Kenya's Future as A Global Hub for International Commercial Arbitration

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1.0 Introduction

Arbitration is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party, who has the authority to hand down a binding decision based on objective standards. There is no universal definition of an 'international' arbitration. Accordingly, recourse must be had to the relevant national laws when seeking to enforce an award.[1] Arbitration, as one of the Alternative Dispute Resolution Mechanisms (ADR), is not a new concept to the Kenyan people and Kenyan legal regime in general. Kenya has a well-established legal infrastructure, based on common law principles, with established provision for dispute resolution in support of a local economy built on agriculture and the service sector. Outside the High Court, the use of arbitration is on the verge of a major leap with the introduction of the Constitution of Kenya, 2010, which inserted a requirement for arbitration prior to the pre-trial process.[2] Arbitration of international commercial disputes has become a popular practice amongst business persons and corporations. This has tremendously grown with the development of the commercial industry internationally and the concept of globalization.[3] Arbitration of business disputes in Africa continues to grow progressively. This upward trajectory in disputes is largely as a consequence of vigorous economic growth in many African jurisdictions. A recent World Bank Report[4] projected Sub-Saharan Africa's growth at an average of 3.7 percent in 2015, partly thanks to "continuing infrastructure investment". The International Monetary Fund (IMF) continues to forecast sub-Saharan Africa's growth at an average of 4 per cent in 2016.[5] This is despite the global economic situation and marked reductions in commodities prices, particularly in the natural resources sector, which to date has contributed significantly to much of Africa's growth. It has indeed been rightly observed, that the increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business, and the preferred methods of resolving international disputes, a trend that is likely to continue into the 22nd Century.[6] Investment in Africa, in general and Kenya specifically, continues to attract investors not only in new sectors, but also from different jurisdictions, with China being a good

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[1] Attiya Waris, "International Commercial Arbitration in Kenya" in Muigai, G. (ed), *Arbitration Law and Practice in Kenya,* (Law Africa, 2011)."

[2] The Constitution of Kenya, Article 159 (Government Printer, Nairobi, 2010).

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

[4] General Overview of the World Bank from 22 October 2015 available at *http:/www.worldbank.org/en/region/afr/overview.*

[5] World Economic Outlook Report published on 19 January 2016 available at *https:/www.imf.org/external/pubs.*

[6] Kariuki Muigua, *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, 2013.*

example. The country has developed a strong foothold in Kenya, and Africa in general, providing the impetus for the creation of an arbitration partnership between China and South Africa for instance. The establishment of Kenya as a regional hub is very much an ambition of the government. This paper seeks to address the challenges that are now a hindrance to the realization of this 'dream'.

2.0 The Place of International Law

Kenya has had laws on Arbitration from as early as 1914.[7] Being a key player in international trade and choice in international investments, Kenya put in place a legal framework for the recognition and promotion of international commercial arbitration. The adoption of UNCITRAL Model Arbitration law led to legal reforms repealing the 1968 Arbitration Act and replacing it with the Arbitration Act (1995) and the Arbitration Rules therein.[8] The model of the United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. Later, Kenya's Arbitration Act, 1995 was amended vide the Arbitration (Amendment) Act, 2009.

However, it is worth mentioning that although the words 'international commercial arbitration' are not expressly provided for under the domestic laws on arbitration in Kenya, its inclusion can be inferred from the Arbitration Act, 1995.[9] Section 3(2) of the 1995 Kenyan Arbitration Act states that-

An arbitration is domestic, if the arbitration agreement provides expressly or by implication for arbitration in Kenya and at the time when proceedings are commenced, or the arbitration is entered into-

a. where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;
b. where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;
c. where the arbitration is between an individual and a body corporate –
    (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and
    (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or
    (iii) 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.

An international arbitration is defined in section 3(3) as one where any of the following applies:

[7] Arbitration Ordinance, 1914.
[8] Kariuki Muigua, *Nurturing International Commercial Arbitration in Kenya,* July 2014.
[9] Act No. 4 of 1995(Amended in 2009)Revised Ed. 2012

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
(b) one of the following places is situated outside the state in which the parties have their places of business –
  (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement and if a party does not have a place of business, reference is to be made to his habitual residence[10].

