The Transformation of Arbitration in Africa
The Role of Arbitral Institutions

Edited by
Emilia Onyema

Wolters Kluwer
To all users of arbitration in Africa
Emilia Onyema is a senior lecturer in International Commercial Law at SOAS, University of London. She is a Fellow of the Chartered Institute of Arbitrators and qualified to practice law in Nigeria and is a non-practising Solicitor in England and Wales. Her teaching and research cover international sales law, law and development in Africa and international commercial arbitration. She has widely published in these areas and is the author of the book, International Commercial Arbitration and the Arbitrator’s Contract (Routledge, 2010). She holds a Ph.D. in international commercial arbitration from Queen Mary University of London.
Contributors

Mohamed Abdel Raouf is the Director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and Associate Professor at Paris 1 Panthéon-Sorbonne. He sits regularly as arbitrator in different jurisdictions; Member of the Governing Board of the International Council for Commercial Arbitration (ICCA) and the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC); Vice President of the International Federation of Commercial Arbitration Institutions (IFCAI), CEDR Accredited Mediator, and arbitrator listed in the Panel of Arbitrators of the Court of Arbitration for Sport (CAS). Mohamed holds a Ph.D. in international arbitration from the University of Montpellier I, France.

Narcisse Aka is the Secretary General of the Arbitration Centre of the OHADA CCJA and teaches the law of arbitration at the OHADA Higher Regional School of Magistracy (ERSUMA). He is the former Secretary General of the Court of Arbitration, Ivory Coast Chamber of Commerce and Industry. His publications include the Commentary on OHADA Uniform Act on Arbitration Law: Practice and Institutions in Africa.

Emmanuel Amofa is the Administrator of the Ghana Arbitration Centre since its inception in 1996. He qualified as a barrister in Ghana and actively practices various forms of commercial law and arbitration in Ghana and internationally. He authored the chapter on Ghana in Boseman Lise (gen ed.) Arbitration in Africa: A Practitioner’s Guide (Kluwer Law International 2013).

Duncan Bagshaw was the first Registrar of LCIA-MIAC and currently with Stephenson Harwood LLP in London. He is a barrister called to the Bar in England and Wales and a member of the Chartered Institute of Arbitrators.

Dalia Hussein is a legal advisor at the CRCICA and Lecturer at the Faculty of Law, Zakazik University. Dalia was an Administrative Prosecutor in Egypt, and Counsel in arbitration practice where she represented states and private parties in commercial and investment disputes before many institutions including CRCICA, ICSID and DIAC. Dalia holds a Maîtrise en Droit from Paris I Pantheon Sorbonne University, an LL.B. from Cairo University, an LL.M. in Private International Law and International
Megha Joshi was appointed the first Executive Secretary/Chief Executive Officer of the Lagos Court of Arbitration (LCA) International Centre for Arbitration & ADR (ICAA) in November 2012. She has been responsible for implementing the institutional framework of the business, administration and engagement of all the stakeholders of dispute resolution services at the LCA. Megha graduated with a degree in Politics from Manchester University in 2004, after which she interned for United States Senator, Hillary Rodham Clinton in New York State and assisted the Democrats campaign in the 2004 Presidential elections.

Mahutodji Jimmy Vital Kodo is Technical advisor to the President of the OHADA, CCJA. He practised law in Paris and Nanterre (France) and served as Adjunct Professor at the University of Paris-Est Creteil, France. He holds law degrees from University of Abomey-Calavi, Benin (Master’s Degree), University of Lille 2, France (LL.M.), and University of Paris-Est Creteil (LL.D). In 2008, Mr Kodo co-authored the Annotated OHADA Code, published by the Institut International de Droit d’Expression et d’Inspirations Françaises (IDEF), and L’Application des Actes Uniformes de l’OHADA, Publications de l’Institut Universitaire André Ryckmans 5 (Louvain-la-Neuve: Academia-Bruylant, 2010).

Kariuki Muigua holds Ph.D. in Law, LL.B, LL.M. (Env. Law, Nairobi), FCIarb (Chartered Arbitrator), Accredited Mediator, FCPSK, MKIM, Dip in Arb (UK) and is Advocate, Lecturer, Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi; Chairperson, Chartered Institute of Arbitrators (Kenya Branch) 2013-2015.

Tolu Obamuroh is Associate General Counsel at the LCA. Tolu obtained his LL.M. degree at Columbia Law School in 2013. Tolu is a Weinstein Fellow and a doctoral candidate at Penn State Law School. His research is on pre-arbitration procedures and the expansion of arbitral powers in international arbitration.

