THE INTERNATIONAL ARBITRATION REVIEW

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Editor
James H Carter

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2019

Chapter 24

KENYA

Aisha Abdallah and Faith M Macharia[1]

I INTRODUCTION

i Overview of the legal framework for arbitration in Kenya

The first arbitration law in Kenya was the Arbitration Ordinance of 1914 (Ordinance), which was a reproduction of the English Arbitration Act of 1889. The Ordinance accorded Kenyan courts ultimate control over the arbitration process in Kenya.[2]

The Ordinance was replaced by the Arbitration Act of 1968, which was based on the English Arbitration Act of 1950. The intention was to ensure that arbitration proceedings were insulated from intricate legal court procedures that were seen to hamper efficiency in dispute resolution and slow down the pace of growth in trade.[3]

However, the Arbitration Act of 1968 was found to be inadequate for this task, as it provided a considerable amount of leeway for the courts to interfere with arbitration proceedings. Accordingly, very deliberate steps were taken to reduce the courts' influence on arbitration, including the adoption of the United Nations Commission on International Trade Model Arbitration Law (UNCITRAL Model).

This resulted in legal reforms that led to the repeal of the Arbitration Act of 1968 and its replacement with the Arbitration Act 1995 (Arbitration Act) and the Arbitration Rules of 1997 (Arbitration Rules), which are currently in force in Kenya. The Arbitration Act and the Arbitration Rules were subsequently amended in 2009 by the passing of the Arbitration (Amendment) Act 2009.

ii Structure of the Arbitration Act

The Arbitration Act is divided into eight parts:

a Part I: preliminary matters;
b Part II: general provisions;
c Part III: the composition and jurisdiction of the arbitral tribunal;
d Part IV: the conduct of arbitral proceedings;
e Part V: the arbitral award and termination of arbitral proceedings;
f Part VI: recourse to the High Court against an arbitral award;
g Part VII: recognition and enforcement of awards; and
h Part VIII: miscellaneous provisions.

1 Aisha Abdallah is a partner and Faith M Macharia is a senior associate at Anjarwalla & Khanna.
2 Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].
3 Ibid.

The courts have held that the Arbitration Act is a self-encompassing (or self-sufficient) statute. This means that one need not look beyond its provisions to determine questions relating to arbitration awards or processes. In *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited*,[4] the Court of Appeal stated that the provisions of the Civil Procedure Act and Rules did not apply to matters that are subject to an arbitration process except as provided in the Arbitration Act.[5]

Similarly, in *Anne Mumbi Hinga v. Victoria Njoki Gathara*,[6] the Court of Appeal observed that Rule 11 of the Arbitration Rules had not imported the Civil Procedure Rules hook, line and sinker to regulate arbitrations under the Arbitration Act. It noted that 'no application of the Civil Procedure Rules would be appropriate if its effect would be to deny an award finality and speedy enforcement, both of which are major objectives of arbitration'.

More recently, in *Scope Telematics International Sales Limited v. Stoic Company Limited & another*,[7] the Court of Appeal dealt with a case where a specific and mandatory procedure set out in the Arbitration Act had not been used by the respondent. The appellant challenged the High Court's decision to sustain the application despite disregard by the respondent of the provisions of the Arbitration Act. The Court of Appeal reversed the decision of the High Court and dismissed the application filed in contravention of the Arbitration Act. The Court stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution of Kenya, 2010 (Constitution) or statute, that procedure should be strictly followed.