The 1995 Arbitration Act adopted Article 1(3) of the UNCITRAL Model Law, which defines arbitration as international, if:

a) the agreement is concluded when the parties have their places of business in different countries;
b) one of the following places is situated outside the country in which the parties conduct business:

  (i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement; or,
  (ii) any place where a substantial part of the commercial relationship's obligations are to be conducted or the place with which the subject matter of the dispute is most closely connected; or

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

The UNCITRAL Model Law recommends that the term 'commercial' be interpreted broadly so as to cover all commercial relationships, whether contractual or not. Without providing an exhaustive list, it suggests that the following relationships are regarded as being of a commercial nature, viz any trade transaction for the supply or exchange of goods or services; a distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation and carriage of goods or passengers by air, sea, rail

[10] Section 3(4), Arbitration Act.

or road.[11] The Model Law encapsulates the policy of autonomy of parties and restricts the involvement of courts of law in the arbitral process, except in the circumstances provided by the law.

The inclusion of the phrase 'commercial relationship' in the definition of international arbitration can therefore be construed to mean that the Arbitration Act contemplates international commercial arbitration.
In addition to this, Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC)[12] and to *International Convention on the Settlement of Investment Disputes* (ICSID) both of which deal with international commercial arbitration.

The 1958 New York Convention is irrefutably one of the most important multilateral Conventions in the recognition and enforcement of foreign arbitral awards. This is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The Convention, however, confers sweeping powers on domestic competent authorities to refuse to recognize and enforce foreign awards.[13]Article V, which enumerates the various grounds on which recognition and enforcement of an arbitral award may be refused, gives the authorities power to question the substantive law of other jurisdictions and this is likely to stifle international commercial arbitration.[14]

Section 36(2) of the Kenyan Arbitration Act provides that an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the *New York Convention*[15]or any other convention to which Kenya is signatory and relating to arbitral awards. The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award.

Arbitration has gained popularity over time as the choice approach to conflict management, especially by the business community, due to its obvious advantages over litigation. the most outstanding of its advantages is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable.[16] Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.

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[11] Ibid, Note 1.
[12] The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.
[13] Gakeri, K. Jacob, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (2011) *International Journal of Humanities and Social Science*, vol. 1 No. 6 p. 225.
[14] Ibid.
[15] Ibid, Note 8.
[16] Kariuki Muigua, *Promoting International Commercial Arbitration in Africa,* paper presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner is not left behind in entrenching the practice of arbitration in settling international commercial disputes.[17] It follows, therefore, that the constituent states, Kenya included, should take the necessary steps towards becoming a focal point for international commercial arbitration, in the recognition of international arbitration as one of the most viable approaches to international disputes management.

3.0 Opportunities and Challenges

Arbitration is now firmly entrenched as a viable alternative to the courts in many jurisdictions across Africa, and as seen above is gaining prominence in Kenya. Although the developments seen in recent years have helped establish more reliable and consistent arbitration practices and procedures, there is still more work to be done. There are still relatively few international arbitration cases heard on African soil (in 2014 only eight ICC arbitration cases were heard in African countries),[18] and the number of African arbitrators appointed on international cases remains woefully small. To set out or give recommendations on the ways to make Kenya a hub for international commercial arbitration, it is critical to first identify the challenges facing the practice in Kenya.

3.1 Attitude on Enforcement and National Courts Interference

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. Although the Arbitration Act[19] provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one, where on the one hand, courts seem to recognise and acknowledge that arbitration should bear minimum court interference, and on the other hand, they appear to violate this important objective of the Act of minimal court interference. Section 10 of the Kenyan Arbitration Act provides that: "*except as provided in the Act, no court shall intervene in matters governed by this Act*."

The provision permits two possibilities where the court can intervene in arbitration, and that is, where the Act expressly permits it or where it is in the public interest for the court to intervene. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are contemplated under the Model Law.

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[17] Kariuki Muigua, *Reawakening Arbitral Institutions for Development of Arbitration in Africa; May, 2005,* available *at https://profiles.uonbi.ac.ke//* (Accessed on 10th March, 2016).

[18] 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

[19] Cap 49, Laws of Kenya, Arbitration Act 1995.

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

The court has no legal right to intervene in the arbitral process or in the award, except in the situations specifically set out in the Arbitration Act, or as previously agreed in advance by the parties and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga -VS- Victoria Njoki Gathara*.[20] The Court of Appeal observed that most of the applications going to court to have the award set aside will be on grounds of public policy. It, however, stated that one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality, would be injurious to the public good or would be wholly offensive to the ordinary, reasonable and fully informed members of the public, on whose behalf the State's powers are exercised.[21]

The Court also stated that "*it follows, therefore, all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.'*

Ringera J (as he then was), in *Christ For All Nations vs. Apollo Insurance Co. Ltd*[22] defined public policy in the following words:

"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or
b) Inimical to the national interest of Kenya; or
c) Contrary to justice and morality."