Jean Alain Penda is the OHADAC Project Manager in the French West Indies and an Independent Consultant at Price Waterhouse Coopers LLP, London. Mr Penda holds an LL.B from the University of Buea (Cameroon), an LL.M. in International Corporate and Financial Law from the University of Wolverhampton (United Kingdom), and a Ph.D. from the University of Basel (Switzerland) specializing in sales and commercial law. Penda was a Research Assistant for the Head of Private Law at the Faculty of Law, University of Basel and a Researcher for Global Sales Law, a project supported by UNCITRAL.

Bernadette Uwicyeza was the Secretary General of the Kigali International Arbitration Centre until 2015. She is currently the Centre’s senior Technical Advisor. She lectures at the University of Rwanda, Kigali Independent University and the Institute of Legal
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INTRODUCTION

This chapter examines the role of arbitration institutions located in East Africa in transforming arbitration in the region. It discusses the successes and challenges of the identified arbitration institutions. This discussion is necessitated because of the importance of international arbitration and its ever growing popularity in Africa and across the world. This chapter also highlights some of the emerging trends in arbitration in the region and makes suggestions on how arbitral institutions can contribute to the transformation of arbitration in East Africa.

The scope of this chapter is therefore limited to arbitration in Kenya, Tanzania, Uganda, Rwanda and Burundi, being the Member States of the East African Community (EAC). This chapter starts with a brief outline of the legal and institutional framework for arbitration in these countries (§4.01) and examines their effectiveness in transforming arbitration in the region (§4.02). Some suggestions on achieving the goal of effective arbitration practice in the region (§4.03) are explored.

§4.01 DISPUTE RESOLUTION PROCESSES IN EAST AFRICA

Increased globalization has brought about the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions thus resulting in the emergence of transnational dispute management mechanisms. The mechanisms now universally and primarily used for dispute management are negotiation, mediation, arbitration and
conciliation. In my opinion these mechanisms work best when a well-resourced, neutral and credible organization administers the process. This section focuses on arbitration as one of the most preferred dispute resolution mechanisms and its administration by arbitration institutions in East African countries.

Arbitration is now regarded as the preferred mechanism for settling international disputes. Peter Cresswell once argued that international arbitration should grow in tandem with the globalization of trade. Arbitration has thus gained popularity over time amongst members of the business community due to its advantages over litigation. One of the most outstanding benefits of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by national courts. This lack of interference by domestic courts boosts the confidence of parties in their pursuit of justice in a forum of their choice. However, it is arguable if this advantage of arbitration can be seen in some East African countries. I have argued elsewhere that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts cannot be relied upon to apply their texts correctly or in good faith. As it relates to Kenya, I have also noted that parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings. John McLaughlin has also argued that traditional litigation before a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes. Finally, William Kirtley has observed that among the primary advantages of international arbitration are its finality and the relative ease of enforcement of arbitral awards.

1. There are other adjudicative (e.g., adjudication) and non-adjudicative (e.g., early neutral evaluation) processes along with various combinations of these processes (e.g., med-arb).
4. Peter Cresswell, International Arbitration: Enhancing Standards 10, 10-13 (The Resolver, Chartered Institute of Arbitrators, 2014). See also Court’s comment in the American case of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) where the Court stated that: the expansion of [American] business and industry will hardly be encouraged if, notwithstanding solemn contracts, [we] insist on a parochial concept that all disputes must be resolved under [our] laws and in our courts. ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.
throughout the world. Countries around the world have thus embarked upon promoting themselves as viable seats for international arbitration, along with the promotion of specific arbitration institutions located in them. It is in this recognition of arbitration as one of the most viable approaches to dispute management and resolution that makes arbitration institutions of importance across the continent.

§4.02 ARBITRATION LAWS AND INSTITUTIONS IN THE EAST AFRICAN REGION

This section examines the laws which support domestic and international arbitration and the major arbitration institutions in Kenya (§4.02[A]), Tanzania (§4.02[B]), Uganda (§4.02[C]), Rwanda (§4.02[D]), and Burundi (§4.02[E]). It also briefly examines the arbitration remit of the East African Court (§4.02[F]). It primarily interrogates the role and functioning of these arbitration institutions in each of these countries. All four East African countries have ratified the New York Convention of 1958 and the ICSID Convention of 1965.

[A] Kenya

Kenya’s Arbitration Act 1995 (KAA) is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which is designed to assist States in modernizing their arbitration laws. The Model Law is specifically designed for the regulation of international commercial arbitration. One significant difference between the Model Law and KAA is that the KAA covers both domestic and international arbitration. The KAA also defines domestic and international arbitration for ease of reference.

