



AFCFTA: RECONNOITERING THE LAW ON ARBITRATION TOWARDS THE RESOLUTION OF COMMERCIAL DISPUTES IN AFRICA

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Abstract

The African Continental Free Trade Area (AFCFTA), which commenced trading activities on 1 January 2021, is adjudged the largest free trade area in the world since the formation of the World Trade Organisation. One of the cardinal objectives of this important trade agreement is to engender cooperation on all trade-related areas with a potential to lift over thirty million people out of extreme poverty on the African continent. This commendable objective would undoubtedly, attract an increased growth and development in commercial activities and indeed, witness exponentially, commercial disputes in Africa. Therefore, achieving full AFCFTA potentials is largely contingent on entrenching significant policy reforms and trade facilitation procedures, including establishing a mechanism for the settlement of disputes concerning rights and obligations. This is where the exploration of alternative dispute resolution (ADR) mechanism for the amicable resolution of commercial disputes within the framework of AFCFTA becomes extremely important. Thus, with the adoption of doctrinal research method, this intervention aimed to strengthen arbitration laws and institutions for effective resolution of commercial disputes in Africa. The work found that as most conventional legal systems fail to provide remedies that are timely, adequate and just, majority are resorting to informal means of justice and arbitration is increasingly becoming popular and acceptable means of resolving commercial disputes on the African continent. In this regard, it is recommended, inter alia, that the needless intervention of the courts to whittle down the cherished party autonomy department of the arbitration process should be curtailed through legislative procedures in Africa.

Keywords: AFCFTA, Commercial-Dispute, Resolution, Arbitration, Africa.

Introduction

Conflict is an inevitable part of human existence particularly in the commercial circle. At one time, the first thought of an aggrieved person especially in civil matters, was that of approaching the court to seek legal redress. However, people began to develop a new kind of

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consciousness that rights and revenge are not the only focus of most disputes.² Indeed, many disputes involve misunderstandings, accidents or other situations where getting the problem resolved amicably is more vital than placing blame especially where disputes border on the needs and interests of the parties and not their legal rights³.

In the same vein, the United Nations Development Programme (UNDP) report⁴ indicated that the traditional justice system is frequently weakened by long delays; prohibitive costs of using the system, lack of available and affordable legal representation that is reliable and weak enforcement of laws. The referenced UNDP report further indicated that most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent; ultimately, court users avoid the legal system due to economic reasons, fear, or a sense of futility of purpose.⁵ Indeed, the multiplication of international commercial transactions, no doubt, increases the number of commercial related disputes in Africa. Consequently, majority of people are basically resorting to informal means of justice, outside the formal system.⁶ These led to seeking for alternatives in several jurisdictions and hence the need to embrace alternative dispute resolution (ADR) mechanisms. As an important component of ADR, this work essentially explores arbitration as a critical tool for the resolution of commercial disputes in Africa.

Therefore, the article is structured into seven parts. The first part, is the introductory segment. Section two, embodies the general overview of alternative dispute resolution mechanism. Reflection on the concept of arbitration is captured in the third segment. Part four, examines arbitration's legal framework and institutions within a selected countries in Africa. The fifth segment, deals with the enforcement of arbitral awards while section six x-rays the impediments thereto. The last part of the work, draws the conclusion.

Alternative Dispute Resolution (ADR) Overview

ADR is a scheme of various dispute resolution techniques sharing the goal of achieving fair, just, and amicable settlement. According to Jillani⁷, ADR is not the outcome of any juristic philosophy, rather, it was necessitated by the growth of commercial litigation needing speedy resolution; by ever-increasing volume of court work, as court dockets becoming heavier and the judges' case ratio becoming imbalanced on account of limited resources.

² Paul Obo Idornigie, 'Alternative Dispute Resolution Mechanism' in Modern Civil

³ Ibid

⁴ See UNDP 'Access to Justice: Practice Note - United Nations and the Rule of Law'

<<https://www.un.org/ruleoflaw/blog/document/access-to-justice-note/>> accessed 9 July 2024

⁵ Ibid

⁶ See UNDP 'Justice Programme'

<<https://www.undp.org/sites/g/files/zskgke326/files/2023-04/undp-htprogrammeJustice-Factsheet-042023En.pdf>> accessed 8 August 2024

⁷ Tassaduq Hussain Jillani, 'Delayed Justice & The Role of ADR' <www.uop.edu.pk> accessed 5 July 2024.
Procedure Law, A.F Afolayan and P.C Okorie (eds) (Dee-Sage Nigeria Limited 2007) 563

Historically, the modern ADR started in the United States of America in the 1970s in response to the need to find more

efficient and effective alternatives to litigation.⁸

Enenche⁹ attributed ADR as a product of Prof. Frank Sander's brain when he delivered an address at a national conference in honour of Dean Roscoe Pound on the 'Varieties of Dispute Processing' in 1976. Sander proposed solution of a dispute resolution center offering a panoply of dispute resolution services to address the concerns or causes of the dissatisfaction in the then American judicial system.¹⁰ Sander's proposed Multi-Door Courthouse (MDC), to accommodate ADR mechanisms where there will be several dispute resolution 'doors' and each case will be diagnosed and referred to an appropriate 'door' or mechanism best suited to its resolution. In other words, the "multi-door courthouse" would provide a range of dispute resolution services and court officials would refer parties to the most appropriate process for their case.

Mediation and arbitration would play key roles in the "multi-door courthouse" as alternatives to litigation.⁸ It is from this period that the concept started gaining traction throughout the world.

However, research has also indicated that prior to Sander's lecture, Gibbs published an article in 1963, which sparked a debate about whether insight from dispute resolution practices in African cultural practices, could be used to promote greater access to justice and community empowerment in the United States.⁹ Gumi,¹⁰ argued that Gibbs' article was used by Danzig to propose developing community participation in dispute settlement in American neighborhood. Lowy also joined him and used the ideas in his dissertation which focused on dispute resolution in Ghana and who later worked on same ideas with Wahrhaftig and the American

⁸ Frank E A Sander, 'Varieties of Dispute Processing' in A Leo Levin and Russell R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (West Group 1979) 65

⁹ See Alexandra Crampton, 'Addressing Question of Culture and Power in the Globalisation of ADR: Lessons from African Influence on American Mediation' *Hanline Journal of Public Law & Policy* (2006) 27(2) 231. Cited in Diram (n 7)

¹⁰ See LH Gumi, 'Sink or Swim: Evolving a Broader Definition of Courts through the Multi-Door Approach to Dispute Resolution and the implication it has for Traditional court Systems' (2010) *International Journal for Court Administration* 2(2) 39 ¹³Ibid, cited in Diram (n 7)

⁸ See A.H Diram, 'Alternative Disputes Resolution and the Quest for Effective Access to Justice in Nigeria' *Obafemi Awolowo University Law Journal* (2020) 4(2) 501

⁹ See Elejo Enenche, 'The Growth of Alternative Dispute Resolution in Nigeria' in *Alternative Dispute Resolution and some Contemporary Issues* (M.O Press and Publishers Limited 2010) 426

¹⁰ Ibid

Friends Service Committee to apply Ghanaian practice of dispute resolution to the United States.¹³

Deduced from the above, it is established that ADR, has been in existence among the Africans from time immemorial. Typical of African culture, dispute resolution was a multi-faceted system in which the disputants would usually make attempts at resolving the issues in dispute. This process can best be described as negotiation. If negotiation fails, the assistance of a senior kinsman can be sought to help parties mediate. Parties could also seek to have the benefit of the intervention of a clan head in continuation of the settlement process. If the disputants are unable to settle amicably, then the authority of the chief/king or his designate is resorted to for a final and binding decision (arbitration).¹⁴

In any event, ADR comprises various approaches for resolving disputes in a non-confrontation way, ranging from negotiation between the two parties, a multi-party negotiation, through mediation, consensus to arbitration and adjudication.¹⁵ ADR is indeed a broad concept. However this research will restrict itself to arbitration as a critical mechanism for commercial dispute resolution within the African continent.

