the state of international arbitration in the East African Community. It posits that there is no better time than the present for governments in the various countries of the East African Community with outdated arbitration legislation to take note of the current changes that are taking place in international commerce. It concludes that the East African Community cannot afford to ignore the demands of international commerce if they have any ambitions of integrating into the global market.

Chapter 2

IMPORTANCE OF ARBITRATION IN INTERNATIONAL COMMERCE

2.1. Introduction

Arbitration has been the *modus operandi* for resolving international commercial disputes in developed countries for several decades and it has gradually expanded across the world.²⁵ The increase in cross-border commerce around the globe has led parties to seek for other methods of resolving disputes that are neutral and more in line with generally accepted norms in the international commercial community.²⁶ Thus, increased economic integration has brought about the need for a mechanism for resolving international commercial disputes that matches the evolving 'socio-economic dynamics in international trade relationships'.²⁷

The New York Convention has played an important role in promoting international arbitration. The fact that arbitral awards can be recognised and enforced in the various member states has greatly promoted the trend towards international commercial arbitration.²⁸ Parties involved in international commercial transactions are assured that arbitral awards will be enforced no matter the country of origin.²⁹

2.2. International Business and Commercial Transactions: Importance of Dispute Clause

Contractual relationships in International commercial transactions are usually more complicated than ordinary contracts due to the usually long duration of the

²⁵ The European & Middle Eastern Arbitration Review 2008, & *The International Journal of Public and Private Arbitration*.
<http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/72/preface> [Dec 3, 2008].

²⁶ *ibid.*

²⁷ See Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 403. 1992.

²⁸ *op cit* note 26.

²⁹ This is subject to mandatory provisions where enforcement is sought and provided that the award is not successfully challenged on the grounds provided for in Art V of the New York Convention. However, it is noteworthy that some States have made the declaration that they will apply the Convention only if the State in which the award was granted is a Contracting State of the New York Convention. See Article 1, 3.

contracts.³⁰ Depending on the length and complexity of the contractual relationship between the parties to the contract, these parties are more susceptible to risks and uncertainties that plague complex international contracts.³¹ This is not to say that ordinary contracts are not exposed to the same risks; rather it is my proposition that disputes are more likely to arise between parties to international commercial transactions due to the usually long duration of such contracts. In order for the business transaction to be of any benefit to the parties involved, much of the transaction will depend on the way the way these parties handle the conflict.³² Should parties include an arbitration agreement or forum selection clause?³³ This goes without question. In addition to choosing a governing law, international contracts should always specify the means by which a dispute should be resolved should one arise.³⁴ Failure to address such issues in the initial contract will unavoidably cause the parties unwarranted complications financially or otherwise due to their inability to enforce their contractual obligations.³⁵

These parties will then be faced with two rather unappealing choices that may prove to be unachievable at this stage of their contractual relationship. The first option would be to conclude a dispute resolution clause with respect to the dispute at hand.³⁶ This choice makes the parties confront the same obligations they avoided at the time of concluding the contract; only this time they are highly unlikely to reach an agreement due to the tense relationship between them.³⁷ This does not necessarily mean that this choice would have been much easier before the dispute arose. However, practical experience in international commercial transactions has shown that parties that are feuding are less likely to reach an agreement on what forum to

³⁰ Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.3. Generally see Joachim G. Frick, *Arbitration and Complex International Contracts* (2001) Kluwer Law International.

³¹ *Op cit* note 31.

³² Scott, *Risk Distribution and Adjustment in Long Term Contracts*, in *The Complex Long Term Contract* 51(Nicklisch ed.,1997).

³³ Charles N. Brower and Abby Cohen Smutny, 'Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations' in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*, p.37. The author posits that the parties usually wonder whether it is necessary to include an arbitration agreement or forum selection clause.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Charles N. Brower *op cit* note 33 at p.37-38.

settle their dispute, even where a valid arbitration clause exists.³⁸ Therefore, it can be deduced from such circumstances that in absence of a dispute resolution clause such an agreement would prove impossible to conclude, especially where relations between the contracting parties are fragile because it is unlikely that they will amicably agree on how to resolve the dispute when relations between them are bad.

The second option would be for the claimant to file suit in a national court. The court will have to assume jurisdiction over the subject matter and the defendant as well. There is no telling whether the claimant will be familiar with the law to be applied in that court since there is likelihood that the relevant national court where the suit is filed could be foreign to the claimant.³⁹ Moreover, success of such a suit is highly dependant on whether or not the judgement rendered is enforceable in the country where the defendant's assets are located.⁴⁰ This is particularly the case in the absence of any treaty obligations between states, since states are not obligated to recognise extraterritorial foreign judgements.⁴¹

There is also the possibility that the national courts of a number of countries may claim to have jurisdiction over the same dispute. This may in turn lead to parallel suits being filed in several courts; a venture that may not only lead to the possibility of conflicting judgements being rendered but may also cost the parties dearly in time and money.⁴²

Despite the possibility that a chosen forum may rely on the doctrine of *forum non conveniens* in refusing to accept jurisdiction, including a choice of forum clause in international commercial contracts decreases the chances of parallel suits from being filed. Therefore, although it is understandable that no party wants to anticipate the possibility that a dispute may arise in future; especially when negotiating a contract

³⁸ Charles N. Brower *op cit note 33* at p.37-38.

³⁹ *ibid* at p.38.

⁴⁰ *ibid*. Also see Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* P.5-6. She states that judgments of national courts are usually unenforceable outside the country where they are rendered, particularly without treaty obligations.

⁴¹ Katherine Lynch *op cit note 40* at p.6.

⁴² *ibid* at p.5.

for a business transaction, those parties who fail to prepare for such eventualities end up paying a hefty price when a dispute arises.⁴³

Several years ago, international business contracts and commercial transactions with foreign investors were mainly reserved for governments in many of the African countries. However, that has increasingly changed.⁴⁴ Many entrepreneurs have joined the field of international trade and many more continue to enter a range of international business relationships.⁴⁵

Additionally, regional and multilateral Free Trade Agreements have decreased the restrictions on multilateral-trade and have not only increased access to local markets but have also promoted greater freedom for cross-border transactions.⁴⁶ Moreover, there has been an increase in the amalgamation of economic and legal cultures around the globe.⁴⁷

Many financial institutions, including international ones, have started including arbitration clauses in their contracts.⁴⁸ Some of the institutions that have included international arbitration clauses are the European Bank for Reconstruction and Development, the World Bank and the Overseas Private Investment Corporation, among many others. Moreover, Bilateral Investment Treaties and Free Trade Agreements have introduced international Arbitration to a variety of new investment disputes.⁴⁹

These developments in international arbitration have concurrently led to the participation of entrepreneurs, lawyers and arbitrators from different legal, economic and cultural backgrounds.⁵⁰ Arbitrators in international arbitral proceedings are usually from countries that are different from those of the parties to the proceedings or

⁴³ Charles N. Brower at p.38.

⁴⁴ See Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 403. 1992.

⁴⁵ *Op cit note 44.*

⁴⁶ Katherine Lynch at p.23.

⁴⁷ *ibid.*

⁴⁸ Gary Born and Rachael Kent, 'The internationalisation of International Commercial Arbitration'. Available at www.wilmerhale.com/files/Publication/ [Dec 3, 2008].

⁴⁹ *ibid.*

⁵⁰ *ibid.*

their legal representatives.⁵¹ In the interest of impartiality and in adherence to matters of due process, arbitral tribunals endeavour to accommodate parties from different legal systems by providing a neutral forum for resolving the parties' dispute.⁵² Mandatory laws permitting, tribunals often refrain from applying local rules of civil procedure that would otherwise be applicable in national court proceedings.⁵³ The next section of this chapter will discuss a few of the issues that make arbitration in international commercial contracts a popular choice over litigation.

2.3. Arbitration over litigation: 'The Popularity of Arbitration as a Choice'⁵⁴.

When negotiating commercial contracts, prudent parties seek to minimise risks in every possible way from the very beginning.⁵⁵ Thus, in making a decision as to how potential disputes should be resolved, each party is reluctant to submit itself to the state courts of the other party.⁵⁶ This reluctance hinges on the fear that the national courts of the other party might be biased in favour of their national or that the idea of defending its interest in an unfamiliar setting (i.e. the notion of unfamiliar laws and possibly a foreign language) may not be appealing to either party.⁵⁷ Therefore, it is vital that the parties agree to a neutral forum for the resolution of their disputes. Even though a court in another country that is not that of the parties might be considered a neutral forum, (assuming that the court in the neutral country even accepts jurisdiction) empirical evidence⁵⁸ shows that arbitration is by far the most popular choice for resolving disputes; particularly for international commercial transactions.⁵⁹

⁵¹ Gary Born and Rachael Kent, *op cit* note 48.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ Charles N. Brower *op cit* note 33 at p.38.

⁵⁵ Charles N. Brower *op cit* note p.38.

⁵⁶ *ibid.*

⁵⁷ *ibid.* This is sometimes referred to as the 'home ground advantage'. However, it should be noted that litigating in a foreign court does not necessarily mean that the law of that court will be applied.

⁵⁸ Alessandra Casella, 'On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration' on p.3 says that a survey of the Netherlands Arbitration Institute shows that 'more than 80% of private international contracts have clauses providing that disputes will be resolved by arbitration. Also the results of a survey conducted in the United States revealed that of the 250 commercial associations involved in international trade, 82% use arbitration. Also see Georgios Petrochilos, *Procedural Law in International Arbitration*, p.1 stating that arbitration has become the preferred choice for resolving international commercial disputes.

⁵⁹ *Supra* at 55.

There are a number of reasons why this is the case. This section shall discuss in detail some of the perceptions that parties have in mind when making the decision to include an arbitration clause as part of their international commercial contract.

Due to the fact that many people perceive arbitration to be a friendlier way of resolving disputes than litigation, there is an increase in the number of standardized form contracts providing for arbitration that are used in international commercial transactions.⁶⁰

Although this may not necessarily apply to the business community or their legal representatives in the member countries of the East African Community (due to their inadequate knowledge of the benefits that arbitration has to offer), it has been posited that many business people prefer arbitration because it is perceived to be confidential, informal, very efficient and that the costs involved are relatively low. Most of these perceptions vary from case to case and the next section will address those perceptions. Additionally, other factors that parties weighing the choice between arbitration and litigation should consider will also be discussed.⁶¹

2.3.1. Arbitration as an Alternative to Litigation: Relevant Considerations.

Cost and Expeditiousness

It is a common, albeit not always true assumption, that arbitration is cheaper and less time consuming than litigation.⁶² Can arbitration be faster and less expensive? The answer to this question is 'most certainly.' However, this is not always the case. Arbitration just like any other adversarial process may be expensive and time consuming especially if one of the parties is willing and able to spend considerable resources to defend its position and can exploit dilatory tactics to his or her benefit.⁶³ In some aspects, the very characteristics that make arbitration more appealing than litigation are the same aspects that frame its disadvantages. For instance, the fact that

⁶⁰ *Supra* note 58.

⁶¹ Charles N. Brower *op cit* note 33 at p.39.

⁶² Brower states that the assumption that arbitration is cheap and fast is considered one of the main advantages of arbitration over litigation. Charles N. Brower and Abby Cohen Smutny, 'Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations' in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*. p.41.

⁶³ Charles N. Brower *op cit* note 33 at p.42.

it is flexible and dependant on the mutual consent of both parties may create time delays and incidental costs.⁶⁴

Although litigation has been described as ‘a machine in which you enter as a pig and come out as a sausage’⁶⁵ one would not be far from right by defining some international arbitration procedures in the same way.⁶⁶ Moreover, it is not uncommon for lawyers to take control of the proceedings in complex international commercial arbitrations.⁶⁷ This may come about as a result of the arbitrators’ effort to instil trust in the arbitration process. Arbitrators give both parties the opportunity to fully present their case.⁶⁸ Unlike in litigation where a case could summarily be dismissed, arbitration does not have the remedies found in judicial systems that are created to limit the development of frivolous cases.⁶⁹ Consequently, there are no measures such as motions to dismiss or motions for summary judgement. The non existence of such measures is an advantage for the claimant but a rather costly disadvantage for a defendant confronted with an unwarranted claim.⁷⁰

Furthermore, another factor that could lead to the high cost of arbitration is the number of extensions granted by arbitrators. Arbitrators are often very generous with the amount of time they grant parties to submit various pleadings. While this may be in line with making sure that both parties are treated fairly or that due process is adhered to, the result is that it amounts to significant delays in conducting the arbitration.

Additionally, there is usually a great amount of difficulty in arranging a timetable that will accommodate the schedule of the members of the arbitral tribunal, the legal representatives or witnesses, if the situation warrants it.⁷¹

⁶⁴ *Op cit* note 63. This is because parties can abuse the flexibility of the arbitral process to delay the proceedings

⁶⁵ Ambrose Bierce, *The Devil's Dictionary* (1911).

⁶⁶ David W. Plant, ‘ADR and Arbitration’ in Lawrence W. Newman, Richard D. Hill (eds) ‘*The Leading Arbitrators’ Guide to international Arbitration*’ p.245.

⁶⁷ *ibid.*

⁶⁸ *supra op cit* note 63.

⁶⁹ Charles N. Brower and Abby Cohen Smutny, ‘Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations’ in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*. p.42.

⁷⁰ *ibid.*

⁷¹ *ibid.*

Moreover the panel of arbitrators for complex international commercial contracts is usually three; each of whom has to be well paid hence increasing the cost of arbitrations. This cannot be compared to the minimal court fees one encounters in litigation.

Although a party who has the intention to drag out the arbitration, may have a great chance of doing so particularly at the commencement of the proceeding, the cost of arbitration is often a great advantage if parties co-operate and keep expenses to a minimum.⁷²

Confidentiality

Many people view the private nature of arbitration as a main advantage. Due to the fact that court proceedings are open to the public; many business people prefer arbitration to litigation.⁷³ Unless otherwise agreed, awards in arbitral proceedings are confidential and the proceedings are closed to the public.⁷⁴ This is considered important especially to parties who wish to protect trade secrets. Moreover, in the interest of protecting present or future commercial transactions, many business people deem any publicity of an ongoing dispute as detrimental to their reputation.⁷⁵

Flexibility

The arbitration process is hailed for its inherent procedural flexibility.⁷⁶ Unlike court proceedings which are rigid, arbitral proceedings offer greater flexibility in international commercial transactions.⁷⁷ Parties get to choose their own arbitrators,⁷⁸ in addition to having the independence to customise the arbitration proceedings to suit their wishes.⁷⁹ Although parties may choose an already established arbitral institution

⁷² *supra op cit* note 69 at p.43.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ The European & Middle Eastern Arbitration Review 2008, The International Journal of Public and Private Arbitration available at <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/72/preface> [Dec 3 2008].

⁷⁷ *supra op cite* note 75.

⁷⁸ Charles N. Brower *op cit* note 33 at p.44. The two arbitrators chose the chairman if it is an arbitration with a three member panel.