The challenge here is the lack of a clear meaning of public policy which gives courts more opportunities to interfere with arbitration proceedings. This has the potential to intimidate local and foreign investors, who carry on business in Kenya, from settling their commercial disputes in Kenya, to instead opt for foreign jurisdictions.

[20] Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR.
[21] Ibid.
[22] [2002] 2 EA 366.

Although there are instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings, these powers, sometimes are exercised far beyond what the Act provides.[23] This often happens where the courts decide that there existed illegality, fraud, incapacity or that the award is against public policy. Though public policy has been defined in the Kenyan context,[24] the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only Kenya's problem but of the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot,*[25] the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act, if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test, which further complicates the understanding of what is to be regarded as being against public policy. As mentioned above, court interference intimidates investors.

The New York District Court in the case of *Parsons & Whittemore Overseas Co. Inc. vs Societe Generale de l'Industrie du Papier (RAKTA)* was confronted by an argument that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the defendant's state) and the United States had been severed. The court rejected this argument and referred to the 'general pro-enforcement bias' of the New York Convention. It held that the Convention's "public policy" defence should be construed narrowly, and that enforcement of foreign arbitral awards should only be denied on this basis "where enforcement would violate the forum state's most *basic notions* (emphasis added) of morality and justice."

As a way forward, therefore, for any jurisdiction to be considered to be a hub of international commercial arbitration, court interference in Arbitration has to be minimized. As Justice Visram in the case of Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors[26] observed:

> Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest…The courts should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so.

The Arbitration Act, however, seems to have vested vast powers in the High Court. In an effort to encourage arbitration as a dispute resolution method, where parties so agreed, Section 6 of the Act

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[23] Ibid.
[24] Christ for all Nations v Apollo Insurance Company ltd.
[25] Civil Appeal 3343/2005 - 12 October 2011.
[26] Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors (2007) eKLR

confers powers to the High Court to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to do so. However, under Section 11, the High Court may determine the number of arbitrators if parties fail to agree. It can also appoint arbitrators where parties fail to agree on the procedure of appointing the Arbitrator(s)[27] or even decide on the termination of the mandate of an arbitrator who fails to act where parties are unable to do so.[28] The High Court has powers to set aside an arbitral award as per the provisions of Section 35, and it may also decide on an application by a party in arbitration proceedings challenging an arbitrator. There seems, therefore, to be unlimited opportunities for the courts to interfere with or be involved in arbitration, and parties may also abuse their autonomy through involving the courts.

3.2 Arbitral Tribunal

The secrecy of the Tribunal's deliberations is fundamental to the arbitral process and this requirement is explicitly set out in some national laws and in the International Bar Association's (IBA) Ethics for International Arbitrators.[29] The Arbitration Act, however, imposes no general duty on the arbitral tribunal to act fairly or avoid conflict of interest or unnecessary delay or expense.[30] The only provision that comes close to this is Section 19 which provides for equality in treatment of parties, with each being given full opportunity to present his case. Otherwise, the Act imposes no positive duty to use reasonable dispatch in conducting the proceedings or making the award and the tribunal is duty bound to adhere to the time limits imposed on them by parties. In the absence of an agreement, there is also no specific time frame imposed by the Act within which the award may be made. The Act does not also impose a duty on the tribunal to act judicially, make an award or ensure the award is unambiguous or uncertain. If these were imposed as minimum duties on arbitral tribunals, arbitration would have been more entrenched in the dispute resolution matrix in the country.[31]

3.3 Arbitration as a Profession

The Arbitration Act does not recognize arbitration as a profession, although it is increasingly becoming common for some individuals to practice exclusively as arbitrators, non-lawyers included. Arbitration, without a doubt, involves attributes generally peculiar to professionals such as professional training, discipline, integrity, expertise and commitment to certain appropriate values. Therefore, recognizing arbitration as a profession would not only enhance the profile of arbitration as a dispute resolution mechanism, but would lead to greater accountability and utilization of the process, as well as popularize arbitration.