The Concept of Arbitration Explained

Arbitration is a process that can be used to resolve disputes between parties without necessarily going through a formal court system. It is a mechanism for the resolution of dispute which take place, usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to the law.¹⁶ The enforceable decision known as arbitral award is given after a fair hearing process.

Thus, it can be inferred that arbitration is a dispute resolution mechanism established for the settlement of dispute by a neutral third party known as the arbitrator or panel of neutrals described as the Arbitral Tribunal. One of the key features is that arbitration is adjudicatory. It is a private system of adjudication¹¹ where parties agree to refer their dispute to an arbitral tribunal of their choice, and to accept the tribunal's decision as final and binding.¹² Among other elements of the arbitration process is the parties' agreement to arbitrate. The agreement to arbitrate is the foundation of any valid arbitration. The contractual nature of the arbitration requires the consent of each party for an arbitration to take place. Without an arbitration agreement, there can be no arbitration.¹³

¹¹ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 1.

¹² Frank D Emerson, 'History of Arbitration Practice and Law' (1970) 19 Clev St L R 155, 158-159. , at 157 ¹⁹
The Resolution Law Firm, 'Arbitration in Nigeria- The Brief Overview'
<https://www.resolutionlawng.com/brief-overview-of-arbitration-in-nigeria/> accessed 7 August 2024

¹³ Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers 1997)1

¹⁴ See Richard L. Abel, John Comaroff and Simon Roberts, 'Rules and Processes: The Cultural Logic of Dispute in African Context ' (1982) *The American Journal of Comparative Law* 31(1) 130

¹⁵ Yona Shamir, 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building'
<<http://unesdoc.unesco.org/images/0013/001332/133287e.pdf>> accessed 9 July 2024

Arbitration: A Historical Perspective

Historically, arbitration, in one form or another, has been with mankind from the beginning of time. One can say it has primordial origin.¹⁹ Some historians posit that arbitration was used as a means of resolving disputes before the appearance of the court system. These historians point to the records of the ancient Greeks and Romans to support this claim.²⁰ These records indicate that in ancient times, contrary to the practice of today, the arbitrator was generally a person known and trusted by both parties. This is vividly captured in the expression that ‘the better known the arbitrator, the more confidence the parties would have in his or her judgment.’²¹

Others specifically hold the view that arbitration developed out of the adjudicative process used by merchants to regulate their disputes. In this viewpoint, merchants would bring their disputes before a tribunal of fellow merchants, which would render a decision based on customary commercial practices in ancient period. Although these private systems of adjudication did not feature formal legal processes, they were considered as credible sources of commercial justice.¹⁴ Learned authors,¹⁵ postulate that in its origin, the concept of arbitration as a method of resolving dispute was simple and they further asserted that: The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the courts.¹⁶

In appreciating the less formalistic nature of arbitration, a distinguished French writer,¹⁷ described arbitration as an ‘apparently rudimentary method of settling disputes, since it consists of submitting to ordinary individuals whose qualifications is that of being chosen by

¹⁶ John Tackaberry and Arthur Marriot, *Beinstein’s Handbook of Arbitration and Dispute Resolution Practice* (4th edn Sweet & Maxwell Ltd 2003) 3

Charles Sherman Haight, ‘Maritime Arbitration: The American Experience’ in *A Collection of the Cedric Barclay Lectures: ICMA X-ICMA XV* (Singapore International Arbitration Center 2006).

¹⁷ Alan Redfern and Martin Hunter, *Law and Practice of Commercial Arbitration*, (2nd edn Thomson Professional Pub 1991) 22

¹⁸ Ibid

¹⁹ Phillippe Fouchard, *L’arbitrage Commercial International* (Dalloz 1965) 1, 30 and 31 ²⁰ Michael John Mustill ‘Arbitration- History and Background’ *Journal of International Arbitration* (1989) 6(2) 43.

Kahl-Heinz Bockstiegel, ‘The Problem Facing Arbitration in the European Union’

<https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal>

[+of+Arbitration,+Mediation+and+Dispute+Management/61.3/AMDM1995043](https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal) accessed 8 August 2024 ²¹ See

DynaLEX, ‘A Brief History of Commercial Arbitration’ [https://dynalex.wordpress.com/2012/12/28/a-](https://dynalex.wordpress.com/2012/12/28/a-briefhistory-of-commercialarbtration/)

[briefhistory-of-commercialarbtration/](https://dynalex.wordpress.com/2012/12/28/a-briefhistory-of-commercialarbtration/) accessed 7 August 2024

the parties'. Mustill²⁷ opined that it is not difficult to visualize the rudimentary nature of the arbitral process in its early history. According to him, two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they trusted for his decision and accept the judgment accordingly. Therefore, 'commercial arbitration must have existed since the dawn of commerce'.¹⁸

The concept of arbitration, in recent times, may have lost its early simplicity and has assumed a form and character different from what it was normatively conceived to be²⁹ as submitted Mustill. In Africa, as in other part of the world, due to the increase in commercial activity, arbitration has become the preferred mechanism for resolving commercial disputes,²⁰ particularly those involving foreign investors.²⁷ Irrespective of whatever opinions anyone may hold, arbitration has been embraced by the commercial world and has been in use for as long as its history can be traced. Arbitration equally embedded functional provisions that have assisted in the resolution of disputes which ordinarily would have added to court congestion.²⁸ Arbitration is therefore suitable where parties want a final and definitive conclusion to their dispute.¹⁹

Legal Framework and Arbitration Institutions in Africa

On the African continent, the umbrella organization of African countries, the African Union, has no functional continental-wide platform designed explicitly for the resolution of commercial disputes through the instrumentality of ADR. It is in the recognition of this fact that, this work will appreciate arbitration's legal framework and institutions as a panacea for effective resolution of commercial disputes from selected regional economic hubs in Africa.

The Egyptian Experience

Egypt is well positioned to use arbitration as tools for resolution of commercial disputes in the MENA²⁰ region. The Egyptian legal system, constitutes the basis of the region's respective legal systems.²¹²² The only ADR mechanism officially acknowledged by Egyptian law is Arbitration²³. That is, the Act No. 27 of 1994 on Arbitration in Civil and Commercial Matters.²⁴

¹⁸ *ibid* 29

See Godwin Odumu Obla, 'Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today?' (University of Ibadan 2011) 2

¹⁹ See Trevor Cook and Alejandro I Garcia, 'International Intellectual Property Arbitration' (Kluwer Law International 2010) 38.