⁷⁹ *ibid.*

with its own set of rules of procedure, the parties have a choice to decide on whether or not they want a totally different procedure that better serves their needs.⁸⁰ If both parties cooperate and decide that they both want a speedy arbitration, the flexibility of arbitration can be used to their advantage to achieve that goal. Moreover, parties may even choose to have 'fast track' arbitration – an option that is offered by institutions such as the International Chamber of Commerce and the London Court of International Arbitration.⁸¹

Another reason for the preference of arbitration over litigation by business parties is that many legal problems may arise due to the possibility of several legal systems clashing hence complicating matters even more.⁸² It may be hard for the parties to find the most ideal place to file their suit. This may lead to a party embarking on a venture in search of a jurisdiction that may be more sympathetic to its interests. 'Forum- shopping' as this venture is often called, may be based on the search for a jurisdiction that is likely to be biased in favour of the party choosing that jurisdiction (for instance the anticipation of large amounts in damage awards).⁸³

Should the national courts of different countries claim to have jurisdiction over the same dispute, parallel litigation in more than one court may be a consequence, which would not only affect the parties heavily in costs but could potentially force them to defend themselves in multiple courts concurrently; not to mention the ordeal of having to cope with 'competing anti-suit injunctions.'⁸⁴ This was the case in *Laker Airways Ltd V. Sabena Belgium World Airlines*.⁸⁵ Furthermore, if the problem of

⁸⁰ *Supra* note 78. The parties could choose institutions such as the international Chamber of Commerce (hereinafter, 'ICC') or the London Court of International Arbitration (hereinafter, 'LCIA') just to mention a few of the institutions or simply decide on an *ad hoc* arbitration and use already established rules such as the United Nations Commission on International Trade Law (hereinafter, 'UNCITRAL' Arbitration Rules).

⁸¹ Charles N. Brower *op cit* note 33at p.45.

⁸² G. Born & D. Westin, *International Civil Litigation in United States courts* (3rd ed., 1996). Also see Katherine Lynch, at p.4.

⁸³ Generally see William P. Park, *International Forum Selection* (1995); *International dispute Resolution: The Regulation of Forum Selection*, Jack L. Goldsmith (ed.1997). Also See Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.5.

⁸⁴ Also See Katherine Lynch, at p.5.

⁸⁵ 731 F.2d 909 (D.C.Cir.1984). This case was riddled with multiple anti-suit injunctions in the national courts of Britain and the United States. The injunctions from the corresponding courts prohibited the other party from participating in court proceedings in the other court. Also see Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.5.

conflict of jurisdiction is not resolved, the various courts presiding over the dispute may render conflicting judgments on the same matter.⁸⁶

Impartiality

One of the main reasons parties opt for arbitration over litigation is the fear the national courts will be biased in favour of their own citizen or the advantage of the home litigant in issues such as knowing the system, procedural rules, etc. Therefore, proceeding on the assumption that the arbitral tribunal will be fair and impartial and will not take the nationality of the parties into consideration, parties choose arbitration over litigation.⁸⁷

If any of the parties reasonably suspects that an arbitrator lacks the necessary degree of objectivity or that the arbitrator will not be fair and impartial in performing his duties, then that party can object on those grounds.⁸⁸ Some have posited this as a disadvantage of arbitration in that a party can use this as a dilatory tactic by 'raising unwarranted objections' or attempt to disturb what could otherwise be a smooth arbitration proceeding by filing an application midway through the proceedings.⁸⁹ However this may not be something to worry about depending on whether the parties' arbitration is under the auspices of an institution with rules safeguarding against such conduct. Institutions such as the International Commercial Court (ICC) have rules where parties have to follow certain procedures in making such objections (which have to be well founded). Moreover, those objections have to be made in within a specific period if the party's application is to be considered on the specified grounds.

Enforcement of awards

With more than 140 countries party to the New York convention, enforcing arbitral awards is easier than enforcing foreign court judgements.⁹⁰ As mentioned earlier in the chapter, states are under no obligation to enforce foreign judgments, particularly

⁸⁶ *Op cite* note 83.

⁸⁷ The European & Middle Eastern Arbitration Review 2008, The International Journal of Public and Private Arbitration available at <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/72/preface> [Dec 3 2008]

⁸⁸ *ibid.* The UNCITRAL Model and also the ICC Rules have provisions to this effect.

⁸⁹ *ibid.*

⁹⁰ www.uncitral.org[Jan 29, 2009].

in the absence of a treaty.⁹¹ This makes arbitration more a more logical choice over litigation especially if the objective of winning the award is to have it enforced in a country where the respondent has his assets, particularly if that country is party to the New York Convention or has adopted the Model Law.

There is no doubt that both litigation and arbitration have some advantages and disadvantages for parties involved in international commercial transactions. Depending on the needs of the parties, litigation or arbitration may be suitable. However, given the ease created by the New York Convention in enforcing arbitral awards, the fact that arbitration is more friendly and flexible are just a few of the considerations that continue to make the choice of arbitration more popular in international commercial transactions than litigation.⁹²

The next section of this chapter will discuss the present state of arbitration in member countries of the East African Community.⁹³

2.4. The Current state of Arbitration in the East African Community

It is worth noting that although several countries on the African continent responded positively to the establishment of the International centre for Settlement of Investment Disputes,⁹⁴ only a few of them have ratified the New York Convention.⁹⁵ The UNCITRAL Model Law, which is the latest of the modern arbitration instruments, has been adopted by even fewer countries in Africa.⁹⁶

⁹¹ Katherine Lynch, at p.6.

⁹² Charles N. Brower and Abby Cohen Smutny, 'Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations' in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*. p.51.

⁹³ When reference is made to 'East Africa' or 'East African Region', it is short hand for member countries of the East African community ("hereinafter, 'the EAC' or 'EAC').

⁹⁴ Hereinafter, 'ICSID' or 'ICSID Convention'.

⁹⁵ The New York Convention on the Recognition and enforcement of Foreign Arbitral Awards of 10 June 1958 (hereinafter, the 'NYC Convention' or the New York Convention'). Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries'.

⁹⁶ Samson L. Sempasa, 'Obstacles' at 400.

In several African countries, the arbitration legislation dates from before their attainment of independence.⁹⁷ In the East African Community for instance, Rwanda, Burundi and Tanzania still use outdated arbitration legislation that has already been replaced in the countries after which they were fashioned.⁹⁸

Moreover, the arbitration laws and procedure in the different countries in the East African Community differ from one country to another.⁹⁹ Laws and procedures in different countries are largely dependent on the legal systems of their former colonial masters. For instance, there are different legal systems in the member countries of the East African Community. Rwanda and Burundi have imprints of European civil Law while Kenya, Tanzania and Uganda's legal systems are fashioned after the English common Law.¹⁰⁰ In Rwanda, Tanzania and Burundi, where these antique laws still exist, they are still applied by the national courts in the same old-fashioned way.¹⁰¹

This section will look at the state of Arbitration in each of the member countries of the East African Community:

KENYA

Kenya has made great progress towards enacting modern regulation on international commercial arbitration and Investment arbitration. Apart from adopting the UNCITRAL Model Law, Kenya is also a signatory to the New York Convention¹⁰² and ICSID¹⁰³ Convention. On 18th August of 1995, an arbitration Bill that had been introduced in the Kenyan Parliament became law thereby repealing its archaic Act.¹⁰⁴

⁹⁷ *Supra* note 96 at 389.

⁹⁸ See Oyekunle, 'The Importance of Arbitration in Trade with the Developing World', VIII ICCA Congress (New York City, 6-9 May 1986).

⁹⁹ Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 1992.

¹⁰⁰ Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 1992.

¹⁰¹ *Op cite* note 99.

¹⁰² Kenya ratified the Convention on 10th February 1989.

¹⁰³ A list of countries that have ratified the ICSID Convention is available at http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp [26, Jan 2009].

¹⁰⁴ Cap 49. *Kenya Gazette*, Supplement No.53 (Act No.5) of 18 Aug 1995.

UGANDA

In 2006, Uganda finalised the revision of its commercial justice system which saw the creation of a compulsory mediation session for all commercial disputes. Uganda's Arbitration Act repeals Cap 55 of 1930 and incorporates the UNCITRAL Model Law¹⁰⁵ in its Arbitration and Conciliation Act.¹⁰⁶ This Act came into force in 2000, replacing an Arbitration Act that was fashioned after the English Arbitration Act of 1930. Uganda's Arbitration Act applies to both domestic and international commercial arbitrations.

Although Uganda has taken strides towards resolving domestic commercial disputes through Alternative Dispute Resolution, it still has a long way to go in the realm of international commercial arbitration.¹⁰⁷

The Arbitration Act of Uganda incorporates the New York Convention in sections 40-45 of the statute. Uganda ratified the New York Convention on February 12, 1992 and is also a signatory to the ICSID Convention.¹⁰⁸

TANZANIA

Tanzania's arbitration law dates back to 1932 and it is fashioned after the English legislation on Arbitration of that time. The Arbitration Act¹⁰⁹, previously known as the Arbitration Ordinance is very brief and contains only 32 sections.¹¹⁰ More provisions are incorporated in the Arbitration Rules of 1957 and were created under Arbitration Act '(published in Government Notice 427 of 1957)'.¹¹¹

¹⁰⁵ UNCITRAL Model Law on International Commercial Arbitration (1985). Hereinafter, the Model Law.

¹⁰⁶ The Arbitration and Conciliation Act, 19 May 2000, chapter 4 of the Laws of Uganda (hereinafter, 'Uganda's Arbitration Act').

¹⁰⁷ 'The 2007 Investment climate Statement-Uganda' available at <http://www.state.gov/e/eeb/ifd/2007/Feb/24/2009> states that Commercial Court Judges report that approximately eighty per cent of commercial disputes are settled through ADR.

¹⁰⁸ A list of countries that have ratified the ICSID Convention is available at http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp [26, Jan 2009].

¹⁰⁹ Cap 15 of the Laws of Tanzania.

¹¹⁰ *ibid.*

¹¹¹ <http://www.nortonrose.com/knowledge/publications/2007/pub8622.aspx?page=070810112342&lang=en-gb> [Jan 26, 2009].

Even though that legislation was amended¹¹² in 1971, it is still outdated.¹¹³ For example, multilateral agreements such as the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on The Execution of Foreign Arbitral Awards¹¹⁴ are still mentioned in the Arbitration Act.¹¹⁵

Tanzania is party to the New York Convention and the Convention entered into force in 1965. It is also party to the ICSID Convention¹¹⁶. However, the UNCITRAL Model Law has not influenced the Arbitration Act or the Rules (since they both pre-date the Model Law).¹¹⁷ A new bill based on the English Arbitration Act¹¹⁸ was proposed by the Tanganyika law society and is currently being reviewed by the Tanzanian government.

Despite being equipped with two arbitration bodies namely, the Tanzania Institute of Arbitrators (TIA)¹¹⁹ and the National Construction Council¹²⁰, arbitration is not yet a popular choice for resolving commercial disputes within the business community in Tanzania.¹²¹ Perhaps the lack of growth of arbitration in Tanzania is due to the poorly conducted arbitral proceedings. It is reported that most of the arbitral proceedings that have taken place in Tanzania have been inefficient[ly] and haphard[ly] conducted.¹²² This has caused many parties to conduct their arbitrations outside Tanzania; choosing international arbitration institutions such as the International Chamber of Commerce

¹¹² To grant the court more power to extend timelines in which arbitration proceedings can be conducted.

¹¹³ *Op cite* note 112.

¹¹⁴ 1927.

¹¹⁵ Cap 15 RE 2002 (Hereinafter, 'the Act').

¹¹⁶ Convention on the Settlement of Investment Dispute between States and Nationals of Other States. Hereinafter, 'ICSID or the 'ICSID Convention'. It has been a party to the Convention since 1992. A list of countries that have ratified the ICSID Convention is available at http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp [Jan 26, 2009].

¹¹⁷ *ibid.*

¹¹⁸ English Arbitration Act of 1996.

¹¹⁹ Hereinafter, 'TIA'. The TIA is a non profit organisation incorporated under the Societies Act (Cap 337).

¹²⁰ Hereinafter, the 'NCC'. The NCC was created under the National Construction Council Act (No.20 of 1979, cap 162). Available at <http://www.nortonrose.com/knowledge/publications/2007/pub8622.aspx?page=070810112342&lang=en-gb> [Jan 26, 2009].

¹²¹ *ibid.*

¹²² www.mkono.com.

(ICC) and the London Court of International Arbitration (LCIA) instead of the local institutions.¹²³

These two arbitration bodies have their own rules on arbitration proceedings pertaining to both domestic and international arbitration. In fact, the National Construction Council adopted a few concepts from the Model Law.

The local courts in Tanzania only interfere with the arbitration proceedings to help with matters regarding the production of documents and attendance of witnesses. However, pursuant to section 16 of the Arbitration Act¹²⁴ an arbitral award may be set aside in circumstances where an arbitrator engaged in an irregularity or misconduct that caused any of the parties involved in the arbitral proceedings to doubt his or her ability to be fair or impartial.¹²⁵

RWANDA

Litigation is the most used method of resolving commercial disputes in Rwanda.¹²⁶ However, Rwanda recently adopted a new law dealing with arbitration and conciliation and it entered into force on March 6, 2008.¹²⁷ For a long time, Rwanda did not have a specialised commercial court but reforms to create one were initiated in December 2007 and as of March 15, 2008 several commercial courts became fully operational.¹²⁸ Although an arbitration centre was created in 1998 to resolve all commercial disputes; it failed miserably to meet the expectations of those who utilized it.¹²⁹ This has in turn made it difficult to ensure that contracts are honoured; thus undermining the sanctity of contracts because the option to litigate in court is hampered by the already clogged system waiting to be resolved.¹³⁰

¹²³ *Supra note* 122.

¹²⁴ S.16, cap 15 of the Laws of Tanzania.

¹²⁵ *ibid.*

¹²⁶ 'Laws and Regulations' 9, June 2007. Available at <http://www.rwandainvest.com/spip.php?article8> [28 September 2008].

¹²⁷ Sabine Hertveldt, 'Pragmatism leads the way in setting up specialised commercial courts.' Available at http://www.doingbusiness.org/documents/CaseStudies/Rwanda_CS2008.pdf. [Feb 18, 2009].

¹²⁸ *ibid.*

¹²⁹ 2007 Investment Climate Statement, available at <http://www.state.gov/e/eed/ifd/2007/8067.html> 9 June 2007 [Sep 12 2008].

¹³⁰ *ibid.*

Plans to develop arbitration and other alternative dispute resolution methods are also underway. To this effect, an Arbitration and conciliation Act is in the process of being drafted so that the country can have a 'legal framework for arbitration and alternative dispute resolution in general.'¹³¹ This is because the labour, administrative, commercial and civil codes in Rwanda make provision for arbitration. Steps towards that direction were evident when Rwanda became the 143 state to adopt the New York Convention on November 3, 2008.¹³²

Generally, the courts in Rwanda will uphold an arbitration clause that provides that a foreign law is the applicable law to the contract.¹³³ The local courts will however, only give effect to that law if it complies with the mandatory provisions of the laws of Rwanda.¹³⁴ Should the parties intend to evade the mandatory legislation in Rwanda by choosing the foreign law as the applicable law, the courts will not recognise the parties choice and will simply apply the local law that the agreement has the closest connection to the agreement.¹³⁵

Rwanda is party to the International Centre for the Settlement of Investment Disputes Convention (ICSID Convention).¹³⁶

BURUNDI

Although the Government of Burundi's official policy encourages Foreign Direct Investment,¹³⁷ the same cannot be said of its legislation on arbitration. First and foremost Burundi has neither ratified the New York Convention nor adopted the

¹³¹ 'Rwanda accedes to UN Convention on Commercial Arbitration'. Available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&CrI=Convention> [Dec 3, 2008]. As of March 6, 2008 this vision was realised. See Sabine Hertveldt, 'Pragmatism leads the way in setting up specialised commercial courts.' Available at http://www.doingbusiness.org/documents/CaseStudies/Rwanda_CS2008.pdf [Feb 20, 2009].

¹³² 'Rwanda accedes to UN Convention on Commercial Arbitration'. The treaty entered into force on January 29, 2009. Available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&CrI=Convention> [Dec 3, 2008].

¹³³ <http://rwandainvest.com/spip.php?article81> [Dec 3, 2008].

¹³⁴ *ibid.*

¹³⁵ *Op cit* note 133.

