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INTERNATIONAL COMMERCIAL ARBITRATION IN KENYA: IS ARBITRATION A VIABLE ALTERNATIVE IN RESOLVING COMMERCIAL DISPUTES IN KENYA?

RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN PART FULFILMENT OF REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS IN APPROVED COURSES AND MINOR DISSERTATION. THE OTHER PART OF THE REQUIREMENT FOR THIS DEGREE WAS THE COMPLETION OF A PROGRAMME OF COURSES.

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DECLARATION

I declare that this dissertation is my own unaided work. It is being submitted for the degree of master of laws at the University of Cape Town.

It has not been submitted before, for any degree or examination to any other university, nor has it been prepared under the aegis or with the assistance of any other body or person outside the University of Cape Town

Cape Town, 13th February, 2014

Peter Mutuku Mbithi

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DEDICATION

I wish to dedicate this work to my family, my wife Susan, my children Steve, Ida and Koki Mutuku, my loving nephew, Isaac.

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CHAPTER 1: INTERNATIONAL COMMERCIAL ARBITRATION

I. Introduction

Increased international trade has defied the geographical borders that define independent states. However, different legal systems in each independent country pose challenges to international trade and in some instances may hinder or slow it down. Disputes occur in trade, as they may occur in all inter-human transactions and relationships.

The nature of international trade is such that different business people and the enterprises they represent originate from different countries, often with different and conflicting legal regimes. It becomes necessary therefore to settle any trade disputes that may occur during international trade in a way and under regulations that accommodate the interests of all the parties involved.

Practice has shown that it is important, and in the interest of continued trade, to solve disputes which may occur in international trade in a private, consensual, speedy and binding way which results in a final decision. This saves parties the risk of disclosure of trade secrets, allows the parties to maintain their relationships, moves at a speed they can influence and results in a decision they can feel part of.

In a fast growing global trade, individuals as well as states appreciate that dispute resolution mechanisms in trade are critical to continued participation in it. Many developed and developing countries, have embraced more flexible ways of settling disputes outside the courtroom, to attract business to themselves, to open up their countries as destinations in which investment may not be challenged by litigation mechanisms which are foreign to their visitor investors. They have embraced commercial arbitration. They have enacted and reviewed their domestic legal frameworks to suit business, to attract investment, to attract trade.

Arbitration is a process by which parties consensually submit a dispute to a non-governmental and independent decision maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures

affording each party an opportunity to present its case.[1] The parties may be states, or persons both natural and juristic.

International commercial[2] arbitration may be described as a means of resolving trade disputes that may arise out of or in international trade, out of the formal court system.

Central to the process is the agreement of the parties to submit their dispute to the process of arbitration. The principal alternative of arbitration would be to submit the adjudication of disputes to (public) courts. While courts are funded by the state, and the procedures thereto set out in the different national legislations, the foreign element of trade means that at any given time, during the course of the litigation, one of the parties would be a foreigner to the court. They would therefore risk the settlement of disputes under legal regimes which are foreign to them, using local lawyers who are not familiar with their nature of business, probably having to work with translators for want of foreign language etc. In the alternative, arbitration offers several advantages. Some of these advantages are:

I. Arbitration is a private process, to the parties and the arbitral tribunal, in that the arbitration proceedings are not open to the general public, and parties may agree to keep the proceedings and the final outcome confidential.
II. Parties have a right to select the arbitrators, who have considerable expertise in the relevant field. Their commercial experience enables them to reach determinations that reflect standard practices by choosing to arbitrate, therefore, business parties avoid inexpert judges, legalistic solutions, and unwanted publicity[3].
III. The process is flexible; it may be tailored to meet specific requirements of the particular dispute. This can result in an economy of time and money. The commercial experience of the tribunal reduces the need for complex rules of evidence, minimizes discovery. These features reduce the prospects of tactical litigious warfare. The procedural informality allows commercial equity to trump judicial considerations.
IV. Its flexible approach is less destructive of business relationships and enables parties to continue with their business relationship during and after the process

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[1] See the definition of Arbitration in Gary B Born, in *International Arbitration: Law and Practice* (2012) at 4
[2] For purposes of this paper, the meaning of the term 'commercial' shall be adopted from the meaning given at page 1 of the UNCITRAL Model law, 2006.
[3] See Arbitration defined , in Thomas E Carbonneau, *Law and practice of Arbitration*-2nd Ed (2007) at 2

V. Confidentiality of the process is attractive to business. It assures them of no negative publicity, no disclosure of trade secrets or competition practices or client lists.

VI. Continuity of roles. Unlike in litigation where the judicial officers may be transferred during the hearing of a matter, arbitrators deal with the file from the start to the end. They therefore get to know and understand the positions of the parties and are therefore able to speed up the process.

VII. The choice of a neutral tribunal and forum: parties coming from different countries and used to different legal regimes will find the process attractive as they are able to choose a forum in which the applicable formalities are agreeable to both, the language is the most convenient for both, the forum is neutral to both and is not the home ground of either. Each party also is given an opportunity of choosing the tribunal. Arbitration tempers the disparities between different legal systems. In the context of trans-border business, arbitration functions as de facto trans-border legal system, providing an adjudicatory process free of national bias, parochial laws and practices and able to dispense sensible commercial justice.[4]

VIII. International enforceability of the decision. The final decision in arbitration is not a recommendation, or a step alongside the long walk of several other decisions. Arbitration leads to a final and binding decision and is enforceable both at the national and international level. Many nations are party to international conventions for enforcement of arbitral awards, primary of which is the Convention for the Recognition and Enforcement of Foreign Arbitral awards, 1958(New York Convention). Arbitral awards therefore find more acceptance and are able to be enforced in many countries, unlike their Court judgments counterparts which may be enforced locally only.

II. Why arbitration was chosen as the topic for this dissertation

Arbitration may be preferred over court litigation in the developing countries for several reasons. Some are:

[4] Carbonneau op cit note 3 at 2

i. Whether arbitration can in anyway contribute to the aspirations and the needs of developing countries and their nationals for social-economic development and prosperity, and at the same time,
ii. Satisfy the needs and expectations of their development partners, and
iii. Ensure fairness and justice to both parties.[5]

Kenya is a developing country. Like many other developing countries, Kenya faces a myriad of problems, among which are slow economic growth and poverty. One way of getting out of this worrying situation is to improve trade and the climate for investment in the Country. In recognition of this fact, the Government of Kenya has taken deliberate legal reforms aimed at attracting both local and foreign traders to engage in trade in the country. The Government of Kenya has also taken measures to make the country attractive for direct foreign investment. Key among these measures has been the objective to create a favorable legal environment for the development of Commercial Arbitration as an alternative mechanism for dispute resolution in the country. Some of these key steps taken by the Government in this regard are:

I. Kenya ratified the New York Convention in the year 1989.[6]

II. The Country enacted the Arbitration Act, No.4 of 1995,[7] which adapted the UNCITRAL Model law of 1985. It revised the same in year 2009 to align the Act with the revised UNCITRAL Model law, 2006.

III. The Constitution of Kenya, 2010 enjoins the support of the courts in advancing and promoting alternative dispute resolution mechanisms.[8]

IV. In January 2013, the country enacted the Nairobi Centre for International Arbitration Act No. 26 of 2013, establishing the Nairobi Centre for International Arbitration[9].The

[5] Amazu A Asouzu in *International Commercial Arbitration and African States* (2001) at 33.
[6] The Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958 at New York, in this work, it will be referred to as the NYC, 1958.
[7] Arbitration Act No. 4 of 1995, laws of Kenya is modeled along the UNCITRAL Model law, of 1985.
[8] Section 159 of the Constitution of Kenya enjoins the Courts of Kenya to promote alternative methods of dispute resolution.
[9] Nairobi International Arbitration Centre Act No. 26 of 2013, Laws of Kenya

Board to the Centre has since been appointed and are in the process of setting up an international arbitration centre in Nairobi.[10]

V. Kenya is also a state party to the International Centre for settlement of Investment disputes, ICSID, the World Trade Organisation, WTO, as well as several other world and regional trade organizations.[11]

This paper will analyse arbitration as an alternative dispute resolution method, and the preparedness of Kenya as favorable place international commercial arbitration. In doing so, the writer will seek to answer the question, Is Arbitration a viable alternative in resolving commercial disputes in Kenya?
The writer intends to compare the preparedness of Kenya as a viable place of arbitration with the position of Mauritius as well as South Africa in that regard. .

Mauritius Chamber of Commerce and Industry set up a Permanent Court of Arbitration in the year 1996. The chamber has been active in promoting alternative dispute resolution mechanisms in Mauritius, through seminars presentations and consultation with the Government over the introduction of appropriate policies and laws for development of Mauritius as an attractive arbitration venue. The Permanent Court of Arbitration has since its inception established strong networks with several reputable arbitration centers around the world. The Government of Mauritius has also ratified the New York Convention, 1958, and enacted an International Arbitration Act, based on the UNCITRAL Model Law of 2006. The aim of Mauritius Arbitration Act is to make Mauritius a favorable jurisdiction for all commercial arbitration, whether such arbitrations arise under ad hoc arbitration agreement or under institutional rules.[12] Mauritius has also set up an international arbitration Centre, the Mauritius International Arbitration Centre, MIAC. The steps taken by Mauritius, which is also a developing country like Kenya, in relation to promoting the country as a better destination for investment and arbitration, are worthy emulating and comparing with.

[10] Nairobi is the capital City of Kenya
[11] Although investment arbitration Is not the focus of this minor dissertation, the step serves to show Kenya's openness to arbitration in general
[12] See the *Travaux Préparatoires* of the International Arbitration Act (No. 38 of 2008) of Mauritius page 3

Commercial Arbitration in South Africa is spearheaded by the Arbitration Foundation of South Africa, AFSA, a joint venture of organized business, the legal and accounting professions in the country. Association of arbitrators (Southern Africa) is another organization promoting arbitration in the country since 1976. Its procedural rules are based on the UNCITRAL Arbitration rules of 2010, amended in the context of the arbitration legislation in Southern Africa. South Africa has a law on arbitration, the Arbitration Act of 1965. The law is rather outdated and in dire need for review. The South Africa Law Reform Commission[13] has made proposals for amendment of the Act but these have not led to new legislation. South Africa is also a contracting state to the New York Convention, and is a member of several economic bodies.

The writer has chosen South Africa and Mauritius for comparison with Kenya because of two main reasons. Both countries are developing countries in Africa. Mauritius has established itself as an arbitration hub in the past few years, while South Africa is not really a popular place for international arbitration, even though in other regards, it is a major economic player in Africa.

[13] See *South Africa Law Commission, Project 94, Arbitration: an International Arbitration Act for South Africa* report of July, 1998 and *South Africa Law Commission, Project 94, Domestic Arbitration Report* of May 2001

CHAPTER 2: HISTORICAL BACKGROUND OF ARBITRATION IN KENYA

I. Introduction

Before the introduction of written statutes in Kenya, indigenous communities had their own ways of settling disputes.[14] These communities had their local economies; they could be growing crops, keeping cattle, harvesting honey etc.[15] Many of these communities had developed mechanisms which were largely known by their tribesmen in which dispute resolutions could be initiated, how deliberations were to be conducted, how the outcome would be communicated and the way in which enforcement could be carried out.[16] Many of these societies did not differentiate between civil and criminal disputes. The resolution mechanism was the same for both.[17] Participants to the deliberations were bound by administered oaths. Disputes between members of the same communities were settled in ways that were generally accepted by the members of the community.[18] Enforcement of decisions was carried out voluntarily, by invocation of curses or by forceful raids to the property and person of the debtor.[19] Most of these societies had formed councils of elders, which would be the equivalent of arbitration tribunals or the judges in courts today. Elders were greatly respected in the society, and were seen to be trustworthy. They were also presumed knowledgeable out of years of experience in making decisions.[20]

Dispute resolution in the pre-statute times was however geared towards reconciliation and cohesion of the group, after a dispute had occurred.[21] It was of great importance that the parties to the dispute return to their pre-dispute cordial relationship. This position mirrors closely the initial aims of arbitration. This paper will discuss the dispute resolution method of the Kamba, Kikuyu and Kipsigis communities in Kenya before the introduction of statute based arbitration.