²⁰ MENA stands for Middle East and Northern Africa; a group of countries situated within and around the Middle East and North Africa.

²¹ Mohamed Abdel Wahab and Noha Khaled, 'International Arbitration 2021' <https://practiceguides.chambers.com/practice-guides/international/-arbitration->

²² [/egypt/trends-and-developments](https://practiceguides.chambers.com/practice-guides/international/-arbitration-egypt/trends-and-developments) accessed 6 August 2024

²³ Adsero-Ragy Soliman, 'Mediation' <https://www.adsero.me/blog/mediatio> accessed 7 August 2024

²⁴ Hereinafter referred to as the Arbitration Act

²⁷ Nikhil Desai and Elizabeth Kageni 'Arbitration procedures and practice in Kenya: overview' <https://uk.practicallaw.thomsonreuters.com/5-633-8955?transitionTypeDefault&contextData=true> accessed 7 August 2022

Whereas the Arbitration Act is generally regarded as the general law regulating arbitration business in Egypt, there are of course, other laws that govern certain aspects of arbitration with regard to certain legal relationship such as technology transfer contracts and sport arbitrations. There is also substantial case law dealing with the application of the Arbitration Law and which has influence the practice of arbitration in Egypt.

The Egyptian Arbitration Act is principally anchored on the UNCITRAL Model Law on International Commercial Arbitration of 1985 with some variations. The Arbitration Act applies to arbitrations conducted in Egypt or in cases where the parties to an international commercial arbitration conducted abroad agree to subject the arbitration to the Arbitration Act.³⁵ An arbitration is considered international, if the subject matter of the arbitration relates to international trade and if the parties to the arbitration agree to resort to permanent arbitral organization or centre headquartered in Egypt or abroad.³⁶

The Arbitration Act incorporates, *inter alia*, vital aspects of the arbitral proceedings, including but not limited to the arbitration agreement, the composition of the arbitral tribunal, the conduct of arbitration proceedings, the rules pertaining to the award, its annulment and enforcement. Indeed, since the introduction of the Arbitration Act, parties have increasingly resorted to arbitration in commercial disputes as arbitration is seen as an important and effective means of dispute resolution in Egypt.³⁷

Therefore, to be valid in Egypt, arbitration agreement must be in writing³⁸. The written arbitration agreement is considered to be the constitution of an arbitration that determines the scope, extent and subject of arbitration.³⁹⁴⁰ The Arbitration Act, further stipulates that an agreement to arbitrate may take three different forms: the arbitration agreement may be embodied as a clause or as an annex to the agreement between the parties before a dispute

²⁸ Valentine Buoro, 'Arbitration as an Alternative Dispute Resolution Process' <https://thenigerialawyer.com/arbitration-as-an-alternative-dispute-resolutionprocess/> access 7 August 2024.

³⁵ Article 1 Arbitration Act

³⁶ Article 3 *ibid*

³⁷ Khaled El Shalakany, „Arbitration procedures and practice in Egypt: overview“ [https://uk.practicallaw.thomsonreuters.com/35017485?transitionTypes=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/35017485?transitionTypes=Default&contextData=(sc.Default)&firstPage=true) accessed 6 August 2024

³⁸ Article 12 Arbitration Act

³⁹ Amr Abbasi and John Matouk, 'The Middle Eastern and African Arbitration Review

⁴⁰ ,

<https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review-2021/article/egypt> accessed 6 August 2024

⁴¹ Article 10 (2) *ibid*

⁴² Article 11 *ibid*

⁴³ Article 16(3) *ibid*

⁴⁴ Article 18 *ibid*

arises between them; the parties may enter into a 'submission agreement', which is an arbitration agreement that the parties agree to after a dispute has arisen – in this case, the parties must define in the arbitration agreement the matters or disputes subject to arbitration, otherwise the agreement shall be null and void;⁴¹ or the arbitration agreement may be incorporated by reference. Whereas the Egyptian law requires arbitration to be in writing, it is not every written arbitration agreement that is arbitrable as the law also admits some exceptions. For example, public policy matters are not subject to compromise and are therefore non-arbitrable.⁴²

One of the crucial elements in Egyptian arbitration process is that the Arbitration Act prohibits court proceedings in breach of arbitration agreement. Therefore, the courts cannot accept a case if there is an agreement to arbitrate except the respondent waives its right to arbitration. To ensure fairness in the discharge of their duties, appointed arbitrators must be impartial⁴³ and independent of the parties as evidence of serious doubts as to the neutrality or independence of an arbitrator may be challenged⁴⁴.

If the request to challenge the neutrality of an arbitrator is submitted to the arbitration tribunal in writing, within 15 days of the awareness of the composition of the tribunal, it is the obligation of the arbitral tribunal under the law, to refer the challenge to the court of competent jurisdiction to decide the challenge.⁴⁵ In order to maintain strict confidentiality of the arbitration process, the arbitration award is not to be published, except with the parties' consent. In most cases, confidentiality of the proceedings is expressly agreed by the parties. However, where the rules are silent, and there is no express agreement between the parties, the award is still made confidential by virtue of the Arbitration Act.⁴⁶

Egyptian Arbitral Institutions

There are existence of specialized arbitral institutions in Egypt, such as the Egyptian Settlement and Arbitration Centre for Sports established in 2017, and the Egyptian Centre for Voluntary Arbitration and Settlement of Non-Banking Financial Disputes established in 2019. However, the leading and prominent arbitration institution is the Cairo Regional Centre for International Commercial Arbitration.⁴⁷

The Cairo Centre is an international, not-for-profit, organization operating in Egypt since 1979. It was established by an international agreement signed between the Egyptian Government and the Asian African Legal Consultative

Organisation⁴⁸. The Cairo Centre, which applies the UNCITRAL rules with some modifications, provides a competitive and less costly alternative foreign arbitration and mediation centres for Egyptian and regional disputes. The Cairo Centre offers specialized services to settle trade and investment disputes, through arbitration. It includes also alternative dispute resolution techniques such as conciliation, mediation and technical expertise.⁴⁹ The Cairo Centre enjoys all the privileges and immunities of an independent international organization in Egypt and is endowed with the juridical personality.⁵⁰

The⁵¹⁵² objectives of the Cairo Centre include promoting international commercial arbitration in the Asian and African regions and assisting in the enforcement of arbitral awards. The Cairo Centre has its own set of arbitration rules⁵² and medication rules⁵³ available in three languages: Arabic, English and French. To strengthen its operations in line with global best practices, the Cairo Centre adopted its Dispute Board Rules in August 2021, geared towards

offering the international business and construction community a cost-effective and impartial dispute resolution method. These rules have been drafted through the guidance of existing institutional rules by renowned experts in the field and made available in English and Arabic languages.²⁵

The Kenyan Approach

As the largest and the most advanced economy in East and Central Africa,²⁶ Kenya offers an internationally recognised mechanisms for dispute resolution that can effectively address commercial related conflicts. Notably, Kenya's bilateral investment treaties with various countries provide for international arbitration as the mode for the resolution of any disputes that may arise between an investor and the government of Kenya.²⁷

The foundation of alternative dispute resolution methods is the Kenyan Constitution. Thus, Article 159(2) (c) of the Constitution of Kenya, 2010, stipulates that the court is to promote all forms of alternative dispute resolution which include arbitration, reconciliation, mediation and traditional dispute resolution mechanisms. This is one of the principles for exercise of judicial authority by courts and tribunals under Article 159(2) of the Constitution.²⁸ However, Kenya's arbitration is significantly regulated by the Arbitration Act 1995 which governs domestic and international arbitration. In Kenya, to ensure autonomy, the parties to the agreement determine the arbitrator, language to be used, the applicable substantive law, and place of arbitration; use of experts as may be appropriate and how the process is conducted.²⁹ In 1989, Kenya became a signatory to the New York Convention³⁰ which governs the enforcement of international arbitral awards and it is incorporated into the Kenyan Arbitration

⁴⁵ Article 19 ibid

⁴⁶ Article 44 (2) ibid

⁴⁷ Later to be known as the "Cairo Centre".

