

Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration

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Abstract

Arbitral institutions play an important role in the growth and development of international arbitration the world over. They are tasked with promoting and safeguarding the discipline, both through ensuring development of sound legal framework and facilitating the practice of arbitration and other Alternative Dispute Resolution mechanisms. While international arbitration is 'international' in nature, various regional blocks have developed arbitral institutions that target particular economic areas and take care of commercial disputes in that area. While these institutions have been established under various legal regimes, they strive to maintain professional standards that correspond to the international best practices in arbitration. The authors, in this paper, critically discuss the potential of the Nairobi Centre for International Arbitration in promoting effective management of commercial disputes in Kenya and the African region as a whole. The paper offers recommendations on how to tackle the potential challenges that the Centre is likely to encounter in discharging its statutory mandate of facilitating and encouraging the conduct of international commercial arbitration in accordance with the Act, and administering domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

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1.0 Introduction

One of the key features of international and regional trade is the need for effective framework for the management of commercial disputes. This is because disputes are considered to be inevitable in the international business world.¹ Considering the transnational nature of international trade, national courts and legal systems in general do not appeal to the international commercial community due to the uncertainties that may come with resorting to them for commercial disputes management.² One of the main contentions against the use of national legal systems in international commercial disputes is that they may not be sensitive to the expectations of disputants from different national and legal backgrounds. The general international law as well may not be adequate to deal with cross-border commercial transactions.³ While there are those who argue for a third legal order to be *lex mercatoria*,⁴ international arbitration has gained popularity as the primary way through which international companies resolve their transnational problems. It is associated with advantages which include: flexibility and adaptability of procedure; the ability to customize

¹ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *William Mitchell Law Review*, Vol. 21, Iss. 3, Art. 23, 1996, pp. 942-987 at p. 942.

² Manruruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" *American University International Law Review*, Vol. 14, no. 3 (1999), 657-734.

³ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 658.

⁴ See Manruruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" op cit. It is important to point out that this is a highly contentious issue especially with regard to its relationship with international commercial arbitration. *Lex mercatoria* is defined as an international law system applied by international merchants based on commercial rules and principles. It is noteworthy that this legal system (*Lex mercatoria*) is not enforced by any national law and is not contained in an international agreement. See Güçer, S., 'Lex Mercatoria in International Arbitration,' *Ankara bar Review*, Vol. 1, 2009, pp.30-39 at p. 34; See also Sweet, A.S., 'The new Lex Mercatoria and Transnational Governance,' *Journal of European Public Policy*, Vol. 13, No.5, August 2006, pp. 627-646.

the process; party participation; predictability; expertise of arbitrators; procedural and evidentiary advantages; finality of decisions and awards; enforceability of awards; speed and efficiency of arbitration; cost savings; privacy; and fairness and accountability.⁵

It has been observed that international commercial arbitration has been successful in recent decades among international traders as an alternative to national courts for the settlement of disputes.⁶ The growth in international commercial arbitration is mainly attributed to globalization and the impracticability of traditional justice systems. However, the tremendous expansion of international commerce and the recognition of [our] global economy has also played a significant role.⁷ Also important is the fact that the growth in international arbitration has seen a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.⁸

It is against this background that this paper focuses on the Nairobi Centre for International Arbitration (NCIA) and how the institution can effectively contribute to management of commercial disputes in the East African region and Africa as a whole, for increased efficiency in regional and international trade. This is because arbitral institutions are an important part of the

⁵ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 948; cf. Burton, S.J., "Combining Conciliation Arbitration of International Commercial Disputes", *Hastings International and Comparative Law Review*, 18, (July, 1995), 637.

⁶ Croff, C., 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' *The International Lawyer*, Vol. 16, No. 4 (Fall 1982), pp. 613-645, p. 613.

⁷ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 945; 947; See also Perlman, L. & Nelson, S.C., 'New Approaches to the Resolution of International Commercial Disputes,' *The International Lawyer*, Vol. 17, No. 2 (Spring 1983), pp. 215-255; See also Burstein, H., 'Arbitration of International Commercial Disputes,' *Boston College Law Review*, Vol. 6, Iss. 3, Art. 13, 1965, pp. 569-577.