3.4 Perception of Corruption/ Government Interference

Corruption in international business is rife, and growing. A report on the state of corruption indicated that:

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[27] Section 12, Arbitration Act.
[28] Ibid, Section 15(2)
[29] Section 6
[30] Ibid, Note 9
[31] Ibid

> The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse. The consequences are dramatic. In developing and transition countries alone, corrupt politicians and government officials receive bribes believed to total between USD 20 and 40 billion annually…When corruption allows reckless companies to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.[32]

At times, governments are perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where its interests are at stake, and put forward the argument of grounds of public policy. Kenya has had cases where instances of corruption had been inferred at the international arena.

The ICSID case of *World Duty Free v Republic of Kenya*[33] is a relevant example. This was a case of a claim of enforcement of a contract by World Duty Free, who claimed to have bribed the former President of the Republic of Kenya, Daniel Arap Moi. The claimant investor argued that the alleged US$2m bribe to the former Kenyan president was made under the "Harambee" system of "mobilizing resources through private donations for public purposes" and was therefore legally justified. ICSID was of the opinion that in light of domestic laws and international conventions relating to corruption, the tribunal was convinced that corruption is contrary to public policy in most jurisdictions. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by the arbitral tribunal.

Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process.

Kenya's competitiveness, according to a Transparency International Survey, is held back by corruption that penetrates every level of society. Frequent demands for bribes by public officials lead to increased business costs for foreign investors.[34] This being the case, it is of utmost importance that international commercial arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration such as the construction, oil and mining industries suffer from endemic corruption.[35] However, the responsibility for just and effective adjudication of issues of corruption, within the context of the global fight against the scourge of

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[32] Transparency International, The 2009 Global Corruption Barometer. Available at *http://www.transparency.org/research/gcb/gcb_2009*

[33] ICSID Case No ARB/00/7 (4 October 2006).

[34] GAN Integrity Solutions, "Business Corruption in Kenya", Business Anti-Corruption Portal (2016).

[35] According to Transparency International's 2011, Bribe Payers Index.

corruption, cannot rest entirely with the tribunal. Parties have as important a role to play in ensuring that the tribunal is properly briefed on these issues, and must make the correct tactical decisions in the prosecution of their case, with sensitivity for the way courts handle public policy challenges.[36]

3.5 Legal and Institutional Reforms

The growth of arbitration in Africa is by no means restricted to an off-shore jurisdiction. Relatively mature arbitral centres already exist in a number of African cities including Kigali, Nairobi and Accra. In 2014, Morocco launched an annual arbitration conference-Casablanca Arbitration Days, which initiative seeks to establish Casablanca as a hub for international arbitration.[37] Governments are getting wise to the fact that arbitration can be a source of economic activity, with conference centres, hotels and professionals engaged in the processes set to benefit. The inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Kenya[38] has, however, denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Tremendous progress has nevertheless been gradually made to change this situation and hopefully, the results will soon follow.

3.6 Endless Court Proceedings

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings, whether yet to start or pending.[39] Sometimes matters will be appealed all the way to the highest court of the land in search of setting aside of awards. This delays finalization of the matter, as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference. The Arbitral Court established under the *Nairobi International Centre for Arbitration Act*[40] will hopefully cut down such cases. It is to provide for the establishment of a regional Centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. This legislation may have been borne out of the recognition that Nairobi is yet to become an attractive destination for foreign investors, seeking the services of international institutional arbitrators. Lack of an elaborate legal and institutional framework on arbitration and excessive court interference in arbitration matters may be cited as some of the contributory factors to this phenomenon.[41] The functions of the Centre include, to *inter alia*, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations, as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the

[36] Hwang M.S.C et al, "Corruption in Arbitration-Law and Reality" available at *http://www.arbitration-icca.org.*
[37]Ostrove, M. et al, "Developments in African Arbitration" *The Middle Eastern and African Arbitration Review (2016).*
[38] Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at *http://www.kmco.co.ke.*
[39] Kariuki Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration in Kenya*, Kenya Law Review (2010).
[40] Laws of Kenya, Nairobi International Centre for Arbitration Act, No. 26 of 2013.
[41] Ibid.

dispute's resolution process of choice.[42] There is already in place a board of directors and an acting registrar, and the physical premises are located in Cooperative House, along Haile Selassie Avenue, Nairobi.

