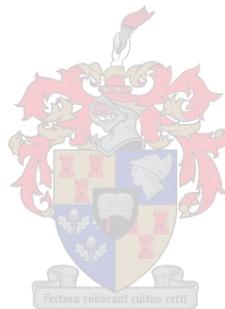


**A Comparative Study of Law and Practice of  
Arbitration in Kenya, Nigeria and Zimbabwe, with  
Particular Reference to Current Problems in  
Kenya**

By

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## **DECLARATION**

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## **SUMMARY**

Arbitration as a mode of dispute settlement has been growing steadily all over the world. The momentum for commercial arbitration in particular was provided by the 1985 UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”). Legislation based on the Model Law has been enacted in many countries. The arbitration laws of three of these countries, Kenya, Nigeria and Zimbabwe, are selected for consideration in this dissertation because of their common origins, similar statutes, similar problems, shared experiences, and their regional distribution. As the writer’s arbitration practice is based in Kenya, that jurisdiction is the primary, albeit not the only, source and foundation for this work, the focal point of reference and the citations from the law and practice incorporated in this research.

The work consists of three chapters. Chapter one is a brief introduction and an overview of arbitration. This is followed by the statement of the research question, the justification for the research, methodology and the structure and content of the dissertation. Chapter two describes the legal and contextual framework for the investigation of the research questions in the selected jurisdictions of Kenya, Nigeria and Zimbabwe. Customary Law arbitration is included as a significant feature of African arbitration law. The UNCITRAL Model Law, the Arbitration Act, 1995 (Kenya), the Arbitration and Conciliation Act, 1988 (Nigeria), the Arbitration Act, 1996 (Zimbabwe), the Arbitration Act, 1996 (England), and the South African Draft Arbitration Bill are all used as legislative or statutory points of reference in the discussion of the research questions.

Chapter 3 contains the main focus of the dissertation in which six recurrent arbitration problems in Kenya are discussed in the context of domestic arbitration. The research investigates (i) the illusiveness of consent as the basis for consensual arbitration (ii) jurisdictional challenges (iii) the procedural powers of the arbitral tribunal (iv) the disruptive effect of adjournments and postponements on the arbitral process (v) constraints on the granting of interim relief and (vi) the enforcement of the arbitral award. Original, creative and innovative proposals in response to these problems include: the express legislative recognition of the manifestation of consent in both the verbal and written forms of the arbitration agreement, the use of the constructive dispute resolution technique, statutory recognition of customary law arbitration, the use of an expedited arbitration procedure, the award of exemplary and punitive

damages in arbitration, a code of sanctions to facilitate the arbitration process, and a simplified method of enforcement and execution of the arbitral award.

The dissertation concludes with reflections on the future of arbitration in Africa, and the need for modernization and harmonization of arbitration laws for peaceful resolution of disputes and serious conflicts across Africa.

The aim of this study is best illustrated by a short story: In the early nineties there was a man, untrained in any known discipline, who strutted court corridors, trade centres and market places, carrying a placard advertising himself to lawyers, traders and marketers as “An Arbitrator and Private Judge”. He attracted business, charged a handsome percentage fee on the value of the claim, was duly paid, until officialdom caught up with him and put paid to his burgeoning career as “Arbitrator-Judge”. But the reckless enthusiasm spawned by his wit and imagination, and the idiosyncratic practices in dispute resolution persisted and are manifest in Kenyan arbitration culture today. The need to remove bad practices, avoidable impediments, and inefficiency in the arbitration culture of Kenya in order to make its procedures and processes more efficacious, is the heart of this study.

\*\*\*\*\*

## OPSOMMING

Arbitrasie as 'n wyse van geskilbeslegting is wêreldwyd aan die toeneem. Die 1985 UNCITRAL Modelwetgewing insake Internasionale Kommersiële Arbitrasie het die momentum hiervoor gebied. Talle lande het vervolgens gereageer deur wetgewing geskoei op hierdie model te promulgeer. Die arbitrasiereg van drie lande, teweete Kenia, Nigerië en Zimbabwe, is vir doeleindes van hierdie proefskrif gekies op die basis van gemeenskaplike geskiedenis, soortgelyke wetgewing, soortgelyke probleme, gedeelde ervarings en regionale verspreiding. Aangesien die skrywer se arbitrasie-praktyk in Kenia gebaseer is, word hierdie jurisdiksie as die primêre, alhoewel nie die enigste, bron en basis vir die navorsing gebruik.