¹³⁶ <http://icsid.worldbank.org/ICSID/Index.jsp> [Dec 3, 2008]

¹³⁷ '2008 Investment Climate Statement- Burundi'. Available at <http://www.state.gov/e/eeb/ifd/2008/100833.htm> [Jan 24, 2008]. The statement reports that Burundi 'upholds the sanctity of contracts' and to promote Foreign Direct Investment, specific provisions within the Civil and Commercial Code were incorporated.

UNCITRAL Model Law which is alarming as one of the ways to attract Foreign Direct Investment would be to assure foreign investors that there are suitable alternatives to litigation in the country. Adopting modern legislation pertaining to international commercial arbitration would send a strong message to potential foreign investors that arbitration proceedings will receive the necessary support in the country.

The Burundi government approved a domestic body on arbitration and if parties have included an arbitration clause in their contract providing for international commercial arbitration, the tribunal will recognise that clause.¹³⁸

Thus Burundi should be commended for recognising international commercial arbitration at least to the extent that it is a signatory to the ICSID Convention.¹³⁹ Other efforts initiated by the government with the aim of encouraging FDI have been to update commercial laws, particularly those pertaining to Competition.¹⁴⁰

2.5. Importance of the Seat of Arbitration

The place of arbitration is important because it often determines the applicable law that will govern the arbitral proceedings.¹⁴¹ In particular, because there is a link between the law of the place of arbitration and the arbitral proceedings, this will influence the extent to which the local courts intervene or 'entertain actions in relation to the arbitration.'¹⁴²

The theory is that the parties' arbitration agreement will only be respected in as far as it does not contravene the mandatory laws of the place of arbitration - the *lex arbitri*.¹⁴³ This theory is embedded in many international instruments on arbitration,

¹³⁸ *Supra* note 137.

¹³⁹ A list of countries that have ratified the ICSID Convention is available at http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp [Jan 26, 2009].

¹⁴⁰ *Op cite* note 138.

¹⁴¹ <http://www.wipo.int/amc/en/arbitration/guide/index.html#location> [Jan 24, 2009]. Also see Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.176. Lynch states that the place of arbitration is not just physical venue; 'it represents the territorial link between the arbitration proceedings themselves and the law of the place in which the arbitration is situated.'

¹⁴² <http://www.wipo.int/amc/en/arbitration/guide/index.html#location> [Jan 24, 2009].

¹⁴³ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed., 1999).

including the UNCITRAL Model Law and the New York Convention.¹⁴⁴ This theory, which is sometimes referred to as the 'seat theory', allows parties involved in an international arbitration to enjoy the benefits of a procedure that is embedded in a specific national legal system which provides support to the arbitral proceedings and has limited supervisory powers over the process.¹⁴⁵ It is understandable that states will only support arbitrations in as far as they do not disrespect the mandatory local legislation. This is the only way that international arbitration can survive. That support is earned from obeying mandatory laws of the *lex arbitri*.

However, for parties to decide on the venue to hold the arbitration, one of the most considerations they keep in mind is the law of the place. Thus, the more modern and pro-arbitration the law of the place is, the more likely it is to be chosen as a suitable venue for holding international arbitration. At the moment the East African Community¹⁴⁶ does not depict the characteristics that a suitable venue for an international arbitration should have. At least in as far as modern arbitration legislation is concerned.

If the law in place is supportive of international commercial arbitration it will attract Foreign Direct Investment in the region because foreign investors will have faith in the dispute resolution method should a conflict arise.¹⁴⁷ This would in turn lead to economic growth in the region.¹⁴⁸ Further, modern laws on international commercial arbitration will make the region a desirable venue for holding international

¹⁴⁴ Article V (1) (a) and (e) of the New York Convention elucidate the significance of the place of arbitration and when contravened, are some of grounds that courts may rely on in refusing to enforce an award.

¹⁴⁵ Katherine Lynch, at p.177.

¹⁴⁶ With the exception of Uganda and Kenya which have modern laws on international commercial arbitration.

¹⁴⁷ Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' vol 3 *Melbourne Journal of International Law*. Also see discussion on the link between legal reform and economic development in chapter 3 of this thesis.

¹⁴⁸ *ibid*.

arbitration.¹⁴⁹ This too will lead to economic growth as the region will benefit from hosting these arbitrations.¹⁵⁰ However, this will be tackled in the next chapter.

One of the concepts that the next chapter will analyse is the link between legal reform and economic growth.

¹⁴⁹ Generally see David W. Butler, 'The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act'. Paper presented at the AFSA & MCCI International Arbitration Workshop at Le Victoria, Mauritius on 12 April 2007. Also see David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region' for arguments on what would make the SADC region a desirable place to hold international commercial arbitrations.

¹⁵⁰ Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' Vol 3 *Melbourne Journal of International Law*.

Chapter 3

LEGAL REFORM AND ECONOMIC DEVELOPMENT

3.1 Introduction

This chapter will discuss the issues hindering the growth of international commercial arbitration in East Africa. It will showcase the challenges faced by lawyers in the region when dealing with matters concerning international commercial arbitration. Central to this chapter is the argument that the lack of growth of international commercial arbitration, particularly the problems plaguing its practice in the region, may discourage Foreign Direct Investment in the region, thereby having a negative impact on the economy of the countries in this region. This chapter posits the argument that in order to encourage economic growth in the region, there is a need for legal reform of the outdated arbitration laws; hence the assumption of a causal link between legal reform and economic growth.

3.2. Why Arbitration has not developed in the East African Community.

Regional integration is evidently one of the strategies that most countries in Africa are using in the hope of transforming their economies and of integrating them into the global market.¹⁵¹ One of the main goals of the East African Community is to establish itself as a 'sustainable economic block'.¹⁵² It is my opinion, as well as that of other scholars,¹⁵³ that a good dispute resolution mechanism is a necessary requirement for the efficient functioning of a regional organisation. Currently, the East African Community does not have a regional institution dedicated to the resolution of international commercial disputes. With ongoing negotiations about establishing an East African Common Market and a signed Customs Union in the region, it is only predictable that there will be an increase in cross-border commercial transactions in

¹⁵¹ NEPAD, 'Regional Integration and Trade' available at <http://knowlegesharing.uneca.org/uneca/community-of-practice/nepad-regional-integration-and-trade> [Feb 24, 2009]

¹⁵² <http://www.eac.int/> this is stated on the website as one of the goals of the East African Community.

¹⁵³ Thalia Kruger, 'Regional Organisations and Dispute Settlement: Court and Arbitration Institution at the same time?' available at <http://www.ialsnet.org/meetings/business/KrugerThalia-SouthAfrica.pdf>.

the community. This creates urgency or at the very least, a reason to consider the necessity to revise the outdated arbitration laws in the region. As already discussed in the previous chapter, arbitration for obvious reasons is the preferred method of resolving international commercial disputes by the international business community.¹⁵⁴

Regrettably, a look at the practice of arbitration in the East African Community depicts that lawyers in the region have not fully embraced arbitration.¹⁵⁵ Below are some of the factors that have stunted the growth of arbitration in the East African Community:

There is a lot of scepticism surrounding the process of arbitration. Not knowing what the arbitral process entails, has made lawyers in the region suspicious about the fairness and impartiality of arbitration.¹⁵⁶ There is scepticism about the ability of the process to be fair to parties from developing countries.¹⁵⁷

My view is that this scepticism is founded on ignorance of the arbitral process. Arbitration is a voluntary process and both parties are free to agree to the procedural terms of the arbitral proceedings. The parties also have the option to choose their own arbitrators. It is therefore hard to imagine how the proceedings could be unfair or impartial to parties coming from developing countries. Additionally, given that arbitral tribunals in international arbitrations are usually from different countries than those of the parties involved in the dispute, makes any foul play rather difficult to imagine. However, it is true that some parties (often those from developing countries) are not in an equal bargaining position when it comes to negotiating terms of arbitral proceedings. Thus it is understandable to why some people may mistakenly view the

¹⁵⁴ Katherine Lynch, at p.1. Also see Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) Oxford University Press, Inc., New York at p.1.

¹⁵⁵ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 407. 1992. Sempasa posits that African lawyers have not fully accepted arbitration because of certain hindrances and since East Africa is in Africa, it is implicit that these factors apply to the East African Community as well.

¹⁵⁶ M.Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint'. In advocating for more supervisory powers for courts in developing countries, Sornarajah is of the view that the Model Law does not cater to the interest of developing countries and could potentially lead to their exploitation.

¹⁵⁷ *ibid.* Also see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 407. 1992.

arbitral process as one that is largely in the interest of parties from developed countries.

The occurrence of any impartiality would imply that the arbitral tribunal defied due process. Moreover, if this were the case and the parties had chosen institutional arbitration, most institutions have rules to remedy such conduct. The International Chamber of Commerce's rules for instance, allows parties to object to the appointment of an arbitrator within a specified period on well-founded grounds.¹⁵⁸ If one of the parties fails to have the arbitrator removed and has evidence to show that he was treated unfairly, there are provisions in relevant statutes to remedy this. The Model Law¹⁵⁹ and the New York convention¹⁶⁰ provide for circumstances where a national court can refuse to enforce an award.

It is argued that the philosophy of the 'new international economic order' of the 1970s and 1980s¹⁶¹ is partly to blame for the ambivalent attitude of African states towards arbitration.¹⁶² The UN General Assembly adopted a number of resolutions which fervently affirmed national sovereignty over natural wealth.¹⁶³ Many African countries interpreted this as a call to exercise more authority over issues having the potential to affect their autonomy.¹⁶⁴ In addition, they viewed this Charter¹⁶⁵ as giving them the discretion to resolve economic issues in their national courts; even where a valid agreement exists.¹⁶⁶ Therefore, several African states have for a number of years

¹⁵⁸ Generally see ICC Rule 11(2). This article stipulates the time limit and circumstance under which parties can challenge the appointment or confirmation of arbitrators.

¹⁵⁹ Article 36 of the Model Law stipulates grounds for refusing recognition or enforcement of an arbitral award. This is on the assumption that the arbitration is taking place in a country that has adopted the UNCITRAL Model Law on international commercial Arbitration.

¹⁶⁰ Article V of the NYC gives grounds for refusal. This is on the assumption that the award is going to be enforced in a country that is party to the NYC or has adopted the Model Law.

¹⁶¹ Hereinafter, 'NIECO'. This order, which was adopted by the UN General Assembly in 1974 focused on restructuring the global economy to allow developing countries to participate and gain from it. The NIECO was followed by the adoption of a Program of Action and a Charter for Economic Rights and Duties of States.

¹⁶² See U.N Doc A/Res/3281 [XXIX] (Dec.12, 1974), Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 394. 1992, Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, p.264.

¹⁶³ Samson L. Sempasa, 'Obstacles' at p.394. Some of the main points were: that developing countries were entitled to control the activities of multinational corporations operating inside their borders.

Another tenet was that developing countries were at liberty to 'nationalise or expropriate' property belonging to foreign investors on terms that were favourable to them.

¹⁶⁴ *ibid.*

¹⁶⁵ *Infra op cite* note 162. Charter for Economic Rights and Duties of States.

¹⁶⁶ Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.264. Generally see Samson L. Sempasa, 'Obstacles' at p.394.

focussed on the restructuring of some of the world's economic legal rules in as far as they relate to issues on economic development contracts involving multinational companies.¹⁶⁷

Despite the decline in support for the NIEO¹⁶⁸, there have been doubts about the Model Law's ability to satisfactorily meet the needs of African countries.¹⁶⁹ There have been arguments about the neutrality of the Model Law's procedures and whether the drafters of the Model Law made the provisions therein with the interests of African countries in mind.¹⁷⁰ For instance, one scholar is of the opinion that the Model Law could be detrimental to the economic objectives of some developing countries.¹⁷¹ He advises that countries should not adopt the Model law if it contradicts with their economic developmental goals.¹⁷² He further advocates for more supervisory powers of national courts; alluding to the notion that the Model Law, with its limited powers, could lead to the exploitation of developing countries.¹⁷³

This theory is misleading on so many levels. First, the assumption that the Model Law could contradict the economic objectives of a developing country is rather superficial. This is because countries have the option to decide which matters are arbitrable and which are not. Should a country regard some issues as pertinent to the achievement of their economic development goals, that country is under no obligation to permit the submission of such a matter to arbitration.¹⁷⁴ Moreover, once a country has declared a subject matter non-arbitrable, this is tantamount to a mandatory rule. The general rule is that mandatory rules have to be respected or else the arbitral award may not be enforced in the country where the award was made.¹⁷⁵

¹⁶⁷ See Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 394. 1992.

¹⁶⁸ Of the 1970's-80's.

¹⁶⁹ Generally see Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. Generally see Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 1992.

¹⁷⁰ M.Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint' is of the view that the Model Law does not cater for the interest of developing countries and could potentially lead to their exploitation.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ For a full discussion on arbitrability, see Alan Redfern, *Law and Practice of International Commercial Arbitration* 4th edition p.163-172.

¹⁷⁵ The exception is where enforcement is sought elsewhere; in a country where the mandatory rule does not offend public policy. However, because arbitrators usually do not know where enforcement

Lastly, the argument that more supervisory powers for the courts would ensure that parties from developing countries are not exploited is seriously flawed. My reasoning is that any alleged exploitation of a party from the developing world would potentially take place at the signing of a contract entailing unfair terms. It is the duty of the lawyer (and not the court) to review the contract prior to its being signed to ensure that the party's interests are protected. Assuming all the necessary prerequisites for a valid contract are present and there is no evidence of foul play, there is nothing in the power of the Model Law or the courts to stop such exploitation.¹⁷⁶

Moreover there have been assertions that because developing countries were not adequately represented at the time of drafting the Model Law, expecting them to adopt the Model Law under the aegis of harmonisation is equivalent to 'economic imperialism'.¹⁷⁷ This is an absurd irony owing to the fact that the Asian African Legal Consultative Committee (AALCC) was the 'initial catalyst for the harmonisation of arbitration procedure and the drafting of the Model Law'.¹⁷⁸

Some of the major factors affecting the development of arbitration institutions and the growth of arbitration practice in Africa stems from the lack of sufficient information about the arbitral process.¹⁷⁹ Many African scholars, particularly those in the legal field, are not conversant with the ever-changing laws on international commercial arbitration, especially those taking place under the aegis of UNCITRAL.¹⁸⁰ This is true of scholars and practising lawyers in the member countries in East Africa, even those that have adopted the Model Law. Even though Uganda has adopted the Model Law, arbitration is not used a lot in the resolution of commercial disputes and this is

will take place; my opinion is that they would err on the side of respecting the mandatory rules of the *lex arbitri* in order to increase the chances of having their award enforced.

¹⁷⁶ For a discussion of what entails a valid contract see Van der Merwe, Van Huyssteen, Reinecke, Lubbe, *Contract General Principles* 3rd edn in Chapter 1. However, some courts could be very protective and disallow certain contractual terms that may be perceived to be unfair. However, in Uganda the courts will uphold a contract if there is no evidence of fraud, undue influence and if the parties had the requisite capacity to bind themselves to the terms in the contract.

¹⁷⁷ Steven P. Ladas, 'Patents, Trademarks and Related Rights: National and International Protection' 14 (1975) quoted in S.Oddi, *TRIPS- Natural Rights and a 'Polite' Form of Economic Imperialism*, 29 *Vand. J. Transnation'l L.* 415 (1994). Also see Samuel K.B. Asante, *The Perspectives of African Countries on International Commercial Arbitration*, 6 *Leiden J. INT'L L.* 331(1993) in Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* p.265.

¹⁷⁸ Katherine Lynch at p.264.

¹⁷⁹ Samson L. Sempasa, 'Obstacles' at 395.