⁸ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

contributing factors in growth of efficacious international arbitration which in turn facilitates deepening of international trade.

2.0 The Nairobi Centre for International Arbitration

One of the most recent international arbitral institutions in the African region is the Nairobi Centre for International Arbitration (NCIA), based in Nairobi, Kenya. NCIA is a regional centre for international commercial arbitration set up pursuant to the Nairobi Centre for International Arbitration Act (the Act),⁹ alongside an Arbitral Court, with its headquarters in Nairobi, Kenya. The Act provides for the functions of the Centre, the Centre's administrative Board of Directors and their functions, establishment, composition and jurisdiction of the Arbitral Court, amongst others. The Centre is supposed to, *inter alia*: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; develop rules encompassing conciliation and mediation processes; organize international conferences, seminars and training programs for arbitrators and scholars; maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; provide advice and assistance for the enforcement and translation of arbitral awards; provide training and accreditation for mediators and arbitrators; educate the public on arbitration as well as other alternative dispute resolution mechanisms; enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives; and provide facilities for hearing, transcription and other technological services.¹⁰

⁹ No. 26 of 2013, Laws of Kenya, Preamble. This Act is also binding on the Government (s. 26).

¹⁰ S. 5, No. 26 of 2013.

The Centre has since discharged some of these functions, such as developing rules encompassing conciliation and mediation processes.¹¹ However, there still lies an uphill task ahead and for the Centre to effectively discharge most of its statutory functions. There are potential challenges that it will arguably have to overcome for it to secure a place among the World's most successful arbitration centres. This paper critically analyses the challenges that are likely to characterize this journey to establishing Kenya as an international arbitration destination. Through highlighting the international best practices in international arbitration, the authors proffer solutions on how the Centre can help make Kenya and the East African region as a whole, the preferred destination for arbitration by the business community around the world.

3.0 Hitting the Ground Running: Key Issues in International Arbitral Institution

The Nairobi Centre for International Arbitration (NCIA) was established in the wake of increased regional arbitral institutions across the African continent and beyond, some of which have been around long enough to win the confidence of the international business community. For instance, it is recorded that the International Chamber of Commerce ("ICC") Court of Arbitration was created shortly after World War I by business people who wrestled with the practical difficulties of resolving disputes with merchants of different national backgrounds.¹² NCIA became the second regional arbitral institution to be set up in the Eastern African region, after Kigali Centre for International Arbitration in Kigali, Rwanda. However, the competition for business extends beyond the region and indeed Africa, to

¹¹ See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255, *Kenya Gazette Supplement No. 210*, 24th December, 2015; Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253, *Kenya Gazette Supplement No. 205*, 18th December, 2015.

¹² Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *op cit*, p. 944.

such areas as the Middle East and the United Kingdom where there are a number of globally competitive arbitral institutions which have been getting much of the arbitration business from this region.¹³ The established institutions include, inter alia: American Arbitration Association (AAA); International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); Lagos Regional Centre (the RCICAL); and Permanent Court of Arbitration (PCA).¹⁴ While it may be expected that NCIA may face challenges in the initial stages, there are key issues that ought to be addressed to catapult the Centre to internationally accepted standards to make sure that all that remains is marketing the institution and the country as a whole. The next section, evaluates key elements from the NCIA Act as well as the NCIA institutional arbitration rules with a view to highlight the potential opportunities and pitfalls that may hinder the blossoming of the Centre.

3.1 Seat of Arbitration and Place of Hearings.

Rule 18(1) states that the parties may agree in writing on the seat of arbitration. However, unless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya.¹⁵ The Arbitral Tribunal may also, on considering all the circumstances, and on giving the parties an opportunity to make written comments, determine a more appropriate seat.¹⁶ The Rules are flexible on physical location as they give the Arbitral Tribunal the power to, with the consent of all the parties to the arbitration, meet at any geographical location it considers appropriate to hold meetings or hearings.¹⁷ Where the Arbitral Tribunal holds a meeting or hearing in a place

¹³ Lew, J.D.M., 'Comparative International Commercial Arbitration,' p.237, [London: Kluwer Law International, 2003].