Die werk beslaan drie hoofstukke. Hoofstuk een verskaf 'n kort inleiding tot en oorsig van die reg rakende arbitrasie. Dit word gevolg deur die navorsingsvraag, die rasionaal vir die navorsing, metodiek en die struktuur en inhoud van die proefskrif. Hoofstuk twee bied die regs- en kontekstuele raamwerk vir die ondersoek in die gekose jurisdiksies, nl. Kenia, Nigerië en Zimbabwe. 'n Bespreking van gewoonteregtelike arbitrasie word ingesluit, aangesien dit 'n belangrike deel van Arbitrasiereg in Afrika uitmaak. Die UNCITRAL Modelwetgewing, die Wet op Arbitrasie 1995 (Kenia), die Wet op Arbitrasie en Konsiliasie 1988 (Nigerië), die Wet op Arbitrasie 1996 (Zimbabwe), die Wet op Arbitrasie 1996 (Engeland) en die Suid-Afrikaanse Konsepwet op Arbitrasie word gebruik as die statutêre basis vir die bespreking van die navorsingsvrae.

Hoofstuk 3 handel met die hooftokus van die proefskrif. Ses probleme wat telkemale opduik in die konteks van plaaslike arbitrasies in Kenia, en wat as die navorsingsvrae geïdentifiseer is, word vervolgens bespreek. Hierdie probleme is (i) die ontwykendheid van toestemming as basis vir arbitrasie deur ooreenkomste; (ii) jurisdiksionele uitdagings; (iii) die prosedurele magte van 'n arbitrasie tribunaal; (iv) die onderbrekende effek van verdagings en uitstelle van arbitrasie-verhore; (v) beperkinge op die verlening van tussentydse regshulp, en (vi) afdwinging en uitvoering van die arbitrasie-toekenning. Oorspronklike, kreatiewe en innoverende voorstelle as antwoord op hierdie probleme sluit in: die uitdruklike statutêre erkenning van toestemming tot arbitrasie in beide mondelinge en geskrewe vorms; die gebruik van konstruktiewe dispuutoplossingstegnieke; statutêre erkenning van gewoonteregtelike arbitrasies; die gebruik van 'n versnelde arbitrasie-prosedure; die verlening van skadevergoeding in die vorm van 'n strafbedrag; 'n kode van sanksies

om die arbitrasie proses te fasiliteer; en 'n vereenvoudigde wyse waarop arbitrasie-toekennings afgedwing en uitgevoer kan word.

Die proefskrif sluit af deur die toekoms van arbitrasie in Afrika te bespreek, asook die behoefte aan modernisering en harmonisering van arbitrasiereg ten einde geskille dwarsoor Afrika op 'n vreedsame wyse te kan besleg.

\*\*\*\*\*

Nota: Hierdie proefskrif weerspieël die reg soos in 2008.

## ACKNOWLEDGEMENT

*Peace is not the absence of war  
It is the presence of love, harmony, satisfaction and  
oneness in the world family  
Peace is the harmonious control of life, a vibrant  
life-energy and a power that easily transcends  
all our worldly knowledge.*

*Sri Chinmoy  
Inauguration of the Peace Mile  
Cuttslowe Park, Oxford, 29<sup>th</sup> May 1987*

On a brisk morning exercise walk, I chanced upon this inscription on a memorial board in Cuttslowe and Sunnymead Park at Oxford, England. The message struck a chord and brought me to a standstill, causing me to take stock of my immediate surroundings. On that beautiful summer dawn, the near empty park was conducive to reflection and I pondered what had brought me all the way from Africa to this enchanting spot in such serene landscape and to this nugget of enlightenment.