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[14] Lucy Mair *Primitive Government, a study of the traditional political systems in East Africa* (1977) at 33
[15] See John Middleton & Greet Kershaw *the Kikuyu and Kamba of Kenya* (1977) East Central Africa part V at pg. 17-20 & 69
[16] [16] Lucy Mair *Primitive Government, op cit note 13* at 33
[17] See John Middleton & Greet Kershaw *op cit note 14* at 40
[18] Lucy Mair *Primitive Government, op cit note 13* at 34-35
[19] John Middleton & Greet Kershaw *op cit note 14* at 44 & 77
[20] John Middleton & Greet Kershaw *op cit note 14* at 31
[21] Michael Saltman, *The Kipsigis A case Study in changing Customary Law* (1977) on the relationship between the traditional legal systems and the national courts of Kenya at 34

II. Kamba

The Kamba are members of the larger Bantu communities in Kenya.[22] Like many groups they did not differentiate between criminal and civil justice.[23] Authority in a home-stead *(Musyi*),[24] occupied by joint family, was vested in the family head, who had complete control over all the members of the group.[25] Their main political unit was *utui,*[26] the territorial cluster of joint families, and the equivalent of what may be called a village today. Disputes would be solved by a council of elders known as *nzama.* [27]It included all elders (*atumia*)[28] of the political unit. However, not all elders took part in the deliberations. Those who did were called *asili* or men skilled in law. An elder of great legal wisdom would represent his *utui* in external cases, and was called *mwalania* or *musili.*[29] *Musili* is still the local dialect name for a magistrate or judge. The basic principle of the Kamba law was that of compensation, not punishment or reformation.[30] The underlying sanction was the fear that if the offender refuses to pay compensation, the injured party would seek physical revenge.[31]

Members of the council of elders were arbitrators who would be called upon by the claimants to assess the damage suffered and to give their opinion as on the compensation due in particular circumstances. [32]Claims never lapsed and could be inherited by the heirs.[33]

A person with a claim would send an elder to the family of the respondent,[34] explaining his claim, and demanding repayment and/ or compensation. The respondent's family would indicate to the elder bearing the claim whether they accepted the claim or whether they

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[22] John Middleton & Greet Kershaw op cit note 14 at ix
[23] John Middleton & Greet Kershaw op cit note 14 at 77
[24] Musyi was the home of elementary, a compound, of three or four generation joint or extended family. See the definition of John Middleton & Greet Kershaw, op cit note 14 at 73.
[25] John Middleton and Greet Kershaw op cit note 14 at 75
[26] *utui* is the equivalent of a village in the current setup
[27] John Middleton & Greet Kershaw op cit note 14 at 75
[28] *Atumia* prl for *mutumia* is a local dialect for an elder. One qualifies to be an elder through several initiations and not by age only.
[29] John Middleton & Greet Kershaw op cit note 14 at 75
[30] John Middleton & Greet Kershaw op cit note 14 at 76
[31] John Middleton & Greet Kershaw op cit note 14 at 76
[32] John Middleton & Greet Kershaw op cit note 14 at 76
[33] John Middleton & Greet Kershaw op cit note 14 at 76. Claims never failed for lack of evidence, and if a man denied charges made, the disputed facts could be left to supernatural powers, one or both parties and possibly the witnesses taking an oath of innocence.
[34] The eldest male of the respondent's family would be deemed to represent the family and would be the one to receive the claims.

would have to consult further.[35] Either way, information would be sent back to the claimant whether the claim would be settled or not. In the event the claim was not settled, the claimant's elder would report to the council of elder at his *utui*.[36] The two parties would thereafter be called to attend to a meeting of the council of elders on a particular day.[37] At the meeting, each party would be accompanied by elders from his family, and witnesses. All the elders were free to express their views about the claim. In fact, an elder could speak on behalf of a party, and that would be accepted as the position of that party,[38] the same way an advocate may represent a client.

After the deliberations when the parties have presented their positions, they would be asked to leave the meeting, alongside their witnesses and elders. The council of elders would deliberate the matter and form a consensus opinion.[39] Parties would be called back. The eldest of the council of elders would inform the parties of the decision, and further explain the need to accept the position of the council, the deadlines for payment of the award, and the threat of enforcement. Enforcement was by confiscation of the property of the losing party, invoking a curse or self- help.[40]

Members of *kisuka*[41] were empowered to execute the decisions of *nzama*, and could impound a defaulter's property. It was a largely accepted way of settling disputes, and was used many years after the introduction of written law.[42] Persistent theft, sorcery or murder if not settled amicably could be settled by a process called *king'ole.*[43].

III. Kikuyu

[35] D.J.Penwill *Kamba Customary Law*(1951) at pg 73
[36] John Middleton & Greet Kershaw op cite note 14 at 75. A family head is responsible for offences committed by his dependents.
[37] John Middleton & Greet Kershaw op cit not 14 at 75.
[38] John Middleton & Greet Kershaw op cit note *14* at 73. Clan members have common totemic observances and duties of assistance towards each other, particularly in litigation. See also D.J.Penwill op cit note 22 at pg. 59
[39] John Middleton & Greet Kershaw op cit note 14 at 76. The basic principle in Kamba law was that of compensation, and not punishment or reformation.
[40] The Kamba practiced a curse called *kithitu* which was largely used to end feuds. It could be invoked when the losing party declined to compensate the successful party. It was believed to kill the defaulting party as well as members of his extended family. It remained a feared curse and threat to invoke it would most certainly result in performance by the losing party.
[41] Kisuka was the name for the elders of each village. They were the elders at the entry stage of the council.
[42] John Middleton & Greet Kershaw op cit note 14 at 76.
[43] John Middleton & Greet Kershaw op cit note 14 at 77, King'olé was a self-help way, similar to mob-justice, in which a group of young men would descend to the homestead of the accused party and kill him/her, destroy property and burn the homestead.

The Kikuyu like the Kamba, are Bantus in Kenya.[44] The Kikuyu traditional law recognised both private and public delicts.[45] Private delicts, when the dispute is between different *mbari,* were submitted to arbitration by the elders-the *kiama kia athamaki.*[46] Judgment was passed by the council and the injured party was entitled to compensation.[47] Public delicts were also brought before the council of elders, who passed judgment and carried out the punishment, in the form of either a curse or putting to death.[48] Private delicts included homicide, physical injury (assault) sexual offences, theft, debt, divorce.[49] Public delicts included persistent theft and sorcery. A persistent offender guilty of private or public delicts would be put to death.[50] This process was carried out by *muingi,* a term used to refer to lynching.[51]

Parties to a dispute were expected to try to settle disputes among them amicably.[52] If they were not able to do so, they could agree to submit the case to arbitration by the elders of the units concerned.[53] The elders would hear the evidence which was given by the principals.[54] The case would then be discussed by all the elders present and the witnesses would be questioned.[55] The inner council of the elders, known as *ndundu*[56] would then retire to consider the judgment.[57] Anyone with direct or indirect interest in the case would be excluded.[58] Findings would then be announced, and two elders would be appointed to oversee the enforcement of the judgment.[59]Both parties in the case and the elders had to take oaths before the beginning of a case, the former to give true evidence and the latter to

[44] See John Middleton & Greet Kershaw op cit note 14 at pg. 17-20 & 69
[45] See John Middleton & Greet Kershaw op cit note 14 at 40
[46] John Middleton & Greet Kershaw op cit note 14 at 32
[47] ibid 14 at 40
[48] ibid at 40
[49] ibid at 40
[50] ibid at 46
[51] ibid at 46
[52] ibid at 44
[53] ibid at 44
[54] ibid at 44
[55] ibid at 44
[56] *Ndundu* consists of senior elders, also called elders of *ukuru,* suggesting seniority in age, which was associated with experience.
[57] 1bid 45 at 44
[58] ibid at 44
[59] ibid 14 at 44

give an unbiased judgment.[60] There was no appeal for the decision of the elders. Decisions of the Council would be by consensus and were rarely contested.[61]

IV. The Kipsigis

The Kipsigis are a sub-tribe of the Kalenjin, [62] a Nilotic group in Kenya. Their ways of settling disputes are not very different from the ones used by the other sub-tribes in the group.

There were two levels of dispute adjudication among the Kipsigis. The lower level was known as *kotigonet* (literally 'the giving of advice')[63]. *Kotigonet* was applied in the event of minor domestic squabbles in a household and somewhat more infrequently in the less serious disputes between neighbours.[64]

Close neighbours of the disputing parties would attempt to arbitrate the dispute by proffering their advice.[65] The *kotigonet* forum had no sanctions at its disposal. The oldest man present would act as the chairman and attempt to maintain order.[66] Its main function was to restrain the disputants from violent actions and to proffer advice by appeals to reason on a 'take it or leave it basis'.[67]

More serious disputes were handled at the *kokwet* level, in addition to those disputes which had remained unresolved through the medium of the *kotigonet*.[68] The proceedings at the kokwet level were termed interchangeably as either *kokwet* or *kituogik* (literally meaning 'judgment').[69] Meetings were chaired by a senior male who was generally recognized for his skills in keeping order.[70] The procedure was more formal at *kokwet* than at *kotigonet.*[71]

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[60] ibid at 44
[61] Ibid at ix
[62] Michael Saltman, *the Kipsigis. A case Study in changing Customary Law* (1977) on the relationship between the traditional Legal systems and the national courts of Kenya at 14
[63] This was a group of elders at a lower level in the community which was essentially supposed to give advice to parties to a dispute especially on the needs to make parties agree to a solution.
[64] Michael Saltman, op cit note 61 at 37-38
[65] ibid at 37
[66] ibid
[67] ibid
[68] ibid at 38
[69] ibid
[70] ibid
[71] ibid at 44

Kotigonet or kokwet meetings took place at the site of the dispute.[72] If it was a dispute about land, the meeting would be at the site disputed. If it was a domestic dispute, the meeting will take place at the particular household where the dispute is located.[73] The chairman to the meeting would give a brief outline of their reasons for the meeting; he would then invite the parties to explain their claims. At the meeting, claimant would be the first to speak, outlining his claim.[74] Thereafter the respondent would then speak explaining his position in relation to the claim of the claimant.[75] The tone of their speeches would be usually low key and unexcited and the speeches would characteristically be brief.[76] The two parties would then call in witnesses, to give evidence in support of their positions. Both parties and their witnesses would then be sent out of the earshot of the proceedings.[77] In the absence of the parties, other people present would be given an opportunity to give their views and spell any additional evidence that any of them could have in relation to the subject dispute.[78] The village being a small unit, it was likely people would know something or other about the dispute. The eldest man at the meeting would be the first to speak, and generally set the tone of the deliberations.[79] It was during this phase that the most important evidence would be elicited. None of the speakers was required to speak under oath.[80]

Decisions of the elders were unanimous.[81] After a decision had been made, the parties would be called back and the decision was announced to them.[82] They were asked if they agreed with the decision. If they did, the meeting was closed. If not, deliberations would be adjourned to another day. On the second meeting elders of the *kokwet* would summon the warring parties to attend the meeting.[83] Based on the facts given at the first meeting, and considering any developments that may have been witnessed ever since, they would give a

[72] ibid at 38
[73] ibid at 38
[74] Michael Saltman op cit note 61 at 38
[75] ibid
[76] Ibid at 44
[77] Ibid at 38
[78] ibid at 38
[79]Ibid at 39
[80]ibid at 44
[81] Ibid at 39
[82] Ibid at 39
[83] Ibid at 47

final decision.[84] The decision given on the new day was final and subject to no further deliberations.[85]

V. Short Comparison

Dispute resolution mechanisms employed by the Kipsigis, the Kamba and the Kikuyu people as shown above were primarily aimed at ensuring cohesion of the family and the group. More emphasis was placed on settling disputes through non-violent means. Decisions were however binding on the parties. It was never winner take all. Both parties would always be required to share the costs of the deliberations which in any event were never beyond food, in the form of meat, and liquors. One of principles of the Kipsigis law was the responsibility of the individual. In practical terms, that would mean that the individual was very much alone before the law, since there were no groupings in the village upon which he could call for support.[86] Negotiations in Kipsigis legal process was based to a large extent on a consideration of the merits of the case and also on the principle that any settlement must prove in the long run to be non-disruptive to the community.[87] This was unlike the case for both the Kamba and the Kikuyu, where the family and/or the clan would be involved whenever a member was in a dispute.

The above dispute resolution mechanisms demonstrate that arbitration in Kenya was known long before the introduction of formal arbitration law, and therefore was not an alien concept. It however took long before the members of these communities and other Kenyans embraced arbitration as provided for in the law.[88]

Although the dispute resolution mechanisms were popular, trusted and acceptable, the colonial government dismantled them by not recognizing them in the settlement of disputes.

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[84] ibid at 47

[85] Ibid at 44

[86] Michael Saltman op cit note 61 at 45. Under the Kipsigis laws, when anyone breaks the laws, he is said to *sogorge* or to do something unnatural, and when a Kipsigis does something unnatural, he is said to *chupge,* to curse oneself. This curse only applies to the offender, and not his family or kinsmen, unlike the case of the kamba and the kikuyu. See also Saltman, Michael op cit 19 at 40

[87] ibid at 46

[88] Lucy Mair op cit note 13 at 215. Despite the imposition of the colonial law on settlement of disputes, traditional leadership and traditional ways of taking decisions continued to exist. Communities living in the countryside in Kenya still practice to a certain level the traditional methods of dispute resolution. Although this is not supported by statute, administrative chiefs and their assistants replace the oldest elder in the meetings. The threat of sanctions has however disappeared and the goodwill of participants is paramount.

The interference of the court in arbitration caused more confusion. Limited use of arbitration as a means of settling disputes in Kenya is one of the hurdles facing the promotion and advocacy of alternative disputes resolution mechanisms in Kenya.

VI. The introduction of Statute

Kenya was formally declared East African Protectorate,[89] a colony of the Great Britain in 1895.[90] Transplantation of British law into the country followed shortly after. The new laws spelt a death-bell to the hitherto known laws of the indigenous communities.

Amongst the laws that were introduced at the time was the dispute resolution mechanism. The first written arbitration law was introduced in Kenya in 1914 when the British enacted Arbitration Ordinance, 1914.[91] The ordinance was similar to the English Arbitration Act, 1889. Under the Ordinance, ultimate control of arbitration process was left to the Court.

An alien way of settling disputes through the court system was introduced.[92] The locals who were considered to be elders were dismissed by the new colonial administration as either too ignorant or old to study new ways. [93] [94]

A new crop of leaders was then appointed to positions in courts. Over time, the local arbitration mechanisms stopped being used. Values changed, from community interests to individual rights. Over time, it became old-fashioned to consider these as means to settle any disputes. Emphasis was placed on litigation as a way of settling disputes and the judicial officers as well as the law practitioners were trained with the understanding that settlement of disputes was the duty of the state, and the courts' role in adjudication of disputes was on behalf of the state. The population however did not embrace the new rules of settling disputes immediately. Over time the courts were considered as tools used by the colonial

[89] ibid at 211

[90] Before the coming of the British in Kenya, Kenya was not an organized state, but a collection of different communities, living alongside each other, each with its own ways of administration, dispute settlement mechanisms and different cultural practices.

[91] There was no country called Kenya when the British colonized Kenya. The country was known as the East African Protectorate, or British East Africa. It changed name to the colony of Kenya in 1920.

[92] Courts were alien to the indigenous communities. It was considered by the new administrators to be superior to the councils' of elders.