¹⁸⁰ *ibid.*

attributed to the fact that arbitration is often not taught in the curriculum at post secondary institutes. Hence my view is that the fear and suspicion that the arbitral process is largely in the interest of developed states falsely lurks in the minds of entrepreneurs in the region.¹⁸¹

Without the necessary information on the most recent relevant arbitration rules, it would be extremely difficult for the average African lawyer to manoeuvre through a complex international commercial arbitration proceeding.¹⁸² One needs to constantly familiarize himself or herself with the most recent 'doctrinal formulations' or attend seminars organised by arbitration institutions to keep up with the most relevant issues on arbitration.¹⁸³

The non-existence of institutions of the same size and with the same broad acceptance such as the ICC and the LCIA on the continent of Africa is said to be part of the reason for the stunted development of arbitration practice.¹⁸⁴ The continent has but a few arbitration centres scattered around and these centres have not had much success attracting international commercial arbitration. Some argue that in developing countries, parties who accept the application of rules such as those of the ICC have usually never encountered these rules before nor are they aware of the implications of agreeing to those rules.¹⁸⁵ While this may be so, it does not have to be like that.

International commercial contracts, especially those involving foreign investors are usually very complex or at the very least involve a lot of money. It is hard to comprehend that a party would simply agree on a dispute to be subjected to rules that he or she has never encountered without consulting a lawyer. Even taking the factor of 'lack of knowledge' of the arbitral process into account, one would expect a prudent lawyer to do some research on what ICC arbitration entails.¹⁸⁶ For a party to agree to ICC arbitration for fear of losing a potential contract is sad but

¹⁸¹ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 1992

¹⁸² *ibid.*

¹⁸³ *ibid* at 395.

¹⁸⁴ *ibid.*

¹⁸⁵ Oyekunle, 'The Importance of Arbitration in Trade with the Developing World', VIII ICCA Congress (New York City, 6-9 May 1986).

¹⁸⁶ This research is readily available on the internet.

understandable. However, merely agreeing on ICC arbitration without doing the necessary research on what it entails is blatantly negligent; if not out rightly naïve on the lawyer's part. This is based on the assumption that the party obtained the services of a legal representative.

Additionally, it has been proposed that the scarcity of literary material on arbitration is one of the reasons that African lawyers have proceeded to arbitration with little understanding of the relevant matters.¹⁸⁷ This is because issues pertaining to the process of arbitration changes faster than the flow of information about arbitration onto the continent.¹⁸⁸ It is argued that owing to this, African lawyers approach the practice of arbitration with perceptions that are no longer pertinent to the present context of international commercial arbitration.¹⁸⁹ This is much to the disappointment of parties who come to the realisation that the entire process of arbitration is not adequately grasped by their legal representatives.¹⁹⁰ This, in addition to the lack of developed arbitration centres in the region causes the parties to submit to arbitral institutions in developed countries¹⁹¹ where the institutions are well equipped.

The issue of the slow flow of information on arbitration to the continent does not hold much ground. In the present day and age, information on almost any subject matter can be retrieved online. Using the internet is the fastest way to retrieve information. Moreover, lawyers specialising in specific fields can gain access to the latest news or articles in their area of practice by subscribing to the journals such as the Journal of International Arbitration.¹⁹² There is no valid excuse for scholars in the East African Community to be ignorant about the latest issues on Arbitration, particularly if they have a genuine interest in the field.

Another factor that has been blamed for the slow growth of the arbitral process in the region is the lack of participation by African states in formulating the rules on

¹⁸⁷ Samson L. Sempasa, 'Obstacles' at 396.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² The cost of such journals is well within the price range of many law firms in Uganda for instance. Moreover, said costs can be regarded as an investment that will hopefully attract more clients to the law firm.

commercial arbitration.¹⁹³ African states are in dire need of the most recent legislation that are necessary to integrate them in the field of international trade yet, ironically, they are the same countries that have had little to no participation in the drafting of the laws of international trade.¹⁹⁴ Much as I acknowledge the absurd reality that developing countries have not adequately participated in the formulation of the rules on arbitration, it would do them little good to reject arbitration solely on that ground.

Policy makers in the member countries of the East African community should examine the proposed legislation on arbitration and decide whether or not it is in the country's economic developmental interest to adopt that law. Rejecting relevant legislation that would otherwise benefit a country's economy just because the country did not participate in the law's formulation would be foolhardy. Policy makers should have specialists assess the proposed legislation and advise them on whether or not it is relevant for them. If the countries in the East African Community allocated their resources well, hiring said specialists to advise them would be money well spent.¹⁹⁵

Some scholars have argued that the adversarial nature of arbitration is in direct contrast with the informal methods of negotiation that Africa is accustomed to.¹⁹⁶ Conciliation is a closer method of dispute resolution comparable to the traditional dispute resolution mechanism in the various countries in African.¹⁹⁷ Therefore, arbitration in Africa is mainly referred to as a subsequent method should efforts on conciliation prove futile.¹⁹⁸ Uganda, for instance, provides in circumstances where disputes between a foreign investor and the government arise, 'all efforts shall be made first to settle the dispute through negotiation for an amicable settlement.'¹⁹⁹

¹⁹³Sempasa, 'Obstacles'*supra* note 187 at 389.

¹⁹⁴ 'Progressive Development of the Law of International Trade' in Report of the Secretary General (UN DocA/6/6396, para 210) reprinted in (1968-70) I (1) UNCITRAL Y.B.II in Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 389 1992.

¹⁹⁵ Unfortunately, countries such as Uganda are guilty of corruption and misallocating resources hence the government may not see the need to spend money on issues that it does not deem important. Moreover, in choosing officials to head certain positions in the government, such choices are not based on qualifications *per se* but often on cronyism and nepotism. All this makes it difficult for the policy makers to make decisions that are beneficial to the country.

¹⁹⁶Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 392 1992.

¹⁹⁷ *ibid* at 389.

¹⁹⁸ *ibid.*

¹⁹⁹ S.30 (1) of Uganda's 1991 Investment Code (statute No.1 199, Laws of Uganda).

Although it is understandable that it is not easy to give up familiar methods of dispute resolution, particularly if they work in the local setting, the reality is that international commercial arbitration is a totally different ballgame. The non-binding nature of negotiation and conciliation is not suitable for resolving issues pertaining to international commercial transactions. Moreover, it is unlikely that foreign investors will agree to subject disputes to a non-binding method when large sums of money are at stake.

Are the fears and insecurities about arbitration well-founded? Perhaps they are. On the face of it, it is understandable why African lawyers or governments are reluctant to participate in a process whose immediate benefit they do not comprehend.²⁰⁰ The fact that the procedures used in complex international contracts are a mix of the common law and civil law system found in Anglo- America and Continental Europe has led many to perceive arbitration as a process that largely benefits developed states.²⁰¹ Naturally, these procedures do not necessarily represent all the legal cultures of those engaged in the practice of international commercial arbitration hence the aforementioned perception.²⁰² Arbitration rules should truly reflect the legal traditions of all its users if the process of arbitration is to be trusted as a neutral and flexible form of resolving international commercial disputes.²⁰³

However, the problem of lack of growth in the East African Community has little to do with the arbitration process itself because the practice of settling disputes by arbitration is embedded in the traditional cultures of many parts of East Africa. Rather, the misunderstanding of the practice of arbitration largely stems from the lack of adequate information about its use, practice and direct benefit to international commercial transactions. If the factors affecting the growth of arbitration in the member countries of the East African Community are not addressed,²⁰⁴ these countries will continue to lag behind economically or will not be chosen as desirable

²⁰⁰ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 393 1992. Also see Gary Born and Rachael Kent, 'The Internationalisation of Commercial Arbitration.' Available at www.wilmerhale.com/files/Publication [Dec 3, 2008].⁴

²⁰¹ Gary Born and Rachael Kent, 'The Internationalisation of Commercial Arbitration.'

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ See chapter 3 of this thesis; It discusses the link between legal reform and economic development.

seats for hosting international arbitrations. It will even be more difficult for lawyers to cope with the ever changing developments in the field of arbitration.²⁰⁵

3.3. Impact of Arbitration on Economic Development in the East African Community.

For the purposes of this paper economic growth and economic development will be treated as synonyms.

While there are other factors that hinder economic development in the East African Community such as corruption, poor infrastructure and high levels of poor education, among other things plaguing the countries in that region, it is hereby posited that the lack of modern arbitration laws in the region might deter potential investors from investing in the region. This is so because if there is another country with the same resources that a potential investor is interested in and that country has modern laws for commercial arbitration, the odds are that the investor will take the latter option. However, it is also possible that an investor could opt for *ad hoc* or institutional arbitration if faced with the above situation.

International commercial transactions usually involve a lot of money and it is unlikely that an investor would take the risk of investing in a country whose arbitration laws are so outdated that they would leave him or her with litigation as his or her only option (assuming that he or she does not want to arbitrate in another forum). Moreover, keeping in mind the reasons why arbitration is the preferred method of resolving international commercial disputes; it is even more unlikely that the investor will agree to litigation in the local courts of a foreign country. He or she could opt for arbitration in desirable places elsewhere that are equipped with good institutions and laws for holding international commercial arbitrations.

‘How does all this affect the economies of the member countries?’- one may ask. The answer is quite simple. When a country has modern laws, particularly those pertaining

²⁰⁵ Samson L. Sempasa, ‘Obstacles to International Commercial Arbitration in African Countries’, 41 *Int’l Comp. L.Q.* 396 1992.

to the enforcement of contractual obligations, trade increases²⁰⁶ because parties are sure that their rights will be enforced and that remedies exist in case of a breach of contract. However, the reverse is true as well. A country with outdated laws, specifically those relevant to international commercial transactions such as modern arbitration laws, will have a negative impact on Foreign Direct Investment.²⁰⁷ Economies in many third world countries are largely dependant on foreign investment for economic growth. It would be in their best interest to attract more investors by having modern laws on arbitration.

Moreover, since most modern arbitration laws such as the Model Law can be applied to domestic arbitrations as well, this would not only reduce the work load of the local courts but will also dispose of commercial disputes quickly if the parties opt for 'fast track arbitrations' and cooperate accordingly. Efficient resolution of commercial disputes both at the domestic level and international level will allow business parties to get back to their daily commercial transactions hence increasing rates of economic growth.

Having discussed the impact of the stunted growth of arbitration on economic development in the EAC, the next section will discuss the correlation between legal reform and economic development. Should the EAC reform their arbitration laws? Would reforming those laws lead to economic development? Those are the central questions that will be answered in that section.

3.3.1. Legal Reform and Economic Development: What are the links?

For a long time, economists have focused on various sources of economic development. Various theories²⁰⁸ have been proposed in order to help poor nations

²⁰⁶ Bruce M. Owen and Jorge Portillo, 'Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador' SIEPR Discussion Paper No.02-32, Also see Richard A. Posner 'Creating a Legal Framework for Economic Development' *The World Bank Research Observer*, vol.13. no.1 (February 1998) pp.1-11.

²⁰⁷ In addition to reducing the workload of courts, arbitration has been said to have a major impact on attracting Foreign Direct Investment. (2007) 5 *University of Botswana LJ* 77 at 77 and 101 cited in David W. Butler, 'The Need for Harmonised Arbitration'

²⁰⁸ Easterly William, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics*, MIT Press (2001). Development models focusing on change in technology, trade, skilled labour, among others have been proposed.

prosper, yet they still remain underdeveloped.²⁰⁹ More recently, the focus has turned to institutional development, particularly legal and judicial reform.²¹⁰ This section will concern itself with the link between law and economic development. Central to this section is the question whether there is a correlation between legal reform and economic development. If there is indeed a link; the section seeks to explore how the countries in the East African Community can use arbitration law to achieve their economic goals.

Developed countries tend to have political stability and modern laws. Does this imply a causal link between economic growth and legal reform? More specifically, does legal reform lead to economic growth? Supposing that legal reform does in fact lead to economic growth, is the adoption of a foreign law on international commercial arbitration capable of being implemented in countries with diverging legal systems?²¹¹

One cannot begin to answer the above questions without a thorough comprehension of the link between law reform and economic patterns. How does law affect incentives?²¹² This is the main question here and it will be elucidated upon below.

Developing countries are often encouraged to adopt if not reform existing laws with the hopes of improving governance and economic growth.²¹³ The definition of law as

²⁰⁹ SIEPR Discussion Paper No. 02-32 'Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador' by Bruce M. Owen Stanford University and Jorge Portillo Economists Incorporated May 2003 p.1. Available at <http://scid.stanford.edu/events/Bruce%20Paper.pdf>.

²¹⁰ *ibid.* Also see Richard E. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues.' *The World Bank Research Observer*, vol 14 no. 1 (February 1999), pp- 117-36 at p.117.

²¹¹ Countries in the East African communities range from those that have a civil background and a common law background. Moreover, they currently use different language in their institutions.

²¹² SIEPR Discussion Paper No. 02-32 'Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador' by Bruce M. Owen Stanford University and Jorge Portillo Economists Incorporated May 2003 p.1. Available at <http://scid.stanford.edu/events/Bruce%20Paper.pdf>.

²¹³ *ibid.* Also see Richard E. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues.' *The World Bank Research Observer*, vol 14 no. 1 (February 1999), pp- 117-36 at p.117.

viewed by lawyers²¹⁴ fails to take into consideration the significant benefits that the legal system contributes to the economy.²¹⁵

Whether people will engage in trade, production or investment transactions in a given country highly depends on the type of law in place.²¹⁶ Law, thus, in a sense affects the incentive to engage in commercial transactions.²¹⁷ In fact, for the purpose of this discussion, law could be defined as the ‘adoption and acceptance of legal institutions that optimize incentives to engage in economic transactions.’²¹⁸ Below are a couple of examples:

- a) If, for instance, land rights are well-defined and well-established by the law in a given country, landowners will be more inclined to engage in commercial transactions related to improving property.²¹⁹ This would be the case because in a place where property rights are secure, the people are able to ‘retain the benefits of such transactions.’²²⁰ Owing to this the value of the land will be of high economic value hence increasing wealth and income.²²¹ The reverse is true in the sense that people will be disinclined to invest in property if a country does not have well defined property rights.

- b) Where the law is capable of enforcing private contracts, trade and investment will increase.²²² This is because individuals that were previously reluctant to engage in various trades for fear of breach of contracts or unjust enrichment by unscrupulous parties now have the backing of the law in case of any

²¹⁴ The main definition of the term is defined as ‘the supremacy of substantive and procedural rights as administered by independent courts, over both arbitrary executive power and might of powerful private individuals.’ Another definition stipulates that law ‘is the mechanism by which the state’s monopoly of legitimate force is channelled to protect civil, property and other rights.’ SIEPR Discussion Paper *op cite note* 209 at p.2. Available at <http://scid.stanford.edu/events/Bruce%20Paper.pdf>.

²¹⁵ SIEPR Discussion Paper *op cite note* 209 at p.2.

²¹⁶ *Op cit note* 213.

²¹⁷ *ibid.*

²¹⁸ SIEPR Discussion Paper *op cite note* 209 at p.2.

²¹⁹ *ibid* at p.3.

²²⁰ *ibid.*

²²¹ *ibid.*

²²² *ibid.*

default.²²³ The increase in trade will naturally lead to an increase in income and wealth.²²⁴

In the above scenarios and several other cases, the economic impact of law on incentives, motivates individuals to engage in activities that enhance trade and increase income.²²⁵ Since individuals respond to economic incentives, strengthening or reforming laws that are beneficial to a nation's economic goals can boost the economic welfare of that nation.²²⁶ Additionally, it can enhance growth irrespective of whether or not there is an increase in economic resources. It does so by promoting allocative 'efficiency through incentive effects'.²²⁷ In fact specialists have acknowledged that it is impossible for markets to work efficiently without good enforceable laws.²²⁸

3.4. Impact of those problems on the choice of East Africa as a desirable venue for international commercial arbitration.