It is only where the Arbitration Act is silent on an issue that recourse can be made to the Civil Procedure Rules and other applicable legal provisions to fill in any gaps, but not so as to conflict with its aims and objectives.

iii Finality of an arbitral award and party autonomy

The adoption of a UNCITRAL model of arbitration laws had the effect of severely limiting the instances of court intervention in arbitration proceedings in Kenya. This was consistent with the concept of party autonomy and the finality of arbitration awards, both of which were recurrent themes in the Arbitration Act.[8]

The Arbitration Act sought to promote the finality and binding nature of arbitral awards by:

a carefully prescribing and limiting the instances when an arbitral award may be set aside;[9]

b permitting the courts to sever part of an award that is properly within the remit of the arbitrator from that which is not;[10]

c empowering the High Court to suspend proceedings that seek to set aside an arbitral award so as to provide the arbitrator with an opportunity to rectify any faults that would otherwise have justified intervention by the courts;[11]

4 High Court (Milimani Commercial Courts) civil case No. 27 of 2014 [2014 eKLR].

5 See also Section 11 of the Arbitration Rules.

6 Court of Appeal, Nairobi CA No. 8 of 2009.

7 Court of Appeal Civil Appeal No.285 of 2015 [2017 eKLR].

8 See Sections 10, 32A and 36 of the Arbitration Act.

9 Section 35(2) and 35(3) and Section 37(1) of the Arbitration Act.

10 Section 35(2) (a) (iv) of the Arbitration Act.

11 Section 35(4) of the Arbitration Act.

d prescribing strict time frames within which applications seeking the intervention of the High Court in arbitral awards must be made;[12]

e upholding the finality of findings of fact by an arbitrator in relation to interim measures;[13]

f giving the arbitrator the right to rule on his or her own jurisdiction;[14] and

g the absence of an express right of a party aggrieved by a decision of the High Court to appeal to the Court of Appeal except in very limited circumstances.

iv The distinction between international and domestic arbitration

The Arbitration Act applies to both domestic and international arbitration.[15] An arbitration is domestic if the arbitration agreement provides for arbitration in Kenya and if the following conditions exist:

a the parties are nationals of Kenya or habitually resident in Kenya;

b the parties are incorporated in Kenya or their management or control is exercised from Kenya;

c a substantial part of the obligations of the parties' relationship is to be performed in Kenya; or

d the place with which the subject matter of the dispute is most closely connected is Kenya.[16]

On the other hand, an arbitration is international if the following conditions exist:

a the parties to the arbitration agreement have their places of business in different states;

b the juridical seat or the place where a substantial part of the contract is to be performed or the place where the subject matter is most closely connected is outside the state in which the parties have their places of business; or

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

v The structure of the courts in Kenya

The courts in Kenya are organised as follows:

a the resident magistrates' courts, which have original civil and criminal jurisdiction and a limited pecuniary and territorial jurisdiction (the Kadhi's courts,[17] the martial courts and other courts and tribunals established by an act of parliament have the status of a resident magistrates' court);

12 Section 35(3) of the Arbitration Act.

13 Section 7(2) of the Arbitration Act.

14 Section 17 of the Arbitration Act. See also *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited*, High Court Milimani Commercial Court, civil case No. 27 of 2014.

15 Section 2 of the Arbitration (Amendment Act), 2009.

16 Section 3(2) of the Arbitration Act.

17 The jurisdiction of the Kadhi's courts is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

b the High Court of Kenya, which has unlimited original and appellate jurisdiction in both civil and criminal matters (the Employment and Labour Relations Court and the Environmental and Land Court, which are specialised courts established under the new Constitution, have the same status as the High Court);

c the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and

d the Supreme Court of Kenya, whose jurisdiction is limited to:

- determining disputes relating to presidential elections;
- providing an advisory opinion to the government, any state organ or any county government with respect to any matter concerning county governments; and
- determining appeals from the High Court related to the interpretation and application of the Constitution, and matters of general public importance.[18]

Disputes that are subject to arbitration will normally end up in the High Court, and on very rare occasions in the Court of Appeal. Such disputes are, however, unlikely to reach the Supreme Court due to the very limited jurisdiction of the Supreme Court (although see below for a discussion of the *Nyutu* case).[19] A matter of general public importance has been defined as one 'whose determination transcends the circumstances of a particular case and has a significant bearing on the public interest'.[20] It is considered that commercial disputes are unlikely to meet this test.

vi Local arbitration institutions

There are various local arbitration institutions in Kenya, with the main ones being the Chartered Institute of Arbitrators and the Nairobi Centre for International Arbitration (NCIA).