The Act also establishes a Court to be known as the Arbitral Court[43] which is to determine all disputes referred to it in accordance with this Act or any other written law, and its decisions are to be final.[44] These provisions are useful in guaranteeing confidentiality and non-interference by ordinary national courts. Section 22(1) of the Act provides that the Court should have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. Section 22(2) further provides that a decision of the Court in respect of a matter referred to it should be final.[45] Under Section 23, subject to any other rules of procedure by the Court, the Arbitration Rules of the UNCITRAL, with necessary modifications, should apply. The Act also establishes an independent tribunal whose decisions on matters of arbitration under the Act should be final and binding. This will go a long way in ensuring its independence. For any country, a recognized arbitral Centre is also a great show of "soft power", helping to underline broader messages about political and legal stability, and give comfort to foreign investors.

The foregoing provisions, in recognizing international legal instruments on arbitration, therefore, place Kenya in a competitive position to engage with the other regional players in its promotion as a hub for International Commercial Arbitration.[46] In order to offer true competition to the established arbitral centres around the world, this Centre will need to demonstrate that it can offer a reliable and efficient alternative for the users of arbitration-including by giving comfort that the local judiciary will actively support, or at least not interfere with, the arbitral process.

3.7 Inadequate Marketing and Bias in Appointment of Arbitrators

Kenya, and the African continent in general, have been portrayed as 'less developed' in terms of handling international commercial arbitration, and nothing much has been achieved in marketing of Kenya as a Centre for international commercial arbitration.[47] Many people outside Africa still carry with them the perception that Africa does not have adequate/ any qualified international commercial arbitrators. They have, therefore, not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption. With racism still existing in society, Africa has borne the brunt of it, with this bias rendering Africa's image as a corrupt and uncivilized continent. It has been observed that parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or

[42] Ibid, Section 5.
[43] Ibid, Section 21.
[44] Ibid, Section 22.
[45] Attiya Waris, "International Commercial Arbitration in Kenya" op cit.
[46] Ibid.
[47] Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' (2014), p. 15.

arbitrators, when asked to make the choice.[48] Despite there being individuals with the relevant knowledge, skill and experience in international dispute resolution, and competent institutions which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turf to appoint arbitrators.[49] Most disputants prefer to appoint non-nationals as arbitrators in international disputes, thus, resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can, in part, be explained by the fact that African states predominantly appoint international lawyers to represent their interests.[50]This portrays Africa to the outside world as a place where there are no qualified arbitrators to be appointed as international commercial arbitrators.[51]

According to statistics from two of the leading global arbitral institutions, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), the number of arbitration cases involving African parties, and in particular parties from sub- Saharan Africa, is on the rise. In its 2014 Statistical Report, the ICC noted that a record 113 parties from sub-Saharan Africa were involved in ICC arbitration in 2014.[52] In its 2013 Statistics, the LCIA registered almost twice as many arbitrations involving African parties as it did in 2012.[53] Despite this strong growth in caseload, however, it is notable that few of the arbitrators nominated to hear these disputes were African themselves. The need for arbitral tribunals to be more diverse and to reflect the community of users is nowhere more stark geographically than in Africa.[54]

3.8 Uncertainty of Costs and Institutional Capacity

There have not been very clear guidelines on the remuneration of arbitrators, and foreigners are not always very sure on what they would have to pay, if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.[55] It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for

[48] Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001, p. 5-6.

[49] Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', *African Development Bank, Law for Development Review*. Available at https://www.mcgill.ca/files/isid/LDR.2.pdf [Accessed on 10/03/2016].

[50] Karel Daele, Mishcon de Reya, 'Africa's track record in ICSID proceedings' *Kluwer Arbitration Blog*, 30 May 2012.

[51] Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya', pages 9-12.

[52] 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

[53] Registrar's Report, Casework 2013, available at *http://www.lcia.org/LCIA/reports.aspx*.

[54] Ostrove, M., et al, 'Developments in African Arbitration,' *The Middle Eastern and African Arbitration Review 2016*. Available at *http://globalarbitrationreview.com/reviews/79/sections/306/chapters/3183/*

[55] CIArb Kenya Website Available at *www.ciarbkenya.org*.

international commercial arbitration matters. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.[56]

3.9 Key Evolutions

In order to cement the progress made to date, other key evolutions are also needed. Kenya has gone a long way in modernizing its domestic arbitration laws through the amendments discussed earlier and through entrenchment of the provision in the Constitution which inserted a requirement for arbitration prior to the pre-trial process. There is, however, need for the local judges and lawyers and other professionals, who in one way or another engage in arbitration to acquire deeper knowledge of arbitration. An awareness of the upside -as well as downside- of arbitration as an effective means of dispute resolution is also crucial towards fostering the growth of arbitration in Kenya and eventual growth of the country as a regional and global hub.