Outdated arbitration laws may be part of the reason why the number of arbitrators or venues for arbitration in the East African Community is insignificant compared to other regions where modern arbitration laws are thriving.²²⁹

Despite having adopted the Model Law for both domestic and international commercial arbitration, most disputes resolved by arbitration in Uganda are of a domestic nature. Since entrepreneurs in Uganda deal with investors from other countries as well, this can only imply that any disputes that arise as a result of their commercial transactions are referred to arbitration in a country outside the region. In fact there is evidence that large corporations in the East African region irrespective of whether they are entering into contracts with parties from another country in Africa or

²²³ SIEPR Discussion Paper op cite note 209 at p.3.

²²⁴ *ibid* at p.2.

²²⁵ *ibid* at p.3.

²²⁶ *Op cit note 222.*

²²⁷ *Op cit note 223.*

²²⁸ World bank Counsel.

²²⁹ David Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. Butler says that the number of venues in Africa or African arbitrators for ICC 'involving at least one African party' is disproportionate. p.2.

overseas are providing for disputes to be referred to arbitration in London under the ICC rules.²³⁰

This speaks for the state of arbitration in the East African Community if parties would opt to arbitrate overseas and subject their dispute arbitration at high costs under the ICC Arbitration Rules.²³¹ This is even more absurd when parties from the same region include an arbitration clause providing for arbitration overseas. Although article 14.2 of the ICC rules permits the arbitral tribunal to hold hearings and meetings at any place after consultation with the parties, it is unlikely that absent good infrastructure and necessary facilities any country in the EAC will be considered a suitable place for holding such hearings.

Parties that do not have the financial means to squander large amounts for arbitration venues overseas or those whose contracts (or disputes) involve less sums than what would otherwise be spent on institutional arbitrations abroad, would have no choice but to settle for a member country of the East African Community.

Consequently, the lack of development of the arbitration laws and institutions in the East African Community make the region an undesirable venue for holding international arbitrations. This calls for urgent legal reform of the outdated laws on arbitration in the region.

The next section of this chapter will entail a detailed discussion on the rationale for legal reform. Specifically it will elucidate why reforming arbitration laws in the region is a necessary precondition for making the East African Community a desirable place for holding international arbitrations or an essential step for achieving its economic goals.

²³⁰ <http://www.shonubimusoke.co.ug/alanshonubi.html> boasts about representing a 'major international client' in ICC arbitration in London. Also see David Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. Butler says that the number of venues in Africa or African arbitrators for ICC 'involving at least one African party' is disproportionate. p.2. Butler says that the same issue is happening in the SADC region.

²³¹ David Butler, 'The Need for Harmonised Arbitration' *op cit* note 227.

3.5. Rationale for Legal Reform

With the trend towards a global market place, it would be unwise for any country with ambitions of joining the global market to ignore the field of international commercial arbitration.²³² Since member countries of the East African community are working towards the common goal of an East African Common Market and establishing themselves as a sustainable economic block, enhancing the field of international commercial arbitration will be a necessary prerequisite for achieving that goal. For as was mentioned earlier, central to the well functioning of a regional organisation, is its dispute resolution mechanism.²³³ Accordingly, there is an urgent need for the countries in the East African Community that are still operating with archaic arbitration laws to acquaint themselves with the most recent legislation on international commercial arbitration.²³⁴

The present time could not be better suited for Rwanda, Tanzania and Burundi to take the necessary initiative to equip them with the latest legislation to meet the needs of the international business community. Already, Rwanda has taken a step in that direction by ratifying the New York Convention.²³⁵ Additionally, Rwanda passed a new arbitration and mediation law²³⁶ which is supportive of arbitration since it treats awards as final. In the old arbitration statute, arbitral awards could be appealed to the High Court.²³⁷ Rwanda's decision to adopt a new law on arbitration is commendable since current laws are vital to gaining 'equality' in international commercial transactions.²³⁸

²³² Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 401 1992.

²³³ Thalia Kruger, 'Regional Organisations and Dispute Settlement: Court and Arbitration Institution at the same time?' available at <http://www.ialsnet.org/meetings/business/KrugerThalia-SouthAfrica.pdf>

²³⁴ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 401 1992. Sempasa suggests that 'many countries in Africa need to re-examine or at least concern themselves seriously with the initiatives that have so far been launched or completed under the auspices of UNCITRAL'S formulating process.'

²³⁵ Rwanda adopted the New York Convention on November 8, 2008. The Convention entered into force in January, 2009.

²³⁶ Law No.005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters. This law was passed on March 6th 2008.

²³⁷ Sabine Hertveldt, 'Pragmatism Leads the Way in Setting up Specialised Commercial Courts.' Available at http://www.doingbusiness.org/CaseStudies/Rwanda_CS2008.pdf [Feb 4, 2009].

²³⁸ Schmitthoff, 'Progressive Development of the Law of International Trade' in Report of the Secretary General (UN DccA/6/6396, para 210 reprinted in (1968) I (I) UNCITRAL Y.B.II

Owing to the increasingly global nature of trade and investment matters, attention has turned to formulating uniform legislation and processes that can be used in the evolving global society.²³⁹ In many developed countries, the trend towards international commercial arbitration has been positive.

In the scope of international commercial contracts the most notable trend has been the fast development of legislation and practices for the resolution of international commercial disputes by arbitration.²⁴⁰ The urgent need for a faster and more efficient mechanism for resolving international commercial disputes to meet the ever evolving economic demands in international trading relationships is responsible for this rapid development.²⁴¹

If theoretical arguments alone do not adequately demonstrate how a properly functioning legal system is indispensable to a country's affluence, there is empirical evidence showing that the rule of law does in fact contribute to a country's wealth and its rate of economic growth.²⁴²

Legislations, especially those pertaining to commercial transactions, do more than ensure the enforcement of contractual or property rights; inappropriate laws may also diminish the economic efficiency of the country.²⁴³ For instance, in the present day and age, operating under outdated arbitration laws would be detrimental to the economy of a country with ambitions of attracting Foreign Direct Investment or with the desire to establish itself as a regional seat for international commercial arbitrations. Although the countries of the East African Community have not stated a desire to become a regional seat for international commercial arbitration, such an ambition would help them achieve their much desired goal of attracting Foreign Direct Investment.

²³⁹ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 388 1992.

²⁴⁰ P.O'Keefe, *Arbitration in International Trade* (1975) cited in Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries', 41 *Int'l Comp. L.Q.* 388 1992.

²⁴¹ Samson L. Sempasa, 'Obstacles' at p.388.

²⁴² Richard A. Posner, 'Creating a Legal Framework for Economic Development. *The World Bank Research Observer vol.13 no. 1 (February 1998) pp.1-11 at 2-3.*

²⁴³ Murphy K.M, A. Schleifer, and R.W. Vishny (1991), 'The allocation of talent: Implications for growth' *The Quarterly Journal of Economics*, CVI, May, 503-530.

The importance of commercial arbitration is authenticated by the fact that enforcement of property and contractual rights are simply a means of 'optimizing economic activity' that existed way before the state and 'formal legal institutions'.²⁴⁴ Even in the United States, a country with a reputation for its litigious culture, the majority of commercial disputes are resolved by arbitration than by litigation.²⁴⁵

The absence of a good legal system may influence potential investors to choose simple and instant commercial exchanges as opposed to longer, complex contracts for fear that legal remedies will not prevail in case of a party's breach of the contract.²⁴⁶

To achieve the economic goals that the East African Community has at heart, concurrent legal and economic reform is necessary. Even though some scholars²⁴⁷ maintain that it is possible for the economy of a country to progress with little or no laws at all, the majority maintain that clear enforceable laws are vital to for the smooth functioning of an economy.²⁴⁸

There is a need for member countries to examine the potential benefits of pursuing inexpensive legal reforms that may be helpful in laying the foundation for the smooth functioning of their economic goals.²⁴⁹ By changing the outdated legislation on arbitration in the region, the East African Community will be doing exactly that.

Therefore, instead of concentrating on what would otherwise be a costly option of 'creating efficient legal institutions',²⁵⁰ the East African Community would save a lot of time and money by adopting modern arbitration laws that can later be enforced by

²⁴⁴ Richard A. Posner, 'Creating a Legal Framework for Economic Development' *op cit note 240*.

²⁴⁵ *ibid.*

²⁴⁶ Hendley, Kathryn, Barry W. Ickes and Randi Ryterman. 1997 'Observations on the Use of Law by Russian Enterprises.' *Post-Soviet Affaires* 13(1): 19-41.

²⁴⁷ Richard A. Posner, 'Creating a legal Framework for Economic Development', *The World Bank Research Observer*, vol. 13, no. 1(February 1998) pp. 1-11 at p.3. Posner compares China's prosperity to India's; stating that China is now a power and yet it did not have good laws as India did.

²⁴⁸ A World Bank counsel says that, 'there is no way a market system can work efficiently in the absence of clear, enforceable laws.'

²⁴⁹ Jonathan R. Hay, Andrei Schleifer and Robert W. Vishny, 'Toward a Theory of Legal Reform' (1996) insinuate that inexpensive goals are capable of assisting in the creation of "preconditions for the operation of efficient markets.'

²⁵⁰ Jonathan R. Hay, Andrei Schleifer and Robert W. Vishny, 'Toward a Theory of Legal Reform' (1996) insinuate that inexpensive goals are capable of assisting in the creation of "preconditions for the operation of efficient markets.'

the institutions in place.²⁵¹ This is the approach that China followed. China adopted and implemented modern commercially driven rules at the time it liberalised its economy.²⁵²

If the fear for litigating in national courts in the EAC is based on a fear of corrupt officials in the home countries,²⁵³ one may argue that investing in legal institutions like the judiciary may be a better option than than adopting new rules on arbitration as this would potentially attract honest legal practitioners. However some argue that skilled labour, particularly that needed to operate a good court, is hard to come by and may be very costly.²⁵⁴

While this may have an inch of truth in it in as far as Rwanda or Burundi are concerned,²⁵⁵ in Uganda skilled labour of legal practitioners is not the problem. It is the low salary levels that cause corruption or disinterest in working zealously in the legal system that are of concern. Much as I agree with Posner that creating an effective judiciary would be costly for poor countries, I do so for entirely different reasons than he puts forward. Investing in a good court in Uganda would require hefty salaries for the legal personnel in addition to ensuring that the government does not interfere with the work of the judiciary.²⁵⁶ The former would be a costly venture for the government while the latter would require unguaranteed political will. Moreover it is unlikely that the government will have the necessary resources – monetary or otherwise, to fulfil the requirements needed to staff a good judiciary.

Owing to the meagre economic budgets of the countries of the EAC, it would be in their best interests to take the cheaper and quicker option of adopting modern laws since it will assist them in achieving their economic goals.²⁵⁷ This will work in a

²⁵¹ *Supra note 250.*

²⁵² Richard A. Posner, 'Creating a legal Framework for Economic Development' at p.4.

²⁵³ Corruption and intimidation from the government are just a few of the vices plaguing African courts and East Africa is no exception.

²⁵⁴ Richard A. Posner, 'Creating a legal Framework for Economic Development' at p.7. Posner states that it is hard to find highly educated people in poor countries to staff a good court 'making the opportunity cost of a first rate judiciary and its associated bar of practitioners very high.'

²⁵⁵ Skilled labour in Rwanda is a problem particularly because of the genocide effects.

²⁵⁶ This something that cannot be guaranteed especially where the government has an interest in the subject matter at hand.

²⁵⁷ Richard A. Posner, 'Creating a legal Framework for Economic Development' at p.7. Posner advises that the more expensive it is to create an independent judiciary of high quality, the more logical it is to

country that has adopted the Model law on international commercial arbitration as courts would have minimum supervision of the arbitral proceedings thereby decreasing the chance of corruption.²⁵⁸

An argument in favour of the rationale for legal reform is that the law in poor countries may be the reason for underdevelopment or a characteristic of it.²⁵⁹ Drafting or formulating new laws on arbitration, particularly by scholars who hardly know what the process of international commercial arbitration entails would be a daunting task. In such a situation as is the case with the East African Community, adopting legislation based on foreign law may be a more logical move.²⁶⁰

Moreover using foreign law as a model is a well tested method.²⁶¹ This is not to say that there is no value in a country formulating its own laws. On the contrary it is of great benefit for a country to do exactly that as it would put the country in position to design its laws according to its own needs. The problem is that such a task would be rather challenging as most countries in the EAC lack the necessary skills for such an undertaking.

The best approach for countries faced with lack of skills, meagre budgets and a dire need for economic development would be to adopt legislation based on foreign law that is in line with their economic goals. One approach would be to create a law reform commission which would analyse and modernise outdated commercial laws, 'borrowing wherever possible from foreign models'²⁶² or where reform of arbitration

'focus on legal reform on the adoption of substantively and procedurally efficient rules.' While this is not enough, it would work in the case where a country adopts the Model Law on international commercial arbitration as courts would have minimum supervision of the arbitral proceedings thereby decreasing the chance of corruption.

²⁵⁸ Richard A. Posner, 'Creating a legal Framework for Economic Development' at p.7. Posner advises that the more expensive it is to create an independent judiciary of high quality, the more logical it is to 'focus on legal reform on the adoption of substantively and procedurally efficient rules.'

²⁵⁹ Richard A. Posner, 'Creating a legal Framework for Economic Development' at p.6.

²⁶⁰ *Op cit note 257.*

²⁶¹ Richard A. Posner, 'Creating a legal Framework for Economic Development', *The World Bank Research Observer*, vol. 13, no. 1 (February 1998) pp. 1-11 at p.6.

²⁶² *ibid.*

laws is concerned; take the best option for countries in Africa- the choice between the Uniform Arbitration Act and the OHADA statute.

Chapter 4

THE CHOICE BETWEEN OHADA'S UAA AND THE MODEL LAW

4.1. Introduction

After the establishment of a link between legal reform and economic growth by the previous chapter, chapter 4 seeks to elaborate on the importance of the type of legal reform chosen in achieving the goal of economic growth and making the East African region an attractive venue for holding international commercial arbitrations. Assuming that, having signed a Free Trade Agreement, the member countries of the East African Community have decided to increase economic integration, the question we should ask is: What type of arbitration law will be suitable to best achieve that goal?

This chapter shall undertake a detailed analysis of the options available to the East African Community for unifying or harmonising the divergent arbitration laws in the member countries. In particular, it will compare the Uniform Arbitration Act (UAA)²⁶³ of OHADA and the UNCITRAL Model Law²⁶⁴ to establish which of the two arbitration legislations is suitable for adoption by the East African Community.

The reason for comparing the above arbitration statutes is that countries in Africa with the latest arbitration legislation can be categorised into two groups: those that have adopted or adapted the UNCITRAL Model Law on International Commercial Arbitration²⁶⁵ and those countries that are members of OHADA where the Uniform Arbitration Act²⁶⁶ of 1999 is the applicable statute.²⁶⁷

²⁶³ Hereinafter, "UAA"

²⁶⁴ Hereinafter, "UNCITRAL Model Law" or "Model Law" of 1985.

²⁶⁵ of 1985

²⁶⁶ *Op cit note 263.*

²⁶⁷ Generally see David W Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. There are sixteen members states to the OHADA treaty and they include Benin, Burkina Faso, Cameroon, Chad, Central African Republic, Comoros, Congo, Equatorial Guinea, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo and the Democratic Republic of Congo which will be joining soon.