I had spent the previous couple of days in the subterranean vaults of the Bodleian Libraries of Oxford University researching peaceful ways, ancient and modern, of resolving disputes and destructive conflicts. Now here I stand, away from the bibliographic monuments, in these vast open fields as though delivered by an unseen hand to a grander celestial presence and to this vision of peace. I was inspired by the coincidence of conflict and peace and in that moment of immersion, my thoughts turned to all those who had directly and indirectly influenced my work on conflict resolution and peaceful settlement of disputes.

In no particular order of recall they include: my daughter Katharine Torgbor (“Tosh”) who enthusiastically encouraged my visit to Oxford; Dr. Wanjiru Njoya, an Oxford don who facilitated my brief sojourn at St. John’s and Wadham colleges, thereby affording me the opportunity for scholarly interaction, the experience of High Table dinners and insightful discourses; Helen Wilton-Godberfforde of the Bodleian Library and Hedy Boland of Rhodes House, both of whom facilitated my admission to, and use of, those great and magnificent university libraries; and Melinda Heese, subject-librarian of Stellenbosch University, who ever so readily obliged my requests for tracking down uncommon publications and materials tucked away in the inner

recesses of the law library or assisting me to access publications from other lending libraries outside Stellenbosch.

Several eminent arbitration practitioners who spared me some of their valuable time in discussions during my research also come to mind. Among them are Professor Derek Roebuck, Lord Michael Mustill, Neil Kaplan, John Uff, Arthur Marriott and Arthur Harverd.

I am particularly grateful to my secretaries, Rose Wangu and Elizabeth Oluoch, for their patience with me and the considerable time spent in checking and ensuring that the draft dissertation was, as far as possible, free of typographical and print errors.

Regrettably the completion of this project was inordinately delayed. The story is long and on record and I have made a conscious decision to move on. That leads to my two promoters, Dr. Juana Coetzee (Internal) and Prof. Derek Roebuck (External). Their involvement was a critical turning point in this project. There was work to be done. There was little time to do it. Both moved swiftly, with impressive speed, skill, expertise and not a little generous spirit to guide the successful revision of the dissertation. I am deeply grateful to them.

A very special place in the flood of memory and gratitude was and is held by Lilian Musau, my gracious wife and support throughout this exercise. She it was who put in the mountainous hours of typing, organizing and arranging the successive drafts of this work until its completion. Like me, she also experienced the long periods of anticipating the successful conclusion of this project so that she could, in her own words, “begin to take a closer look at the fine vineyards of the Western Cape”, with her proffered intention of taking up vinology as a career. I concede a benefit of doubt on that dream.

Thank you very much everyone here acknowledged for your support and assistance in facilitating this work, and to earn this praise, although the opinions and conclusions drawn, except where attributed to others, are mine alone.

Now, salutations to my beloved Gurumayi Chidvilasananda

*Om santih, santih, santih*

*Sadgurunath, Maharaj ki Jay!*

Hon. Justice Edward Torgbor

Stellenbosch

South Africa

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## CHAPTER ONE

### THE ORIGINS

*“Arbitration has a long Past, but scarcely any History. Over the years there have been treatises, and recently a torrent of articles, seminar papers, case digests, together with quite a number of books. But almost all of these are snapshots, slides, cross-sections of the contemporary worlds of dispute resolution, localized by time and space. There are none of the grand perspectives in which modern arbitration could be viewed as the inheritor of a continuous process of change.”<sup>1</sup>*

#### 1.1 The Foundation

The law develops slowly, alas and oftentimes, too slowly. But what the law also stubbornly refuses to do, is to stand still. Inevitably therefore, a sense of legal history<sup>2</sup> is a compelling aid to the comprehension of new law.<sup>3</sup>

This discourse is on modern arbitration law in three representative regions of Africa. The history is embedded in antiquity. Roebuck<sup>4</sup> provides fascinating glimpses of the early life of arbitration through the ages: from Aeschylus’s Athens and ancient city states in which arbitration was already an established system of dispute resolution; the transition from Greek influence to Rome where arbitration was known from the time of the Twelve Tables and the use of the formulaic *compromissum* by which parties

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<sup>1</sup> Mustill MJ, Foreword to Roebuck D “Sources for the History of Arbitration” (1998) 14(3) *Arbitration International* 235.