13. Section 2 of KAA.
14. Section 3(2). 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 (d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is Kenya.
The KAA generally makes provisions for the conduct of arbitral proceedings and the enforcement of arbitral awards by national courts. The Act’s omission on provisions relating to the institutional framework on arbitration is however glaring. It is noteworthy that the KAA does not establish or endorse a sole arbitral institution in the country. Its provisions apply to both ad hoc and institutional arbitrations where Kenya is the seat of arbitration. There are three major arbitration institutions in Kenya: Chartered Institute of Arbitrators, Kenya Branch (§4.02[A][1]), Nairobi Centre for International Arbitration (NCIA) (§4.02[A][2]), and the Centre for Alternative Dispute Resolution (CADR) (§4.02[A][3]).

[1] **Chartered Institute of Arbitrators-Kenya Branch**

The Chartered institute of Arbitrators, Kenya Branch (CIArb-K) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, United Kingdom, which itself was founded in 1915 with headquarters in London. CIArb-K is registered under the Societies Act of Kenya. It promotes and facilitates the determination of disputes by arbitration and other forms of alternative dispute resolution (ADR) processes such as: mediation, Conciliation, Neutral Evaluation, Expert Determination and adjudication. CIArb-K currently has over 700 members, evidencing the availability of a wide pool of knowledgeable and experienced arbitrators in Kenya. CIArb-K also facilitates the appointment of arbitrators in its role as appointing authority. In addition to a dedicated website, CIArb-K has a Secretariat with physical facilities in Kenya for arbitration and other forms of ADR. These facilities include arbitration hearings rooms and other support services. To further support the processes of arbitration and ADR, CIArb-K has published its own Arbitration Rules, 2012. These Rules are binding on arbitrators conducting arbitral proceedings CIArb-K arbitrations.

The Chartered Institute of Arbitrators as is well known is a membership based organization that primarily provides training and education services for dispute

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15. Section 3(3). An arbitration is international if: (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.


19. CIArb-K secretariat is located at Kindaruma Lane, Nicholson Drive, Off Ngoing Road, Nairobi.


21. Chartered Institute of Arbitrators Arbitration Rules of December 2012; following the CIArb Headquarters’ Model Arbitration Rules and available are at the Institute’s offices for a fee.
resolution processes.\textsuperscript{22} It is therefore debatable if CIArb-K can be properly described as an arbitration institution in the strict sense. This is more so as CIArb-K was constituted as an organization with one of the objects being to ‘generally promote, encourage and facilitate the practice of settlement of disputes by arbitration and alternative means of dispute resolution other than resolution by the courts.’\textsuperscript{23} As far as international arbitration practice is concerned in Kenya, CIArb-K has been effective in providing qualified arbitration practitioners to sit as arbitrators in ad hoc arbitrations. However, considering that CIArb-K follows the parent CIArb Headquarters in its mode of operation, it is unlikely that it will develop into an institution offering full institutional arbitration services. As such, it may need to work closely and collaborate with the other institutions in Kenya and the region to support and promote arbitration in Kenya.

\textbf{[2] Nairobi Centre for International Arbitration}  

The Nairobi Centre for International Arbitration (NCIA) was set up through the office of the Attorney General of Kenya under the auspices of the Asian-African Consultative Organization (AALCO).\textsuperscript{24} This was the result of a Memorandum of Understanding (MoU) concluded between AALCO and the Government of the Republic of Kenya. This MoU was signed on 3 April 2006 during the Forty-Fifth Annual Session of AALCO at its Headquarters in New Delhi to establish an AALCO Regional Centre in Nairobi.\textsuperscript{25} The NCIA is therefore the third AALCO Regional Centre\textsuperscript{26} in Africa following the Cairo Regional Centre for International Commercial Arbitration, Egypt,\textsuperscript{27} and Lagos Regional Centre for International Commercial Arbitration, Lagos, Nigeria.\textsuperscript{28}

The NCIA was established under the NCIA Act, 2013.\textsuperscript{29} Its functions as set out in section 5 of the NCIA Act include to, ‘promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act’;\textsuperscript{30} ‘administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices’;\textsuperscript{31} ‘ensure that arbitration is reserved as the dispute resolution process of choice’;\textsuperscript{32} and ‘develop rules encompassing conciliation and mediation processes’.\textsuperscript{33}