⁴⁸ AALCO

⁴⁹ Cairo Regional Centre for International Commercial Arbitration'

<https://www.aalco.int/arbitrationCRCICA> accessed 2 August 2024

⁵⁰ Menna Sadek, „Cairo Regional Centre for International Arbitration“

<https://arbitrationlaw.com/library/cairo-regional-centre-international-commercialarbitration-crcica-worldarbitration-reporter> accessed 2 August 2024

⁵¹ See Wahab and Khaled (n 34)

⁵² Kenya Investment Authority, ' East Africa's Largest Economy' <http://www.invest.go.ke/why-invest-in-kenya2/east-africa-largest-economy> accessed 30 August 2022

⁵³ JMiles & Co, „The landscape of international arbitration in Kenya“

<https://www.inhouselawyer.co.uk/legalbriefing/the-landscape-of-internationalarbitration-in-kenya> accessed 1 August 2024.

⁵⁴ Odhiambo Jerameel Kevins Owuor, „Legal Framework for Alternative Dispute

Resolution: Kenyan Perspective“ https://papers.ssm.com/sol3/papers.cfm?abstract_id=3816632 accessed 1 August 2024

⁵⁵ Ibid

⁵⁶ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Act. Specifically, Section 36(5) of the Arbitration Act accords recognition to the New York Convention on the enforcement of foreign arbitral awards.

In Kenya, to be enforceable, arbitration agreement, must be in writing. Under section 4 of the Arbitration Act, the agreement can be contained in a clause within the contract or in a separate agreement. It will be considered to be in writing if it is a document signed by the parties, an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunication providing a record of the agreement. Similarly, parties to arbitration agreement can decide to have a separate arbitration agreement. However, for a separate document to be considered as the arbitration clause to the contract in dispute, parties must expressly reference the separate arbitration agreement as part of the contract.³¹ Therefore, arbitration agreement is treated as separate from the contract.³² Thus, in *Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another*,³³ the court held that an arbitration agreement survives the contract's termination.

It is equally important to stress that parties are bound by arbitration agreement. Under the cherished doctrine of privity of contract, arbitration agreement can only confer rights and impose obligations upon the parties to the agreement. However, the Kenyan Arbitration Act, admits some exceptions to the principle of privity of contract. For example, on the death of a party, the agreement is enforceable against or by the deceased's personal representative and in the event of bankruptcy, the trustee in bankruptcy adopts the contract and the terms are enforceable by or against the trustee³⁴. While the Arbitration Act does not expressly make provision for the position of an agent and heirs with respect to the arbitration agreement, the Kenyan court in *KNHA v Masosa*,³⁵ was of the view that a third party is bound by the agreement where there are evidence that could lead the court to conclude that the third party had either authorised the parties to the agreement to enter into the contract or the third party has chosen to accept the terms of the agreement.

Arbitration agreements in Kenya are always respected and held sacrosanct. This means, court proceedings in breach of an arbitration agreement, is not tolerated and no court will intervene in matters governed by the Arbitration Act *suo moto*. Where a party approach the court in breach of arbitration agreement, the defendant is expected under the law³⁶ to apply to the court to have the proceedings stayed. However, the application for stay of proceedings must be made timeously and at a time the defendant enters an appearance in court. The court will refer the parties to arbitration unless it finds that the agreement is null and void, or the dispute is not covered by the agreement.³⁷

³¹ Section 4(4) Arbitration Act.

³² Section 17 *ibid*

³³ [2006] eKLR

³⁴ Section 38, Arbitration Act

³⁵ [2015] eKLR

³⁶ Section 6 Arbitration Act

³⁷ Nikhil Desai and Elizabeth Kageni, (n 30)

In exceptional circumstances, the Kenyan Arbitration Act³⁸ allows the intervention of the court in arbitration matters. Such an exceptional circumstances include, where the tribunal requests assistance in the taking of evidence and where parties institute proceedings to challenge the appointment of an arbitrator. In addition, the court may intervene to determine the tribunal's jurisdiction; to give interim orders of protection during arbitration; and to determine questions of law on application by the parties.

In order to ensure a bias free arbitral process in Kenya, the Arbitration Act,³⁹ requires an arbitrator to disclose any circumstances that could bring their independence and or impartiality into question. While there is a general consensus that confidentiality is a core feature of arbitration and must be strictly observed, there is however, no provision for confidentiality of proceedings and awards in the Kenyan Arbitration Act. As jurisdiction is a livewire of every successful arbitration, the doctrine of kompetenz-kompetenz⁴⁰ is provided for under section 17 of the Kenyan Arbitration Act. Ordinarily, an arbitrator's jurisdiction is derived from the parties' binding agreement to arbitrate, the validity of the arbitrator's appointment and there must be a dispute that the parties had agreed to arbitrate.

Arbitration Institution in Kenya

There is currently one recognised centre conducting domestic and international arbitration in Kenya. It is known as the Nairobi Centre for International Arbitration,⁴¹ established under the Nairobi Centre for International Arbitration Act, 2013. Before then, On 3 April 2006, during the Forty-Fifth Annual Session of AALCO,⁴² held in New Delhi, a Memorandum of Understanding for the establishment of a regional centre for arbitration in Nairobi was signed by the Secretary-General of AALCO and the Attorney General of the Republic of Kenya.⁴³ The following year, on 2 July 2007 at the Forty-Sixth Annual Session of AALCO in Cape Town, South Africa, an agreement was signed establishing the Nairobi Regional Arbitration Centre.⁴⁴

The Nairobi Centre Act was enacted to strengthen the legal and institutional frameworks of arbitration and other ADR mechanism in Kenya. Thus, it is an international dispute resolution service provider. The Nairobi Centre, which issued its Arbitration and Mediation Rules in 2015 was officially launched in December 2016. Among other functions, the Nairobi Centre is geared towards the promotion of international commercial arbitration and alternative forms of

³⁸ Section 10

³⁹ Section 13

⁴⁰ A German legal principle which grants full autonomy to the tribunal with least interference of the courts in the arbitral proceedings.