<sup>2</sup> See generally Visser DP (ed) *Essays On the History of Law* (1989); Midgley TS “The Role of Legal History” (1975) 2 *British Journal of Law and Society* 153 155 *et seq*; Nader L *The Life of the Law* (2002) ch 1 and 2; Edgeworth B *Law, Modernity, Postmodernity* (2003); Handler JF *Social Movements and the Legal System* (1978).

<sup>3</sup> A broad but functional definition of law is that it is a set of rules people accept as binding, particularly where the rules emanate from an authoritative source (such as a legislature) and are enforced by the organs of state (such as a judiciary and police authority). See Redgment J *Introduction to the Legal System of Zimbabwe* 2<sup>nd</sup> ed (1981). See also para 2.3.1 below.

<sup>4</sup> Roebuck D “The Myth of Judicial Jealousy” (1994) 10 *Arbitration International* 395 – 406 reprinted in *Disputes and Differences* (2010) 300 – 311; Roebuck D “A Short History of Arbitration” in Kaplan H, Spruce J and Moser MJ *Hong Kong and China Arbitration: Cases and Materials* (1994) XXXIII – IXV.

submitted their dispute to an arbitrator of their choice and entered into a penal bond which the praetor enforced; the laws of Hlothere and Eadric of Anglo-Saxon England by which the dispute was referred to a third party who helped the parties to a compromise; and then into the Middle Ages when parties took advantage of the benefit of arbitration to solve their own problems and those of others. Of the three categories of arbitration that then already existed,<sup>5</sup> the first was created by the agreement of the parties, the second, from the parties' membership of a community (such as a merchant or trade guild) whose rules bind the parties to submit their disputes to community-appointed arbitrators, and the third, was court-sponsored arbitration, either *suo moto* or at the request of one or both parties, during or instead of litigation.<sup>6</sup>

The common law court and its tradition, as inherited in Africa, allowed an arbitration or an award to be pleaded in bar to an action and the Curia Regis Rolls and Year Books attested to the popular use of arbitration throughout the 13<sup>th</sup> and 14<sup>th</sup> centuries. Then, as now, the law courts acted in some ways as arbitrator or sponsor of forms of alternative dispute resolution.<sup>7</sup> Throughout the ages there was always the comforting constancy, even during change, of the advantage arbitration offered for reconciliation through compromise and the restoration of peace as its aim, instead of an objectively just solution - a core essence inherited and transferred with embellishments into modern arbitration practice worldwide and in Africa, as evident in the discussion of the legal framework of arbitration in Chapter 2.

This study investigates problems in Kenyan arbitration law and practice. The research question, consisting of six selected problems of common occurrence in Kenyan arbitration, are set out in paragraph 1.3 and discussed in Chapter 3. The concept, rationale and justification for the research are stated in paragraph 1.4 and the method by which the work is undertaken is described in paragraph 1.5 wherein the

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<sup>5</sup> Other sources cited by Roebuck are: Hogg QW *The Law of Arbitration*; Aristotle *Athenian Constitution* para 53; Bonner RJ *The Jurisdiction of Athenian Arbitrators* 408; Watson A *Roman Private Law around 200 BC* 2; Attenborough FL *The Laws of Earliest English Kings* 20 – 21. Adams H *The Anglo-Saxon Courts of Law* 26, 53, and Vinogradoff P *Outlines of Historical Jurisprudence* 1 345 – 354.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

reasons for the comparative study involving Kenya, Nigeria and Zimbabwe are also elaborated. The structure and content of the study is explained in paragraph 1.6.

This study draws on the writer's own field work and wide consultations and interviews with eminent scholars and specialists in the study field from Africa and beyond. It is aided also by insights from discussions with fellow participants at international arbitration seminars and workshops. It is a modest beginning intended as a contribution to knowledge and scholarship in Africa. Its uniqueness is twofold: first, it is a study that has not been specifically undertaken so far from a Kenyan perspective. Secondly, it is work to whose outcome the importance and uniqueness of the writer's inside knowledge of the reality of the problems in Kenya, is intended to contribute, perhaps not only for Kenya but for Africa.