4.2. Arbitration Legislation: Options for the East African Community

Although a country has the choice of tailoring its own arbitration law to its needs, the main choice for countries in the East African Community with antiquated arbitration statutes is between the UAA and the UNCITRAL Model Law.²⁶⁸ The choice of drafting their own arbitration law is attractive but could potentially be costly in terms of time and finances. Moreover, if all the countries in the East African Community drafted their own laws on arbitration, it would be difficult to harmonise the different arbitration laws in the region. Harmonisation of arbitration laws in the region would attract Foreign Direct Investment and make the East African Community an attractive venue for holding international arbitrations.

In Africa the number of countries that have adopted the Model Law on International commercial arbitration is nine²⁶⁹ as opposed to the sixteen states that are members of OHADA.

In East Africa, only Uganda and Kenya have adopted the Model law and although Tanzania came to the conclusion that it should adopt the Model law, a bill has not yet been passed to render this decision absolute. No member country of the East Community is a member of OHADA and thus the UAA is not applicable in any of the EAC countries. In fact of the five member countries of the East African Community only Uganda and Kenya have updated arbitration legislation.²⁷⁰

There is no doubt that harmonising arbitration laws within member countries of the East African Community will boost cross-border commercial transactions within the

²⁶⁸ David W Butler, "The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: A comparison between the UNCITRAL Model Law and the OHADA Uniform Act at 1. Also see David W Butler, 'The Need for Harmonised Arbitration' at p.3.

²⁶⁹ Only 9 countries in Africa have adopted or adapted the UNCITRAL Model Law on International Commercial Arbitration. For a list of countries that have adopted the UNCITRAL Model Law see <http://www.uncitral.org>. The countries that have adopted the Model Law in their national legislation include Uganda, Kenya, Nigeria, Egypt, Tunisia, Madagascar, Mauritius, Zambia and Zimbabwe.

²⁷⁰ Uganda and Kenya have ratified the New York Convention and adopted the Model law. Tanzania and Rwanda have outdated arbitration laws even though they have ratified the New York Convention. Burundi has neither ratified the New York Convention nor adopted the Model law and it still operates with an outdated legislation on arbitration.

East African Community; including between parties within and outside the East African Region.²⁷¹ The options regarding the adoption of such legislation will be discussed below.²⁷² This chapter will provide a general discussion on the OHADA and UNCITRAL arbitration systems after which it will elaborate on the factors which could possibly influence a policy maker to choose one of them. After comparing the contents of the Model Law and the UAA, an informed recommendation as to which of the two laws is suitable for adoption by the East African Community will be made.

OHADA

The Organisation for the Harmonisation of Business Laws (OHBLA) also known as OHADA in French is a result of the Treaty for the Harmonisation of Business Laws in Africa.²⁷³ This treaty, among other things, aims at harmonising business law and promoting arbitration for resolving commercial disputes.²⁷⁴ The Treaty, which has been mainly adopted by French Speaking countries, is open to any of the members of the African Union ('AU')²⁷⁵. Pursuant to Article 53, a non -member state of the AU may be invited to become a member of OHADA upon the agreement of all contracting states.²⁷⁶ OHADA has a council of Ministers which is assisted by the Permanent Secretariat. The ministers of justice and finance from the different member states of OHADA make up the Council of Ministers. These Ministers are responsible for adopting the Uniform Acts.²⁷⁷ Currently, six Uniform Acts have been adopted by the Council of Ministers and these Uniform Acts supersede the domestic laws in the member states of OHADA.²⁷⁸ In 1999, the Uniform Arbitration Act was adopted.²⁷⁹

²⁷¹ Generally see David W. Butler, 'The Need for Harmonised Arbitration'.

²⁷² *ibid.*

²⁷³ This Treaty was signed in Port Louis Mauritius on 17 October 1993 and is available at <http://www.jurisint.org> [Feb 24, 2009].

²⁷⁴ Articles 1, 2 and 54 OHADA Treaty Preamble.

²⁷⁵ At the time the Treaty was concluded it referred to the OAU. Currently the AU is the legal successor of the OAU.

²⁷⁶ Article 53 of the OHADA Treaty.

²⁷⁷ The Council of Ministers is the legislative arm. Generally Articles 3, 27-30 of the OHADA Treaty.

²⁷⁸ Douajni GK 'OHBLA Arbitration' (200) 17(1) *J Int'l Arb* 127.

²⁷⁹ Shackleton, 'A single new arbitration regime for sixteen African States- beyond the Model Law' *LCIA Newsletter* vol 5 no. 4 (2000) 2-5. Also see Amazu. A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and institutional Development* 126-128.

The Uniform Arbitration Act does not permit reservations and ‘applies automatically’ in member states.²⁸⁰ It can only be adopted by those countries that are members of OHADA although a non member country can opt to customise its arbitration law based on the Uniform Arbitration Act without becoming a member of OHADA.²⁸¹ Upon becoming a member state of OHADA, a country accepts all the other uniform commercial laws under the treaty.²⁸²

Additionally, OHADA has two distinct arbitration systems.²⁸³ One of the arbitration systems consists of institutional arbitration based on the ICC Rules (but the arbitrations would take place under OHADA rules) under the ‘auspices of’ the Common Court of Justice and Administration (CCJA).²⁸⁴ The CCJA acts as the highest judicial authority under the OHADA treaty and is also an arbitral institution.²⁸⁵ The second arbitration system is under the Uniform Arbitration Act which we have already discussed above.

UNCITRAL MODEL LAW

Since 1985, the UNCITRAL Model Law on International Commercial Arbitration has been the yardstick for measuring national arbitration statutes.²⁸⁶ The UN General Assembly approved the Model Law in 1985 and recommended it for adoption by the member states. The Model Law is only applicable if adopted by a State. It may be altered to suit the needs of the adopting state.²⁸⁷ The drafters of the Model Law had the following goals in mind.²⁸⁸

²⁸⁰ OHADA Treaty Article 10, Title II of the UAA. Also see David Butler, ‘The Need for Harmonised Arbitration’ at p.4. Also see David W Butler, ‘The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act’ at p.2. Paper presented at the AFSA & MCCI International Arbitration workshop at Le Victoria, Mauritius on 12 April 2007.

²⁸¹ David Butler, ‘The Need for Harmonised Arbitration and ADR legislation in the SADC region’.

²⁸² David Butler, ‘The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act’ at p.2.

²⁸³ David Butler, ‘The Need for Harmonised Arbitration and ADR legislation in the SADC region’ at p.4.

²⁸⁴ The CCJA has its basis in Chapter IV of the OHADA Treaty articles 21-26

²⁸⁵ Article 20 of the OHADA Treaty under Title III states that judgments of the CCJA are ‘final and conclusive.’ Article 21 of the OHADA Treaty and Title IV elaborates how the CCJA acts as arbitral institute. Also see David Butler, ‘The Need for Harmonised Arbitration’ at p.4.

²⁸⁶ *Op cite* 280.

²⁸⁷ David Butler, ‘The Desirability of a Common Arbitration Statute’ *op cite note* 280.

²⁸⁸ SALRC Report (July 1998) available at <http://www.doj.gov/za/salrc/index.htm> [Feb 20, 2009].

They wanted to liberalise international commercial arbitration by limiting the role of domestic courts and promoting party autonomy. In addition to creating a well-defined set of mandatory provisions to ‘ensure fairness and due process’, the drafters wanted to make sure that arbitrations could be completed efficiently.²⁸⁹ To ensure this, arbitrators were given more powers. Another goal of the drafters was to clarify some of the controversial issues.²⁹⁰

In 2006, UNCITRAL adopted a couple of amendments to the UNCITRAL Model Law on International Commercial Arbitration. If states which have implemented the Model law adopt these amendments, they will become part of their domestic arbitration legislation.²⁹¹ States which have not yet adopted the UNCITRAL Model law on International Commercial Arbitration can do so at a future stage thereby adopting these amendments as a result.²⁹²

4.3 Factors to Consider When Comparing OHADA and UNCITRAL Model Law

Let us assume that we are policymakers working and living in one of the member countries of the East African Community and we have the interests of the region at heart. Our country has a variety of natural resources but bad infrastructure. We have a small manufacturing industry with the potential for growth.²⁹³ Our people, though good at business, are rather uneducated and rely on litigation if at all, to dissolve their commercial disputes. Our country is plagued by poverty and our courts are riddled with corrupt officers. A fraction of those who are educated and knowledgeable about alternative dispute resolution, are succumbed to international arbitrations in far away venues. The vital question to ask ourselves is: What do we want?

Naturally, we want education, better infrastructure and higher rates of economic growth. We want international commercial disputes to be resolved out of court

²⁸⁹David Butler, ‘The Need for Harmonised Arbitration and ADR legislation in the SADC region’ at p.4

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ Eleanor M. Fox, ‘*Economic Development, Poverty and Antitrust: The Other Path*’, Festschrift For Professor Lawrence Sullivan, 13 *Sw. J. L & Trade in Americas* 211(2007) at 116 uses this analogy to advise policy makers of countries in third world who are contemplating adopting competition law..

without investors worrying about corrupt officers. Do we require and want modern commercial arbitration laws? And if so what type of arbitration laws? We want to explore the opportunities that the latest arbitration laws can give us: The chance to make the region a desirable place for conducting commercial arbitrations and also the opportunity to attract Foreign Direct Investment.²⁹⁴ We therefore, come to the conclusion that a modern arbitration statute will help us explore those opportunities.

Assuming that we want the latest arbitration law, do we want unification or harmonisation with other states (in our region)? Some of the most important aspects a policy maker has to keep in mind when comparing arbitration statutes is whether these statutes respect party autonomy, whether the statute provides for substantial procedural powers for the arbitrator if the arbitration agreement is silent on certain aspects and the balanced power to the courts so, as to allow supervision but avoid too much interference.²⁹⁵ The supervision of courts to ensure fairness and due process is essential to the process of arbitration to eliminate abuse of power by an arbitrator.

Another important factor that should be kept in consideration when comparing arbitration statutes is the statute's compatibility with international treaties; especially the New York Convention. Additionally, it is crucial that the arbitration statute can cater for parties from various procedural backgrounds.²⁹⁶

4.4. UNCITRAL Model Law and the OHADA Uniform Arbitration Act: A Comparison.

In analysing the differences between the Model Law and the OHADA Uniform Act on Arbitration, the factors mentioned above will be the basis for the comparison.

SCOPE OF APPLICATION

²⁹⁴ The chance to make the region a desirable place for conducting commercial arbitrations and also the opportunity to attract Foreign Direct Investment.

²⁹⁵ David Butler, 'The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act at p.2. Paper presented at The AFSA & MCCI International Arbitration Workshop at Le Victoria, Mauritius on 12 April 2007.

²⁹⁶ David Butler, *op cit* note 289.

The UNCITRAL Model Law which applies to both *ad hoc* and institutional arbitration was drafted for the purposes of aiding international commercial arbitration. Policy makers have the choice of adopting the Model Law for domestic arbitration by omitting the words ‘international’.²⁹⁷ With the exception of a few provisions,²⁹⁸ the Model Law only applies to arbitrations taking place in countries which have adopted the Model Law.²⁹⁹

Unlike the Model Law, the OHADA UAA applies to any arbitration where the seat of the arbitral tribunal is in one of the member states.³⁰⁰ Previously enacted arbitration laws in member states of OHADA are subordinate to the UAA.³⁰¹ The UAA was intended to be applied uniformly in the member states. This can be inferred from the fact that the UAA is meant to be applied to the exclusion of national arbitration statutes in the member states of OHADA.³⁰² Additionally, OHADA has a general rule that Uniform Acts are directly applicable in all its member states which makes it different from the Model Law that serves only as an example to national legislators.

In order to achieve relative uniformity in the application of the Model Law, article 2A of the Model Law was drafted to eliminate the difficulties encountered by various judges in some jurisdictions in interpreting the provisions of the Model law.³⁰³ This article basically states that consideration for the need to enhance uniformity and the observance of good faith, in the interpretation of the Model Law is of paramount importance.³⁰⁴

COURT POWERS

The drafters of the Model Law rightly anticipated that dilatory tactics could be used to defeat arbitration proceedings. In order to minimise interference of courts, the drafters

²⁹⁷ *Supra* note 296 at p.7.

²⁹⁸ See Article 1(2) of the amended version of the Model Law.

²⁹⁹ *ibid.*

³⁰⁰ Article 1 of the UAA.

³⁰¹ Article 35 of the UAA. Also see article 10 of the OHADA Treaty.

³⁰² David Butler, ‘The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act’ p.8. Paper presented at The AFSA & MCCI International Arbitration Workshop at Le Victoria, Mauritius on 12 April 2007.

³⁰³ *ibid.*

³⁰⁴ Article 2A of the Model Law.

were able to strike a balance between court interference and court support for arbitration hence consciously reducing the chances of obstruction or delay that could be caused by a party's reliance on court intervention.³⁰⁵

Article 6 of the Model Law mandates a country adopting the Model Law to appoint a court or any other competent authority that will carry out specific duties of the court under the Model Law.³⁰⁶ As will be discussed in the next chapters, this article could be used to delegate power such as the power to appoint arbitrators to the East African Community Regional Arbitration Centre. Establishing a regional arbitration centre is one of the recommendations made by the author to address the current problem of less international arbitrations taking place in the EAC.³⁰⁷ The Uniform Arbitration Act does not have a provision to this effect.³⁰⁸

ARBITRATION AGREEMENT

Both the UAA and the Model Law require that the arbitration agreement be in writing or by any such means, including electronic means of communication, that would allow it to be recorded.³⁰⁹ This was not the case with the Model Law before its amendment. Before its amendment, the Model Law had strict requirements which were very narrowly defined.³¹⁰

If the East African Community wants to establish itself as a regional centre for international arbitration, adopting the Model law is one of the surest ways to realise that goal. For this is the path that many developed countries have taken and indeed, they are currently well known for their arbitration centres. It is important that the East African Community adopt a legislation that has achieved wide acceptance by the

³⁰⁵ RH Christie, 'The UNCITRAL Model Law in Southern Africa' (1998) 64 *Arbitration* 272. Also see David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region' p.11.

³⁰⁶ David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region' p.11.

³⁰⁷ This is one of the recommendations discussed in Chapter 6.

³⁰⁸ *Op cit note 306.*

³⁰⁹ Article 3 of the OHADA Uniform Arbitration Act and Article 7(1) Option 1 of the Model Law as amended in 2006.

³¹⁰ David W. Butler, *op cite note 306* at p.10.

international business community. Judging from the number³¹¹ of countries that have adopted the Model Law or used the Model Law as basis for drafting their own legislation, it is safe to conclude that the Model Law will best meet the needs of resolving cross border disputes in the region.

4.5. The Model Choice: Why Countries in the East African Community Should Adopt the Model Law.

Approximately 47 countries in the world have adopted the UNCITRAL Model Law on International commercial arbitration including several states in America.³¹² Majority of these are developed countries. In the East African Community, Uganda and Kenya have adopted the Model Law and by the looks of it, Tanzania is considering to adopt the Model law as well. This thesis argues that international arbitration laws for the East African Community must be viewed in a wider context. This scope includes the economic goals of the East African Community and how it is viewed by its business partners.³¹³

Arguments have been posited to the effect that developing countries often see international commercial arbitration laws as inappropriate to their context because of the tendency of arbitration laws to disproportionately benefit the already advantaged.³¹⁴ Does this then imply that international commercial arbitration laws for developing countries should drastically differ from a developed country's? Not at all. As will be discussed in the subsequent chapters, adopting the appropriate law is only but one step forward in the direction of establishing the East African Community as a desirable venue for international arbitration or putting it in a position to attract Foreign Direct Investment.