⁴¹ Later known as the Nairobi Centre

⁴² Asian African Legal Consultative Organisation

⁴³ „Nairobi Centre for international Arbitration“

<https://aalco.int/Nairobi%20Centre%20for%20international%20Arbitration%20%28NCIA%29%20Nairobi%20Republic%20of%20Kenya> accessed 2 August 2024

⁴⁴ Ibid

dispute resolution.⁴⁵⁴⁶⁷⁴ A fundamental feature of the Act is its broad nature that goes beyond arbitration to include other forms of the Alternative dispute Resolution.⁴⁷ Significantly, Section 21 of the Nairobi Centre Act, establishes an Arbitration Court, which shall have jurisdiction to hear and determine all disputes referred to it in accordance with the Arbitration Act, the Rules or any other written law.

The Nigerian Legal Framework

In Nigeria, the potentiality of arbitration in facilitating the promotion of access to justice and timely commercial dispute resolution is recognised. Therefore, the need for legal instrument for proper and successful implementation of ADR in general is not only needed but necessary⁷⁵ to make dispute resolution mechanism flexible to meet emerging challenges. The courts in Nigeria have equally developed positive attitude towards the vital role arbitration can play in dispute resolution and declared arbitral proceeding as a recognized means of resolving disputes.⁴⁸

In this realization, Nigeria has entrenched important legal framework in the system to encourage ADR. The most significant of the legal instruments is section 19(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates that the foreign policy objectives shall be in ‘respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication’.⁷⁸

Arbitration is principally regulated in Nigeria by the Arbitration and Mediation Act,⁷⁹ signed into law on the 26th May 2023 by the President of the Federal Republic of Nigeria. The Act was anchored on the 1985 UNCITRAL Modern Law on International Commercial Arbitration. The Nigerian Arbitration and Mediation Act 2023 repeals the Arbitration and Conciliation Act, 2004 and enacts the Arbitration and Mediation Act, 2023, to provide a unified legal framework for the fair settlement of commercial disputes by arbitration and mediation. Part 1 of the 2023 Act is made applicable to both domestic⁴⁹ and international arbitration.⁵⁰

Arbitration proceedings in Nigeria must comply with some conditions precedent in order to be valid: it is mandatory that arbitration agreement should be in a written form⁵¹ as it is a proof of parties’ intention to submit to arbitration. The written agreement can be in form of document signed by the parties, or in exchange of letters, telex, telegrams or other means of communication which provide the record of the arbitration agreement. By the provision of section 3 of the 2023 Act, such an arbitration agreement if entered, is irrevocable except by an agreement of the parties or leave of court. Interestingly, by

⁴⁵ ‘Nairobi Centre for international Arbitration’ <https://ncia.or.ke> accessed 2 August

⁴⁶ See Owuor, (n 57)

⁴⁷ See Diram (n 7)

⁴⁸ See *C.N Onuselogu Ent.Ltd v. Afribank Nig. Ltd* (2005) 1 NWLR (Part 940) 577 ⁷⁸ See section 19(d) Constitution of the Federal Republic of Nigeria (1999) ⁷⁹ Hereinafter referred to as the ‘2023 Act’.

⁴⁹ See section 1(6) of the 2023 Act

⁵⁰ See section 1(7) *ibid*

⁵¹ Section 2(1) (2) *ibid*

section 2(4) of the 2023 Act, the requirement that an arbitration agreement must be in writing can now be satisfied by an electronic communication that is accessible to be usable for subsequent reference. Indeed, the new 2023 Act acknowledges electronic communication and conduct of electronic arbitration proceedings in Nigeria.

Furthermore, in Nigeria, parties to arbitration agreement are not allowed to approach the court on a dispute covered by arbitration agreement. Section 5 of the 2023 Act, empowers the court to stay proceedings and refer parties to arbitration at the instance of a party to the arbitration agreement, where there is an arbitration clause and such matter becomes the subject matter of court proceedings. Thus, the Nigerian Supreme Court has earlier held that it was an abuse of court process for a fresh suit to be instituted in Nigerian court during the pendency of an arbitration proceedings in London.⁵² However, existence of an arbitration clause that is a subject of court proceedings should be raised timeously. In other words, a party who fails to draw the attention of the court to an existence of an arbitration clause in a contract and rely on same at the early stage of the proceedings would be deemed to have waived his right under the arbitration clause.⁵³ In the same vein, in consonance with the principle of natural justice, the arbitral tribunal shall ensure that parties are accorded equal treatment and that each party is given full opportunity of presenting his/her case in arbitral proceedings.⁵⁴ Again, the 2023 Act grant the tribunal at the request of any of the party to the arbitration proceedings, the power to take any interim measures it deems necessary in respect of the subject-matter of the dispute.⁸⁶

Notably, Nigeria has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The 2023 Act, equally takes a pro-enforcement posture as it allows a party to exercise his rights to recognition and enforcement of an interim measure in a manner similar to that of arbitral award.⁵⁵

Arbitration Institutions in Nigeria

There are several arbitral institutions in Nigeria that can entertain commercial disputes including the Lagos Court of Arbitration, Lagos Chamber of Commerce, International Arbitration Centre, among others. Arbitration can also be administered in Nigeria under the rules of international institutions such as the International Court of Arbitration of the International Chamber of Commerce (ICC). However the leading arbitral institution and the focus of our article is the Regional Centre for International Commercial Arbitration Lagos.

The Regional Centre for International Commercial Arbitration, Lagos (“The Lagos Centre”) was established in Lagos-Nigeria in 1989 under auspices of the Asian African Legal Consultative Organisation (AALCO) by exchange of letters of agreement concluded in 1980 between the AALCO and the federal government of Nigeria. The Centre was ratified by treaty executed on the 26th April 1999 in form of a Headquarters Agreement between AALCO and

⁵² *M.V Lupex v. Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR (Part 844) 469

⁵³ See *Akpaji v. Udemba* (2003) 6 NWLR (Part 815) 169

⁵⁴ Section 30, the 2023 Act ⁸⁶ Section 20 *ibid*

⁵⁵ See section 28 *ibid*.

Nigeria. To satisfy the dualist nature of the Nigerian legal system, the domestication of the headquarters agreement was completed and becomes a municipal law known as the Regional Centre for International Commercial Arbitration Act No. 39 of 1999.

From available information,⁵⁶ the Lagos Centre provides a fair and adequate system for settlement of disputes arising out of international commercial transactions including foreign investment and applies UNCITRAL Arbitration Rules of 1976 with necessary modifications and adaptations. The Rules of the Lagos Centre allows a great deal of flexibility in the conduct of proceedings of the arbitration and leaves a wide discretion to the parties with regard to the choice of arbitrators, the place of arbitration and the applicability of the procedural rules. For this reason, the Lagos Centre maintains an international panel of arbitrators and another panel for conciliators and by extension, mediation. Each panel contains the name of a number of eminent jurists, judges and diplomats drawn from the countries in the Asian- African region as well as the countries which have close economic links or large investment in the Asian-African Region.⁵⁷

The facilities for arbitration under the auspices of the Lagos Centre can be availed by the parties who may request for it whether government, individual or bodies corporate, provided the dispute is of an international character. In other words, the parties belong to or are resident in two different jurisdictions, or the dispute involves international commercial interests. The Centre has an autonomous international character. The Centre enjoys all the privileges accorded to other international organizations in accordance with International Law⁵⁸ therefore absolutely necessary for commercial dispute resolution in the West African region and beyond.