\textsuperscript{23} The Chartered Institute of Arbitrators Kenya Branch Constitution, Clause 2(j)(a).  
\textsuperscript{26} The other two Centres established under the auspices of the Asian-African Legal Consultative Organisation (AALCO) are the Kuala Lumpur Regional Centre for Arbitration in Kuala Lumpur, Malaysia and Tehran Arbitration Centre in Tehran, Iran.  
\textsuperscript{27} For Cairo Regional Centre, see: http://crcica.org.eg/ [accessed 4 Mar. 2016].  
\textsuperscript{28} For Lagos Regional Centre, see: http://www.rcicalagos.org/ [accessed 4 Mar. 2016].  
\textsuperscript{29} Act No. 26 of 2013, Laws of Kenya.  
\textsuperscript{30} Section 5(a), No. 26 of 2013.  
\textsuperscript{31} \textit{Ibid.}, s. 5(b).  
\textsuperscript{32} \textit{Ibid.}, s. 5(c).  
\textsuperscript{33} \textit{Ibid.}, s. 5(d). Further functions include: to organize international conferences, seminars and training programmes for arbitrators and scholars; to coordinate and facilitate, in collaboration
The NCIA is administered by a Board of Directors with membership drawn from Kenya, Rwanda and Uganda,\(^{34}\) and a Registrar appointed by the Board of Directors. The Registrar oversees the day to day management of the affairs and staff of the Centre and also acts as secretary to the Board.\(^{35}\) The NCIA maintains offices\(^{36}\) in Nairobi and recorded its first reference in 2015.\(^{37}\) Following other AALCO Regional Centres, the NCIA has its Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.\(^{38}\) These Rules are based on the UNCITRAL Arbitration Rules. Attached to the NCIA is an Arbitral Court established under section 21 of the NCIA Act. This Arbitral Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the NCIA Act or any other written law.\(^{39}\) A decision of the Court in respect of a matter referred to it is to be final.\(^{40}\) 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. For clarity on the nature of such matters, recourse is to be to the NCIA Arbitration Rules\(^{41}\) which provide for a number of instances where the jurisdiction of the court may be invoked. For example, Rule 11(3) of the NCIA Arbitration Rules 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),\(^{42}\) 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

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35. For more details see s. 9 NCIA Act.
36. NCIA offices are located at The Cooperative House, Haile Selassie Avenue, Nairobi.
39. Section 22(1), No. 26 of 2013.
40. Section 22(2).
42. 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.
the written statement, unless the arbitrator resigns from office; or all other parties agree
to the removal of the arbitrator.43

Rule 6(1) of the NCIA Arbitration Rules provides that where interim payments are
required to cover the Centre’s administrative costs or the arbitral tribunal’s fees or
expenses, including the fees or expenses of an expert appointed by the arbitral tribunal,
the Centre may, on the approval of the Arbitral Court, make payments out of the
deposits held.

The Arbitral Court does not concern itself with interim and conservatory mea-

sures as these may only be issued by the arbitral tribunal. Rule 27(1) of the NCIA
Arbitration Rules empowers the arbitral tribunal, unless otherwise agreed by the
parties in writing, to make various decisions on a provisional basis. These include
decisions on security for costs and preservation of property which is the subject matter
of the arbitration. It is noteworthy that the same Rule 27(4) preserves the right of
parties to apply for such measures before a judicial authority.

Section 10 of the NCIA Act confers on the Registrar (who is also the Chief
Executive Officer of the NCIA) with the powers to oversee the business of the Arbitral
Court including enforcement of decisions of the Arbitral Court. The Arbitral Court has
a President and two Deputy Presidents and the Registrar. The Court is also to have
fifteen other members all of whom should be leading international arbitrators. All these
fifteen other members of the Court are be appointed competitively by the Board for a
period of five years but shall be eligible for re-appointment for one further term of five
years.44

Though the role of the Arbitral Court is administrative under the NCIA Act and
Rules, the nature of its relationship with national courts is not very clear especially
during the arbitral hearing. This raises confusion as far as jurisdiction in arbitration
matters is concerned. What is clear however is that the Arbitral Court is independent
of the Judiciary and has original and exclusive jurisdiction in certain matters as
discussed above. It is also noteworthy that the jurisdiction is mainly administrative in
nature as opposed to judicial, which is largely vested in the arbitral tribunal. This is
perhaps meant to ensure that domestic courts do not interfere with the arbitration
process once it starts especially in matters that can either be determined by the arbitral
tribunal or the Arbitral Court as per the NCIA Act and the NCIA Arbitration Rules.