³¹¹ 47 countries have adopted the Model Law to date. Available at <http://www.rozoviclaw.com/newsletter/newsletter.jsp?jsessionid=ACC2C6CE5D525002766CB8F0478E0FEF> [Feb 1, 2009].

³¹² <http://www.rozoviclaw.com/newsletter/newsletter.jsp?jsessionid=ACC2C6CE5D525002766CB8F0478E0FEF> [Feb 1, 2009].

³¹³ The EAC needs to be viewed as a desirable venue for holding international commercial arbitrations and currently it is not given the disparity of arbitration laws in the region.

³¹⁴ Samson L. Sempasa, "Obstacles to International Commercial Arbitration in African countries". Also see Amazu A. Asouzu, *International Commercial Arbitration and African States*. Also see Nancy Birdsall, *Inequality matters: Why Globalisation Doesn't Lift All Boats*, Boston Rev., Marc-April 2007, at 7 [Dec 28 2008]. Also see M. Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint', 6:4 *J. INT'L ARB.* 7.

From the above comparison of the Model Law and the OHADA Uniform Arbitration Act, it is clear that the Model Law is way more powerful than the UAA in as far as powers of the court and powers of the tribunal are concerned because of the wide acceptance it has received within the international business community.

Even though, some scholars³¹⁵ have expressed doubt about the Model Law's suitability for developing countries, I contend that the Model is the most logical choice for members of the East African Community. The arguments that have been put forward by Sornarajah can be refuted. He argues, for example, that if the Model Law defeats the mandatory provisions of the enacted national law meant to protect the developing country's economic developmental interests, then that country should not adopt the Model Law. While the argument seems valid, it is rather obvious that the mandatory national law of any country that has adopted the Model Law would prevail over the provisions of the Model Law. This is because mandatory rules apply regardless of the proper law or procedural law chosen by the parties.³¹⁶ This would render Sornarajah's argument redundant. Even keeping in mind that a party could have the award enforced in another country (other than the country where there is a mandatory law), it is unclear how this would affect the economic interests of the country whose mandatory law was disregarded.

He further argues that the limitations of the Model Law on judicial intervention are not in the interest of developing countries which rely mainly on foreign contracts to export their natural resources.³¹⁷ His argument is that developing states could easily be exploited by foreign investors.³¹⁸ He posits that the courts of developing countries should have more supervisory power or more power to review such contracts to ensure that there is no exploitation.

³¹⁵ M. Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint', 6:4 *J. INT'L ARB.* 7 (1989). Also See M. Sornarajah, "The Settlement of Foreign Investment Disputes (2000).

³¹⁶ Andrew Barraclough and Jeff Waincymmer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) *MelbJIL* 9.

³¹⁷ M. Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint," 6:4 *J. INT'L ARB.* 7 (1989). Also See M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2000).

³¹⁸ *ibid.*

In positing his argument, Sornarajah fails to take into consideration the basic elements of what constitutes a valid contract. In the event that a developing state has already signed an unfair contract that could lead to its exploitation, there is no amount of supervisory power the Model Law could grant the local courts to remedy such a situation. Even if the Model Law were to permit courts more intervention, the general rule is that once a contract has been signed and there has been a valid offer and acceptance for a sum or consideration no matter how small, the court does not concern itself with the amount or price to be paid where parties (presumably of sound mind or having the requisite capacity) have freely chosen to be bound by such a contract.³¹⁹ It would be the responsibility of the lawyers to review the contract before both parties sign it to ensure that it is fair and not detrimental to the developing state.³²⁰ I find Sornarajah's argument on how the Model law could enable such exploitation rather unconvincing.³²¹

Moreover, it has been posited that the Model law is more compatible with the common law procedure which Uganda, Kenya and Tanzania are accustomed to.³²² The Model Law would be suitable for the East African Community since the majority of the members already have a common law procedural culture. This would make harmonisation of arbitration laws in the region more plausible than OHADA's UAA which is civil law inspired. Unless OHADA modifies its laws, it is unlikely that its common law neighbours will adopt its laws since the common law and the civil law systems are fundamentally different.³²³

³¹⁹ There are few exceptions where a party may be excused from performing his obligations e.g in case of hardship or if the contract goes against the public policy of a country. However, as already explained, mandatory laws prevail over any contractual agreement of the parties; therefore, in case a contract entails a subject matter that is against the public policy of the *lex arbitri*, the local courts can interfere in the proceedings.

³²⁰ *ibid.*

³²¹ Also see David Butler's views on Sornarajah's article. M. Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint,' 6:4 *J. Int'l Arb.* 7-20 (1989). David Butler is unconvinced with Sornarajah's argument that the Model Law pays little attention to the interests of developing countries in David Butler, 'The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: a Comparison between the UNCITRAL Model Law and the OHADA Uniform Act' p.5. Paper presented at The AFSA & MCCI International Arbitration Workshop at Le Victoria, Mauritius on 12 April 2007.

³²² David Butler, 'The Need for Harmonised Arbitration' at p.5.

³²³ C. Moore Dickerson, 'The Introduction of OHADA Law in Anglophone Countries: Linguistic Challenges' *International Business Law Journal* No.6 of 2008. p.743-750.

Additionally, Uganda and Kenya have already adopted the Model Law and Tanzania is in the process of adopting the Model law as well.³²⁴ The only countries remaining would be Rwanda and Burundi and a prudent policy maker in those countries would recommend the adoption of the UNCITRAL Model Law. It would not be in the interest of the EAC (if they wish to establish themselves as a regional arbitration centre) if any of the remaining countries were to join OHADA.

Furthermore, the Model Law and the UNCITRAL Arbitration Rules of 1976 are highly compatible.³²⁵ Many arbitration rules are modelled on the UNCITRAL Rules such as those of the Singapore International arbitration Centre, the International Arbitration Rules of the American Arbitration Association, the Dubai International Arbitration Centre, to mention just a few. These countries are important trading partners to the EAC than the OHADA States. Therefore, it would not only be smart but logical to have the UNCITRAL Rules as the rules of a Regional Arbitration Centre for the East African Community because they work already exist and work well together.³²⁶

Most importantly, since the Model Law gives countries the option of applying it to either international or domestic arbitration, the Model Law offers the flexibility that is required when conducting international arbitration. This is not the case with the Uniform Arbitration Act which applies to both domestic and international arbitration.³²⁷ This flexibility will be elucidated upon in the next chapter.

Due to the divergent legal traditions in the East African Community, it is only logical that in creating a legal structure under the auspices of international arbitration, the discussion should include harmonisation and address the advantages that harmonisation of arbitration laws would bring about.³²⁸

³²⁴ www.uncitral.org [Feb 12, 2009].

³²⁵ David Butler, 'The Need for Harmonised Arbitration' at p.5.

³²⁶ *ibid.* David Butler made the same recommendation for the SADC region and it also applies to the EAC. See David Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region' at p.5

³²⁷ *ibid.*

³²⁸ Samson L. Sempasa 'Obstacles to International Commercial Arbitration in African Countries' at 392. This discussion should also include an instrument where the exercise has already been done. For instance the Model Law was drafted by experts from different legal traditions.

Chapter 5

HARMONISATION: LESSONS FOR THE EAST AFRICAN COMMUNITY

5.1. Introduction

The global increase in economic integration has sparked the trend towards harmonisation of trade laws. In order to boost international commercial transactions worldwide, attempts at unifying and harmonising international commercial law have been on the rise. These efforts have manifested themselves in the ‘unification of choice-of-law rules and harmonisation or unification of substantive rules.’³²⁹ Currently efforts to harmonise procedural rules of arbitral institutions are being made.³³⁰ However, this chapter will focus on the trend ‘towards harmonisation of national arbitration laws and the movement towards a single, unified legal system.’³³¹

This chapter argues that members of the East African Community need to adopt the Model Law on International Commercial Arbitration if they want to realise their economic goals. Moreover, apart from increasing their economic opportunities, the adoption of the Model Law would also make the region an attractive venue for holding international arbitration.³³² This is because the Model Law is widely accepted and trusted and the fact that a country’s legislation is based on it encourages business people to use that country as a venue for holding international commercial arbitrations.³³³ Additionally, even countries that have not directly adopted the Model Law have had drafters of their arbitration statutes fashion their arbitration legislation close to the Model Law.³³⁴ It is implicit therefore, that the provisions of the Model Law represent the current trend of thoughts on the subject of International commercial

³²⁹ Elizabeth Shackelford, ‘Party Autonomy and Regional Harmonisation of Rules in International Commercial Arbitration’. Available at <http://lawreview.law.pitt.edu/issues/67/67.4/Shackelford.pdf>. [Feb 20, 2009]

³³⁰ *ibid.*

³³¹ Richard Garnett, ‘International Arbitration law: Progress towards Harmonisation’. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf). [Jan 23, 2009].

³³² *ibid.*

³³³ <http://www.uncitral.org/en-index.htm> [Jan 20 2009].

³³⁴ Brazil, Finland, Italy and The Netherlands have arbitration laws that are described as ‘inspired by’ or ‘compatible with’ the Model Law. Richard Garnett, ‘International Arbitration law: Progress towards Harmonisation’. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf).

arbitration. Hence, in the interest of regional and global economic integration, the East African Community should adopt the Model Law.

5.2. Why Harmonise Arbitration Laws?

Due to the increase in economic integration, it has been posited that the harmonisation of national legal systems and other regulatory policies is not just desirable but is an absolute necessity for free trade.³³⁵ The topic on how harmonisation eliminates the nuances in the different legal systems thereby ensuring security of [commercial] transactions is an important one.³³⁶ However some scholars have questioned whether harmonisation is really a necessary precondition for free trade.³³⁷ This section will elaborate on the justifications for harmonisation of arbitration laws.

The massive reform of arbitration laws in various countries is indicative of ‘the tension between the notions of harmonisation and denationalisation’.³³⁸ The drafting of the Model by UNCITRAL greatly ‘overshadowed’³³⁹ the trend towards denationalisation of international arbitration procedural law.³⁴⁰ The lack of uniform and harmonised rules on international commercial arbitration is one of the reasons that led to the rise of the trend towards denationalisation.³⁴¹ Every country had its own arbitration laws, most of which did not cater for international commercial arbitration.³⁴² International commercial arbitration has increased owing to the recent reform of arbitration laws that have taken place in various countries. This shows how much the international community has yearned to establish an international standard for supervising international commercial arbitrations.³⁴³

³³⁵ Katherine Lynch, *The forces of Economic Globalisation; Challenges to the Regime of international Commercial Arbitration*, p.196.

³³⁶ Generally see David W. Leebron, ‘Lying Down with Procrustes: An Analysis of Harmonisation Claims’, in *Fair Trade and Harmonisation: Prerequisites for Free Trade* (Jagdish N. Bhagwati & Robert E. Hudec eds. 1996).

³³⁷ Jagdish Bagwati, ‘The Demands to Reduce Domestic Diversity Among Trading Nations’ in *Fair Trade and Harmonisation: Prerequisites for Free Trade* (Jagdish N. Bhagwati & Robert E. Hudec eds. 1996).

³³⁸ Katherine Lynch, *op cite note 336* at p.272.

³³⁹ *ibid.*

³⁴⁰ *ibid.*

³⁴¹ *ibid.*

³⁴² William W. Park, *International Forum Selection* 37 (1995).

³⁴³ *supra note 338.*

Although a considerable amount of time was taken to draft the Model Law, the New York Convention³⁴⁴ can be viewed as the first effort to harmonise arbitration law.³⁴⁵ The New York Convention, which only deals with arbitral agreements and arbitral awards, was drafted with the intention of making awards enforceable in member states. However this chapter will limit its discussion to the Model Law. The Model Law was specially designed as a 'benchmark for an international arbitral procedural law.'³⁴⁶

Harmonisation of arbitration laws has many benefits such as the facilitation of international business. The harmonisation of arbitration laws enables parties active in commercial transactions to reap the benefits of a dispute resolution system that is neutral and flexible.³⁴⁷ This is, after all the rationale behind the need to harmonise arbitration legislation; the need to remove or reduce national diversity among countries with ambitions to engage in free trade.³⁴⁸

Additionally, harmonisation of arbitration laws in a region can also lead to economic growth because the region will attract international arbitration business.³⁴⁹ Moreover, the availability of a flexible and neutral forum for resolving international commercial disputes promotes the flow of international commercial transactions on a wider level as there is greater certainty in the method of dispute resolution.³⁵⁰

Furthermore, harmonisation of arbitration laws in the East African Community would potentially improve the competitiveness of the region in comparison to before when the region could not compete with other areas with good resolution systems for resolving international commercial disputes. The above are the main objectives of regional harmonisation of arbitration laws.

³⁴⁴ Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Hereinafter, 'The New York Convention' or the 'NYC'.

³⁴⁵ Richard Garnett, 'International Arbitration law: Progress towards Harmonisation'. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf).

³⁴⁶ *Op cit note 346*.

³⁴⁷ *ibid*.

³⁴⁸ Katherine Lynch at p.197.

³⁴⁹ Richard Garnett, 'International Arbitration law: Progress towards Harmonisation'. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf).

³⁵⁰ *ibid*.

5.3. The Need for Harmonisation of Arbitration Laws in the East African Community.

Subsequent to the drafting of the Model Law and its adoption by the UN, several 'legislative initiatives' were created to address the international business community's needs.³⁵¹ These initiatives were also introduced to remedy the effect that outdated arbitration statutes had on international commercial arbitration.³⁵²

It was argued that the reform of national arbitration laws would be more meaningful through the process of harmonisation hence, the drafting of the Model Law, a statute which nations could adopt and implement in their domestic arbitration statutes.³⁵³

The Model Law has played an important role in the reform of domestic arbitration legislation across the world, particularly with regard to the doctrine of party autonomy.³⁵⁴ Unlike the notion of denationalisation which disregards the importance of the *lex fori*, the Model Law acknowledges the role played by the national legal system in supporting the process of international commercial arbitration. Most importantly, the Model Law limits unnecessary court intervention.³⁵⁵ Article 5 of the Model Law provides that '[i]n matters governed by this Law, no court shall intervene except whereso provided by this Law.'³⁵⁶ This article is important because it prevents national courts from exploiting domestic laws in a way that could interfere with the arbitral proceedings. Without Article 5 of the Model Law, national courts would be in position to exploit domestic laws in such a way that could lead to courts' intervention in arbitration proceedings; an act that would negatively affect the principle of party autonomy.³⁵⁷

³⁵¹ Katherine Lynch, *The forces of Economic Globalisation; Challenges to the Regime of international Commercial Arbitration* p. 238.

³⁵² *ibid.*

³⁵³ Generally see Richard Garnett, 39 *AM. J. COMP.L.* 699 at 718. Also see Katherine Lynch, *op cit note 352* at p.239.

³⁵⁴ *ibid.* Also see Richard Garnett, 'International Arbitration law: Progress towards Harmonisation'. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08.Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08.Garnett.pdf). Garnett says that the enactment of the Model Law has made a significant contribution towards inspiring the movement 'to embrace party autonomy.'

³⁵⁵ Article 5 of the Model Law. Also see Richard Garnett, 'International Arbitration law: Progress towards Harmonisation'. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf).

³⁵⁶ Article 5 of the Model Law.

³⁵⁷ Richard Garnett, *op cit note 355*.