Modern arbitration law, with its long past, is no exception to the common evolutionary pattern of refusing to stand still. On the contrary and notwithstanding the fission lines that run through arbitration, such as those between theory and practice, domestic and international arbitration, customary and statutory arbitration, and the idiosyncratic patterns in the civil and common-law arbitral traditions, arbitration is firmly established as a distinctive means of resolving disputes. The difficulties that still remain, hold out the challenge and prospects for study, and stimulate new perspectives, through which modern arbitration could justly claim to be the beneficiary of a continuous process of change and, consequently, progress.

## **1.2 Arbitration in Crisis: An Overview of the Nature, Definition and Form of Arbitration**

### **1.2.1. The Crisis of Nature and Definition**

In its simplest formulation arbitration is a means for disputing parties themselves to settle their dispute.<sup>8</sup> They do so by agreeing to appoint someone else to determine

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<sup>8</sup> A Dispute can simply mean a quarrel, debate or argument. See Davidson GW, Seaton MA & Simpson JA *Chambers Concise 20<sup>th</sup> Century Dictionary*). It can also mean conflict or controversy or a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other (see *Black's Law Dictionary* 6<sup>th</sup> ed (1990)). See also Iwara AU "Nature, Sources and Causes of Disputes" unpublished paper delivered at an ADR Conference in Abuja,

their differences. The person they appoint, the arbitrator, makes the decision the parties will not make but does so on their behalf.

Despite the modern trend towards harmonization there is no single uniform definition of arbitration. The writer would describe arbitration as a procedure by which the disputing parties resolve their dispute by choosing an arbitrator or a tribunal or through a method to which they have consented, corresponding with the Chartered Institute of Arbitrators' definition that:

“[a]rbitration is the process whereby the parties in dispute appoint or have appointed on their behalf an independent neutral person to resolve the dispute.”<sup>9</sup>

Some writers admit the difficulty in defining arbitration<sup>10</sup> but nevertheless offer illustrative definitions.<sup>11</sup>

The authors of *Russell on Arbitration*<sup>12</sup> explain that although arbitration has been used in England and elsewhere for centuries the need for a definition has always been subsidiary to its purpose as a means for resolving a dispute.

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Nigeria, July 2007, who states: “we may say that by dispute, we mean a debate or a situation of interaction involving two or more parties in which actions in pursuit of incompatible objectives or interests result in varying degrees of discord. There are several words commonly used to refer to it. Some are conflict, war, violence, crisis and fight.” Gabi M, Van der Merwe HW & Kawa W *Conflict Accommodation: Towards Conceptual Clarification* Centre for Intergroup Studies, Conflict and Peace Studies Series no 1 (1986) 3 state that conflict is “the assertion of contrary claims of right, which is latent when those claims of right are not asserted. When those claims of right are asserted, conflict develops into a dispute.” See also Halsbury’s *Laws of England* 4<sup>th</sup> ed Vol 2 para 602 for the distinction between “dispute” and “difference”. Regarding arbitration clauses that require a “dispute” or “difference” see Mustill MJ & Boyd SC *Law and Practice of International Commercial Arbitration* 2<sup>nd</sup> ed (1989) 122.

<sup>9</sup> Chartered Institute of Arbitrators *Consumer Arbitration Scheme for the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA)* England (2000).

<sup>10</sup> Brown & Marriot *ADR Principles and Practice* 2<sup>nd</sup> ed (1999) 49. The authors say that defining arbitration is not so easy and that no statutory definition is available in English law. Definitions of “arbitration” in arbitration statutes are usually of a formal nature and do not explain what arbitration actually is. For example, the UNCITRAL Model Law, under Article 2(a) states merely that “arbitration means any arbitration whether or not administered by a permanent arbitral institution.”

<sup>11</sup> See Bernstein R, Tackaberry J & Marriot AL *Handbook of Arbitration Practice* 3<sup>rd</sup> ed (1998) 13; Orojo JO and Ajomo MA *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) 3. That the dispute is resolved without resort to court is emphasised in the definition of international commercial arbitration by Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* 4<sup>th</sup> ed (2004) 1.

<sup>12</sup> Sutton D, Gill J & Gearing M *Russell on Arbitration* 23<sup>rd</sup> ed (2007) 5 para 1-008.