[3] Centre for Alternative Dispute Resolution

The Centre for Alternative Dispute Resolution (CADR) is another registered arbjudiation
institution in Kenya that aims to enhance the settlement of disputes through ADR
mechanisms.45 With the recognition of ADR as processes of dispute resolution in

43. Rule 11(6).
44. Section 21(3), No. 26 of 2013. It is expected that the members of the Board will be drawn from
both domestic and international arbitration practitioners as this will enhance the scope of the
expertise available to the Board.
45. The Centre was registered under the Companies Act Cap 486 of the Laws of Kenya as Company
limited by guarantee.
Article 159 of the current Constitution of Kenya, 2010, CADR plans to provide ADR services to enhance such provisions for dispute settlement in Kenya. Its membership is also drawn from the Chartered Institute of Arbitrators, Kenya branch (CIArb-K). Currently, the CADR operates from the premises of the CIArb-K. However, CADR differs from CIArb-K in that it is conceived as an arbitral institution properly so called and not just an association of professionals interested in arbitration and ADR.

There are major benefits for CADR from its association with CIArb-K especially in relation to sourcing qualified arbitrators. In due time it can set up its own facilities from where it can offer arbitration services and also create enough capacity to enable it act as an appointing body and administer the arbitration references. Such capacity development by CADR will leave room for CIArb-K to concentrate on creating awareness of arbitration and other ADR mechanisms, and also offering training and continuous professional development in arbitration to all its affiliated professional bodies. This will leave CADR to concentrate on administering institutional arbitration in Kenya and the region.

[B] Tanzania

The Tanzania Arbitration Act (TAA) was enacted in 1931 as the enabling law for arbitration references where Tanzania is the seat. The TAA has general provisions relating to arbitration by consent as well as provisions on court-annexed arbitration. Further, provisions on arbitration are contained in the Arbitration Rules of 1957, made under the Arbitration Act, so effectively the TAA has a set of arbitration rules annexed to it for use by parties primarily in ad hoc references. It is noteworthy that the arbitration legislation in force (both the TAA and the Rules) pre-dates the UNCITRAL Model Law and has never been changed to take into account its provisions.

The TAA needs to be modernized. For example, it still provides for the appointment of even number tribunals with an umpire. The TAA does not have any provisions on the grounds upon which a party may challenge the appointment of any of the arbitrators. It is also silent on the scope or definition of arbitration but makes reference to international conventions on international arbitration to which Tanzania

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46. CIArb-K members become automatic members of CADR.
48. Ibid., ss 3-26.
49. Tanzania’s Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings as provided under Schedule 2 of the Code.
50. Published in Government Notice 427 of 1957.
51. Section 20, Ch. 15, Laws of Tanzania.
53. First Schedule (s. 4), Clause 2, Cap 337, Laws of Tanzania.
is party. The TAA however, makes express reference to foreign awards in Part IV which applies to foreign awards and not to any award made on an arbitration agreement governed by the law of Tanzania. It generally recognizes foreign awards as binding and enforceable, and may be relied on by way of defence, set-off or otherwise in any legal proceedings. The Act does not make any provisions on institutional arbitration in Tanzania. It also does not endorse a sole arbitral institution in the country. It may, therefore, be implied that the provisions of the TAA apply to both institutional and ad hoc arbitrations where Tanzania is the seat of arbitration. There are two main arbitration institutions in Tanzania: the Tanzania Institute of Arbitrators (TIA) and the National Construction Council (NCC).

1. **Tanzania Institute of Arbitrators**

The Tanzania Institute of Arbitrators (TIA) is a non-governmental organization registered under the Societies Act of Tanzania (Cap 337). The TIA acts as facilitator of arbitration. It assists the parties (in consultation with the parties’ arbitrators) to agree ad hoc rules on the procedures which will bind them. The TIA has its own bespoke set of arbitration rules which it uses in conducting both domestic and international arbitration proceedings.

2. **National Construction Council**

The National Construction Council (NCC) is a statutory body created under the NCC Act. The NCC is mandated to among others:

- promote and provide strategic leadership for the growth, development and expansion of the construction industry in Tanzania with emphasis on the development of local capacity for socio-economic development and competitiveness in the changing global environment; and facilitate efficient resolution of disputes in the construction industry.

55. Section 28(2), Cap 337, Laws of Tanzania.
56. Section 29, Cap 337, Laws of Tanzania.
57. Cap 337, Laws of Tanzania.
In 2001, the NCC adopted a set of arbitration rules, to enable parties settle their construction disputes under the Rules. The NCC Arbitration Rules (2001 Edition) are available at the NCC offices in Dar es Salaam, Tanzania for a fee. The TCC also maintains a Panel of Arbitrators to facilitate the settlement of such differences and disputes. The arbitration services of the NCC are mainly available to persons in the construction industry although it also offers its services to persons outside the industry.