NCIA is a state-sponsored international arbitration centre, and was established under the Nairobi Centre for International Arbitration Act No. 26 of 2013. NCIA has the following objectives:

a facilitating and administering arbitrations;

b training and accrediting arbitrators;

c fostering and developing investment; and

d advocacy and networking with other arbitrations institutions and stakeholders.

NCIA's 2015 rules are modelled on modern international arbitration institution rules, and contain provisions on expedited arbitration, emergency arbitration and multi-party arbitrations.

NCIA held its inaugural conference between 4 and 6 December 2016, and the first NCIA Alternative Dispute Resolution (ADR) National Conference on 5 and 6 June 2018.

18 An appeal may lie from the Court of Appeal to the Supreme Court with the leave of court only if the appeal is certified as involving a matter of general public importance. Where the matters under appeal relate to the interpretation or application of the Constitution, an appeal from the Court of Appeal to the Supreme Court will not require leave of court (Article 163(4) of the Constitution).

19 Civil Application No. 61 of 2012 [2015 eKLR].

20 *Tanzania National Roads Agency v. Kundan Singh Construction Limited*, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR), and *Herman v. Ruscone* [2012 eKLR].

II THE YEAR IN REVIEW

i The principle of finality and minimal local court interference

As stated above, the principle of finality of the arbitration award is a recurrent theme in the Arbitration Act. In practice, the courts in Kenya have upheld and promoted this principle. In the Court of Appeal decision in *Nyutu Agrovet Limited v. Airtel Networks Limited*, the Court found that there is no right of appeal against a High Court decision on an application to set aside an arbitration award.[21]

In *Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited*,[22] the High Court upheld the principle of finality and, following the precedent in *Christ for All Nations v. Apollo Insurance Co Limited*,[23] the Court found that an error of fact or law or mixed fact and law, or of the construction of a statute or contract, on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards the finality of arbitral awards.

While there are limited prescribed circumstances in which the courts in Kenya will intervene in matters or disputes that are subject to arbitral proceedings and processes, the general trend is to limit such court interventions to those cases where it is necessary to support the arbitration process or because of public policy.

ii Party autonomy

Party autonomy with respect to arbitration proceedings has been promoted by the courts following the landmark case of *Nyutu Agrovet Limited (Nyutu) v. Airtel Networks Limited (Airtel)*,[24] discussed in detail elsewhere in this chapter, as seen in such cases as *Aftraco Limited v. Telkom Kenya Limited*.[25] In this case, the court was tasked with determining whether it had jurisdiction to grant orders for consolidation with respect to two parallel arbitration proceedings and, if indeed it had the jurisdiction, whether there was good cause for ordering the consolidation of the proceedings. The court found that it had jurisdiction to determine the application as consolidation was not espoused in the Arbitration Act, and thus such an application could not fall within the limitations of Section 10. The court, however, declined to intervene and order the consolidation of the disputes for determination by a single arbitral tribunal in view of the consensual nature of arbitral proceedings. It was the court's view that, unless consented to by the parties, an order of consolidation would not meet the ends of justice in that matter.

iii Stay of court proceedings pending a reference to arbitration

The courts in Kenya will, as a matter of course, stay any proceedings filed before them that are subject to an arbitration clause, unless the agreement is void or incapable of performance or if there is no dispute between the parties that is capable of being referred to arbitration.[26] There is in fact an automatic statutory stay of proceedings under the Arbitration Act, as the Act is

21 Civil Application No. 61 of 2012 [2015 eKLR].

22 Miscellaneous Civil Application 278 of 2017 [2018 eKLR].

23 [2002] 2 EA 366.