[93] Lucy Mair op cit note 13 at 212-214

[94] Michael Saltman op cit note 20 at 55, the magistrate would remain by the decisions of the council of elders' decision and make his own interpretation of the customary law.

masters to punish the locals. The police were considered enemies of the people as they could be used to enforce some of the judgments. That lack of trust in the court system is still present today, though many other factors have also contributed to the state of affairs. A majority of the Kenyan people in the countryside will first try to settle any commercial dispute between them through some kind of informal negotiation, involving elders. By the time the matter goes to court, almost all the possibilities of settlement have been exhausted. [95]

The fact that even when a matter was under arbitration the court would still be able to interfere meant that the local population could neither embrace arbitration as provided for in the law nor seek to improve their indigenous arbitration mechanisms, as they were not provided for in the new law. In *M'Kiara v M'Ikiandi*,[96] Hancox JA stated "I do not see how a case before the (High) Court can validly be relegated to an oath administrator, even if it is not the administration of an oath in the sense previously understood by the people of Kenya" [97] further down he held that "consent of the parties to some unknown procedure for settlement of a given dispute does not oust the jurisdiction of a court properly seized of a suit"[98]

Kenya was to use this law of arbitration until it gained independence from Britain. One reason for this was that the British did not amend their own arbitration law, until in 1950. By extension, the country was a party to the Convention on the execution of foreign arbitral awards, 1924 (the Geneva Convention), having been ratified on its behalf, as colony and protectorate by the United Kingdom, as one of the High Contracting parties to the convention by order in Council dated 23rd July, 1931, as set out in Vol. XI of the revised laws of Kenya.[99] As a matter of record, foreign arbitral awards were enforced in Kenya after independence on the basis of the Geneva protocol.[100]

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[95] *M'Kiara v M'Ikiandi* (1984) KLR 170. In this case, even when the matter was already in court, the parties sought the permission of the court to settle the matter by indigenous means, of administering oath both believed in.

[96] (1984) KLR 170 at

[97] *M'Kiara v M'Ikiandi* (1984) KLR 170 at 177

[98] *M'Kiara v M'Ikiandi* (1984) KLR 170 at pg. 179

[99] Amazu A. Asouzu op cit note 5 at foot note 17 of the *International Commercial Arbitration and African States* (2001) at 181

[100] See the position of the Court of Appeal in *Kassamali Gulamhussein Company (Kenya) Ltd v Kyrtatas Brothers Ltd* (1968) 2 ALR Comm. 350.

In 1968, an independent Kenya enacted its Arbitration law, the Arbitration Act, chapter 49 of the laws of Kenya.[101] It was enacted as an adaptation of the British Arbitration Act, 1950. The Act however was limited to domestic Arbitration in Kenya. A lot of controlling power was still left to the courts.[102] Kenya ratified the New York Convention in 1989.

Later in 1995, Kenya repealed its arbitration Act and adopted the UNCITRAL Model Law, 1985, by enacting the Arbitration Act, 1995.[103] It is still the Arbitration Law of the Country and has been revised since it was enacted, to adopt revisions done by the UNCITRAL.

The aspirations and the practice of dispute resolution mechanisms of many communities in Kenya were reflected in the Constitution of Kenya, 2010 which provides under section 159(2) that;

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
(*a*)
(*b*)
(*c*) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause

(3) Traditional dispute resolution mechanisms shall not be used in a way that—
(a) Contravenes the Bill of Rights;
(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
(c) is inconsistent with this Constitution or any written law.

This new position of the Constitution has given new hiatus to arbitration which was largely considered to be a practice evading litigation.

The country enacted the Nairobi Centre for International Arbitration Act (Act No. 26 of 2013) in January, 2013. The Act came into force on the 25th January, 2013. It provides for

[101] This is the Arbitration Act, chapter 49 of the laws of Kenya, now repealed.
[102] See the Arbitration Act Chapter 49 of the laws of Kenya (repealed), see also *Rawal v Mombasa Hardware Ltd* (1968) EA 398
[103] The Arbitration Act of Kenya

the setting up of an arbitration Centre in Nairobi. This new centre is intended to promote Kenya as a country that embraces commercial arbitration.[104] It is further intended to draw traders to the country to spur economic growth. It is the ambition of the country that the new Centre will create jobs for those who will have the skills of arbitration as legal practitioners.

It is further intended to place Kenya in good stead as a place of international arbitration, even for parties who may not have any other business in the country.

The way in which arbitration law was introduced in Kenya made it look alien. Notwithstanding that the communities had practiced a mechanism similar to arbitration for ages, they have had little trust in arbitration and the new Centre will have to work in overdrive to convince the domestic market that arbitration is a viable method of solving disputes.

The introduction of the Arbitration Ordinance in 1914 started the long development of formal law on Arbitration. Over the time, the law of arbitration has developed to meet the demands of both domestic and international arbitration. The Government of Kenya, though at times slow, has spearheaded the growth of arbitration process and the supporting legislation.

In the next chapter, the writer looks at the development of the law of arbitration since introduction, to the current situation.

[104] The functions of the Centre include 'to promote, facilitate and encourage the conduct of International commercial arbitration in Kenya.'

CHAPTER 3. THE DEVELOPMENT OF THE LAW OF ARBITRATION

I. The Arbitration Ordinance

The establishment of the East Africa Protectorate, later the colony of Kenya, by the British saw the emergence of the written law in Kenya. Among the laws introduced was the Law of Arbitration, in the form of the Arbitration Ordinance, 1914.[105] It was largely borrowed from the English Act, and vested the court with the power to control arbitration process. Britain repealed its Arbitration Act in 1950,[106] but did not consequently amend the Arbitration Ordinance of Kenya.

II. The Arbitration Act Chapter 49 laws of Kenya

After independence, Kenya revised its law of arbitration in the year 1968, by enacting a new Arbitration Act, chapter 49 of the laws of Kenya[107], which was largely based on the English Arbitration Act, 1950. The new Act also adopted the General protocol on Arbitration Clauses, 1923 and the Geneva Convention, 1927[108] as its first and second schedules respectively. This was in complete ignorance of the New York Convention, the successor of the Geneva Protocol and Convention.[109] The new Act retained controlling power with the courts over arbitration. Parties could use the courts to frustrate and delay the process.[110] Arbitration in the country remained unpopular.[111]

III. The Conventions

The Government of Kenya signed the Washington Convention on 24th May, 1967.[112] The convention came into force in the country on 2nd February, 1967.[113] By assenting to the convention, the Government of Kenya showed a pragmatic way by opening itself to

[105] See the Arbitration Act of the UK, 1889
[106] See the Arbitration Act of the UK , 1950
[107] This is the repealed Arbitration Act, which was in force between 1968 and 1995.
[108] These are the Geneva Protocol and Convention respectively
[109] There cannot be a rational explanation for this omission as the New York Convention, 1958 provided far more certainty for the recognition and enforcement of foreign arbitral awards than its precursors.
[110] Githu Muigai & Jacqueline Kamau " Legal framework of arbitration in Kenya" in Githu Muigai (ed) *Arbitration Law & Practice In Kenya* (2011) at 1
[111] Ibid at 2
[112] See details of membership of the ICSID at *www.icsid.worldbank.org*
[113] The convention, promulgated under the auspices of the World Bank established the International Centre for the settlement of Investment Disputes (ICSID) with a mandate to provide facilities for conciliation and arbitration of disputes between member states and investors from other contracting states.

foreign investment as well as acknowledging the place of arbitration in dealing with disputes. This was however to be different for the New York Convention of 1958. Despite its need for more commercial activities, and in spite of growing acceptance of commercial arbitration as a dispute resolution mechanism in trade, the Government of Kenya exhibited ignorance to the accruing benefits of the New York Convention. The Country continued to rely on the Geneva Convention until the year 1989 when it ratified the New York Convention, 1958, thirty years after it had been agreed upon.[114]

Commercial activities increased, and the economy of Kenya made impressive strides. The Legislature in Kenya was however slow to revise the Arbitration Act. It certainly did not appreciate the benefits of adopting the UNCITRAL Model law of 1985, which was a very progressive Law, and which sought to harmonise the Arbitration laws in the world.[115] This was despite the fact that Kenya was a member of the UNCITRAL Working Group II- 1981-2000 on International Contract Practices,[116] whose terms of reference were to prepare a draft model law on International Commercial Arbitration, and which drafted the UNCITRAL Model Law, 1985.

Calls to repeal of the Arbitration Act were led by the business community, more particularly the Kenya Association of Manufacturers (KAM).[117]

IV. The Arbitration Act No. 4 of 1995

In 1995, the legislature enacted the Arbitration Act, No. 4 of 1995, effectively repealing the previous Arbitration Act, Chapter 49 of the laws of Kenya.[118] The new Act adapted the UNCITRAL Model law, 1985 and was assented to on 10th August, 1995. It came into effect on 2nd January, 1996. It was however a departure from the recommended International Commercial Arbitration Law. First, the Act is referred to as "Arbitration

[114] The decision of *Kassamali Gulamhusein company (Kenya) Ltd v Kyrtatas Brothers Ltd* (1968) 2 ALR 350 confirmed that Kenya was still using the Geneva Convention of 1924 for the enforcement of foreign arbitral awards.
[115] See the explanatory notes by the UNCITRAL Secretariat on the Model law on International Commercial Arbitration, 1985
[116] See www.unicitral.org/unicitral/en/commission/working_groups.html
[117] The Kenya chamber of commerce was weak at the time and could not effectively lobby the Government to change laws in favor of business. KAM therefore took it upon itself to agitate for revised law on arbitration.
[118] The preamble of the Act states that it is 'an Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes'

Act"[119] and therefore, is not confined to Commercial Arbitration.[120] Second, the Act applies to both domestic and international arbitration.[121]

Section 2 of the Act defines that arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya:[122] and at the time when proceedings are commenced or the arbitration is entered into-

(a[123]) Where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

(b) Where arbitration is between corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;

(c) Where the arbitration is between an individual and a body corporate

(i) The party who is an individual is a national of Kenya; and

(ii) The party that is body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or

(d) The place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.

On the other hand arbitration is international if;[124]

The parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different states

One of the following places is situated outside the state in which the parties have their places of business;

[119] Section 1 of the Act defines the Act as the "Arbitration act" not necessarily the Commercial arbitration Act. The Act does not define "commercial"
[120] the Title of the Arbitration Act of Kenya, 1995(in this chapter, it will be referred to as the Act)
[121] section 2 of the Act
[122] section 3(2) of the Act
[123] Section 2 (a) of the Act
[124] section 3(3) of the Act

i. The place of arbitration if determined in, or pursuant to the arbitration agreement, and
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 closely connected

The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

An important development in the new Act was the limitation of interference of the courts in the arbitration process. Section 10 of the Act states that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. This provision is similar to article V of the Model law, 1985. It was an important inclusion as the courts in the country had grown in a legal culture where they were the determinants of all adjudicative functions in the country. A party would use the courts to frustrate and delay arbitration process and the interventions of the court therefore made arbitration an unreliable and expensive process in the country.

Party autonomy was also another important development in the new Act. The Act gave the parties the autonomy to choose the law as well as the rules which may be applicable to the arbitration process.[125] It also provided autonomy on the choice of the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, [126] the choice of language and further gave the arbitral tribunal the leeway to determine matters for which parties may not have made adequate choices.

The Act was not exhaustive on the procedure in which a party may approach the Court and therefore made provision under section 40[127] thereof for the Chief Justice[128] to make rules for:

i. Recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto

[125] Section 29 of the Act
125 section 20 of the Act
[127] section 40 of the arbitration act
[128] The Chief justice of Kenya enjoys immense ability of influence in the administration of justice in the country and could influence the promotion of arbitration by encouraging courts to refer parties to arbitration whenever it could be possible.

ii. The filing of applications for setting aside arbitral awards
iii. The staying of any suits or proceedings instituted in contravention of an arbitration agreement
iv. Generally all proceedings in court under the Act.[129]

In this regard, the Chief justice made and published the Arbitration rules, 1997, through legal notice No. 58 of 1997 on 6th May, 1997.[130]

V. Amendments to the Act in 2009

The legislature in Kenya made several amendments on the Arbitration Act in the year 2009.[131] Key among these was the provision for the finality of an arbitral award.[132] This was crucial as it is one of the strong reasons parties may resort to arbitration. Amendments were also necessary to factor in the changes and amendments adapted by the UNCITRAL model law of 2006.[133]

Another development was the provision for the immunity of the Arbitrator for anything done or not done in good faith in the discharge of his functions as an arbitrator.[134] This was a reassuring development especially for local arbitration process as it had been left open and party could embarrass an arbitral tribunal after losing a matter.

VI. Arbitration under Order 46 of the Civil Procedure Rules (2010), the Civil Procedure Act, Chapter 21, Laws of Kenya.

Arbitration may also be conducted by an order of the Court. Order 46 (1) of the Civil Procedure rules, 2010, states that 'Where in any suit all the parties interested, who are not under disability, agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the

[129] Muigai & Kamau op cit note 109
[130] See subsidiary legislation on legal notice no. 58/1997, Kenya Gazette
[131] See the Arbitration (Amendment) Act , 2009, laws of Kenya
[132] Section 32A of the arbitration act provides that 'except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it…..'
[133] See the UNCITRAL Model law , 2006
[134] See section 16B of the Act

court for an order of reference.'[135] Several advantages lie in this form of arbitration. None of the parties will find it easy frustrating the process. Also the court is allowed by the provisions[136] to fix a time it may consider reasonable for the making of the award. Once the matter has been referred to arbitration, the court does not deal with it in the suit.[137]

Provisions under Order 46 however make the intervention of the Courts in such arbitration more prevalent than arbitration process started under the Arbitration Act. The arbitration process in any event can only commence after the proceedings have been started. The award is read in court and there is no provision that only the parties may be present. This opens the possibility that there will be no confidentiality, in the award. The pleadings and the proceedings will be public documents once filed with the Court.