It seems that one of the difficulties in defining arbitration stems from the fact that its various definitions are not unique to arbitration and could also apply to other forms of dispute resolution.<sup>13</sup> Nevertheless, and despite the difficulty in identifying the exact combination of features which sets arbitration apart from other methods of dispute resolution, the features usually found in consensual arbitration are “the need for [an agreement] referring the dispute to arbitration, the privacy of the proceedings, a determination of the dispute and the finality of the decision.”<sup>14</sup>

The existence of a dispute<sup>15</sup> is therefore a prerequisite for arbitration with a tendency to render the procedure adversarial.

But it is perilous to take the “consensual basis of arbitration” and “party autonomy” at face value because these fundamental principles do not operate in isolation but within the constraints of public policy and their practical implications are commonly played out in arbitration practice necessitating the aid of principles of interpretation to determine the existence or otherwise of legally valid consent or the valid exercise of party autonomy in the choice of procedure, where these are contested or denied.

The question why such a seemingly simple process of private arbitration can become controversial and sometimes turns rancorous or degenerates to a point where the parties depart from their preferred procedure to a court procedure they had initially avoided, is inherent in the nature and crisis of arbitration.

Lord Roskill offers an assuagement with the observation that “[S]o long as human nature is what it is, there will always be disputes. And those disputes, whatever their character, must be resolved – if society is to live in a civilized way – as quickly, as cheaply and as satisfactorily as possible.”<sup>16</sup>

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<sup>13</sup> See *Russell on Arbitration* 5 para 1-008 at n 45 with reference to the definition in *Collins v Collins* (1858) 26 Beav. 306 at 312 quoted in the text above. They also refer to a discussion of the problems of definition in Mustill & Boyd *Commercial Arbitration* 38-50.

<sup>14</sup> *Russell on Arbitration* 5 para 1-008.

<sup>15</sup> The word “difference” is used interchangeably with “dispute” and for practical purposes they mean the same thing. The point is that unless there is a dispute, there is nothing to refer to arbitration and the denial of genuine dispute ought to be determined by the arbitral tribunal, not the court. See Mustill & Boyd *Commercial Arbitration* 122-123.

<sup>16</sup> In a paper delivered in 1978 to the Chartered Institute of Arbitrators.

Resort to court is unavoidable because it is available to dissatisfied arbitral parties and litigation will continue to thrive at the expense of arbitration for a number of reasons that include the poor performance of some arbitrators, the pivotal position of lawyers in the dispute resolution processes and the ambivalent attitude of some judges towards arbitration.<sup>17</sup>

But the fact that arbitration is a private process that has a public effect and is implemented with the support of public authorities of each state as stipulated by its national law does not support the proposition that arbitration is a derogation of the sovereign power.<sup>18</sup> This is because far from being a derogation of sovereign power arbitration stems from an agreement between parties and that agreement is no derogation from any sovereign power; furthermore it is an agreement individuals have the freedom to make and parties are not compelled to arbitrate.<sup>19</sup> They do so voluntarily and in the majority of domestic arbitrations the award is implemented voluntarily without state intervention. The fact that arbitration legislation emanates from the state legislature and some awards sometimes require the assistance of state courts to enforce them should mislead no one into believing that legislation creates consensual arbitration. It does not; it merely regulates it.

The notorious cases in which the award of a tribunal has been set aside in the place it was made but is enforced in another jurisdiction<sup>20</sup> do not support the theory of derogation because if the process were a derogation from sovereign power then the declaration of nullity or setting aside of the award by a state court of competent jurisdiction would completely annihilate the award leaving nothing for enforcement by a foreign court.<sup>21</sup>

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<sup>17</sup> Rutledge P B “Whither Arbitration?” (2008) 6(2) *Georgetown Journal of Law & Public Policy* 549.

<sup>18</sup> See Marriott A “The Categorical Imperatives of Pateley Bridge” (1999) 65 *Arbitration* 278.

<sup>19</sup> See too *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6 paras 198, 212 and 217.

<sup>20</sup> Such as *Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 (DDC 1996).