¹⁴ See Blackaby, N., et al, *An Overview of International Arbitration*, in *Redfern & Hunter on International Arbitration*, (Oxford University Press, 2009), pp. 1-83 at pp. 59-69.

¹⁵ Rule 18(2).

¹⁶ Rule 18(3).

¹⁷ Rule 18(4).

other than the seat of arbitration, the arbitration is to be treated as arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.¹⁸ Thus, the change in geographical location may only offer physical comfort and satisfy parties' aesthetic preferences rather than have any legal implications on the *lex arbitri*, that is, law of the seat of arbitration.¹⁹

Rule 19 of NCIA Arbitration Rules states that the law applicable to the arbitration shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat. It has been observed that since it is the law of the seat that governs how the arbitral proceedings are to be conducted, the choice of seat can affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease by which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.²⁰

It is, therefore, important for the NCIA to actively 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. This is one of its main functions as provided for by the establishing Act and it is one of the most important roles since it will help in enhancing the competitiveness of the Centre in the region. If there is a negative perception about Kenyan courts'

¹⁸ Rule 18(5).

¹⁹ See generally, Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' *Singapore Academy of Law Journal*, 26, 2014, pp. 886-910.

²⁰ Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p.2. Available at https://www.ashurst.com/doc.aspx?id_Content=9363 [Accessed on 4/03/2016].

willingness to enforce and uphold arbitral awards, then the effectiveness of NCIA would be affected. The Centre must ensure that the country remains globally attractive by way of having in place laws, policies and institutions that support ADR and arbitration in particular. In the Kenyan case of *Nyutu Agrovet Limited v Airtel Networks Limited*,²¹ the Court, in supporting limited role of national courts, stated as an *Obiter*: “Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in *Prof. Lawrence Gumbo & Anor –v - Hon. Mwai Kibaki & Others*, High Court Misc. Application No. 1025/2004 referred to as; “A Pariah state and could be isolated internationally (emphasis added).”

It is believed that the success of an arbitration institution is dependent on a number of factors that range from its pricing strategy to the overall quality of the legal system of the host state.²² NCIA must therefore take up the challenge and aggressively play its expected role of selling Kenya as the preferred destination for international arbitration. It must work with the other stakeholders to ensure that the national legal system offers support rather than a sabotaging international arbitration.

3.2 The enforcement of the award

The fact that Kenya is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),²³ will

²¹ *Nyutu Agrovet Limited V Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61 of 2012.

²² Gadelshina, E.R., ‘What plays the key role in the success of an arbitration institution?’ *Financier Worldwide Magazine*, February 2013. Available at http://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.Vt_n_dA4Q7o [Accessed on 02/03/2016].

²³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.

make it easy for arbitral awards to be enforced in states that have reciprocity agreements with Kenya. This may, therefore, help in achieving certainty and predictability that is vital in international arbitration. Also noteworthy is the express provision in the East African Court of Justice Arbitration Rules, 2012 that enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.²⁴

It has been argued that "overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings."²⁵ The Kenyan Courts have demonstrated goodwill in recognizing and enforcing international arbitral awards especially under the New York Convention. In the Kenyan case of *Nyutu Agrovet Limited V Airtel Networks Limited*,²⁶ the Court affirmed its intention to support arbitration by holding, *inter alia*, 'no court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that had been adopted by many nations had to be respected. The parties herein had agreed that the Arbitrators decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant was an unjustifiable attempt to wriggle out of an agreement freely entered into and had to be rejected (emphasis added).' This denotes a positive step and a bright future for parties that choose to enforce arbitral awards in Kenya.

An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. (United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [Accessed on 03/03/2016].

²⁴ Rule 36(3).