These two institutions enjoy close collaboration in Tanzania. They jointly organize short professional courses and examination for aspiring arbitrators and jointly compile a list of arbitrators available for appointment. However, for a vibrant institutional framework on arbitration in Tanzania to develop, much more needs to be done to project these two institutions into the international arena and change the perception that they only administer domestic disputes and also are only industry-specific. To begin with, little information can readily be accessed regarding the institutions. These institutions need to disseminate information to the business community in the region and beyond to create awareness of their existence. This may be achieved through setting up resourceful websites with relevant and up to date information, organizing joint promotional activities such as conferences and workshops, amongst others, with other institutions in the region and the continent.

Despite the rigidity of Tanzania’s national legal framework on arbitration, it is important for the two institutions to ensure that their arbitration rules reflect international best practices so as to meet the requirements of modern users of international arbitration. These rules need to be flexible enough to allow the parties considerable freedom to agree upon the lawyers to represent them, the procedure to be followed, language of the arbitration, and the size of the tribunal to decide their dispute.

[C] Uganda

Uganda’s Arbitration and Conciliation Act was enacted to amend the law relating to domestic arbitration and international commercial arbitration, and provide for the enforcement of foreign arbitral awards. The Act also defines the law relating to conciliation of disputes. Under this Act, national courts may assist parties involved in arbitration with taking evidence, setting aside arbitral awards and recognition and

65. Ibid.
67. Ibid., s. 1.
68. Ibid., s. 27.
69. Ibid., s. 34.
enforcement of the arbitral awards. This Act is modelled on the UNCITRAL Model Law. There is one major arbitration institution in Uganda, the Centre for Arbitration and Dispute Resolution (CADRE).

Centre for Arbitration and Dispute Resolution

Uganda’s Arbitration and Conciliation Act establishes the Centre for Arbitration and Dispute Resolution (CADRE). The Act empowers CADRE to make appropriate rules, administrative procedure and forms for effective performance of arbitration, conciliation or ADR processes; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and ADR; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to provide skills training and promote the use of ADR methods for stakeholders. The Arbitration and Conciliation (Amendment) Act, 2008 provides for the funding of the CADRE by the Ugandan government. While this may help the institution to run smoothly, caution should always be exercised to avoid creating the impression that as a result of the funding, the Centre’s activities are not independent of government interference.

CADRE is empowered under the Act to offer both ad hoc and institutional arbitration whether domestic or international. The Act refers to ‘administered arbitration’ in defining arbitration and allows parties to authorize such institution to take decisions the Act permits them to make. In Uganda, the parties are free to determine the number of arbitrators. However, if the parties fail to determine the number of arbitrators under subsection (1), there shall be one arbitrator.

Redfern and Hunter observed in 1995 that:

[a]n established and well-organized arbitral institution can do much to ensure the smooth progress of an international arbitration even if the parties themselves- or their legal advisers- have little or no practical experience in the field.
CADRE may, therefore, have to do more especially with regard to the qualification and accreditation of arbitrators, to ensure that they can competently administer both domestic and international arbitration. It will also be beneficial for the region for CADRE to closely collaborate with the business community and other arbitral institutions in the region to promote the use of arbitration.

[D] Rwanda

Rwanda’s law on arbitration and conciliation in commercial matters is based on the UNCITRAL Model Law (2006 revision). The Act applies to domestic and international commercial arbitration and conciliation. However, the Act does not prejudice the enforcement of any other Rwandan Laws by virtue of which certain disputes may not be submitted to arbitration. Article 12 of the Act expressly provides that the parties to arbitration agreement are free to determine the number of arbitrators which, in any case, shall be an odd number. Failing such determination, the number of arbitrators shall be three. The Arbitrators may be from Rwanda or any other country. Rwanda has one arbitration institution, the Kigali International Arbitration Centre, (§4.02[D][1]).

[1] Kigali International Arbitration Centre

In February 2011 the Rwandan Parliament enacted a law establishing the Kigali International Arbitration Centre (KIC) as an independent body to administer mediation, adjudication and arbitration. KIC has a panel of domestic and international arbitrators publicly available on its website. Parties to KIC arbitration are free to nominate their arbitrators, in accordance with the KIC Rules. However, when KIC is called upon to appoint an arbitrator, it does so primarily from its panel of arbitrators. It is noteworthy that prior to the establishment of KIC, there was no formal organization administering amicable dispute resolution processes in both domestic and international disputes.