Capacity building is now being implemented through non- profit organizations such as African Legal Support Facility (ALSF) as well as through international cooperation agreements, such as the one concluded between the Permanent Court of Arbitration (PCA) and the African Union.[57] These agreements aim to assist with the development of arbitral infrastructure and the engagement of the regional arbitration community in participating in educational outreach and training programmes throughout the continent.[58] Kenya should take advantage of such programs.

3.10 Modernization of Arbitral Institutions

Communication remains a challenge to arbitrations being heard in the continent, and a quick fix would be to ensure that institutions created, and already in existence, maintain user-friendly websites where the latest arbitral rules and details of arbitrator panels can be found. According to a recent survey, the most commonly cited challenge by parties when conducting arbitration in Africa is the availability and experience of arbitrators.[59] According to Judge Abdulqawi Ahmed Yusuf, the Somali vice-president of the ICJ Court, African states have failed to appoint an African arbitrator or conciliator in 69 out of 85 existing ICSID disputes involving the continent.[60] He further states that the "legitimacy of investor-state arbitration in Africa depends on African arbitrators serving on tribunals and African states having more of a role in the formulation of bilateral investment treaties".[61]

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[56] Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at *http://www.kmco.co.ke/attachments.*

[57] Ostrove, M., et al, 'Developments in African Arbitration,' *The Middle Eastern and African Arbitration Review 2016*, op cit.

[58] Transparency International, The 2009 Global Corruption Barometer, op cit..

[59] *http://www.simmons-simmons.com/~/media/Files/Corporate/External%20publications.*

[60] Lacey Yong et al, 'Africa must have more representation on tribunals, says Somali judge', GAR, vol. 10, iss 6, 15 October 2015.

[61] Ibid.

4.0 Conclusion

It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a commercial dispute, parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.[62] Further, international arbitration has been regarded as being very effective in the international business arena, since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations, and the awards can only be challenged on very limited grounds.[63] Africa's seventh largest economy, Kenya, is home to a well-developed legal disputes sector, with a healthy future, and since the introduction of the country's new constitution, arbitration has been gaining ground. Although the full effect has not been felt, growth in the market is imminent.[64]

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence, knowing their disputes will be settled expeditiously and this can enhance economic development for Kenya and the region. Arbitration is already established in certain sectors because it allows cases to be heard by specialists in a relatively short period of time. There is arbitration where parties feel that judges do not have enough expertise to handle the matter, or where they want the dispute at hand to be resolved within a particular period of time because the courts tend to be somehow unpredictable.[65] The surge in construction, in the Nairobi area as well as the East Africa region in general, is potential fuel for arbitration work. Government related disputes in Kenya's and the region's mining sector, energy, insurance and commercial corporations that 'want to resolve their problems and get on with business' also figure strongly in the use of arbitration.[66]

The current Arbitration Act is compatible with the prospect of Kenya being an attractive venue for international commercial arbitration, both for *ad hoc* and institutional arbitrations.[67]

If the foregoing challenges are fully addressed, then Nairobi (Kenya) can secure for itself a place on the global arbitration map.

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[62] Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, *International Arbitration Insights*, 18 June 2008.

[63] See Attiya Waris, "International Commercial Arbitration in Kenya".

[64] Andrew Mizner, 'Arbitration rising,' (African Law & Business, February, 2016).
Available at *https://www.africanlawbusiness.com/news/6143-arbitration-rising*

[65] Ibid.

[66] Ibid.

[67] In institutional arbitration, the specialist institution generally administers the arbitration under its own rules, unless it agrees to do so under another set selected by the parties. The institution appoints the tribunal and, in most cases, acts as the intermediary between the parties and the tribunal until the, undertaking all necessary administrative arrangements. In ad hoc arbitration, the parties agree to execute the process themselves by appointing the arbitrator and attending to the necessary administrative requirements before and during the hearing. (see Attiya Dr. Waris. "International Commercial Arbitration in Kenya - Book Chapter in Arbitration Law and Practice in Kenya Ed Prof G Muigai (LawAfrica: 2011)."