²⁵ Sweeney, J.C., 'Judicial Review of Arbitral Proceedings,' *Fordham International Law Journal*, Vol. 5, Issue 2, Art. 3, 1981, pp. 253-276 at 276.

²⁶ [2015] eKLR, Civil Appeal (Application) 61 of 2012.

3.3 Language

Language is an important aspect of the process and it can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.²⁷ As such, it has been observed that parties should not only choose the language, but also they should do it with due consideration. This is because choice of the “wrong” language may imply the need to resort to translation and interpretation for most of the conduct of the proceedings and this may, on one hand affect the costs and the duration of the proceedings and, on the other, may not be very accurate.²⁸

Rule 20(1) of the NCIA Arbitration Rules states that the initial language of the arbitration shall be the language of the arbitration agreement, unless the parties have agreed in writing otherwise. The Rules also provide that in the event that the arbitration agreement is written in more than one language, the Centre may, unless the arbitration agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the arbitration.²⁹ The Rules further provide that upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language of the arbitration, the Arbitral Tribunal shall decide upon the language of the arbitration, after giving the parties an opportunity to make written comments and after taking into account— the initial language of the arbitration; and any other matter it may consider appropriate in all the circumstances of the case.³⁰

Rule 20 (5) provides that if a document is expressed in a language other than the language of the arbitration and no translation of such document is

²⁷ Faienza, V., “The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?” *Kluwer Arbitration Blog*, available at <http://kluwerarbitrationblog.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/> [Accessed on 4/03/2016].

²⁸ *Ibid.*

²⁹ Rule 20(3), *Nairobi Centre for International Arbitration (Arbitration) Rules*, 2015.

³⁰ Rule 20(4).

submitted by the party relying upon the document, the Arbitral Tribunal or, if the Arbitral Tribunal has not been formed, the Centre may direct that party to submit a translation in a form to be determined by the Arbitral Tribunal or the Centre, as the case may be.

Art. 17 (1) UNCITRAL Arbitration Rules provides that the arbitral tribunal shall determine the language of the arbitration 'promptly after its appointment'. The *Arbitration Rules of the Singapore International Arbitration Centre*³¹ also provide that where unless the parties have agreed otherwise, the Tribunal is to determine the language to be used in the proceedings. There are those who argue that in view of the extreme significance of the language issue in international commercial arbitration, where the parties usually come from different countries and speak different languages, this rule should generally be followed in international arbitration, even if the proceedings are not conducted under the UNCITRAL Arbitration Rules.³² It has rightly been observed that party autonomy is particularly important here since the choice of the language affects the parties' position in the proceedings and the expediency and costs of the arbitration.³³ If the parties have reached an agreement on the language to be used in the arbitration, due to the principle of the priority of party autonomy, the tribunal has to accept the determination by the parties.³⁴ NCIA may, therefore, need to have in its list, arbitrators who are knowledgeable in a number of major languages. It is to be appreciated that translations may not always capture the original intent of the parties. Arbitration proceedings may also have on board parties, as witnesses, who were not parties to the original contract. Understanding more languages may help the arbitrator gather important

³¹ Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules (5th Edition, 1 April 2013), Rule 19.

³² Ibid.

³³ Principle No. XIII.3.4 - Language of the arbitration: "Commentary to Trans-Lex Principle, available at <http://www.trans-lex.org/969050>" [Accessed on 26/02/2016].

³⁴ Ibid.

information directly from the witness during proceedings as opposed to translated proceedings.

3.4 Choice of Rules of Procedure

Rule 3(1) of NCIA Arbitration Rules provides that the Rules shall apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration. It has been noted that if institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration.³⁵ If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.³⁶

In recognition of this, the NCIA Act provides 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.³⁷ Further, Rule 3(3) states that nothing in the Rules shall prevent parties to a dispute or arbitration agreement from naming the Centre as the appointing authority without submitting the arbitration to the provisions of these Rules. This, therefore, ensures that flexibility and autonomy of parties is retained especially where the Centre is expected to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties, as provided in its mandate. It has been observed that the adaptability and flexibility parties have in choosing or shaping their own arbitral process is one of arbitration's

³⁵ Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p. 1.