24 Civil Application No. 61 of 2012 [2015 eKLR].

25 [2016] eKLR.

26 Section 6 of the Arbitration Act.

explicit that proceedings before a court shall not be continued after an application for stay has been made and the matter remains undetermined. An application to stay proceedings must be made before or at the point of entering appearance, before acknowledging the claim.[27] The court may, however, decline to grant an application for stay if the applicant fails to satisfy the court that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

In *Niazsons Ltd (Niazsons) v. China Road & Bridge Corporation (CRB)*,[28] CRB entered an appearance in proceedings filed in the High Court by Niazsons but did not file a defence. CRB also applied to stay the High Court proceedings on grounds that the dispute was subject to arbitration. In turn, Niazsons applied for judgment against CRB on grounds that the latter had not filed a defence to the High Court proceedings, and further argued that the claim was not disputed. However, the Court of Appeal held that upon filing a stay application, CRB's obligation to file a defence was suspended and judgment would not be entered.

iv Interim measures of protection pending a reference to arbitration

The Arbitration Act allows a party to approach the High Court to obtain interim measures of protection pending arbitration.[29] Such measures include status quo orders, injunctions to halt an action that would cause irreparable loss or prejudice the arbitration process, and orders to preserve assets or evidence.

The test for the grant of interim measures of protection involves an analysis of the following factors:

a the existence of an arbitration agreement;
b whether the subject matter of the dispute is under threat;
c the appropriate measure of protection to be taken depending on the circumstances of the case; and
d the duration of the interim measure of protection so as to avoid encroaching on the arbitral tribunal's decision-making power.[30]

The courts have also found that such interim measures take different forms and go under different names. However, whatever their description, they are intended in principle to operate as holding orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

v Setting aside of arbitral awards by the courts in Kenya

The Arbitration Act prescribes limited scope for the courts in Kenya to set aside an arbitral award. An arbitral award may only be set aside if one or more of the following grounds are proved, namely:

a incapacity of a party;
b invalidity of an agreement;
c insufficient notice of appointment of an arbitrator or of the arbitral proceedings;
d where an arbitrator exceeds the scope of his or her reference;
e where an award is induced or influenced by fraud or corruption;

27 Ibid.
28 Court of Appeal, Civil Appeal No. 187 of 1999.
29 Section 7 of the Arbitration Act.
30 *Safaricom Limited v. Oceanview Beach Hotel*, Civil Application No. NAI 327 of 2009 (UR 225/2009).

f where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,[31] unless that agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act;

g where the dispute is not capable of being resolved by arbitration; or

h where the arbitral award is against public policy. [32]

Accordingly, the courts of Kenya will not set aside an arbitral award even if it is shown to be affected by an error of fact or an error of law (except where the error of law is apparent on the face of the record).[33] Further, an application to set aside an arbitral award must be made within three months from the date of delivery of the award, which timeline has been strictly enforced by the courts in Kenya.

In *Hinga v. Gathara*,[34] Hinga applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, in rejecting the application to set aside the award, the Court held that a failure to notify Hinga of the delivery of the award was not one of the prescribed grounds under the Arbitration Act for setting aside. Further, the Court held that a party cannot apply to set aside an award after three months of delivery of the award even if it was for a valid reason. The Court observed that 'in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for finality.'

Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (Agency)[35] concerned an application to set aside an award made by two of the three arbitrators appointed by the Stockholm Chamber of Commerce. The applicant had also appealed the award in Stockholm. The judge held that the application to set aside should have been made in Sweden, which had primary jurisdiction as the arbitral seat. He upheld a preliminary objection raised by the Agency on the basis that Kenya only had secondary jurisdiction under Section 37 of the Arbitration Act as to recognition and enforcement. There is fairly wide scope for the courts in Kenya to interfere with an arbitral award on grounds of public policy due to its undefined nature. In *Christ for All Nations v. Apollo Insurance Co Limited*,[36] Mr Justice Ringera noted that 'public policy is a most broad concept incapable of precise definition', and he likened it to 'an unruly horse' that 'once one got astride of it you never know where it will carry you'. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).