Several other Acts also give the Chief Justice the power to appoint an arbitrator when a dispute occurs. This is mainly because of lack of another reputable appointing authority in the country. For instance, section 62(1) of the Kenya Ports Authority Act, Chapter 391 of the laws of Kenya provides that the Chief Justice may appoint an arbitrator if there is a dispute in which Kenya Ports Authority is a party and parties to the dispute are unable to appoint an arbitrator.

VII. The Constitutional back up

The constitution of Kenya, 2010 has given arbitration a great deal of support by imploring on the courts to support and promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[138] By taking this position, the constitution gave unwavering support to arbitration, and was a good indicator that dispute resolution is not the preserve of the Courts.

VIII. Fundamental developments

The development of the law of arbitration outlined above, over the time, has resulted in legal position which place Kenya in a good stead as a country which supports commercial

[135] See Order 46 of the civil procedure rules, 2010.
[136] See rule 3 of Order 46 of the civil procedure rules of 2010.
[137] Order 46, rule 3 (2) of the Civil procedure rules
[138] Section 159(2) (a) & (3) of the Constitution of Kenya, 2010.

arbitration, both in the domestic and international markets. Some of the key principles in the development include:

i. Enforcement of arbitration agreement

It is now the position of the law that once parties have agreed to arbitrate any disputes between them, one party cannot unilaterally ignore the agreement and move to court. Article II (3) of the New York Convention,[139] binds a court in a contracting state, when seized of a matter which is subject to an arbitration agreement to refer the parties to arbitration. This provision may be used where international arbitration is involved. Section 6 of the Arbitration Act of Kenya[140] reinforces this position and may also be invoked in domestic arbitrations also. This has in effect made arbitration to be a recognized and enforceable mode of dispute resolution in the country.

ii. Interim measures

A party is now able to move the arbitral tribunal for interim measures[141] and the court is obliged to assist whenever a tribunal may request for assistance in this regard.[142] This provision gives the parties the ability to obtain injunctive and conservatory orders, especially for the security of assets that may be disputed, at the beginning or during the arbitral proceedings.

A party may also move to the high court and obtain interim relief before, or during arbitral proceedings.[143] This further settles the omission of the New York Convention which did not provide for interim measures.

iii. Kompetenz Kompetenz

[139] Article II (3) of the NYC.
[140] See section 6 of the Arbitration Act of Kenya. Both the section and article II (3) of the NYC require a court seized of a matter which is subject to an arbitration agreement shall on application of one party refer the parties to arbitration.
[141] section 18 (1) (a) of the Act
[142] Section 18(2) of the Act
[143] section 7 of the Act

The law gives the Arbitral tribunal the ability to rule on its own jurisdiction, as well as the validity of an agreement to arbitrate.[144] This is one of the important provisions of the model law[145] and of great importance in limiting the intervention of courts in the arbitral process. It avoids the delays that may be associated with the applications to Court on the issues of jurisdiction as well as the validity of arbitration agreements, whether as a clause in a contract, or a separate agreement. This is the principle of *kompetenz kompetenz* which has been accepted by the arbitration law in Kenya.

iv. Party Autonomy

Arbitration is a consensual process, and parties retain the ability to control the process. The Act confers the parties the power to choose the procedure[146] as well as the rules which may be used[147] in the proceedings. Further, parties may agree on the pace of arbitration,[148] the judicial seat of the arbitration, the appointment of the arbitral tribunal[149] and the language of the process[150] alongside other matters.

v. Arbitration Proceedings

Parties to the process are presumed equal and by law should be given equal opportunity to present their claims.[151] They are further given the same opportunity in determining the number of arbitrators as well as the choice of arbitrators.[152] This makes the process more attractive to the domestic market, as parties may choose arbitrators from people who are experts in the particular field that is related to the disputed facts. It also encourages international arbitration as a party may decide to choose an arbitrator from outside the country. Further, parties are free to agree at the timelines at which pleadings, and supporting documents may be filed with the tribunal and/ or served to each other.[153]

vi. Arbitral Award.

[144] section 17 of the Act
[145] Article 16 of the model law.
[146] section 20 of the Act
[147] Section 29 of the Act. This provision is adopted from article 19 of the UNCITRAL Model law.
[148] section 21 of the act
[149] section 12 of the Act
[150] Section 23 of the Act. This promotes the ability of indigenous people as well as foreigners who may not be well versed with either English or Swahili, the official languages in the country.
[151] section 19 of the Act
[152] section 11 &12 of the Act
[153] Section 24 of the Act.

The arbitration process comes to an end with a pronunciation of a final award.[154] Under the law, the award shall be made in writing and should be signed by the arbitrator or arbitrators.[155] As adapted by the UNCITRAL in the Model law, the award is final and binding[156] on the parties and closes the trial on the issues that have been subject to the process. No recourse is available against the award, unless parties had earlier agreed otherwise.[157] A party wishing to raise an issue with the award may move to the high court to set aside the arbitral award under guidelines which are set out in the Act, and which in any event do not relate to the merits of the award,[158] but rather the process. Section 35 of the Act sets out grounds upon which an award maybe set aside. These are;

35. An Arbitral award may be set aside by the High Court only if;

(a) The party making the application furnishes proof ;
   i. That a party to the arbitration agreement was under some incapacity; or
   ii. The arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication of that law, the laws of Kenya; or
   iii. The party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or
   iv. The arbitral award deal with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
   v. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

[154] section 33 of the Act
[155] section 32 of the Act
[156] section 32A of the Act
[157] section 32A of the Act
[158] section 35 of the Act

vi. The making of the award was induced or affected by fraud, undue influence or corruption;

(b) The High Court finds that-

i. The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
ii. The award is in conflict with the policy of Kenya

The grounds on which an award may be set aside were drawn along the lines recommended by the Model law,[159] as well as the ground for refusal of recognition and enforcement set out in the New York convention.[160] Kenya however introduced a new ground, 'influence of fraud, undue influence or corruption'. It can be argued these are factors that can be considered when a party claims that "the award is in conflict with public policy" as fraud, undue influence and corruption are factors that may be considered as going against public policy. At the time of drafting the law, Kenya was under serious threat of corruption in many sectors. That may have been one of the reasons that informed the legislature when including the provision. It is however debatable if that is not throwing a spanner into the works, as it is rather difficult to get hard evidence on corruption, or undue influence, especially in arbitration which is a private process.

It is of great importance for parties to know that the process will not be in vain. It is therefore re-assuring when the law limits the extent to which a party may appeal an award.

vii. Enforcement of the arbitral award

Parties choosing arbitration as their preferred way to settle existing or future disputes in their relationships do so believing that the eventual result will be acceptable and enforceable.[161] In the pre-statute times, enforcement was effected by way of voluntary performance, curses and self-help.[162] In Arbitration, enforcement is either by way of voluntary performance, or court supported enforcement.[163]

[159] article 34 of the UNCITRAL Model law 2006
[160] Article V of the NYC 1958
[161] Redfern and Hunter ,International Arbitration (2009) 5th edition at 621
[162] John Middleton & Greet Kershaw op cit note 14 at pg. 44
[163] Githu Muigai & Jacqueline Kamau op cit note 109 at 23

An award made by an arbitral tribunal formed at the instance of the Court will be adapted as the judgment of Court and will be enforced as if it was the judgment rendered by the court in the particular file.[164]

On the other hand, the arbitration Act provides for mechanisms on which an arbitral award may be recognized and enforced.[165] An award delivered by an arbitral tribunal in terms of an arbitration agreement will be enforced by way of application to the High Court as provided for by the Arbitration Rules, 1997, Legal Notice No. 58 of 1997.

Section 36(2) of the Act further provides that "an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards" The Act goes further to provide that an arbitral award may be recognized and enforced, irrespective of the state from which it was made.[166] Kenya ratified the New York Convention in 1989[167] with a reciprocity reservation. The new development of the law means that notwithstanding the reservation, the country may enforce arbitral awards from any country, except for instances provided for in the Act.

It further lays down clear reasons upon which a court may refuse recognition and enforcement of an award.[168] The grounds provided for in the Act cover all the grounds in the New York convention[169] on the issue, and further provide that recognition and enforcement may be denied if the party opposing it furnishes to the High Court Proof that "the making of the award was induced or affected by fraud, bribery, corruption or undue influence".[170]

These developments have been capped by the establishment of the Nairobi International Arbitration Centre, which has the potential to transform dispute resolution mechanisms in the country. The Centre however faces inherent challenges, even before it starts to fully operate. These will be subject of further discussion in later chapters in this work.

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[164] Order 46 rule 18 of the Civil Procedure Rules, 2010.
[165] section 36 of the Act
[166] section 37 of the Act
[167] See the membership of the New York Convention at *www.newyorkconvention.org*
[168] section 37 of the Act
[169] article V of the NYC, 1958
[170] Section 37 (1)(a)(vii) of the Act

IX. The Nairobi International Arbitration Centre Act, Chapter 26 of the laws of Kenya

Kenya enacted the Nairobi International Arbitration Centre Act, Chapter 26 of the laws of Kenya in January, 2013, setting up the Nairobi International Arbitration Centre. Functions of the Centre are set out in section 5 of the Act and include,

(a) Promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;
(b) Administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;
(c) Ensure that arbitration is reserved as the dispute resolution process of choice;
(d) Develop rules encompassing conciliation and mediation processes;
(e) Organize international conferences, seminars and training programs for arbitrators and scholars;
(f) Coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;
(g) Maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;
(h) In collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;
(i) establish a comprehensive library specializing in arbitration and alternative dispute resolution;
(j) Provide ad hoc arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;
(k) Provide advice and assistance for the enforcement and translation of arbitral awards;
(l) ….
(m) Provide training and accreditation for mediators and arbitrators;

(n) Educate the public on arbitration as well as other alternative dispute resolution mechanisms;[171]

The Centre has adopted the UNCITRAL Arbitration Rules. Section 23 of the Act states that "Subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications shall apply"[172]

This may make the centre more attractive as parties who may find it difficult to draft their own rules will enjoy tested and proven rules of arbitration, if and when they choose to do their arbitration under the centre.

i. Challenges

The Centre has been set at the behest of the Government of Kenya and appointment to the board is therefore spear- headed by the Government. The center will also be financed by the Government of Kenya. This is a good development towards the promotion of arbitration as a process for the resolution of commercial disputes in the country. It opens Kenya as a place of arbitration, and may be a tool to attract arbitration business in the country.

It however remains a challenge as to how the international arbitration Centre will be required to promote domestic arbitration in the country. Government involvement may also project the Centre as being a Government institution, in which case independence may be not assured, and many business parties may feel a level of uncertainty as to the influence the Government wield on the Centre. In many other circumstances elsewhere, arbitration centers have been set up by business oriented organizations and are rarely funded by the national governments. The governments may however provide the necessary legal infrastructure to enable the Centre work effectively. A good example in this regard would be the Mauritius International Arbitration Centre (MIAC), London Court of International Arbitration (LCIA), The International Chamber of Commerce (ICC), the Permanent Court of Arbitration (PCA) etc.

[171] See the Nairobi International Arbitration Centre Act, cap 26 of 2013
[172] Nairobi International Arbitration Centre Act, cap 26 of 2013 Section 23

The position of the law would be incomplete without considering the how the court in the country has interpreted the law on arbitration in Kenya. Over the time, the relationship between the national courts and arbitration process has ranged between forced cohabitation and partnership. In the next chapter, the writer will give an overview on the role the Courts in Kenya have played in the development of the law of arbitration.

CHAPTER 4: THE ROLE OF THE COURT IN ARBITRATION

Under the laws of Kenya, arbitration process may be commenced under the Arbitration Act[173] or under the supervision of the Court in terms of the Civil Procedure Act. [174]The involvement of the Court in the two scenarios is different.

I. Involvement of the Court under the Civil Procedure Act

Section 59 of the Civil Procedure Act provides that:

"All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules"[175]

Order 46 of the Civil Procedure Rules, 2010 then provides that;

"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference"

These two provisions give power to the court to order, or accept to consent of parties in a civil matter before the court to resort to arbitration while the matter is pending. The court then gives directions as to how the process will be conducted, including the particular matters which shall be the subject of arbitration and setting time by which the process may come to a close.[176] The High Court is the principal Court involved in the supervision of the arbitration proceedings.[177] The Court of Appeal may also play its appellant role in this case.

This will be regarded as a court- supervised process.[178] The court is able to intervene to a greater extent than is provided for by the Arbitration Act.[179] Two stages of this kind of arbitration which are very important are the challenge and enforcement of the award.

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[173] See section 1 of the *Arbitration Act* (in this chapter hereafter referred to as the Act)
[174] Section 59 of the *Civil procedure Act*, Chapter 21 of the laws of Kenya and order 46(1) of the Civil procedure rules , 2010(The Rules)
[175] Ibid
[176] Section 59 of the *Civil procedure Act*, Chapter 21 of the laws of Kenya and order 46(1) of the Civil procedure rules , 2010(The Rules)
[177] See Githu Muigai op cit note 109 at 66
[178] See Githu Muigai op cit note 109 at 91
[179] Ibid

An award made as a result of court-supervised arbitration will be accepted and upon application by a party to the suit shall be adopted as a judgment of the court and enforced like any other Judgment. Rule 46 order 18, of the Civil procedure rules states that ;(1) "The Court shall, on request by any party with due notice to the other parties, enter Judgment according to the award"[180]

(2)"Upon the judgment so entered, a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award."