³⁶ *Ibid.*

³⁷ S. 23, No. 26 of 2013, Laws of Kenya.

strengths.³⁸ It is important to guarantee both national and international parties that their autonomy and flexibility in the process, being one of the key advantages of international arbitration, would not be lost should they settle on NCIA as their preferred choice for institutional arbitration or even appointing authority.

3.5 Confidentiality

Rule 34(1) of the NCIA Arbitration Rules states that unless the parties expressly agree in writing to the contrary, the parties must undertake to keep confidential all awards in their arbitration, as well as all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not in the public domain, except where disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. Further, the deliberations of the Arbitral Tribunal are confidential to its members, except where disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under rules 12, 14 and 30.³⁹ The Centre also commits also not to publish an award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.⁴⁰

Safeguarding the confidentiality of the arbitration process and outcome is important for the international arbitration parties who may wish to maintain business interests and secrets. It is however noteworthy that confidentiality may be lost in case of appeal to national courts.

3.6 The Role of National Courts during the Arbitration Proceedings

The NCIA Act provides for the establishment of a Court to be known as the Arbitral Court, to be presided over by a President; two deputy presidents;

³⁸ Fischer, R.D. & Haydock, R.S, "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," *William Mitchell Law Review*, op cit. at p. 948.

³⁹ Rule 34(2).

⁴⁰ Rule 34(3).

fifteen other members all of whom shall be leading international arbitrators; and the Registrar.⁴¹ The Court is to have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law.⁴² Further, a decision of the Court in respect of a matter referred to it is to be final.⁴³ Rule 33 of the NCIA Arbitration Rules provides that the decisions of the Centre with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal.

The NCIA Act is not clear on the role of the Arbitral Court and its relationship with national courts as far as jurisdiction in arbitration matters is concerned. While this may be attractive as far as arbitral independence is concerned, it is also likely to cause confusion especially when considered in light of Kenya's Arbitration Act, 1995⁴⁴ which provides for the role of the national courts in arbitration proceedings. The Arbitration Act provides for limited role of the court in arbitration as stated as follows: '*Except as provided in this Act, no court shall intervene in matters governed by this Act (emphasis added)*'.⁴⁵

The role of the national courts as provided in the Arbitration Act, 1995 is limited to: appointment of a tribunal as provided for under section 12 of the Arbitration Act, 1995; Stay of legal proceedings as provided for under section 6 of the Act; power of the High Court to grant interim orders for the maintaining of the status quo of the subject matter of the arbitration pending the determination of the dispute through arbitration (s. 7); application by a party to challenge arbitrator or arbitral tribunal (s.14); assistance in taking evidence for use in arbitration (s.28); and setting aside of an arbitral award (s.35). The legal provisions on intervention by the two courts (national courts

⁴¹ S. 21.

⁴² S. 22(1).

⁴³ S. 22(2).

⁴⁴ Act No. 4 of 1995, Laws of Kenya.

⁴⁵ S. 10, Act No. 4 of 1995, Laws of Kenya.

and arbitral court) are mainly found in the Arbitration Act, 1995 and the NCIA Arbitration Rules. The role of national court as provided for in the Arbitration Act, however, is divided between the Arbitral tribunal and the arbitral court in the NCIA Act.

Most of the foregoing instances where national courts can intervene fall within the jurisdiction of the arbitral tribunal in NCIA Act.⁴⁶ While the NCIA Act is silent on the specific role of the Arbitral Court, the NCIA Arbitration Rules provides for a number of instances where the jurisdiction of the court may be invoked. Rule 11(3) provides that a party who intends to remove an arbitrator shall, within fifteen days of the formation of the Arbitral Tribunal or on becoming aware of any circumstances referred to in paragraph (1) and (2)⁴⁷, send a written statement of the reasons for requiring the removal, to the Arbitral Court, the Centre, the Arbitral Tribunal and all other parties. The Arbitral Court is to make its decision on the removal of an arbitrator within fifteen days of receipt of the written statement, unless – the arbitrator resigns from office; or all other parties agree to the removal of the arbitrator.⁴⁸