The South African Perspective

Arbitration is a well-established and popular mechanism for the resolution of commercial dispute in South Africa. The role of arbitration in the resolution of commercial disputes is further boosted by the enactment of the South African International Arbitration Act in 2017 and the South African Uniform Court Rules 41A of 2020 respectively.

In South Africa, while the Domestic Arbitration Act, 1965, is applicable to all domestic arbitration, the 2017 International Arbitration Act⁵⁹ is applicable to all international arbitration. The Act governs South African law on international commercial arbitration. It applies to any international commercial dispute that the parties have settled for under an arbitration agreement and equally relates to a matter which the parties are entitled to resolve by way of arbitration.⁶⁰ The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration 1985, into South African law, subject to limited modifications and

⁵⁶ see „Regional Centre for International Commercial Arbitration-Lagos“
<https://rcical.rg/index.php/corporate.profile/> accessed 3 August 2024

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Hereinafter referred to as ‘The Act’

⁶⁰ Rogan Bruce and Marthinus Prinsloo, „Arbitration as a Viable Option to Resolve IP Disputes in South Africa“
<https://www.mondaq.com/southafrica/arbitration-disputeresolution/1131204/arbitration-as-a-viable-option-toresolve-ip-disputes-in-south-africa> accessed 9 August 2024 ⁸⁹ See section 6 ibid

adaptations, the most significant of which relate to the power of the arbitral tribunal to order interim measures on request of a party as enshrined under Article 17 of Schedule 1 to the Act.

While the International Arbitration Act, basically relates to international arbitration, it is worthy of note that Schedule 1 to the International Arbitration Act, applies to arbitrations in South Africa.⁸⁹ The Act stipulates further that arbitration agreement must be in writing. It is deemed to be in writing if its contents are recorded in any form, regardless of whether it or the wider contract was originally concluded orally, by conduct or by other means. Thus, arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.⁶¹

Commendably, with the enactment of the International Arbitration Act, arbitral proceedings become a condition precedent to a court action. Therefore, if a commercial dispute that is subject to a valid arbitration agreement is brought before a court, before arbitral proceedings, on a request by a party to the arbitration agreement, the court must stay the proceedings and refer the party to arbitration.⁶² Importantly too, in South Africa, the court is not permitted to intervene and frustrate international arbitration seated in its jurisdiction.⁶³

Arbitration Institution in South Africa

The arbitration institution, most commonly used to resolve large commercial disputes in South Africa, is the Arbitration Foundation of Southern Africa (AFSA). The AFSA is a non-profit organization, private dispute resolution authority which manages and administers the confidential resolution of a wide-range of local and international disputes by way of mediation, adjudication, arbitration and related processes.⁶⁴

AFTA, with its head office in Johannesburg, South Africa, aims to develop and enhance commercial dispute resolution practices in the SADC⁶⁵ countries, by way of a joint initiative between SADC Lawyers Association and AFSA. Thus, commercial disputes in South Africa can be referred to AFTA for arbitration and mediation purposes.

In discharging its duties, AFTA arbitrators are expected to disclose any such circumstances likely to give rise to justifiable doubt as to their impartiality or independence without delay on appointment and throughout the arbitral proceedings, unless the parties have already been informed.⁶⁶ Similarly, to guarantee confidentiality, in arbitration held in private, the award and all documents created for the arbitration that are not otherwise in the public domain must be kept confidential by the parties and tribunal, except to the extent that the disclosure of such documents is required by a legal duty or to protect or enforce a legal right.¹⁰⁰

⁶¹ Section 7 of Schedule 1 to the International Arbitration Act

⁶² Article 8 *ibid*

⁶³ Article 5 of Schedule 1 *ibid*

⁶⁴ 'Arbitration Foundation of Southern Africa' <https://arbitration.co.za> accessed 3 August 2024

⁶⁵ Southern African Development Community

⁶⁶ See Article 12(1) of Schedule 1 to the International Arbitration Act ¹⁰⁰section 11 *ibid*

In South Africa, to encourage flexibility in arbitral proceedings, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.⁶⁷ Significantly, the Act recognizes the concept of *Kompetenzkompetenz* and provides that an arbitral tribunal can rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement.⁶⁸ Indeed, the advent of International Arbitration Act in 2017 coupled with the arbitration friendly jurisdiction, have significantly increase the number of international arbitration particularly in commercial disputes being held in South Africa.⁶⁹

Enforcement of Arbitral Awards on the African Continent Ordinarily, it is expected that the party against whom an arbitral award is made, should voluntarily obey the order as every arbitral award made should be accorded recognition and enforced. In some situations however, a party may be averse to honour the arbitral award. When an award is not conformed with, the question of enforcement becomes inevitable. The New York Convention⁷⁰ is an important international treaty designed specifically for the recognition and enforcement of foreign arbitral awards. Most countries within the African region have ratified the New York Convention and incorporated same in their respective local legislation with some modification to suit local circumstances.

Indeed, the dominant aim of the New York Convention is to ensure ‘that foreign and nondomestic arbitral awards should not be discriminated against, by courts asked to enforce them’.¹⁰⁰ Therefore, the Convention obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. Thus, Article III of the New York Convention mandates Contracting States to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

We will now appreciate the enforcement of arbitral award in Africa within our focused regional jurisdictions.

Domestic and foreign arbitral awards can be enforced in Egypt. The New York Convention came into force in Egypt in 1959. The Convention is recognized and entrenched in Egypt to the extent that the Egyptian Court of Cassation held that if the provisions of the New York Convention contradict the provisions of domestic Egyptian law, the provisions of the New York Convention will prevail.⁷¹ The enforcement of domestic arbitral awards is regulated by the provision of Article 56 of the Egyptian Arbitration Act, which requires a request for

⁶⁷ Article 19(1) *ibid*

⁶⁸ Article 16 *ibid*

⁶⁹ Des Williams, „Arbitration Procedure and Practice in South Africa: overview“

[https://uk.practicallaw.thomsonreuters.com/45020878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/45020878?transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed 2 August 2024

⁷⁰ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. ¹⁰⁰ Karpl Bagh, ‘New York Convention’ <https://www.drishtiilas.com/daily-newsanalysis/new-york-convention> accessed 8 August 2024

⁷¹ See Court of Cassation Challenge No. 282 JY 89, dated 9 October 2020

enforcement to be submitted to the president of the competent court, along with the required documents.