Grounds upon which an award may be challenged are limited to only two, i.e.

i. Corruption or misconduct of the arbitrator or umpire; or
ii. Either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.[181]

Where an award is set aside under the above grounds, the court shall supersede the arbitration and shall proceed with the suit.[182]

The Act goes further at Order 46, rule 18 (2) to state that-

"Upon judgment so entered, a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award". [183]

II. Involvement of the Court under the Arbitration Act, Chapter 49 of the Laws of Kenya

Section 10 of the Arbitration Act limits the intervention of the courts in arbitration proceedings. It provides that "Except as provided in this Act, no court shall intervene in matters governed by this Act"

A court may be called upon to assist the arbitration process either before the start of the Arbitration process, during the arbitration proceedings, after an award has been rendered and

[180] See Order 46 rule 18. There are qualifications to the section set namely that there should be no pending application as to challenge of the award.
[181] Order 46 rule 16(1)
[182] Order 46 rule 16(3)
[183] Order 46 rule 18

at the enforcement of the arbitral award. The Act limits the role of the Court to specific circumstances which are listed below.

i. Enforcing the Arbitration Agreement[184]
ii. Establishment of the tribunal[185]
iii. Challenge of arbitrators[186]
iv. Challenge to jurisdiction of the arbitral tribunal[187]
v. Interim measures[188]
vi. Assisting the arbitral tribunal in taking evidence[189]
vii. Challenge of awards[190]
viii. Enforcement of awards[191]

i. Enforcing the Arbitration agreement

A party to an arbitration agreement may decide to issue proceedings in a court of law, rather than take the dispute to arbitration.[192]If the other party does not raise any objection, the suit will proceed. In most cases however, the respondent will not allow the plaintiff to resort to court litigation when both parties had earlier agreed to settle the particular dispute through arbitration. The available law in Kenya empowers such a respondent to move to the court where the proceedings have been commenced and apply for stay of the proceeding and an order of the court referring the matter to arbitration.

Kenya is a state party to the New York Convention [193] Article II (3) of the convention provides that "The Court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall at the request of one of the parties refer parties to arbitration, unless it finds that the said agreement

[184] Section 6 of the Act and the Article 11 (3) NYC 1958
[185] Section 12(6) of the Act
[186] Section 14 of the Act
[187] Section 17 of the Act
[188] Section 7 of the Act
[189] Section 28 of the Act
[190] Section 35 of the Act
[191] Section 36 & 37 of the Act and Article V of the NYC, 1958
[192] Redfern and Hunter *Law and Practice of International Arbitration* (2009) 5th Ed. at pg. 443
[193] See http://www.newyorkconvention.org/contracting-states/list-of-contracting-states. Kenya became a contracting state of the New York convention in 1989

is null and void, inoperative or incapable of being performed".[194] This provision is further supported by Section 6 of the Arbitration Act which gives the court power to enforce the arbitration agreement, by giving an order of stay of the proceedings and requiring parties to an arbitration agreement to resort to arbitration.[195]

The Court has not always exercised its discretion in favor of the arbitration agreement. In fact in several cases, it has questioned the steps an applicant has taken to initiate the arbitration process before giving an order to stay proceedings. In the case of *East African Power & Lightning Co. Ltd v Kilimanjaro Construction ltd,*[196] the High Court, and later the Court of Appeal, declined to stay proceedings in favor of arbitration despite there being a clear arbitration clause in the contract. One of the grounds cited by the court in declining to stay the proceedings was that "The defendant itself took no steps; it never intended and was not ready and willing to do all things necessary to refer the dispute to arbitration"

The fact that the matter of enforcement of an arbitration agreement has to be determined by the court of appeal shows the challenges that remain in enforcing an arbitration agreement in the country. Enforcement of the Arbitration agreement however remains possible as shown by the decision in the matter of *University of Nairobi v N.K. Brothers Limited.*[197] The parties entered into a construction contract in which the respondent was to construct several buildings for the Appellant. The contract contained an arbitration clause, referring any dispute arising between the parties to arbitration. A dispute arose as to some of the payments sought by the contractor on account of certifications of the Architect.[198] The respondent contractors moved to court to enforce payments. The appellant filed their memorandum of appearance and immediately filed an application seeking to stay the suit and refer the parties to arbitration in line with their previous agreement. The High court dismissed the application to refer the matter to arbitration, citing that the dispute involved actions of the architect and

[194] See Article II(3) of the NYC, 1958
[195] Section 6 of the Arbitration Act is similar to Article II (3) of NYC 1958, save that it requires the party seeking to refer the matter to Arbitration to make the application before filing any further pleadings or taking part in the proceedings in the matter in court. This was the position of the Court of Appeal in the matter of *Niazsons (K)Ltd v China Road and Bridge Corporation Kenya, Nairobi Civil Appeal No. 157 of 2000*, where the Court held that " it is the policy of the law that concurrent proceedings before two or more for a is disapproved"
[196] (1983) eKLR. See also the decision of *Esmailji v Mistry Shamji Lalji & Co* (1984)KLR 150
[197] (2009) eKLR. See also the matter of *Alividza v LZ Engineering Construction Ltd*(1990) KLR 143
[198] The architect was an agent of the University, who was to certify the work done and the corresponding costs.

the Contractors, and not the appellant and the respondent. Dissatisfied, the appellant moved to the Court of Appeal. The Court of Appeal overruled the High Court on the grounds that the architect was acting on behalf of the appellant and any dispute arising out of his work fell within the definition of 'dispute' contemplated in the agreement. It referred the parties to arbitration pursuant to section 6 of the Arbitration Act.

It is however the responsibility of the party sued to bring to the attention of the court the existence of the arbitration agreement. It is also advisable that the party does not take part in the proceedings that have been filed in court. The Court has always taken the view that by filing pleadings or taking any other steps in court proceedings, the defendant submits himself to the jurisdiction of the court in respect of the dispute and will not be allowed to go back on his election.[199]

ii. Establishment of the Arbitral Tribunal

A properly drawn up arbitration agreement should contain directions on how an arbitral tribunal may be established. However, for different reasons, parties may not include the provision on the appointment of the tribunal. Also, a party whose participation is important for the appointment of the tribunal may delay such appointment.[200] The Act empowers the court to intervene on application by either party, in the appointment of the arbitrator, and therefore the setting up of the tribunal.[201]

iii. Challenge of Arbitrators

The Act provides for mechanisms in which an arbitrator may be challenged.[202]It further provides that the mandate of an arbitrator shall terminate if:

a. He is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch; or
b. He withdraws from his office; or
c. The parties agree in writing to the termination of the mandate[203]

[199] Githu Muigai op cit note 109 at 77-78
[200] See section 12 (2)(4)
[201] See section 12(6-9)
[202] See section 14
[203] See section 15 (1)

The High Court is empowered to decide on application of a party if any of the grounds above exist.[204] Decision of the High court in this regard is final and subject to no appeal.[205]

The mandate of the High Court in this regard must be construed as a result of lack of a reputable appointing authority in Kenya. With the establishment of the Nairobi Centre for International Arbitration,[206] there is hope that these roles will be taken away from the courts, and dealt with by the centre.

iv. Challenge to the Jurisdiction of the Arbitral Tribunal

The doctrine of kompetenz kompetenz was adopted in the arbitration Act of Kenya. [207]The Act also provides for an appeal to the High Court against a decision of the arbitral tribunal in relation to its jurisdiction.[208] These provisions are adapted from article 16 of the model law.

v. Interim measures

The Act envisages a situation where a party may need to move the court for interim measures before or during arbitral proceedings. Section 7 (1) provides that

"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High court to grant such a measure"

a. Before arbitral proceedings commence;

An arbitral tribunal cannot issue interim measures until the tribunal itself has been established.[209] Section 7 of the Act therefore comes in handy whenever there maybe need for interim measures before the proceedings commence. In the matter of *Alividza v L Z Engineering Construction Ltd*,[210] the Plaintiff sued the defendant for a dispute arising out of a contract where parties had agreed to solve their dispute by arbitration. He also made an application for injunction against the defendant not to interfere with the property involved in

[204] See section 15(2) & (3)
[205] See section 15 (3)
[206] The Nairobi International Arbitration Centre Act, lists some of the functions of the Centre to include promoting Arbitration
[207] See section 17 of the Act
[208] See section 17(6) &(7)
[209] Redfern and Hunter op cit note 191 at 445
[210] (1990) KLR 143

the dispute. The defendant filed their memorandum of appearance and made application to stay the proceedings on account of the arbitration agreement. The court granted the defendants prayer to stay the proceedings, and ordered the parties to honor their agreement to arbitrate the dispute. It however granted the interim orders sought by the plaintiff stating that "It is clear the plaintiff has cause to apprehend that the suit property, which is also subject of the agreement between the parties, may be sold unless appropriate orders are made restraining the defendant from doing so. "In those circumstances, this court is entitled, in an application of this nature not only to grant the stay sought but also to protect the status quo by granting auxiliary relief including an interim injunction"[211]

b. Orders against third parties

Another situation where the assistance of the court in granting interim measures may be required is when the parties to whom the orders are intended to bind are not parties to the arbitration agreement. Powers of the arbitral tribunal are limited to the parties involved in the arbitration itself. [212] If for instance the interim orders relates to funds in a bank account, an order stopping the bank from dealing with the funds may not be given by the tribunal as it may not have jurisdiction over the bank. Also, if the order refers to the transfer of land, an order to the registrar of lands may not be given by the tribunal for lack of jurisdiction. The court is the only institution with jurisdiction over persons who may not be parties to the dispute. The Court may therefore be approached by a party, before or during the arbitral proceedings to assist in issuing order to such parties.[213]

vi. Assisting the arbitral tribunal in taking evidence

The court may also be called upon to assist a party or the tribunal in taking evidence. Section 28 provides that "the arbitral tribunal, or any party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence…" This may be necessary especially when the parties from whom the evidence has to be taken are not parties to the arbitration process. In this instance, the Court has discretion to use its own rules of evidence.[214]

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[211] Ibid 38 at 145, para 30
[212] Redfern and Hunter op cit note 191 at 446
[213] Section 7 of the act
[214] See section 28 of the Act. Also see Githu Muigai in op cit note 109 at 82

vii. Challenge of Awards

Section 32A of the Act states that "Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act". It follows that an appeal can only lie on an award if parties had prior agreement to the same.

There are three ways in which a party seeking to challenge an arbitral award made under the Arbitration Act may approach the Court in Kenya. One is that they may make an application to set aside the award on any of the grounds provided by the Act in section 35 of the Act.[215] These are the only grounds upon which a party may raise on an international arbitral award.

The second option is on domestic arbitral awards. If there was a prior agreement, a party is allowed by the law to appeal an award. Section 39 of the Act states that:

"Where in the case of domestic arbitration parties have agreed that;

a. An application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
b. An appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be may be made to the High Court." [216]

The High Court on application may confirm, vary, or set aside the arbitral award, or remit the matter to the arbitral tribunal for re-consideration.[217] Either way, an appeal shall lie to the Court of Appeal against the decision of the High Court in this regard.[218] Section 39 of the Act therefore retains the power of the Court to entertain appeals on awards, which can be rather protracted once it begins. The caveat that parties must agree to the provision is good, but the Act would have been better without the provision.

The last alternative against an award in which a party may invoke the power of the Court is for the losing party who has not performed in terms of the award to wait until the successful party makes an application to court for recognition and enforcement of the Arbitral award. Once the party becomes aware or is served with the application, he may seek to raise any of the grounds set out for refusal to recognize and enforce an award under the provisions of

[215] See reference in chapter 3
[216] section 39 of the Act
[217] section 39(2)
[218] section 39 (3) of the Act

section 37 of the Act.[219] The provision is however phrased in a way that gives the court discretion, to recognise and enforce an award even after the losing party has proved the grounds set out.

viii. Enforcement of Arbitral awards.

The Court is required once more at the end of arbitral proceedings to enforce the arbitral award. An award given by an arbitral tribunal formed in terms of the Arbitration Act will be enforced under the provisions of section 36 of the Act.[220] It states "domestic arbitral award shall be recognized as binding and, upon application in writing to the High Court shall be enforced subject to this section and section 37." "An International arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards."

The grounds upon which an award may not be recognised and enforced are set out in section 37 of the Act and among others are:

The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—;

(a) At the request of the party against whom it is invoked, if that party furnishes proof that:

i. A party to the arbitration agreement was under some incapacity; or
ii. The arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication of that law, under the law of the state where the arbitral award was made; or
iii. The party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or
iv. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral

[219] Section 37 of the Act sets the grounds upon which recognition and enforcement may be denied by the Courts
[220] Section 37 of the Act

award which contains decisions on matters referred to arbitration may be recognised and enforced; or

v. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing any agreement by the parties, was not in accordance with the law of the state in which, or under the laws of which, that arbitral award was made; or

vi. The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which , that arbitral award was made; or

(b) The High Court finds that-

i. The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. The recognition or enforcement of the arbitral award would be contrary to policy of Kenya[221]

The Court in Kenya has pronounced itself in several instances on the grounds set out above. Some of the judgments and rulings have shown the Court to be very conservative in letting go of its position as the sole adjudicator of justice in the country.

The Court was willing to consider the award in the matter of *Tanzania National Roads Agency v Kundan Singh Construction Limited.*[222] The applicant made an application for recognition and enforcement of an arbitral award given by the Stockholm Chamber of Commerce. The respondent opposed the application on the grounds that they had already filed application to set aside the award in Stockholm, the place of arbitration. The court found for the respondent and instead of giving a stay for the proceedings as provided for by the New York Convention, Article VI dismissed the application with costs. The Court held that "in our present case the final award was arrived at in breach of the express terms of the agreement between the parties which contain the arbitration clause that any dispute shall be referred to arbitration and shall be governed by the law of Tanzania."[223] The Court went on to

[221] Section 37 of the Act
[222] [2013] eKLR;
[223] See the judgment of Muya J of 15th August, 2013 in *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] eKLR pg. 10

paraphrase the question "Should the court condone that breach by recognizing and enforcing the award?"[224]

Then contrary to Article VI of the New York convention, and section 37 (2) of the Arbitration Act, dismissed the application, holding that "I find there would be no justification legally or morally to condone a breach of a contract between two parties and it would be contrary to the public policy of Kenya to allow a court to be used towards that end. The upshot is that the application dated 15th January, 2013 to recognize and enforce the award as decree of the Court is dismissed with costs."[225]While the Court retains the discretion of the order that it may make, dismissing the application for enforcement is finality, in that even if the application to set aside the award were to fail, it would be difficult for the award-holder to make a fresh application for enforcement.