While the creation of an independent arbitral court and an arbitral tribunal with expanded mandate is laudable as a positive step towards encouraging international arbitration in Kenya, there is the potential of dissatisfied parties, especially of Kenyan nationality, challenging the same on grounds of ousted jurisdiction of national courts. While international commercial arbitration mostly takes place in a country that is neutral, it may not be uncommon to have nationals taking part. The most likely challenge would be where an arbitration is international by virtue of the subject matter being

⁴⁶ See Rule 27 of NCIA Arbitration Rules on Interim and conservatory measures.

⁴⁷ Rule 11. (1) A party may require the removal of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

(2) A party may remove an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which the party becomes aware after the appointment has been made.

⁴⁸ Rule 11(6).

in a foreign country, while both parties may be locals. In the Tanzanian case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v. Tanzania Electric Supply Company Limited (Tanzania)*,⁴⁹ it was held that the intervention by the national courts is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts. Such a position by Kenyan courts is likely to interfere with the functions of NCIA. From the NCIA Act, it appears that the national courts shall only come in during recognition and enforcement of the arbitral award, although this is likely to create confusion especially in case of dissatisfied party (ies).

It is, therefore, important for the NCIA to trend this ground carefully so as to safeguard its independence from domestic interference. This is especially important if the Centre is to compete with other regional independent institutions. For instance, the East African Court of Justice Arbitration Rules, 2012 provide under Rule 36 for finality and enforceability of Award. It states that subject to Rules 33⁵⁰, 34⁵¹ and 35⁵², the arbitral award shall be final. It also states that by submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay. It is noteworthy that the East African Court of Justice is independent of any national laws as far as its activities are concerned, and the only instance where national courts may come in would be during recognition and enforcement of its awards, as foreign or international arbitral awards. There are those who believe that the tribunal can handle contested issues of arbitral procedure and the courts of the seat be available for supportive and supervisory action if the parties require, in accordance with the *lex arbitri*.⁵³ Others argue that the typical statute

⁴⁹ *Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539.

⁵⁰ Rule 33: Interpretation of the Award.

⁵¹ Rule 34: Correction of the Award.

⁵² Rule 35: Additional Award and Review of the Award.

⁵³ Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' *op cit*, p. 910; See also Lew, J.D., *Does National Court*

governing arbitration provides for cooperation between the judicial and arbitral processes, limits judicial supervision of awards, and perhaps most importantly divests courts of the jurisdiction to hear matters submitted to arbitration in recognition of the legitimate exercise of contractual rights between parties.¹⁵⁴

NCIA must scrupulously maintain a reputation of independence and non-ambiguity in the guiding laws and regulations. The possible confusion in the role of court may therefore need to be clarified so that it will be clear to the parties, from the onset, what they are submitting to.

3.7 NCIA and ADR Mechanisms

The NCIA Act provides that nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms.⁵⁵ NCIA may benefit from teaming up with other local and regional institutions that specialize in ADR mechanisms, for cooperation in training and building capacity in the region. This is important if the Centre is to achieve some of its main functions: to provide training and accreditation for mediators and arbitrators; to educate the public on arbitration as well as other alternative dispute resolution mechanisms; and to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives.⁵⁶

Involvement Undermine the International Arbitration Process? *AM. U. INT'L L. REV.*, Vol. 24, 2009, pp. 489-537.

⁵⁴ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *op cit*, p.947.

⁵⁵ S. 24.

⁵⁶ S. 5, No. 26 of 2013.