31 The agreement of the parties should conform with the Arbitration Act to allow for this caveat.

32 Section 35(2) of the Arbitration Act.

33 *Kenya Oil Company Limited & Anor v. Kenya Pipeline Company Limited* [2014 eKLR].

34 Court of Appeal Civil Application No. 285 of 2008 (UR 187/2008).

35 High Court (Nairobi Law Courts) Miscellaneous Civil Cause 248 of 2012 [2012 eKLR].

36 [2002] 2 EA 366.

vi Enforcement and recognition of arbitral awards

Section 36 of the Arbitration Act provides that a domestic award shall be recognised as binding upon application in writing to the High Court and shall be enforced subject to Section 37. Section 37 sets out the limited instances in which the High Court may decline to enforce an arbitral award. These grounds are similar to the grounds upon which the High Court may set aside an arbitral award (see subsection iv above).

A party may make an application to the High Court to enforce an international or domestic arbitral award as a decree of the Court if no party has filed an application to set aside the award within three months. An applicant seeking enforcement of an arbitral award will be required to provide the original arbitral award or a duly certified copy of it; the original arbitration agreement or a duly certified copy of it; and, if the arbitral award or the arbitration agreement is not made in the English language, a duly certified translation of it into the English language.

However, a court is unlikely to refuse to enforce an award on account of a failure by an applicant to comply with the foregoing procedural requirements. In *Structural Construction Company Limited v. International Islamic Relief Organization*,[37] the applicant failed to furnish the original or a certified copy of the arbitration agreement. The Court held that this omission was not fatal to the application, and a copy of the arbitration agreement that was annexed to the applicant's supporting affidavit was held to be acceptable for purposes of enforcement of the award.

The fact that a party has failed to apply to set aside an award within the three-month period prescribed in the Arbitration Act does not preclude him or her from objecting to an application seeking to enforce the award. In *National Oil Corporation of Kenya Limited (NOCK) v. Prisko Petroleum Network Limited (Prisko)*,[38] Prisko opposed an application by NOCK to recognise an award made against it in respect of an agreement for the supply of automotive gas oil. NOCK argued that Prisko was precluded from objecting to the enforcement of the award since it had failed to apply to set aside the award within the three-month limitation period prescribed in the Arbitration Act. The Court held that the opportunity to be heard on an application for the enforcement of an award was not lost because the person against whom the award was to be enforced had not filed an application to set aside the award.

vii Appeals in relation to arbitration proceedings

There is very limited scope for the courts in Kenya to interfere with an arbitral award or proceeding by way of an appeal process.

The right of an appeal to the High Court only exists by agreement of the parties, and even then only on points of law.[39] Similarly, appeals from the High Court to the Court of Appeal only lie on domestic awards by an agreement of the parties or with the leave of the Court of Appeal, and on condition that the Court of Appeal is satisfied that the appeal raises a point of law of general importance that affects the rights of the parties. This position was reaffirmed in *Hinga v. Gathara*, where the Court of Appeal held that there was no right to appeal a decision of the High Court refusing to set aside an arbitral award.