In the matter of *Anne Mumbi Hinge v Victoria Njoki Gathara*,[226]The parties had a sale agreement for a piece of land. Their contract had an arbitration clause. Before the contracted was fully performed, a dispute arose. The parties subjected the dispute to a sole arbitrator. An award was made in favour of the respondent. Copies of the award were sent to the advocates for both parties, with a notice of filing the award in court. Dissatisfied, the appellant moved to the High court to appeal the award on grounds that she had not been notified of the given notice of the reading of the appeal. The High court dismissed the appeal, finding that both parties had been served. The appellant, dissatisfied with the decision of the High court moved to the Court of appeal.

The High court while dismissing the appeal held that the powers of the Court in relation to arbitral awards were clearly set out in section 35 and 37 of the arbitration Act, and the court could not assume any other powers. Failure to serve the notice of the award on any of the parties was not a ground to refuse recognition and enforcement of an award. The court further went on to state that the court lacked jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act.

[224] ibid at 10
[225] ibid
[226] (2009)eKLR

In the matter of *Christ for All Nations v Apollo Insurance Company Ltd*,[227] Justice Ringera while dismissing objections to recognition and enforcement of an arbitral award on grounds of public policy, correctly held, **"**In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act."[228]

The role of the court as shown above supplements the legislation in support of arbitration as an accepted way of settling disputes in Kenya. While the Act has limited the instances to which the Court is invited to intervene in arbitration, there is room for improvement in this regard. The fact that a decision of the High Court in regard to arbitration is open to appeal at the Court of Appeal may be seen to make arbitration a protracted process. Arbitration is still improving in the country and remains a viable option of adjudication.

The next chapter will discuss the legal position of the Mauritius and South Africa in relation to commercial arbitration, as a comparison to the Kenya's position.

[227] (2002) EA 366**.** See also the Judgment in the matter of Havelock J in *Intoil Limited & another v Total Kenya Limited & 3 others* [2013] eKLR,

[228] *Christ for All Nations v Apollo Insurance Company Ltd* (2002) EA 366 at pg 370, the last paragraph

CHAPTER 5: ARBITRATION IN SOUTH AFRICA AND MAURITIUS

The preceding chapters show that arbitration has been practiced in Kenya for a long period of time. The law of arbitration has also progressed with the time. In this chapter, the writer will give a brief overview of the state of arbitration in two countries in Africa, namely, South Africa and Mauritius.

I. Arbitration in South Africa

Arbitration in South Africa is regulated by the Arbitration Act No. 42 of 1965.[229] The Act applies to domestic arbitration. At its enactment, it was seen as a progressive law and was at par with the arbitration laws of other progressive economies.[230] Enforcement of foreign arbitral awards is regulated by the Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977.[231]

i. The Arbitration Agreement

The South African Arbitration Act does not guarantee that an arbitration agreement is binding as it is open to being set aside by a court, if good reasons for the same can be shown.[232] The Act offers wavering support for the enforcement of the arbitration agreement. Section 6 of the Act states:

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or

[229] See the Arbitration Act No. 42 of 1965(hereinafter referred to as the Act)
[230] See Butler and Finsen on *Arbitration in South Africa: Law and practice* (1993) at page 6. The author correctly holds that the South Africa Act was more logically organised than the English Act of the time. It was also in advance of legislation in other jurisdictions.
[231] Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977. This is the Act that domesticated the New York Convention in South Africa.
[232] Section 3(2) of the Arbitration Act

taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

This provision places the onus on the person applying to enforce the arbitration agreement to show sufficient reasons why the dispute should be referred to arbitration.[233] Although one might expect that the court will exercise its discretion in the best interests of the parties, the invitation of the court to rule on whether parties should subject their dispute to arbitration, even when they already had an agreement to, may make a party reluctant to enter into the arbitration agreement in the first place. [234]

ii. Proceedings

Arbitral proceedings are carried out according to the agreement of the parties.[235] The arbitral tribunal remains in charge until the award or final order is announced. Section 21 of the Act empowers the Court to intervene in the Arbitral proceedings. Section 21(3) states that "Notwithstanding anything to the contrary in the arbitration agreement, the court may at any time, on the application of any party to the reference, order that the umpire shall enter upon the reference in lieu of the arbitrators in all respects as if he were a sole arbitrator"[236]

iii. The award

An arbitral award once pronounced is binding and not subject to appeal as provided by section 28 of the Act which states; "Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its

[233] See also section 7 of the Act. See also the decision of the SCA in *PCL Consulting (pty) v. Tresso Trading 119 (pty)Ltd* 2009 (4) SA 68

[234] See the case *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) where the court was tasked with the question whether it is possible to enforce an arbitration clause where the contract that contains the arbitration clause is invalid. The court did not apply the principle of separability of the arbitration agreement from a parent contract which was allegedly induced by fraud, and held both agreements, the contract as well as the arbitration agreement to be invalid.

[235] Arbitration being a private process, parties have autonomy to choose in their agreement how the process is to run

[236] Section 21 of the Act

terms." This is encouraging in that the option of challenging the award is then limited by the statute.

The Act also provides that an award may require a party to make specific performance; Section 27 of the Act holds that "Unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so."[237] This is a good provision especially for commercial transactions.

A party to arbitral proceedings may have recourse as against the award by either making an application to set aside the award,[238] or opposing an application made by the successful party, for the recognition and enforcement of the award.[239] Section 33 of the Act lists limited grounds upon which a party may apply to set aside an arbitral award.[240] The grounds are:

(1) Where-

(a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) An award has been improperly obtained,

The court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."[241]

Although the grounds are few, they are capable of being interpreted widely, and may encompass many aspects. A party dissatisfied with an arbitral award may appeal to the High Court, with a residual privilege to go the Supreme Court of Appeal if dissatisfied with the decision of the High Court.[242] Parties have made applications to the Constitutional Court in

[237] Section 27 of the Act
[238] Section 33 of the Act
[239] See also the provisions of section 31 of the Act
[240] See section 33 of the Act
[241] See section 33 of the Act

[242] Butler and Finsen on *Arbitration in South Africa: Law and practice* (1993) at 291-295. See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009) which went all the way to the Constitutional Court.

the challenge of awards. This is largely because there is no clear provision providing a stage at which the court will bring an arbitration dispute to an end.

iv. Enforcement of award

The Act provides enforcement of the award and limits the grounds upon which enforcement may be refused.

(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of Court.

(2) …

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

While this provision is brief enough, and limits the grounds upon which an award may be challenged, the unlimited involvement of the Court in arbitration makes it complicated to enforce the award, especially when the losing party opposes the enforcement.

South Africa ratified the New York convention in 1977. It also domesticated the convention by enacting the Recognition and Enforcement of Arbitral Awards Act 40 of 1977.[243] This Act applies only in relation to foreign arbitral awards.

v. Calls for a new Arbitration Act

Since the South African Arbitration Act was enacted, many developments in the practice of arbitration have occurred elsewhere in the world. The UNCITRAL Model law was adapted by the United Nations in 1985. The model law was revised and replaced with UNCITRAL Model law, 2006. It was intended to promote uniformity of the arbitration rules used in different jurisdictions.[244] Many countries have adopted the model law,[245]and it has had great success where it has been adopted.

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[243] Butler and Finsen on *Arbitration in South Africa: Law and practice* (1993)
[244] See preparatory notes for the Model Law, 1985 &2006
[245] Over 100 countries have enacted their local Arbitration law in line with the model law.

In this realization, the Association of Arbitrators wrote to the South Africa Law Reform Commission in 1994, seeking its input in revising and amending the arbitration Act in the country.[246] The Commission, with the approval of the line minister, deliberated and in 1998 came out with a draft bill to be placed before Parliament, for a new Arbitration Act. The proposed bill was to create the International Arbitration Act for South Africa which was to deal only with International arbitration.[247] It was felt that the domestic Arbitration Law could be revised separately considering that the existing South Africa Act dealt only with domestic arbitration. [248]The proposed bill has not been debated in parliament up to now.

The same Commission again engaged stakeholders and in 2001 came out with another draft bill (for the domestic arbitration law) for debate in parliament. The last bill proposed that the Country amends the existing Arbitration Act, retaining the provisions that have been successful in application, infusing other provisions from the English Arbitration Act and the Model law.[249] The resultant law was to be the domestic Arbitration Law in South Africa. The Provisions that the commission recommended were relative to the model law, 1985. UNCITRAL has since amended the model law and is now using 2006 model. The Bill has not been debated in parliament and therefore the old Arbitration Act subsists. The Country may therefore need another bill for debate if it were to refer to Model law, 2006.

At the time of writing this work, the government of South Africa was preparing the draft *Promotion and Protection of Investment Bill,* for debate in parliament. The Bill proposes to exclude recourse to international arbitration for investor-state disputes where the government of South Africa is involved. It further proposes that foreign investors will only have recourse to SA courts, domestic arbitration or the mediation services of the Department of Trade and Industry. [250]

While this work is on commercial arbitration, the direction the Government of South Africa takes to the settlement of investor–state disputes is a pointer to the position it may take in

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[246] See the *South Africa Law Commission, Project 94, Arbitration: an International Arbitration Act for South Africa* report of July, 1998 op cit 13 at pg. 29.
[247] Ibid at pg 21
[248] Ibid at pg 22
[249] See *South Africa Law Commission, Project 94, Domestic Arbitration Report* of May 2001, op cit 13 recommendations at pg *ix*

[250] See http://www.allenovery.com/publications/en-gb/Pages/South-Africa-seeks-to-exclude-recourse-to-international-arbitration-for-foreign-investors.aspx also see reports at http://www.bdlive.co.za/business/2013/11/05/sa-courts-will-not-be-poodles-of-the-state-in-arbitration

commercial arbitration. The legislation currently under discussion indicates the approach that the government is taking to arbitration, which seems rather hostile and mistrustful.

vi. Arbitration Bodies

The Association of Arbitrators (Southern Africa) is an organization promoting arbitration as a means of resolving disputes, and provides a body of competent and experienced arbitrators for appointment as may be required. It has been in operation in the country since 1979.[251]Its procedural rules are based on the UNCITRAL Arbitration rules of 2010, amended in the context of the arbitration legislation in Southern Africa. The rules were revised and came into effect in January, 2013.

The Arbitration Foundation of South Africa, AFSA, is also engaged in arbitration in the country. It is a joint venture of organized business, the legal and accounting professions in the country. It uses its own commercial rules for complex matters with substantial claims, and has expedited rules for smaller claims. The rules are drawn under the arbitration Act of South Africa. South Africa has a law on arbitration, the Arbitration Act of 1965.

vii. Conclusion

While South Africa remains one of the most progressive economies amongst developing countries, and while its development of law in several other aspects remains a good example to other developing countries, the law of Commercial arbitration is rather outdated and not a good example for other growing economies. The courts have explicitly given their support to commercial arbitration.[252] The supporting law however remains outdated. The approach that the country has taken in relation to commercial arbitration is not the example that Kenya should consider taking.

[251] See their site at http://www.arbitrators.co.za/index.php

[252] In the matter of *Telecordia Technologies Inc v Telkom SA Ltd 2007* (3) SA 266 (SCA), the Supreme Court of Appeal affirmed the international principle that judicial intervention when reviewing international commercial arbitration awards should be minimised

II. Arbitration in Mauritius

Arbitration law in Mauritius can be traced back its code civil, and the code de procedure civil, in the section dedicated to clause Compromissioire.

Mauritius enacted its Mauritius International Arbitration Act, 2008 based on the UNCITRAL Model law, 2006. The Act while adapting the provisions of the Model law, 2006 went further to require all proceedings filed in court in relation to Arbitration under the Act to be commenced at the Supreme Court in the Country, with a direct and automatic right of appeal at the Privy Council.[253] The intention of legislature in providing this provision was to "provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists."[254] The Country has since made arrangements with The Permanent Court of Arbitration (PCA) to be a default appointing authority in the country. Some of the most progressive features of the Mauritius International Arbitration Act, 2008 are:

i. Application

The preamble of the Act states that its aim is "To promote the use of Mauritius as a jurisdiction of choice in the field of international arbitration, to lay down the rules applicable to such arbitrations and to provide for related matters"[255] The Act is deliberately enacted to apply to international arbitration. It is intended further to make Mauritius a country of choice for international arbitration.[256]Domestic arbitration has been left to be dealt with according to the Code de Procedure Civile.[257]

ii. Enforcement of the Arbitration Agreement

The Act provides a strong provision for the enforcement of an arbitration agreement. Section 5 provides that:

(1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the

[253] *Travaux Préparatoires* op cit note 12 at Section 2 (d)(i)
[254] *South Africa Law Commission,* op cit note 245
[255] See the preamble of the Act
[256] See *Travaux Préparatoires* op cit note 12 section 7
[257] Ibid section 7(a)

Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.