KIC has the potential to promote the development of international arbitration in the region and Africa as a whole. With its international outlook, KIC can forge

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81. Article 2.
82. Ibid.
83. Bernadette Uwihyzeza the former Director General of KIC examines the Centre in greater detail in Ch. 9.
strategic partnerships with the other regional Centres to jointly host conferences, provide trainings, workshops and professional development activities for arbitration practitioners.

[E] Burundi

Although, international arbitration in Burundi is supported by law, there are no comprehensive laws on the same. The Civil Procedure Code of 2005 introduced arbitration in Burundi. However, there is a wider issue of language barrier as far as integration within the EAC is concerned since all their laws are in French only.88 There is one arbitration centre in Burundi, the Burundi Centre for Arbitration and Mediation (BCAM) (§4.02[E][1]).

Burundi Centre for Arbitration and Mediation

In 2007, the Burundian Government created the Burundi Centre for Arbitration and Mediation (BCAM) to deal with commercial and investment disputes.89 It is not very evident how busy the BCAM has been.90 In a 2008 World Bank publication, it was noted that the BCAM, need to project its profile to the international community.91 To increase its visibility, the Centre may enter into strategic collaboration with the other centres within the region in the area of conferences and other activities of these institutions. BCAM can also organize international and regional conferences, in collaboration with the business community of Burundi to promote the use of arbitration to them. Such collaboration may also include the various government ministries that deal with the international business community in the areas of tourism, investments and trade.

[F] East African Court of Justice

A mention should be made of the role of the East African Court of Justice (the EACJ) which is one of the organs of the EAC established under Article 9 of the Treaty for the Establishment of the EAC.92 The EAC is a regional intergovernmental organization comprising the Governments of Burundi, Kenya, Rwanda, Tanzania and Uganda for

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purposes of East African economic, social, cultural and political integration. In addition to the Court’s jurisdiction over the interpretation and application of the EAC Treaty, it has arbitration related jurisdiction. The EAC arbitration jurisdiction covers matters arising from arbitration agreements contained in a contract or agreement concluded by the Community or any of its institutions; and arbitration agreements contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court to deal with arising disputes.

The EAC Court has formulated the EACJ Arbitration Rules, 2012, made under Article 42 of the EAC Treaty. These Rules apply to very arbitration references pursuant to Article 32 of the EAC Treaty. Where the parties have agreed to submit to arbitration under the Rules, they are deemed to have submitted ipso facto to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

Despite the existence of the arbitration rules which have incorporated international best practices on arbitration. It does not however appear that the EAC Court has a vibrant arbitration matters cause list. This may partly be attributed to the fact that the integration process of the East Africa Community is still ongoing. The Member countries have also not submitted any matters to the EACJ jurisdiction on arbitration.

§4.03 CHALLENGES

Having examined the various arbitration institutions that operate in East African countries, this section examines some of the challenges confronting these centres and suggests how the centres can grow their workload, make their services better known and strategically share their regional space.

[A] Effectiveness of Arbitration as a Process

I have noted as it relates to Kenya that in some cases parties will litigate arbitration related disputes all the way to the Supreme Court especially in pursuing setting aside

93. Preamble, EAC Treaty.
94. Article 27, EAC Treaty.
95. Article 32, EAC Treaty.
97. Rule 1 provides that unless the parties to arbitration agree otherwise: (a) these Rules shall apply to every arbitration under Art. 32 of the Treaty; (b) the parties to any arbitration may agree in writing to modify or waive the application of these Rules; (c) where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.
of awards. This situation creates an impression that courts are entertaining litigation at the expense of arbitration, thus, scaring away some potential users of arbitration. The effect of this is that parties who are keen on having their disputes settled faster may avoid jurisdictions where they perceive that they may be dragged before courts for longer than necessary. This has the effect of denying the local arbitration institutions the opportunity to administer such arbitration matters.

[B] Institutional Capacity

I have also observed that there exists a challenge on the capacity of existing arbitration institutions in the region to meet the expectations of modern arbitration users. Much more needs to be done to enhance the capacity of these institutions in terms of the number and quality of available arbitrators, adequate administrative staff and financial support to ensure that they are fully equipped to administer in particular international arbitration references.

It is my opinion that despite the existence in Africa of individuals with the relevant knowledge, skill and experience of international dispute resolution and competent institutions, there has been a general tendency by foreign parties doing business in Africa to appoint non-African arbitrators in their arbitration references. This practice has denied local arbitrators the opportunity to put their skills and expertise in arbitration to use in international disputes. The same also applies to the use of foreign arbitration institutions in preference to local institutions. Some African parties also appoint non-Africans as arbitrators. Indeed, Julian Lew has 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.