37 High Court Nairobi, Miscellaneous case No. 596 of 2005.

38 High Court (Milimani Commercial Courts) civil case No. 27 of 2014 [2014 eKLR].

39 Section 39 (1) (b) of the Arbitration Act.

In *Nyutu*,[40] the Court of Appeal expressly rejected the position in the previous *Shell v. Kobil* case that there the Arbitration Act had not taken away the jurisdiction of the Court of Appeal to hear appeals from the High Court. *Nyutu v. Airtel* concerned a distributorship agreement between the parties for the distribution of Airtel's telephony products. An award was made in favour of Nyutu, and Airtel filed an application in the High Court to set aside the award on grounds that it dealt with matters outside the parties' agreement and the arbitrator's terms of reference. The application was allowed in the High Court, and the award was set aside. Thereafter, Nyutu appealed to the Court of Appeal against the High Court's decision to set aside the award. Airtel filed an application challenging the appeal on, among other grounds, the fact that the appeal departed from the provisions of the Arbitration Act. In a unanimous decision, the Court of Appeal found that there was no right to appeal to the Court of Appeal against the High Court's decision to set aside the award. The Court of Appeal further noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties. Nyutu applied to the Court of Appeal to certify the case as being of general public importance, and thereby to obtain leave to appeal to the Supreme Court. The Court of Appeal allowed the application. Airtel was aggrieved by the decision of the Court of Appeal, and made an application to the Supreme Court for a review of the Court of Appeal decision granting leave to appeal. This application for review was declined by the Supreme Court. The matter is now pending before the Supreme Court, which will make a final and binding decision on this issue.

The High Court decision in *Nyutu* has been criticised.[41] The judge in this case was not convinced that Sections 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from the decision of the High Court. The judge observed that the Court in *Nyutu*, in professing to respect and uphold the finality of the arbitral process, had inadvertently invested the High Court and not the arbitrator with finality, and was of the view that the majority decision in *Kenya Shell* represents the correct position of the law. This is an indication that there is no congruence among the courts in Kenya on whether a party in arbitration can appeal from the decision of the High Court.

The Court of Appeal in *Tanzania National Roads Agency v. Kundan Singh Construction*[42] observed that the UNCITRAL Model Law, upon which the Kenyan Arbitration Act is based, shows that there was a clear and deliberate intention to limit court intervention in arbitration matters, and proceeded to dismiss the appeal on the basis that there is no right of appeal against a decision to accept or refuse recognition and enforcement.

Despite the criticism of the Court of Appeal, the principles in *Nyutu* are still being upheld with the proviso that they remain as good law until overturned by the Supreme Court. This was seen in *Micro-House Technologies Limited v. Co-operative College of Kenya*[43] and *DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited*.[44]

40 *Airtel Networks Kenya Limited v. Nyutu Agrovet Limited* [2018] eKLR.

41 Article 164 (3) of the Constitution.

42 Court of Appeal (Nairobi Law Courts) Civil Appeal 38 of 2013 [2014 eKLR].

43 [2017] eKLR.

44 [2016] eKLR.

viii Developments affecting international arbitration

The New York Convention and other international instruments

Section 37 of the Arbitration Act provides that an international award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention)[45] or any other convention to which Kenya is a signatory that relates to arbitral awards.

Accordingly, an international award may also be enforced in Kenya in accordance with the provisions of the International Convention on the Settlement of Investment Disputes (ICSID), the Geneva Protocol on Arbitration Proceedings, 1923 and various bilateral investment treaties (BITs) that have been signed by Kenya.[46]

Prior to the coming into force of the current Constitution, Kenya was a dualist state, which essentially meant that all conventions, treaties or other international instruments that Kenya had ratified only came into force in Kenya once they went through a domestication process and were recognised in an act of parliament as part of the laws of Kenya.

However, it has been suggested that Section 2(5) and 2(6) of the current Constitution dispensed with the requirement for the domestication of conventions, treaties and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya. The effect of this would be that Kenyan courts can now readily apply the provisions of conventions, treaties and international instruments that have been ratified by Kenya, including those that deal with arbitration, without requiring that they first be adopted as an act of parliament through an elaborate and lengthy domestication process.

ix Investor–state disputes

There has been a significant increase in BITs in Africa and, as a result, an increase in foreign direct investment (FDI). In the 2018 World Investment Report by the United Nations Conference on Trade Development, Kenya was reported to have received US$672 million in 2017.[47] *World Duty Free Company Limited v. The Republic of Kenya* is one notable ICSID decision that involved Kenya. It remains to be seen how an application for enforcement of the ICID award will be dealt with by the courts in Kenya.[48]

III OUTLOOK AND CONCLUSIONS

It is evident that there is scope for growth in the areas of domestic and international arbitration in Kenya. The constitutional recognition of ADR and development of a legal regime for

45 Kenya acceded to the New York Convention with a reciprocity reservation such that it only recognises convention awards.