On the other hand, enforcement of foreign arbitral awards is determined by the New York Convention and subject to the same enforcement rules applicable to national arbitral awards under the Egyptian Arbitration Act.⁷² Thus, a foreign arbitration award is enforceable in a similar way to an award issued in Egypt. Enforcement is carried out after depositing the award with the competent court and obtaining a writ of execution.⁷³ It is important to note that the enforcement order can only be submitted after the lapse of the 90-day period prescribed for filing the nullity action.⁷⁴ Simply put, enforcement of arbitral award order should be kept in abeyance until after the 90-day period permitted for filing a nullity action has elapsed. An arbitration award is then enforceable in the same way as a court judgment, through court bailiffs in consonance with other procedures that must be undertaken such as notifying the other party of the arbitral award.⁷⁵

In Egypt, in line with Article 55 of the Arbitration Act, all arbitral awards rendered in accordance with the provisions of the law have the authority of *res judicata* and shall be enforceable in conformity with its provisions. It is also important to note that the Arbitration Act⁷⁶ allows the court to order the enforcement of interim measures decided by arbitral tribunals in arbitrations that are subject to the Arbitration Act. However, the power to order interim measures in the circumstance should be by agreement, conferred on the tribunal by parties to the arbitration.¹¹²

In **Kenya**, arbitral awards are recognized and enforced under the Kenyan Arbitration Act. The enforcement is however made conditional on whether the arbitral proceedings were domestic or foreign. It is to be noted that a domestic award will be recognised as binding and enforced on application to the Commercial and Admiralty division of the High Court. The arbitral award can be challenged. Therefore, an aggrieved party can appeal on a point of law arising in the course of the arbitration or out of the award to the High Court under section 39 of the Kenyan Arbitration Act. However, recourse to the High Court is subject to the parties' agreement that such an appeal can be made. Local arbitral awards can also be set aside on grounds provided under section 35 of the Arbitration Act.

On the other hand, foreign awards are recognised and enforced under the New York Convention to which Kenya is a signatory⁷⁷. The award must, however, have been rendered in a signatory State to the New York Convention. Under the Kenyan Arbitration Act,⁷⁸ for a foreign award to be recognised and enforced, the applicant must provide the court with the

⁷² Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019

⁷³ Article 56 Egyptian Arbitration Act

⁷⁴ Article 58 *ibid*

⁷⁵ Khaled El Shalakany, (n 39)

⁷⁶ Article 24 Egyptian Arbitration Act ¹¹² *Ibid*

⁷⁷ Section 36(2) Kenyan Arbitration Act

⁷⁸ Section 36 (3) *ibid*

original award or a duly certified copy; and the original arbitration agreement or a duly certified copy.

The foreign arbitral awards may be set aside within the contemplation of section 35 of the Arbitration Act. Thus, a party can make an application to the High Court for the award to be set aside within three months of receipt of the award⁷⁹ owing to the reasons that include, party to the arbitration agreement was incapacitated; the composition of the tribunal or arbitral procedure was not in accordance with the agreement; the making of the award was induced or affected by fraud, and the award is in conflict with Kenyan public policy.

Under the Nigerian legal framework, both domestic and international arbitral awards are recognized and enforced. Foreign awards are recognised and enforced in conformity with the New York Convention. Under section 57(1) of the Nigerian Arbitration and Mediation Act 2023, an arbitral award shall be recognized as binding and shall upon application in writing to the court be enforced by the court. The procedure for obtaining enforcement of an award is set out in section 57(2) of the same Act. Therefore, it is mandatory for the party wishing to enforce an award to bring an application before the High Court, annexing the duly authenticated original award or duly certified copy thereof; the original arbitration agreement or a duly certified copy thereof after which, the party shall apply to the court for leave to enforce the award. However, where the international award or arbitration agreement is not made in English language, a duly certified translation into the English language must accompany the application for recognition and enforcement.⁸⁰

South Africa is equally a party to the New York Convention. Thus, the South African International Arbitration Act provides for the recognition and enforcement of foreign arbitral awards as required by the New York Convention.⁸¹ Under the Act, a party seeking a recognition or enforcement of a foreign arbitral award must produce the authenticated or certified original award and the original arbitration agreement in court. However, the court can accept other documentary evidence regarding the existence of the foreign arbitral award as sufficient proof where it considers appropriate.¹¹⁸

A perusal through the appreciation of the recognition and enforcement of arbitral award in Africa reveals that a significant number of African nations have evolved robust mechanisms for the enforcement of arbitral award through legislation by way of domestication of the New York Convention. However, the enforcement of arbitral award is not without its attendant impediments in Africa.

The Impediments to the Enforcement of Arbitral Award in Africa

Arbitration process should be driven by party autonomy and finality of arbitral awards. An award is considered as the ultimate goal of any arbitration process and a party should be allowed to enjoy the fruits of arbitral award. This position is encapsulated by Redfern and Hunter⁸² thus:

⁷⁹ section 35(3) *ibid*

⁸⁰ See section 57(2) (c) of the Nigerian Arbitration and Mediation Act, 2023

⁸¹ See Article 35 of Schedule 1 to the South African International arbitration Act ¹¹⁸ Section 17 *ibid*

⁸² Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern and Hunter on International

...parties who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that, unless a settlement is reached along the way, the proceeding will end with an award. They also expect that, subject to any right of appeal or recourse, the award will be final and binding upon them.

Relatedly, it is not enough for an arbitral tribunal to grant a final and binding award. A successful party in an international arbitration expects the award to be enforceable.¹²⁰ To this end, some national courts in African countries have taken a proarbitration approach by recognizing and enforcing arbitral awards even when it is against state-owned company without any contention.⁸³ Thus, in the *Nigerian case of Shell Trustees (Nig.) Limited v Imani & Sons (Nig.) Limited*,⁸⁴ it was the decision of the court that, upon the recognition of the proceedings for recognition and enforcement of an award, it is immediately enforceable as if it were a judgment of the court in Nigeria. This decision was considered significant because it demonstrated that Nigerian courts are more willing to enforce awards where the parties freely agreed to resolve their disputes by arbitration.⁸⁵

However, enforcement of international arbitral awards may not be as easy as one may think. The enforcement may be complex and in some cases, subjected to excruciating obstacles and resistance⁸⁶ owing to many factors. One of such factors is the role of the national courts in arbitral proceedings viewed as a challenge to the enforceability of awards. In many countries in Africa, the national arbitration laws provide for certain situations whereby the local courts may intervene in the arbitral proceedings at the instance of either party to the dispute. For instance, under the Egyptian Arbitration Act⁸⁷, the competent local court may order provisional or conservatory measures, whether before the commencement of arbitral proceedings or during the procedure based on an application from any of the parties. In the same vein, the new Supreme Constitutional Court Law in Egypt⁸⁸ expanded the scope of the Supreme Constitutional Court's control and vesting it with new powers to review the constitutionality of decisions delivered by international organisations and bodies and foreign court judgments which enforcement is sought against the Egyptian State. In conformity with the new powers, the Egyptian Prime Minister may request the Supreme Constitutional Court, to disregard any decision/judgment rendered by an international organisation/body or a foreign court, and the obligations deriving therefrom, when enforcement is sought against the

Arbitration, 5th edn, (Oxford University Press 2009) 513 ¹²⁰ Robert Opiya, 'Recognition and Enforcement of International Arbitral Awards: A

Comparative Study of Ugandan and UK Law and Practice, LLM Thesis, Oxford Brooks University, 2012, 14

⁸³ Aisha Abdallah and Abbas Esmail, 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' <https://www.ibanet.org/challenges-with-recognitionenforcement-arbitral-awards-africa> accessed 9 August 2024

⁸⁴ (2000) 6 NWLR (Pt 662) 639

⁸⁵ See Abdallah and Esmail (n 121)

⁸⁶ Godwin Odumu Obla (n 29)

⁸⁷ See Article 14

⁸⁸ Law No 137 of 2021 which amended Law No 48 of 1979, which came into effect on August 15, 2021,

State.⁸⁹ Therefore, it is apparent that the Egyptian State can take steps in line with the referenced law to whittle down the cherished party autonomy stance of the arbitration process.