(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.[258]

The Supreme Court therefore becomes a court of first instance in matters in which a party wishes to enforce an arbitration agreement.[259]

iii. Interim measures

The Act further provides that a party may, before or during arbitral proceedings, approach the Supreme Court or a court in a foreign state, for interim measures in protection or support of arbitration and such court may grant such measure.[260] Interim measures may also be granted by the arbitral tribunal.[261] Section 22(1) goes on to provide for the recognition of an interim order, irrespective of the country in which it was issued. It states, "An interim measure granted by an arbitral tribunal shall, subject to this section, be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced on application to the Supreme Court, irrespective of the country in which it was issued." Grounds upon which recognition and enforcement may be refused are set out in section 22(4) of the Act.

iv. Appointment of Arbitrators

The Act provides that the Permanent Court of Arbitration, the PCA, shall be a default appointing authority where parties are unable to appoint arbitrators. The decision of the PCA is subject to no appeal. PCA is a neutral international organisation based at The Hague, and has been the authority of reference under the UNCITRAL Rules for more than thirty years.[262] It is a reputable organisation, with long experience in international arbitration, commercial or

[258] Section 5 of the Act
[259] The importance of this section is that the Supreme Court is the highest Court in the country.
[260] Section 6 of the Act
[261] Section 21 of the Act
[262] Ibid at section 2(d)(ii)

otherwise and its inclusion in the Act as a default appointing authority is very progressive. It gives prospective parties an assurance that the experience of the PCA will be applied in appointment of arbitrators whenever that may become necessary.

v. Challenge of arbitrators

The act provides for grounds upon which a party may challenge an arbitrator either appointed by the party or the other party to the proceedings. The arbitral tribunal may decide on the challenge if the challenged arbitrator does not resign. If dissatisfied with the decision of the Arbitral tribunal on the challenge, the challenging party may request the PCA to decide on the challenge.[263]

vi. Kompetenz Kompetenz

The doctrine of kompetenz kompetenz has been adopted in the Act. Section 20(1) states that: "An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement."
The Act further provides that a party dissatisfied with the decision of the Arbitral tribunal in this regard may approach the Supreme Court to decide on the matter, within 30 days, after receiving notice of the ruling.[264]

vii. Representation.

The Act opens an opportunity that a party may be represented by their chosen lawyers, notwithstanding that they may not be practicing law in Mauritius.[265] This is a great development in the practice of arbitration in Mauritius, as it will enable a party to appoint a lawyer who is conversant with the dispute, and who may not be from Mauritius.

viii. Arbitral award

[263] Section 14(3) of the Act
[264] Section 20(7). A recent decision in the matter of *Liberalis Limited and anor v Golf Development International Holdings Ltd and others* (2013 SCJ 211, SCR No. 107600) of the Supreme Court gave the direction the Court will take in relation to the jurisdiction of arbitral tribunal to decide on its jurisdiction.
[265] Section 31 of the Act states "Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practice law in Mauritius or in any other jurisdiction."

An award issued under the Act is final and binding and opens limited chances of challenge. Section 36 (7) states that " An award shall be final and binding on the parties and on any person claiming through or under them with respect to the matters determined therein, and may be relied upon by any of the parties in any proceedings before any arbitral tribunal or in any Court of competent jurisdiction."

The grounds for setting aside the award are limited and an application for setting aside may only be made to the Supreme Court. Section 39 provides that

(1) Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section.

(2) An arbitral award may be set aside by the Supreme Court only where –

(a) the party making the application furnishes proof that -

(i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law; or

(ii) It was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

or

(iii) The award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act; or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law;

(ii) the award is in conflict with the public policy of Mauritius;

(iii) the making of the award was induced or affected by fraud or corruption; or

(iv)a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

The Act further provides that "the Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."[266]

ix. Enforcement of the award

The Act provides that enforcement of awards shall be done according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001.[267] This is the Act which domesticated the New York Convention in Mauritius.

The Mauritius International arbitration Act also provided for some drastic measures which projects the country as a competitive place of international arbitration. Some of these measures are:

a. The Court

The Act provides that all Court applications under the Act are to be made to the Supreme Court, [268]with a direct and automatic right of appeal to the Privy Council.[269] The Supreme Court shall be constituted by a panel of three judges.[270] This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.

b. Appointing Authority

The Act adopts a unique solution, in that all appointing functions (and a number of further administrative functions) under the Act are given to the Permanent Court of Arbitration (the "PCA"). The PCA is a neutral international organisation based at The Hague, and has been the authority of reference under the UNCITRAL Rules for the over thirty years. As such it is uniquely well-placed to fulfill appointing and administrative functions under the

[266] Section 39(5)
[267] Section 40
[268] Section 42 (1)
[269] Section 42(2)
[270] Section 40(1)and Ibid 21 at Section 2 (d)(i)

Act in an independent and efficient way. Further, in order to ensure that the PCA is able to react swiftly in all Mauritian arbitrations, Government has concluded a Host Country Agreement with the PCA pursuant to which the PCA has appointed a permanent representative to Mauritius, funded by Government, whose tasks consist *inter alia* of assisting the Secretary- General of the PCA in the discharge of all his functions under the Act, and of promoting Mauritius as an arbitral jurisdiction within the region and beyond.[271]

c. Off-shore companies

Specific provision has been made in the Act for the arbitration of disputes under the constitution of off shore companies incorporated in Mauritius[272] in order to provide a link between Mauritius' thriving offshore sector and the new intended international arbitration sector.

d. Representation

The Act expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitrations in Mauritius.[273]

e. Application

Finally, and in line with the Amended Model Law, the Act does not link international arbitration in Mauritius with any given arbitral institution, or with any institutional rules. The aim of the proposed Act is to make Mauritius a favorable jurisdiction for all international commercial arbitrations, whether such arbitrations arise under *ad hoc* arbitration agreements, or under institutional rules such as those of the International Chamber of Commerce or the London Court of International Arbitration.[274]

x. Mauritius International Arbitration Centre-MIAC

Mauritius has since opened the Mauritius International Arbitration Centre. The Centre is a product of the Mauritius Chamber of Commerce, which was founded in 1850, and remains one of the oldest business groups in the country. It is supported by good legal infrastructure

[271] *South Africa Law Commission,* op cit note 245 at Section 2 (d)(ii)
[272] Section 3(2)(b)(iv) & (6)
[273] Section 31
[274] *South Africa Law Commission,* op cit note 245 at Section 2 (d)(v)

in the country. The Centre entered into partnership with The London Court of International Arbitration and is now referred to as The LCIA-MIAC centre. By joining hands with LCIA, the MIAC is drawing the experience and reputation of one of the oldest and reputable arbitration centres in the world.

xi. Conclusion.

The Law of International commercial arbitration was enacted in Mauritius in the year 2008. The country has since taken strong, decisive and progressive steps to anchor Commercial arbitration at the centre of its dispute resolution mechanisms. The measures outlined above clearly project the country as a desirable, attractive and able place of arbitration for international commercial arbitration. The provisions for appeal at the Privy Court, as well as the choice of the Permanent Court of Arbitration as a default appointing authority, with several other administrative functions supplements any defects that the law and practice may have in the country.

III. Comparing South Africa and Mauritius law and practice of arbitration

Both countries have developing economies. South Africa remains a leading economy in Africa. The approach that the South Africa has taken in relation to arbitration is rather hostile. The law of arbitration was enacted in 1965 and remains largely outdated. The law provides for several ways in which the court may intervene and interfere in the process of arbitration. There are no provisions providing for international commercial arbitration in the South Africa arbitration Act. Many would-be parties to international commercial arbitration would hesitate to consider South Africa as a place of arbitration. Foreign business people wishing to engage in trade in South Africa will also consider the legal regime available in settlement of disputes and the local arbitration law is not attractive to business.

On the other hand, Mauritius which enacted its International Arbitration Act in 2008 has made big strides to make the country attractive to investors and business people, as a positive place of international commercial arbitration. The deliberate measures taken by the Government of Mauritius, in conjunction with the business community in the country gives positive indicators of a government which is keen to attract international arbitrations in the country, as well as an assurance to investors who may consider the country as a viable place

to engage in trade, with the assurance that should disputes arise, they have a familiar mechanism of settling the same.

Kenya has an arbitration law which is adapted from the UNCITRAL Model law, with a few variations. The Government of Kenya has employed several measures to advance the practice of commercial arbitration in the country. Deliberate legislative measures have also been put in place to make the country a preferred choice as a place of arbitration. Much more still needs to be done to make it possible for Kenya to be an attractive place of international commercial arbitration, as well as an attractive destination for international business. South Africa's route would be the wrong way to take if Kenya is to achieve the stated goals. Mauritius on the other hand would be a good example to consider for Kenya in this regard.

In the next chapter, having covered the law and practice of arbitration in Kenya, as well as the brief overview of the two countries above, the writer will outline the challenges that face arbitration in Kenya.

CHAPTER 6: THE BENEFITS AND CHALLENGES

I. Opportunities

As has been shown in the previous chapters, a form of dispute resolution akin to current day arbitration was practiced in the Kenyan societies before the introduction of statute law in the country.[275] With the development of the law of arbitration in the country,[276] Kenya now has the potential to promote effective resolution of commercial disputes through arbitration. The establishment of the Nairobi Center for International Arbitration further enables the country to promote arbitration while at the same time projecting Kenya as a suitable place for international commercial arbitration. Mauritius, which is a country worthy of emulating has developed similar state-of the -art arbitration laws, as well as established the Mauritius International Arbitration Centre (MIAC), with an over-riding objective to attract the business of commercial arbitration to its territory, and position the country as an attractive investment destination.[277] The MIAC, has since establishment affiliated itself with international reputable arbitration centres, in order to learn their ways and also to raise its profile.

Nairobi also has the potential to associate itself with international arbitration institutions and /or organisations of good repute, to learn from their experience and also improve its own profile. This will give the centre more opportunities and will make Kenya a preferred place of arbitration.

The legislature should also consider amending the Arbitration Act to incorporate the participation of reputable bodies with vast experience, in the administration of arbitration at various levels. A good example would be the Permanent Court of Arbitration, (PCA). The example taken by Mauritius to sign a host Government agreement with PCA serves the MIAC well and increases the confidence of traders who wish to utilize the Centre. It would be a good example for Kenya to follow.

[275] See chapter 2 herein on the history of arbitration.
[276] As has been shown in the previous chapters, Arbitration law has developed over the time in the country and the practice has been accepted by the courts in Kenya to be
[277] See the *Travaux Préparatoires* op cit note 12 section 17

Kenya should also consider amending its law to accept the participation of foreign lawyers in international commercial arbitration process in the country. This will enable parties to arbitration to choose lawyers who are familiar with their nature of business and the subject in issue.

II. Benefits

Arbitration has numerous advantages.[278] In Kenya, effective arbitration will open several benefits. Key among them will be

i. **Increased settlements:** Matters have been known to drag on for years in the courts in Kenya.[279] This state of affairs means fewer matters are conclusively settled through the courts. An increased use of domestic arbitration will see an increased volume of settlement of disputes in the country. An early settlement of a dispute gives the parties involved an opportunity to move on past the dispute, and concentrate on other activities. Taking complex matters out of the court will also enable the courts to benefit from a reduced work load. Reduced work load for the courts will mean the courts will have the ability to decide on the matters that will remain in courts much faster than has been witnessed before

ii. **Increased satisfaction with the outcome of the process**: one of the advantages of arbitration is that it is a consensual process. Parties participate in the formation of the arbitral tribunal, the choice of the rules, and will normally choose arbitrators on the basis of their experience in the particular issue in dispute. Parties also participate in the choice of the place of arbitration. The solutions are therefore more acceptable to the parties as they are part of the process all through.

iii. **Reduced time in dispute**: Unlike litigation which depends on the volume of work a particular court has, and the availability of time within the Courts diary, arbitration is a private process and time is therefore managed by the arbitral tribunal and the parties involved. As such, once pleadings are closed, the matter

[278] See chapter one hereof.
[279] An example is the case of George Njau Maichibu v. Mungai Maichibu & Joseph Kimani Waithima (2007)eKLR which was filed in 1981 but was concluded in 2008

will normally be set down for hearing as soon as is convenient to the parties and not the court's diary. This ensures that the dispute is solved with speed.

iv. **Reduced costs in dispute resolution**: If a matter takes long in court, valuable time is spent attending to the numerous proceedings, attending to the lawyers, and meetings on the matter. Witnesses are bound to be at the proximity of the court at all times when the matter may be called. Arbitration has the potential to reduce the time spent in litigation in that the arbitral tribunal will set hearing times convenient to the parties, and may even decide to sit at a place convenient to the witnesses. No time is lost waiting.

v. **Increased compliance with the awards:** Parties to an arbitration process agree to perform the decision of the arbitral tribunal. Accepting the decision of the tribunal will reduce the costs involved and the time spent contesting court decisions.

III. Challenges posed by the Arbitration Act

The Arbitration Act of Kenya was drafted to apply to both the domestic and the International arbitration.[280] The two forms of arbitration however are different in nature, and give rise to different problems and solutions.[281] Experience in other countries suggests that if the same rules are applied to both domestic and international arbitration then a tension is created between the more interventionist approach that may be necessary in the domestic context and the non-interventionist approach required in the international context.[282]

The conflicting positions taken by the courts in the interpretation of different provisions of the Act are not good for the promotion of Kenya as a safe destination for arbitration. Decisions of the High court, are also subject to appeal at the Court of Appeal, This is not reassuring to investors wishing to do business in the country as there is no way of knowing when the process will end. It is also not good for parties wishing to do international arbitration in Kenya, as an award may be challenged at the country in which it has been

[280] Section 2 of the Arbitration Act
[281] *Travaux Préparatoires* op ci note 12 at section 7(a)
[282] Ibid section 7(d)

made. Increased litigation on matters that are subject to arbitration is a result of the vague description of the powers of the court, at the time the Arbitration Act was enacted. In Mauritius, when the country was enacting its arbitration act, it was consciously and correctly the intention of parliament that all matters subject to arbitration would, whenever need arose, be commenced at the Supreme Court. Section 17 (a) (ii) of the Travaux *Préparatoires of the Mauritius International Arbitration Act* provides that:

"The Act provides that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists."

Such provision, that the matters are commenced at the highest court, will ensure that there is rarely confusion, or contradiction of decisions relating to arbitration.

The limited number of people practicing arbitration in the country poses another challenge.[283] Few judges and lawyers have been trained in arbitration and therefore, the process is not yet fully embraced in the legal practice.