<sup>21</sup> The structure of the UNCITRAL Model Law, Art 36, by which recognition or enforcement of an arbitral award may be refused, irrespective of the country in which it was made, at the request of the party against whom it is invoked, is powerful evidence that the arbitral process is something *sui generis* and not a derogation from the Sovereign Power

As arbitration continues to evolve the notion that any natural person acceptable to the parties can be an arbitrator<sup>22</sup> holds out a fascinating but critical challenge to aspirant arbitrators; but alongside the fascination is a bundle of rigorous requirements which include, principally, the need to be suitably qualified and recognized as a competent and skilful arbitrator with the ability and experience to attract appointments. These are no mean attributes and requirements and their fulfilment may well be at the climax and culmination of a lifetime of effort and achievement.<sup>23</sup> The qualifications and requirements of skill and competence are valid for both domestic and international arbitrations. Good arbitrators get to be known and recognized by their peers and arbitration institutions to an extent where their frequent reappointments as arbitrators do not escape the criticism of cliquishness and elitism and, for their collegiality, they are even likened to a “mafia”.<sup>24</sup> In recognition of this criticism with particular reference to international arbitration Paulsson responds that:

“[i]ndividual reputations in this field grow only by the slow accretion of evidence of independence and fair mindedness in numerous instances when it really matters. Elitism is no sin, the ambition to work at the highest possible level is surely a healthy one. The building of a reputation in this challenging context is a lengthy process, which offers no assurance of success. However it creates a depth of confidence which can never be achieved by self-serving declarations.”<sup>25</sup>

Be that as it may, the clubbism of international arbitration is openly recognized as creating cozy relationships amongst international arbitrators, which, compounded by the lack of transparency can lead to a lack of credibility. Arbitration specialists must

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<sup>22</sup> Mustill & Boyd *Commercial Arbitration* 9-10. See also para 3.2.1 below on the qualifications of an arbitrator.

<sup>23</sup> Dezalay Y & Garth BG *Dealing in Virtue: International Arbitration and the Construction of a Transnational Legal Order* (1996) 10.

<sup>24</sup> Dezalay & Garth *Dealing in Virtue* 10 add the following footnote to their observation that international commercial arbitration was replete with “grand old men” deemed a “mafia” or “club” by outsiders: “In the words of a well informed New York partner: ‘The more you see of international arbitration, the more you know the people who are involved, and they tend to be repetitively involved.’” Another expert noted that “especially in the ICC, it’s a club of friends with the same names coming up all the time.” According to another insider, “[i]t is a club. They nominate one another. And sometimes you’re counsel, and sometimes you’re arbitrator”. Another very successful arbitrator put it even more strongly “it’s a mafia because people appoint one another. You always appoint your friends – people you know.”

<sup>25</sup> Paulsson J “Ethics, Elitism, Eligibility” (1997) 14(4) *Journal of International Arbitration* 13; but see Notaras A “Best in Show” 2006 *Legal Business Arbitration Report* 33, which states: “There are a lot of people who profess to be specialists but they are buttering each other up, and it becomes a bit too clubby.”

therefore take care that an “old mafia” is not replaced by a “new mafia” of younger arbitrators with the same characteristics as the old. Ultimately the arbitration profession needs to be credible and this it cannot be if it is seen as an exclusive club.

The adversarial nature of arbitration making it sometimes indistinguishable from litigation remains. Therefore the great variation in how arbitrations are conducted, the contemplation of a fair process and the need for a just result are challenges that necessitate the appointment of good and competent arbitrators. Parties who ignore this fundamental requirement risk an unsatisfactory outcome and the possibility of the award being challenged and set aside. Again therefore, the problems in the practice of arbitration perhaps relate less to its definition or the lack of uniform definition than to how the arbitral procedure is used by the particular arbitrator or arbitrators who manage the process and conduct the proceedings.<sup>26</sup>

### 1.2.2 The Crisis of Form and Identity

Arbitration,<sup>27</sup> as a system of justice, is in crisis.<sup>28</sup> This perception synthesizes the writer’s experience in arbitration practice. But it is primarily a reflection on the nature, form and malleability of the arbitral procedure that makes it readily adaptable not only to the variety of disputes referred to a sole arbitrator or to an arbitral tribunal composed of persons from different disciplines and backgrounds but also to the diversity of techniques and skills drawn upon for managing the disputes to a settlement or an award. On the one hand arbitration may emulate litigation.<sup>29</sup> In this vein arbitration has almost all the trappings of litigation with such formalities as pleadings, interlocutory applications and orders, discovery of documents, formal reception of oral and documentary evidence and on to the delivery of an enforceable award similar to a judgment of court on the issues in dispute. On the other hand

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<sup>26</sup> See particularly paras 3.3-3.5 below.