Congruently, section 56 of the Nigerian Arbitration and Mediation Act, 2023 introduces a provision allowing parties to opt for a review of the arbitral award by an Award Review Tribunal (ART). Termed an unusual concept,⁹⁰ the ART, permits a second tribunal to access challenges to an arbitral award reflecting the grounds considered by a court for setting aside an award. Comparable to the court jurisdiction, the ART can either partially or fully set aside the award or uphold it entirely. In situations where the ART's decision is deemed unsound, the court possesses the authority to reinstate the award that was previously set aside. However, the court can only set aside an award upheld by the ART on the grounds of non-arbitrability and public policy. Nonetheless, the ART mechanism falls within the parties to the arbitration's jurisdiction. Whatever may be the merit of the newly introduced ART, we submit that the review of the arbitral award by an Award Review Tribunal in Nigeria, is a cumbersome process and a hurdle to a timely enjoyment of the fruits of arbitral award.

Correspondingly, in Kenya, recent court decisions are viewed in some quarters to be an intervention of courts in party autonomy posture of arbitration system.⁹¹ Before December 2019, and in consonance with the canon of finality in arbitration, a party dissatisfied by the decision of the High Court on an application seeking to set aside an arbitral award, was considered to have no right of appeal to the appellate court. This, indeed, is in tandem with the 1995 Kenya Arbitration Act⁹² which restricts courts' intervention in arbitration proceedings. However, in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*⁹³ the Supreme Court of Kenya found that the decisions of the High Court in regards to enforcement or setting aside of an arbitral award are appealable to the Court of Appeal. While this decision is perceived to upset the previously long held judicial precedent that had affirmed the principle of party autonomy as a key characteristic of arbitration,⁹⁴ the Kenyan Supreme Court further rationalized, justified and reiterated its position in the case of *Synergy Industrial Credit Limited v Cape Holdings Limited*⁹⁵ and held that the decision was anchored on section 35 of the Kenyan Arbitration Act, which ensures that courts can correct specific errors of law which, if left unchallenged, would lead to a miscarriage of justice.

Again, public policy, contained under the New York Convention, can be explored by national courts in Africa as one of the grounds for refusal of recognition and enforcement of arbitral awards. Article V (2) (b) of the New York Convention empowers the courts of the Contracting State to refuse recognition and enforcement of an award when it is discovered that such

⁸⁹ Mohamed Abdel Wahab and Noha Khaled (n 34)

⁹⁰ See Tiwalade Aderoju, 'The Nigerian Arbitration and Mediation Act 2023: A Comparison with the Arbitration and Conciliation Act 2004 and Global Practices' <https://www.ibanet.org/the-nigerian-arbitration-andmediation-act-2023> accessed 3 August 2024

⁹¹ See Nikhil Desai and Elizabeth Kageni (n 30, 66)

⁹² See section 10

⁹³ [2019] eKLR

⁹⁴ See George Kashindi, Margaret Miringu and Nelson Otieno, „Kenya: An Introduction to Dispute Resolution“ <https://chambers.com/content/iem/389> accessed 2 August 2024

⁹⁵ (2019) eKLR

recognition and enforcement would be contrary to its public policy. However, the New York Convention does not clearly provide for a definition of public policy. Thus, public policy issues may transcend what is provided in national laws of various jurisdictions in Africa. It was observed that owing to the fact that the recognition and enforcement of foreign arbitral awards are mostly dependent on the national courts, the national public policy, rather than the international public policy, is sometimes adopted to refuse the recognition and enforcement of arbitral awards.⁹⁶ In the light of the uncertainty and ambivalence surrounding the scope of applicability and meaning of the doctrine of public policy as regards arbitration, it has been suggested that the intercourse between different legal systems in international arbitration requires a developed and harmonized legal infrastructure.⁹⁷

In addition, while the New York Convention, has created a regime for the recognition and enforcement of arbitral award, it is worthy of note that some countries in Africa¹³⁶ are yet to ratify the New York Convention,⁹⁸ leading to different legislative approaches to the enforcement of awards. There is no doubt that absence of standardization in legislative approaches can result to inconsistent legal interpretation that may impact on the recognition and enforcement of arbitral awards in different jurisdictions within the African continent.

Conclusion

The multiplication of international commercial transactions will undoubtedly, increase the number of commercial related disputes in Africa. As most legal systems fail to provide remedies that are preventive, timely, adequate and just, majority of the people are ultimately resorting to informal means of justice, outside the formal system. Arbitration is increasingly becoming popular and acceptable means of resolving commercial disputes across the world, the African continent cannot be left behind in this direction. Remarkably, Articles 3(1) and 20 of the AFCFTA⁹⁹ Protocol on Disputes Settlement has established a dispute settlement mechanism and further makes provisions for arbitration as an alternative route to resolving disputes.¹⁰⁰ It is now the responsibility of stakeholders in commercial world to consider arbitration as a viable alternative to court litigation in Africa.

To this end, African countries yet to ratify the New York Convention are hereby implored to do so immediately in order to effectively and uniformly adopt an arbitration's recognition and enforcement process within the continent. It is also important that the concepts of party autonomy and finality of arbitral awards are jealously protected by the courts across all

⁹⁶ Francis Kariuki, Challenges Facing the Recognition and Enforcement of International Arbitration Awards within the East African Community' <http://kmco.ke/wpcontent/uploads/2018/08/paper-on-recognition-and-enforcement-of-foreign-arbitralawards.pdf> accessed 9 August 2024

⁹⁷ Ibid 136

Such as the Gambia, Chad, Eswatini, Libya, Namibia Somalia, South Sudan and Togo

⁹⁸ Andrew Battisson and Holly Stebbing, 'Enforcement of awards across Africa-42 of Africa's 54 states have not acceded to the New York Convention' <https://www.nortonrosefulbright.com/en/inside-africa/blog/2021/03/enforcement-ofawards-across-africa-42of-africa-54-states> accessed 3 August 2024

⁹⁹ African Continental Free Trade Area

¹⁰⁰ Articles 8 and 27 AFCFTA Protocol on Disputes Settlement.

jurisdictions, to boost the confidence of the international community in arbitration process in Africa. In this regard, the unnecessary intervention of the courts to whittle down the cherished party autonomy department of the arbitration process should be curtailed through legislative procedures.

Furthermore, there is no doubt, arbitration's regional institutions in Africa have immensely contributed to the amicable resolution of commercial disputes within the African region. In view of the successes recorded by these Arbitration Centres as a timely-and cost-efficient alternative dispute resolution institutions, it is further recommended that they should be well funded and strengthened particularly in the area of capacity building geared towards efficient service delivery in consonance with the global realities.

Again, in order to reduce to the barest minimum, the arbitrariness in the interpretation of the doctrine of public policy associated with the recognition and enforcement of foreign arbitral awards by the national courts in Africa, we submit that the African Union should, as a matter of urgency, evolve a uniform legal regime and rules to regulate the recognition and enforcement of international arbitral awards applicable to commercial disputes within the African continent.