Building capacity in all the major ADR mechanisms is important to ensure that those who approach the Centre in need of other services other than arbitration have confidence in the institutional capacity. There are those who believe that parties to international contracts often fail to face squarely the issue of whether they really want arbitration rather than either court litigation or nonbinding procedures such as conciliation and mediation.⁵⁷ This may be attributed to an ambiguous arbitration agreement or clause or the nature of the subject matter, especially in light of arbitrability.⁵⁸ It is also possible to combine conciliation and international arbitration where the circumstances so demand.⁵⁹ Indeed, the International Chamber of Commerce Court of Arbitration provides for optional conciliation in its rules.⁶⁰ Even if the NCIA Arbitration Rules do not have such express provisions on conciliation, it can still exploit the provisions of the NCIA Act which require the Centre and Court to adopt and implement ADR mechanisms.⁶¹

It is also commendable that the institution already has in place the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.⁶² The Mediation Rules are to apply to both domestic and international mediation proceedings.⁶³ Thus, parties to a domestic or international commercial contract may choose to engage in mediation to resolve their dispute under the NCIA. It is also possible to employ both mediation and arbitration in a

⁵⁷ Park, W.W., 'Arbitration of International Contract Disputes,' *The Business Lawyer*, Vol. 39, No. 4 (August 1984), pp. 1783-1799 at p. 1783.

⁵⁸ See Curtin, K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws,' *Defense Counsel Journal*, April, 1997, pp. 271-284 at p. 271.

⁵⁹ See van den Berg, A.J. (ed), *New Horizons in International Commercial Arbitration and Beyond*, (Kluwer Law International, 2005), pp. 480-481; Schneider, M.E., 'Combining Arbitration with Conciliation,' available at

<http://www.nigerianlawguru.com/articles/arbitration/COMBINING%20ARBITRATION%20WITH%20CONCILIATION.pdf> [Accessed on 10/03/2016].

⁶⁰ 'Rules for the ICC Court of Arbitration,' *Berkeley Journal of International Law*, Vol. 4, Issue 2, Article 17, pp. 422-432 at pp. 422-424.

⁶¹ S. 24, S. 26 of 2013.

⁶² Legal Notice No. 253, *Kenya Gazette Supplement No. 205*, 18th December, 2015.

⁶³ *Ibid*, Rules 4 & 5.

contract as conflict management mechanisms, since the rules do not restrict parties from doing so. Under the doctrine of party autonomy, it is possible to exploit the advantages of both mechanisms where necessary. NCIA should take advantage of this possibility to afford parties the best option to their dispute. It may therefore be important to ensure that NCIA is well equipped in offering services in the various ADR mechanisms.

4.0 Opportunities for Nairobi Centre for International Arbitration

It has convincingly been argued that arbitration involving parties from developing countries will only work effectively if it is tailored to satisfy the needs and legitimate expectations of all parties.⁶⁴ The belief comes from the perception that many developing countries view existing forms of international arbitration as mechanisms which primarily serve the interests of Western entities. Thus, unless the developing countries are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized in the developing world. NCIA, in collaboration with other regional institutions can take up the challenge and offer tailor made services for the regional and international clientele. It is arguable that they are in a better position to understand and address the interests and expectations of the locals, without necessarily appearing like they are favouring them in the process.

The familiarity with the cultural setting may boost the chances of acceptance or recognition of award by parties thus saving on time. It may also inform parties' choice of ADR mechanism to be employed, and NCIA Act contemplates such a situation. It has been argued that culture can profoundly affect a dispute resolution process. This is because far from being merely a function of practical and procedural efficiency contemplated by disputing parties, the choice of a dispute resolution mechanism -- whether mediation, arbitration or litigation -- within the forum of a certain

⁶⁴ McLaughlin, J.T., 'Arbitration and Developing Countries,' *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 231.

society is strongly influenced by the peculiarities of tradition, culture, and legal evolution of that society.⁶⁵ Thus, it is possible to argue that NCIA is likely to get most of the clients in need of other ADR services, apart from international arbitration, from the local business community. They may take advantage of the proximity (thus saving on costs), and the feeling that the experts in NCIA are more likely to appreciate the nature of their dispute in local context, either out of having lived around the same area or having interacted with the local circumstances.⁶⁶