In order for the countries in the East African Community to truly enjoy the benefits of the Model Law they should all adopt the common version of the Model Law on international commercial arbitration.³⁵⁸ Additionally, it is advisable for the countries in the East African Community to make as few changes as is reasonably possible in order to facilitate harmonisation.³⁵⁹

This is because one of the main objectives of the Model Law is the promotion of harmonisation.³⁶⁰ The other reason is that it will make the countries in the East African Community attractive venues for hosting international commercial arbitration owing to the newly acquired modern legislation.³⁶¹

Additionally, because the adoption of appropriate legislation will increase the flow of international commercial transaction in the region, this will attract Foreign Direct Investment.³⁶² The enactment of the Model Law within national arbitration legislation with limited changes signifies a country's support for the arbitration process.³⁶³ Foreign investors will potentially view it as message that arbitration agreements will be honoured by the local courts and will, if the situation warrants it, receive court support.³⁶⁴

5.4. Adopting the Model Law: How the EAC countries can translate the Model Law in their National Legislations.

As already mentioned above, one of the main objectives that the drafter's of the Model Law had in mind was to promote the harmonisation of national arbitration

³⁵⁸ David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. p.5. This was proposed for the SADC region by David W. Butler.

³⁵⁹ *ibid.*

³⁶⁰ Explanatory Note by UNCITRAL Secretariat on the Model law o International Commercial Arbitration, available at <http://www.uncitral.org/> [Dec 12 08]. Also see David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. p.5.

³⁶¹ David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. p.6.

³⁶² *ibid* at. p.5. Also see Richard Garnett, 'International Arbitration law: Progress towards Harmonisation'. Available at [http://mjil.law.unimelb.edu.au/issues/archive/2002\(2\)/08Garnett.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2002(2)/08Garnett.pdf).

³⁶³ *op cit* note 362.

³⁶⁴ *ibid* pp. 5-6.

legislation.³⁶⁵ The Model Law has been widely accepted by various countries and this is evident from the number of countries that have adopted it fully or partially.³⁶⁶

However, despite the Model Law's contribution to the harmonisation of arbitration legislation, countries that have adopted the Model Law have taken diverging approaches in enacting the Model Law into their arbitration statutes.³⁶⁷

The different ways in which the Model Law has been adopted and enacted into national arbitration statutes by various countries reflects the varying economic, political and legal backgrounds of the adopting countries.³⁶⁸ The Model law has mainly been adopted by countries with no historical background of international commercial arbitration.³⁶⁹

While some countries have adopted the Model Law to be used in international and domestic arbitrations, others have adopted it solely for international commercial arbitration.³⁷⁰ Egypt, Uganda, Bulgarian and Mexico are just a few of the countries that have adopted the Model law for both international and domestic arbitrations.³⁷¹

This was indeed anticipated by UNCITRAL when the Model Law was drafted:

'...any State is free to take the model law whether immediately or at a later stage as a model for legislation on domestic arbitration and thus, avoid a dichotomy within its arbitration law.'³⁷²

The choice to opt-in or out of domestic or international arbitration has been left up to the parties in some countries. For instance the arbitration statute in Hong Kong permits parties in a domestic arbitration 'to opt-in to the Model Law regime' when a conflict has arisen.³⁷³ Yet other countries allow parties involved in international

³⁶⁵ *Op cit* note 360.

³⁶⁶ For the exact number of countries that have adopted the Model Law please visit <http://www.uncitral.org>.

³⁶⁷ Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration*. p.247.

³⁶⁸ *ibid*.

³⁶⁹ *ibid* at p.247-248.

³⁷⁰ *ibid* at p.250.

³⁷¹ *ibid*.

³⁷² Comments made by the Secretary General of UNCITRAL in the Analytical Commentary, March 25, 1985 in Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration*. p.250.

³⁷³ Arbitration Ordinance, section 2L (Cap.341) (H.K) in Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration*. P.250.

commercial arbitrations to opt-out of the Model Law and conduct the proceedings under the rules of domestic arbitrations.³⁷⁴

There are just as many differences in the modification and adoption of particular provisions of the Model Law as there are differences in the methods employed in enacting the Model Law into domestic arbitration legislation.³⁷⁵ Several countries have modified the wording of the Model Law provisions when enacting it into their national legislation.³⁷⁶

This is however not advisable for countries in the East African Community as it may create discrepancies in the interpretation of the provisions of the Model Law thus defeating the objective of unification and harmonisation of arbitration laws. It is recommended that the countries in the East African community adopt the Model law with as little changes as possible³⁷⁷ because of the above reason.

5.5. Harmonisation of National Arbitration Laws: Possible challenges

After the countries in the East African Community have all adopted the Model Law thus achieving regional harmonisation in international commercial arbitration, there are other options which each country can consider for domestic arbitral proceedings however, since this thesis is limited to international commercial arbitration, any discussion on that matter is beyond the scope of this subject. This section will therefore explore the difficulties of harmonising arbitration laws.

In spite of the diverging approaches in the adoption of the Model Law as discussed above, the Model Law has greatly facilitated the harmonisation of national arbitration legislation. The few examples of the different methods taken by various countries in

³⁷⁴ Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration*. p.250.

³⁷⁵ David W. Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. p.5.

³⁷⁶ *Op cit note 374* at p.250-251.

³⁷⁷ *Op cit note 375*. Even though Butler makes this recommendation for the SADC region, it is applicable to the countries in the EAC as well.

adopting, modifying and adapting the Model Law only attest to its success in influenc[ing] ‘the reform and modernisation of national arbitration laws.’³⁷⁸

However, these different approaches also show how difficult it is to design ‘a single uniform and harmonised law’³⁷⁹ to govern international commercial procedure.³⁸⁰ This is because it is difficult to reconcile the conflicting values that prevail between international and national systems.³⁸¹ It is hard to determine which of them should take precedence in international commercial arbitration.³⁸²

By assuming a conjunction of the best practice and procedure of international commercial arbitration, harmonisation undermines the diverging arbitral practices and legal procedures in various jurisdictions.³⁸³

The policy of harmonisation also misjudges the power of national differences and the extent to which countries may be attached to their own arbitration legislation or historical backgrounds.³⁸⁴ This may be inferred from how long Rwanda and Burundi have held onto their outdated arbitration statutes despite being aware of the steps taken by the neighbouring states (Kenya and Uganda) to update their arbitration laws through the adoption of the Model Law. Tanzania still has not passed a bill to adopt the Model Law despite coming to the conclusion in parliament that it would adopt the Model Law. This could easily be interpreted as a self-destructive attachment to a statute that the government knows to be outdated because Tanzania is aware of the benefits the Model Law has to offer to the commercial community as a whole and yet no steps have been taken to expedite the enactment of the Model Law into its national arbitration law.

³⁷⁸ David W. Butler, ‘The Need for Harmonised Arbitration and ADR legislation in the SADC region’, p.8.

³⁷⁹ Katherine Lynch, *The Forces of Economic Globalisation: Challenges to the Regime of International Commercial Arbitration*. p.258.

³⁸⁰ *ibid.*

³⁸¹ *ibid.*

³⁸² *ibid* at p.258-259.

³⁸³ *ibid* at p.259.

³⁸⁴ *ibid.* Also see Louis W. Pauly & Simon Reich, National Structures and MNC Behaviour: Enduring Differences in an Age of Globalisation 51:1 *INT.ORG.* 1 (1997). Also see Samuel Huntington, *The Clash of Civilisations and the Remaking of World Order* (1996).

Moreover, the fact that all the countries in the East African community do not share the same historical and legal backgrounds could potentially create a problem in the harmonisation of arbitration laws if the Model Law is not adopted.

Further, because the Model Law is limited to a particular area of law and must be interpreted by national courts against the backdrop of the *lex fori*, this may lead to inconsistent interpretation of the Model Law.³⁸⁵ This makes it hard to develop a uniform interpretation of the Model Law.³⁸⁶

However, in spite of the above misgivings about harmonisation, the Model Law has achieved great success in international commercial transactions and has been adopted by 47 countries worldwide.³⁸⁷ Harmonisation is the best way forward. It would

³⁸⁵ Katherine Lynch *op cit* note 384.

³⁸⁶ *ibid.* This also the reason why UNCITRAL Secretariat began collecting and reporting court decisions in different jurisdictions to monitor how the Model Law was being interpreted.

³⁸⁷ A list of countries that has adopted the Model Law is available at <http://www.uncitral.org> [Jan 28, 2009].

make sense for the East African Community to adopt a statute that has wide acceptance in the international business community.

Chapter 6

THE WAY FORWARD

Legal practitioners in the East African Community must come to terms with the fact that law evolves with time and with needs of society. In this respect, lawyers must focus on current issues in the field of international trade and investment and keep up with the latest trends of dispute resolution methods.³⁸⁸

Additionally, it is necessary that they participate where possible, in any ongoing debate about the formulation of rules in the area of international commercial arbitration.³⁸⁹ This will avoid circumstances where a statute is rejected by those concerned as foreign and not representative of their needs.

Legal practitioners in the commercial field must address issues from a global trading perspective. Only then will they fully appreciate the continuing process of the ever evolving needs of the international commercial community.

The first task for the countries in the East African Community is to disengage themselves from any fears that are associated with international commercial arbitration. It is high time the member countries faced the reality that comes with regional and global integration.³⁹⁰

If the factors hindering the arbitration process in the East African Community are not addressed, legal practitioners and other stakeholders will not be able to keep up with the fast changes in the field of international commercial arbitration.³⁹¹

³⁸⁸ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' 41 *Int'l & Comp. L.Q.* 388 1992, pp 388-413. Sempasa states that it would be dangerous for any country in Africa or for any developing country for that matter, 'to let themselves lag behind the emergent impetus in international arbitrations' at 401.

³⁸⁹ *ibid.*

³⁹⁰ Sempasa at p.397. Sempasa says that it is important for African countries to alleviate old fears of arbitration and face modern commercial realities.

³⁹¹ *ibid* at pp. 388-413. Sempasa states that it would be dangerous for any country in Africa or for any developing country for that matter, 'to let themselves lag behind the emergent impetus in international arbitrations' at p.396.

In order for the above efforts to be of any meaning, policy makers must continuously modify old legislation to meet the evolving needs of the international commercial society.

It is not enough for the countries in the East African Community only to adopt the UNCITRAL Model Law. Nationals should be educated on how the Model Law works and what changes it will bring about. Legal reform of arbitration laws will only be meaningful if it is understood and accepted by all the stakeholders.³⁹² Therefore, the countries in the East African Community should embark on an educational campaign about the importance and benefits of arbitration to its citizens.³⁹³

The arbitration field requires special training and so far efforts to create programs in international commercial arbitration for lawyers have been made.³⁹⁴ It is vital that the new generation of lawyers fully engages in the field of arbitration. Tertiary institutions should play an active role in ensuring that the field of international arbitration is on the curriculum.

It is important that information concerning applicable rules and practices of various arbitration centres is widely available.³⁹⁵ Also lawyers and policy makers should keep up with the ongoing initiatives in the field of arbitration particularly those concerning UNCITRAL.

Additionally, various institutions and infrastructure that will support international commercial arbitrations should be established and maintained appropriately. This is because central to the choice of a venue to conduct arbitration are the physical facilities in place. Moreover, with modern arbitration laws in place, the EAC would

³⁹² SIEPR Discussion Paper No. 02-32, 'Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador' by Bruce M. Owen Stanford University and Jorge Portillo Economists Incorporated May 2003 p.4. Available at <http://scid.stanford.edu/events/Bruce%20Paper.pdf>. This paper states that the rule of law is not of any use if it is not widely understood and accepted and hence suggests that people should be educated on the benefits of a particular law if it is to be of any meaning.

³⁹³ Samson L. Sempasa, 'Obstacles' at p.406.

³⁹⁴ The European & Middle Eastern Arbitration Review 2008, *The International Journal of Public and Private Arbitration*. Available at <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/72/preface> [Dec 3 2008].

³⁹⁵ Generally see Samson L. Sempasa, 'Obstacles' pp.388-413.

have no difficulty attracting investors to the region and making the region a desirable place to hold arbitrations.

Entrepreneurs in the East African Community should use the arbitration institutions the region to resolve cross-border disputes within the community as well as those disputes that may arise with foreign investors.³⁹⁶ In order for international commercial arbitration to prosper in the region, entrepreneurs in and outside the East African Community should have confidence that the available institutions will be in a position to resolve their disputes expeditiously. This confidence can only be gained by utilising the facilities available in the region.

Further the East African Community should formulate policies that promote other forms of ADR such as conciliation and mediation. This is because including provisions that encourage the use of ADR mechanisms will lead to a faster and cheaper way of resolving the dispute than arbitration.³⁹⁷ Moreover, by opting for mediation, the parties will have chosen to resolve their disputes in a style that is more compatible with the traditional way of resolving disputes in Africa as opposed to the 'adversarial-style arbitration with an imposed solution.'³⁹⁸

In fact many countries have chosen this approach. India for instance, has included provisions on conciliation in its arbitration legislation that are modelled after the UNCITRAL Conciliation Rules of 1980.³⁹⁹ Uganda and Nigeria have also followed suit by including provisions on conciliation in their arbitration statutes; that are similar to the UNCITRAL Conciliation Rules.⁴⁰⁰

6.1. CONCLUSION

Now is the time for governments in the various countries of the East African Community with outdated arbitration legislation to take note of the current changes that are taking place in international commerce. The East African Community cannot

³⁹⁶ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' 41 *Int'l & Comp. L.Q.* 388 1992. p.397.

³⁹⁷ David Butler, 'The Need for Harmonised Arbitration and ADR legislation in the SADC region'. p.11.

³⁹⁸ *ibid.*

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

afford to ignore the demands of international commerce if they have any ambitions of integrating into the global market. Participating in the world market means keeping up with the demands of the international commercial community.

Since trade and development have always been at the centre of developing countries, it is in the interest of the East African Community to let go of the formalistic legal approaches to resolving commercial disputes.⁴⁰¹ For these approaches merely distract lawyers and scholars in the region from facing the reality of the future of international commerce.⁴⁰²

Keeping the economic goals of the East African community in mind; it would be detrimental to their economic ambitions if any of the member countries lagged behind the ever evolving trend of international arbitrations.⁴⁰³ Moreover, this would not make the East African Community an attractive venue to hold international commercial arbitrations.

The way forward for the countries in the East African Community that still have antique laws is to disengage themselves from any scepticism or mistrust they have of the arbitration regime and take a more prudent role in encouraging practice of arbitration.⁴⁰⁴ The most logical move would be to adopt the UNCITRAL Model Law on International Commercial Arbitration. They should adopt and implement the Model Law in a way that ensures that the provisions of the Model Law are applied in the same manner by all the countries in the Community to prevent any confusion in its interpretation.

The East African Community needs a modern arbitration law that will address and respond to the needs and ambitions of regional and global integration. The East African community should adopt a law that is well designed, widely applied and one

⁴⁰¹ Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' 41 *Int'l & Comp. L.Q.* 388 1992, pp 388-413. Sempasa states that it would be dangerous for any country in Africa or for any developing country for that matter, 'to let themselves lag behind the emergent impetus in international arbitrations. p.405.

⁴⁰² *ibid.* Sempasa adds that the 'formalistic legal' approaches also delay the full participation of African scholars and jurists in the formulation of a uniform system of international arbitration.

⁴⁰³ *ibid.*

⁴⁰⁴ *ibid.*

that will efficiently resolve international commercial disputes in the region. The UNCITRAL Model Law is compatible with the common law legal system which many of the countries in the East African Community are familiar with as opposed to OHADA which is civil law based.⁴⁰⁵ Additionally, because many of the EAC's trading partners have adopted the Model Law, this makes adoption of the statute the most logical step towards achieving its economic goals.

Above all, when one talks about the Model Law, one cannot help but recall the words of Henry Campbell Bannerman:

“Gentlemen, I fervently trust that before long the principle of arbitration may win such confidence as to justify its extension to a wider field of international differences.”⁴⁰⁶

The Model Law fulfils this prophecy.

⁴⁰⁵ Moreover, in the interest of regional integration, Rwanda has recently updated its laws to include the common law procedure.

⁴⁰⁶ Henry Campbell Bannerman (1836-1908).

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