101. Section 35(1) of the Act. See K. Muigua, Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya, supra, available at: http://www.kenyalaw.org/klr/index.php?id=824 [accessed on 8 Apr. 2016]. See the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) which made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR). See Glencore Grain Ltd v. T.S.S.S Grain Millers Ltd [2012] eKLR; See also Daily Nation Newspaper, ‘Not again! Pattini’s new Sh4bn scandal,’ of Saturday, 11 May 2013, available at: http://www.nation.co.ke/News/Not-again-Pattinis-new-Sh4bn-scandal/-/1056/1849756/-/14axo7az/-/index.html [accessed 8 Apr. 2016]. The Newspaper partly read ‘Controversial businessman Kamlesh Pattini is set to pocket Sh4.2 billion worth of taxpayers’ money if the High Court upholds a hefty award issued in his favour by an arbitrator’. It went further to state ‘But it is the hefty award against the government authority that is likely to attract public attention given that it is wananchi (meaning citizens) and taxpayers who will foot the Sh4.2 billion bill.’


East African arbitral institutions need ensure that, while parties may choose persons of their choice to appoint as arbitrators, they are also provided with a list of qualified African arbitrators from which they may consider appointment. Arbitration institutions (among others) have databases with arbitrators’ qualifications which can be made publicly available for ease of reference by parties seeking to appoint arbitrators. It is important for arbitration institutions to support the visibility of African arbitrators as this will in turn raise their profiles which will lead to increased caseload.

Finally it is important that commercial parties are encouraged to include valid arbitration clauses in their contracts. It has been argued that an arbitration clause should take into consideration the applicable law, state and attitude of the possible seat towards arbitration as well as the effect of its domestic law on arbitration proceedings and outcome so as to ensure that the parties’ intentions are not defeated by legal technicalities.105 This is because it is the arbitration clause that dictates where the proceedings will be held and the applicable law. As such, it is important to have a clear non-ambiguous clause as this will not only save time but will also save resources for the parties by way of minimized challenges before national courts.106

Arbitration Users’ Concerns

There are various issues of concern to users of arbitration, some of which do not fall within the ambit of arbitration institutions while others do.107 Users need adequate Information Communication Technology (ICT) infrastructure and other relevant physical infrastructure for the conduct of modern arbitration. Some of these arbitration institutions lack such basic infrastructure. Also some of the centres lack institutional capacity which refers to both physical infrastructure and adequately trained staff to assist parties and arbitrators sitting under their rules. Arbitration institutions in Africa must meet these concerns of users and provide a professional environment for such users.

Suggestions

I have observed elsewhere that government intervention in arbitration can raise fears of bias and the exercise of undue influence. However it is important to note that it is possible for arbitration institutions to receive support from the government while retaining their independence. The governments of East African states can provide seed funding to help the institutions commence their activities. These governments can also (and even more importantly) nominate these institutions in their arbitration agreements. State institutions, such as courts can also play a critical role in supporting the arbitral centres by facilitating the enforcement of international and domestic arbitral awards as well as ensuring that there is minimal court interference in the arbitral process. This will win the confidence of potential arbitration users within and outside the region. Parliament and Courts need to also work in tandem in promoting law reform to ensure that the state arbitration related laws reflect modern trends in arbitration practice. An example of government and arbitration centre collaboration is the case of NCIA and the Kenya National Chamber of Commerce and Industry (KNCCI) in Kenya. KNCCI collaborates with the Government of Kenya in promoting business and foreign investment in the country. Some of these investors enter into partnerships with the government who can promote these institutions as competent to administer their disputes.

Arbitration institutions can also support the training of arbitration practitioners and the teaching of arbitration in Law Schools. A good example is the University of Nairobi, School of Law, which currently offers international commercial arbitration as a course on its Masters of Law Programme. This course is also accredited by CIArb-K so that students who pass this course can apply directly to become Associate members of CIArb-K. This not only boosts the number of persons eligible to pursue a career in arbitration but also helps in creating awareness in the country and the region. It is also a powerful tool for improving the legal capacity and personnel of arbitral institutions, and boosting the development and practice of arbitration generally.

CONCLUSION

The availability of effective and reliable arbitration institutions is an additional factor that encourages investors to enter and carry on business in any jurisdiction. This is because of the confidence in knowing their disputes will be settled expeditiously and in a neutral forum. This will also enhance users’ confidence in arbitral institutions in the African continent and directly impact positively on the transformation of arbitration practice in Africa.

108. See Kariuki Muigua, Natural Resources and Conflict Management in East Africa, paper presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25 and 26 Sep. 2014.