Maintaining international standards is key if NCIA is to rise above the perceptions that typify the legal institutions in this region and country, namely, inter alia: unprofessionalism, corruption, institutional incapacity and lack of goodwill. While it is expected that the Centre will receive financial and technical support from the State and its machinery, this should not interfere with its functioning or discharge of its statutory duties. It should retain its independence as far as neutrality, predictability, professionalism and competitiveness are concerned. Foreigners as well as locals should be able to approach the institution for arbitration services without any reservations.⁶⁷

⁶⁵ De Vera, C., 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,' *Columbia Journal of Asian Law*, 18, 2004, p. 149. Cf. Barkett, J.M. & Paulsson, J., *The Myth of Culture Clash in International Commercial Arbitration*, *FIU Law Review*, Vol. 5, No.1 (2009).

⁶⁶ See Kohler, G.K. & Kun, F., 'Integrating Mediation into Arbitration: Why It Works in China,' *Journal of International Arbitration*, Vol. 25, No. 4, 2008, 479-492; See also Goldsmith, J.C., et al, *ADR in Business: Practice and Issues Across Countries and Cultures, Volume 2*, (Kluwer Law International, 2011); See also LeBaron, M., "Culture and Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <<http://www.beyondintractability.org/essay/culture-conflict>>. [Accessed on 10/03/2016]; 'International Construction Arbitration: When Cultures Collide,' *Trust the Leaders*, Issue 1, Fall 2002. Available at http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl1/594/ [Accessed on 10/03/2016].

⁶⁷ See Kirby, M., 'International Commercial Arbitration and Domestic Legal Culture,' Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009, p. 2. Available at

One of the ways that NCIA can establish and maintain international standards is through forging strategic partnerships with other players in the sector-national, regional and international. Locally, it can liaise with such institutions as the Chartered Institute of Arbitrators (Kenya branch) (CIArb-K), Centre for Alternative Dispute Resolution (CADRE), Kenya National Chamber of Commerce and Industry, Strathmore Dispute Resolution Centre (SDRC); and the Universities. While institutions such as CIArb-K, CADRE, SDRC and Universities may not be institutional arbitrations in the strict sense of the word, they can play a major role, through collaborative activities, in facilitating training, accreditation and making available a pool of competent practitioners. They can also be useful in creating public awareness on ADR mechanisms and international arbitration. This is besides collaboration with other regional and international arbitral institutions such as the Kigali International Arbitration Centre, Mauritius International Arbitration Centre (MIAC-LCIA), Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); and Lagos Regional Centre (the RCICAL) amongst others. Such collaborations and cooperation can go a long way in boosting NCIA's profile as well as the other institutions'.

The relationship between the national courts and the arbitral Court established under NCIA Act, also ought to be clearly defined so as to promote predictability and confidence in the Centre. The international business community may only trust the institution where they are assured that national courts will not unnecessarily interfere with the process. The Centre's administrative Board ought to ensure that the Centre will not be associated with the perceived court inefficiencies as this may adversely affect its development and growth. The Centre should seek to paint a better image, one associated with efficiency, neutrality and general professionalism.

http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2419.Speech_Acica_Conf.Melbourne_December_2009.pdf [Accessed on 10/03/2016].

5.0 Conclusion

Kenya is hoping to become a middle-level income economy by the year 2030 and one of the ways through which it can achieve this is increased regional and international trade.⁶⁸ As already pointed out, this often comes with commercial disputes which must be dealt with if trade is to thrive. As such, it is important for the country to have in place effective conflict management mechanisms. This presents NCIA a good opportunity to establish itself and the country as the preferred destination for international arbitration. With support from the relevant stakeholders such as the Government, Judiciary, practitioners, amongst others, NCIA has the potential to achieve all its statutory obligations and even surpass the expectations to join the world's most respected international arbitral institutions. NCIA has the potential to become the one stop shop for the effective management of commercial disputes.

⁶⁸ Vision 2030, Republic of Kenya, (Government Printer, Nairobi, 2007). *Vision 2030* is based on three main pillars: economic, social, and political.

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