IV. The Nairobi Centre for International Arbitration

Kenya is an important economic country in East and Central Africa. It has joined several economic organisations in the area to promote trade within the countries. Kenya also hosts some serious foreign investments in the region. The establishment of the Nairobi Centre of International Arbitration opens the possibility of increased choice of the country as a destination for business,[284] in the region and beyond. It also assures investors of the support for arbitration in the country. The position of the centre is founded on a strong foundation laid by the arbitration legislation. Investors may have disputes with other local business

[283] According to *the Chartered Institute of Arbitrators in Kenya,* only 500 members are registered as arbitrators, against a population of over 40 million people. see http://www.ciarbkenya.org/About_Us.html

[284] Section 5 of the Nairobi Centre for Arbitration Act list one of the functions as to "promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;" and also to "administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;"

people in the country. The support for arbitration means such disputes may be settled at arbitration and not through litigation. Arbitrations using the facilities of the Centre will also bring business to the country.

It would be appropriate if the centre was to cultivate working relations with other reputable international arbitration centres to learn from their experiences. It would be even better if the centre was to partner with such institutions, as that would improve its profile and reputation. As a comparison, the Mauritius International Arbitration Centre has partnered with the London Court of International Arbitration (LCIA) to make what is now known as the LCIA-MIAC. Although the Mauritius centre was set up a few years ago, [285]such partnership raises its profile.

Further the promotion of arbitration as a form of dispute resolution[286] will resonate well with the local population as the practice of amicable solution still lingers in the largely indigenous population in Kenya.

The inclusion of arbitration as a subject in the syllabus for lawyers' training will increase the knowledge of the practice of arbitration,[287] and this opens an opportunity for the local lawyers to be involved in arbitration in the country and outside the country. The judiciary will also have an opportunity to learn about arbitration. This has the potential to remove the ignorance that has been exhibited by the courts at times to arbitration as an alternative mechanism of resolution of commercial disputes. The court should support arbitration as a method of dispute resolution, and should minimize any interference with the process. In South Africa, notwithstanding the old arbitration law, the court has severally come out in support of arbitration. In the case of *Telecordia Technologies Inc v Telkom SA Ltd,*[288] the Supreme Court of Appeal affirmed the international principle that judicial intervention when reviewing international commercial arbitration awards should be minimized. The

[285] The MIAC was opened in year 2012.
[286] Section 5 (c)
[287] Section 5(e)
[288] *2007* (3) SA 266 (SCA),

establishment of a resource centre on arbitration by the Centre will also go a long way in consolidating the resource material for the practice of arbitration.[289]

i. Challenges facing the Nairobi Centre for International Arbitration

The business community in Kenya would be the foremost users of the Arbitration Centre. The need for a centre should therefore emanate from the practical need for a central place for arbitration, an institution breeding arbitrators, and giving administrative assistance to arbitration etc. Kenya already hosts a branch of the Chartered Institute of Arbitrators,[290] which has been in the forefront in the promotion and practice of Arbitration in the Country since 1984.[291]

While many Arbitration Centres are founded and/or managed by the local business communities,[292] the Nairobi Centre is an initiative of the Government of Kenya, and the management of the Centre will largely be appointed by the Government.[293] Several members of the board will be representatives of various Government offices.[294] The funding of the Centre will also be provided by the Government of Kenya. [295] The initiative of the Government of Kenya to establish an international arbitration centre is a clear indication that the government supports the process of arbitration. Government support is crucial in promoting arbitration as an accepted mechanism of dispute resolution. It is the government which may amend other laws, in support of arbitration, as well as provide the infrastructure for a strong arbitration centre. Its involvement however should be limited in order to ensure that the centre is independent, and trusted by users.

Corruption remains one of the biggest challenges facing civil service in Kenya. The Courts fall under civil service and have had a very difficult time gaining faith of the population,

[289] Section 5(i)
[290] The Chartered Institute of Arbitrators which was formed in 1915 with headquarters in London. It promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR) The institutes is spread out in 90 countries in the world
[291] See the profile at http://www.ciarbkenya.org/About_Us.html
[292] The Mauritius Centre for International Arbitration (MIAC) was founded as an initiative of the Mauritius Chamber of Commerce. The ICC was also founded as an initiative of the International chamber of Commerce, etc.
[293] See section 6 of the Act
[294] Section 6(1)(b)(c)(d)(e)&(g)
[295] Section 16 (1)(a) &2

because of the lack of trust in fair decision making, free of official influence and corruption. Few international participants will trust a system the locals have doubts with. The participation of civil servants in the International Arbitration Centre should therefore be avoided whenever that will be possible.

Challenges to arbitration process also abound in the country. The Kenyan society has been made skeptical by the slow process of the courts. They have also been subjected to malpractices in the judicial system in the country. Trust therefore remains a challenge to arbitration.

In the next chapter, the writer will make conclusions on the question whether Kenya is a viable destination for International commercial arbitration. Recommendations will be made for what may need to be done to improve the current state of affairs in the field of international arbitration in Kenya.

CHAPTER 7: THE CONCLUSION AND RECOMMEDATIONS

I. Summary

The purpose of this paper was to determine whether arbitration is a viable alternative for resolving commercial disputes in Kenya. More so, because Kenya has adopted the UNCITRAL Model law, 1985 and revised the same in line with the model law, 2006. Furthermore, Kenya has set up the Nairobi Centre for International Arbitration, with an aim to promote and improve the conducting of arbitrations in the country. To answer the research question, the writer looked at the history of the arbitration law in Kenya, how the communities living in Kenya settled their disputes. In doing so, the writer looked at the dispute resolution mechanisms of the Kamba, the Kikuyu and the Kipsingis, all communities living in Kenya before the country was colonised by the British. We also looked at how the law of arbitration was introduced. Having established the basis of the Arbitration law in the country, the writer canvassed on the development of the law since independence in 1963 to the current situation. This included the support recently given to alternative dispute resolution mechanisms by the Constitution of Kenya as well as the establishment of the Nairobi Centre for International Arbitration.

The writer also gave an overview of the role of the court in arbitration in Kenya, giving instances and examples at which the law envisages the involvement of the court in the arbitration process. Court supervised arbitration was also canvassed.

The paper went on to look at the situation of commercial arbitration in two other developing countries in Africa, South Africa and Mauritius. It was found that Mauritius, which enacted its International Arbitration Act in 2008, has moved decisively to market itself as a viable, safe and prospective place of international commercial arbitration. It was also established that South Africa has not been able to review its Arbitration law, which was enacted in 1965. Last the writer looked at the opportunities, the benefits and the challenges that face arbitration in Kenya today.

The research was limited by the fact that it was not possible to write about the practice of all communities in Kenya and therefore the three chosen were taken as samples to represent all the others. The research also did not include interviews with business persons, judges and

advocates in Kenya, Mauritius or South Africa. It is limited to record and the writer's basic knowledge and information on the law and practice of commercial arbitration, especially in regard to Kenya. Opportunity remains for further research. Limited case law on international arbitration, in relation to Kenya, also created a situation where most of the provisions of the Arbitration Act relative to international commercial arbitration remain unclear and unpredictable.

II. Conclusion.

This dissertation has investigated the viability of arbitration as an alternative method of settling disputes in Kenya. The writer has argued that the practice of arbitration existed among the different communities living in Kenya a long time before written arbitration law was introduced in the country at the turn of the 20th century.

On the hypothesis question, whether arbitration is an alternative to resolving disputes in Kenya, the writer has investigated the development of the law of arbitration, the practical application thereof, the role of the court, the benefits and challenges of arbitration and the comparison of the law and practice of arbitration in Mauritius and South Africa.

It is possible from the study above to conclude that, with the recommended improvements, arbitration is a viable alternative in resolution of international commercial disputes in Kenya. The study has shown that the Government of Kenya has put in place practical measures to make Kenya a viable destination for international commercial arbitration. Over time, the courts in the country have moved from a dominant position in arbitration to a supporting partner of the process. The establishment of the Nairobi Centre for International Arbitration gives more support to the Government efforts. The study has, however, shown that there is still room for improvement on some of the provisions of the law, if the country is to fully embrace arbitration, and attract international arbitration to the new Centre.

Key among the provisions that need revision is section 2 of the Act on the application of the Act. The scope for application should also be clear, as domestic and international arbitration are different in nature, offer different kinds of issues and their solutions are different. The definition of what is to constitute domestic or international arbitration is also vague and should be revised and defined clearly in the Act.

Several provisions that provide for the intervention of court should also be revised. While the courts should still remain to assist the process and enforce the decisions, the legislature needs to limit the extent to which the court has discretion to interfere in the process. The provisions for appeal on decisions of the High Court in arbitration pose the challenge of prolonging the process.

In comparing the arbitration law and practice of South Africa and that of Mauritius, the conclusion is that Kenya should follow the path that Mauritius has taken, in making user-friendly laws in support of International commercial arbitration. It should for instance consider amending the law to open opportunity to allow foreign lawyers to represent their clients in arbitral proceedings in Kenya. A default appointing authority, like the Permanent Court of Arbitration (PCA), based at The Hague, should also be considered, to be included in the Act. The country should also consider partnership of the new Nairobi Centre for International Arbitration with other international and reputable arbitration institutions, to draw their experience, as well as reputation.

The Nairobi Centre for International arbitration is established under Act 26 of 2013. Its board of directors is appointed by the Government of Kenya. It funding is drawn from the funds that may be allocated by the office of the Attorney General. As has been shown elsewhere in this work, arbitration is a private process, in that parties fund the process, and are willing to pay for the premises they use. Parties to commercial arbitration should be able to trust the institution which administers the process. The involvement of the Government in running both the Courts as well as the arbitration centre may make prospective parties question the independence of the centre and jeopardise its success. It is therefore imperative for the Government of Kenya to sever from the Nairobi Centre for International Arbitration.

It would serve the country also if all court interventions started from the most superior court in the country, with eminent judges on the bench.

The sluggish approach taken by South Africa, in relation to commercial arbitration is a bad example and Kenya should avoid the example of South Africa if it is to be a competitive destination for international commercial arbitration.

III. Recommendations

For arbitration to fully become an alternative dispute resolution mechanism in Kenya there is need to amend the Arbitration Act of Kenya in the following sections.

Section 2 on application should be amended. The definition of what constitutes domestic and international arbitration in section 3(2) & (3) of the Act is vague and should be clearly spelt out. The description for International arbitration may remain as it is. A suggested definition for domestic arbitration is "domestic arbitration" means any arbitration with its juridical seat in Kenya other than an international arbitration under section 3(3)."[296] If possible, domestic and international arbitration should have different statutes in the future.

Section 12 (6)(7)&(9), on the appointment of an arbitrator where one party delays, or declines to appoint, should be amended and in the place of the High court, another appointing authority should be considered. The Permanent Court of Arbitration (PCA), the Nairobi Centre of International Arbitration or another reputable institution should be considered to the default appointing authority, whenever the parties cannot appoint an arbitrator in time.

Section 14 (3-8) should also be amended and in the place of the High court another appointing authority, as recommended above, should be involved in final determination of a challenge to an arbitrator. This should also apply to section 15 (2 &3)

The requirements for the recognition of an international arbitral award require the applying party to furnish the court with:

(a) The original arbitral award or a duly certified copy of it; and

(b) The original arbitration agreement or a duly certified copy of it.

Since the provisions for communication and definition of arbitration agreements were amended at section 4 of the Act, the requirement for an original arbitration agreement or certified copy thereof should be deleted. This would also be in line with the recommended provision in the UNCITRAL Model law, 2006 article 35(2)

Among the grounds listed that a party may rely on to set aside an award is the ground at section 35 (2)(vi) "the making of the award was induced or affected by fraud, bribery, undue

[296] Section 2(1) of the Mauritius International Arbitration Act, no. 38 of 2008

influence or corruption." It is recommended that this ground should be deleted and any issues related thereto may be raised under the provision that the award is contrary to the public policy of Kenya. Section 37 (1)(a)(vii) also lists the same ground as a reason for refusal to recognise and enforce an award. The same should also be deleted.

The involvement of the High court in the arbitration process needs to be limited and if possible done away with all together. This is because under the constitution, High court decision are subject to appeal at the Court of Appeal an any law challenging the role of the Court of Appeal in this regard will eventually be quashed. Instead, the Act should provide that any recourse to court starts at the Supreme Court of Kenya, whose decisions are not subject to an appeal at any other court in Kenya.

It will be of great assistance if the Arbitration Act as well as the Advocates Act (Chapter 16 of the Laws of Kenya) are amended as to allow foreign lawyers to represent their clients in arbitral proceedings in Kenya.

The Nairobi Centre for International Arbitration should be made a private non-profit organisation, may be limited by guarantee, and managed by the business community in Kenya. The Government of Kenya should completely sever itself from the funding and management of the centre, if the centre is to gain the confidence of the business community, both domestic and international. It would be of great assistance if Kenya were to borrow a leaf from the Mauritius International Arbitration Centre, the set-up, the management, the involvement of the business community and the partnerships with other institutions doing the same business. More institutions to borrow experience from would be the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

Section 4 of the Act on the establishment of the centre should be amended to provide for the establishment of a non-profit organisation.

Section 6 of the Act on the appointment of the board should be amended to provide for appointment of the board of the directors by the business community and other private bodies like the Law Society of Kenya, the Federation of Kenyan Employers, and the Kenya Manufactures Association.

Section 16 of the Act on the provision for funds should be amended to stop the funding of the centre by the state. The centre should generate its funds from its own activities, donations and fees it charges to users. Section 19 of the Act on the preparation for budget should accordingly be amended, in the light of amendments to section 16.

The conduct of business by the board of directors of the centre will then be determined by stakeholders, and section 7 of the Act, as well as the schedule on conduct of business and affairs of the board should amended to reflect the new situation.

With the recommended improvements on the law, and practice, Arbitration is a viable alternative in resolving commercial disputes in Kenya**.**

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