46 See the UNCTAD website (https://investmentpolicyhub.unctad.org/IIA/CountryBits/108) for a list of BITs that have been signed by Kenya.

47 www.fdiintelligence.com/Locations/Middle-East-Africa/African-Countries-of-the-Future-2013-14.

48 There are also ongoing international arbitrations between Vanoil Energy Limited and Kenya, and between WalAm Energy Limited and Kenya. The WalAm Energy dispute relates to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession.

mediation,[49] and the establishment of NCIA and several local arbitration centres, are notable developments. The national government is keen to promote the use of NCIA as part of its efforts to attract foreign direct investment.

However, in spite of the goodwill and commitment of major stakeholders such as the judiciary, Parliament and the government to promote arbitration and other forms of ADR mechanisms in Kenya, there remain challenges. These include the cost of arbitration, lack of local arbitrators, perceived corruption and an overlap of the functions of arbitration centres. These issues will need to be addressed if Kenya is to experience real growth in domestic and international arbitration.

49 See Sections 59A, 59B, 59C and 59D of the Civil Procedure Act.

Appendix 1

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AISHA ABDALLAH

Anjarwalla & Khanna

Aisha Abdallah is the head of the dispute resolution department at Anjarwalla & Khanna (A&K). Her practice focuses on all aspects of commercial litigation, with a particular emphasis on anticorruption issues, money laundering and disputes over land, environment and natural resources.

Aisha is dual qualified as an advocate of the High Court of Kenya and a solicitor of England and Wales. She joined A&K from Shoosmiths in the United Kingdom in 2012 and has over 17 years of experience in complex, high value litigation. She also has experience in alternative dispute resolution, including multi-party mediation and international arbitration.

Aisha was recently appointed as a member of the MARC Court established as the ADR arm of the Mauritius Chamber of Commerce and Industry, joining some of the world's most eminent arbitration experts. She is the co-author of the Kenyan chapter of the 6th, 7th, 8th and 9th editions of *The International Arbitration Review* as well as the country rapporteur for Kenya for the 2nd and 3rd editions of the ICC Guide on the New York Convention.

Aisha is part of an expert team that drafted Anti-Money Laundering, Remittances and Mobile Money Bills for Somaliland, and advises corporate clients on best practice in combating financial crime and cybercrime.

Aisha regularly conducts external training, and writes and speaks on a wide range of contentious issues including arbitration, corruption and compliance issues, including the Kenya chapter of the 2018 *Chambers Anti-Corruption Global Practice Guide*.

FAITH M MACHARIA

Anjarwalla & Khanna

Faith M Macharia is a senior associate in the dispute resolution department at A&K. She has handled a blend of complex matters before the High Court, the Court of Appeal, local tribunals and international tribunals appointed by the London Court of International Arbitration. These matters include oil and gas disputes, construction disputes, completion accounts disputes, shareholder disputes, employment matters and tax disputes.

Faith is qualified as an advocate of the High Court of Kenya and is also a member of the Law Reform and Devolution Committee of the Law Society of Kenya. Faith has been on secondment to Stephenson Harwood, London, a leading multinational law firm. She is a co-author of the Kenyan chapter of the 7th, 8th and 9th editions of *The International Arbitration Review*. She also speaks as a panellist on arbitration topics in the region, including at the 2016 East Africa International held in Kampala.

Faith was ranked as an associate to watch in 2018 *Chambers* rankings in dispute resolution in Kenya. Clients acknowledged that 'she has very good insights and is always on top of facts and strategy'.

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