<sup>27</sup> Arbitration is a private method, alternative to the public state court system, for resolving disputes.

<sup>28</sup> The *Chambers Concise 20<sup>th</sup> Century Dictionary* defines crisis as “a crucial or decisive moment; a turning point; a time of difficulty or distress: an emergency.” For the challenges facing international arbitration see Kaplan N “Arbitration in Asia – Development and Crises” (2002) 19 *Journal of International Arbitration* 163-170 and 245-260.

<sup>29</sup> Litigation is the process for resolving disputes publicly by the state courts and tribunals (see Bernstein et al *Handbook of Arbitration Practice* 3<sup>rd</sup> ed 3-4. It has been said that although arbitration presents an alternative to the judicial process in offering privacy and procedural flexibility to the parties, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental: see Redfern & Hunter *International Commercial Arbitration* 37.

arbitration is in essence and by definition distinct from litigation. In this respect arbitration arguably belongs to the cluster of alternatives to litigation commonly known as “ADR”<sup>30</sup> (or Alternative Dispute Resolution). But even within this group arbitration asserts a distinctiveness quite unlike the other competing procedures in this group for being able to produce a binding and enforceable award and to bring finality to a dispute.<sup>31</sup> Consequently arbitration is not just an alternative to litigation but also an alternative to the alternatives in the ADR group for solving disputes.

Then again at other times arbitration assumes a hybrid character with mediation to form what has come to be known as “med-arb”<sup>32</sup> or “arb-med”<sup>33</sup> or “medaloo”.<sup>34</sup> These designations have earned arbitration the dubious epithet of being “chameleon-like” and “protean”<sup>35</sup> and prompted essays such as “Whither Arbitration?”<sup>36</sup> and “Where do you come from, Arbitration?”<sup>37</sup>

A picture then emerges of arbitration in a crisis of identity. But that is not all. In considering the various methods for resolving disputes it is not inconceivable that there may be disputes on facts and in circumstances in which the most desirable and effective technique for solving the specific dispute cannot be easily classified,

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<sup>30</sup> An elaborate list of ADR techniques is provided by Brown & Marriott *ADR Principles and Practice* 17-19; see also Merkin R. *Arbitration Law* (1991); Redfern & Hunter *International Commercial Arbitration* 22 – 23; Orojo & Ajomo *Arbitration and Conciliation in Nigeria* 41; Boule L. & Rycroft A. *Mediation: Principles Process, Practice* (1997) 63; Pettifer BWB May 1998 *Chartered Institute of Arbitrators Newsletter* 1.

<sup>31</sup> An exception to this statement is the ADR technique known as expert determination. An expert’s decision is only binding contractually, and when not an arbitrator he is not bound by the Arbitration Act.

<sup>32</sup> In “med-arb” the mediator first assists the parties to settle their differences but if unsuccessful then, with the parties’ consent, he conducts an arbitration and publishes an award. See Oghigian H “The Mediation/Arbitration Hybrid” (2003) *Journal of International Arbitration* 75-80.

<sup>33</sup> In “arb-med” the arbitrator conducts the arbitration to an award which he puts aside to await the outcome of his efforts as mediator to assist the parties to reach a settlement. If that fails the award is published but if a settlement is reached the award is not disclosed and has no further purpose.

<sup>34</sup> Medaloo is an abbreviation of “mediation and last offer arbitration”. The mediator first attempts to settle the dispute, but if this fails the mediator then proceeds to arbitrate the dispute, but is limited to choosing between the final offers of each party during the mediation phase. This motivates the parties to moderate their demands during the mediation phase. See Coulson R “MEDALOO: a Practical Technique for Resolving International Business Disputes” (1994) 11(2) *Journal of International Arbitration* 111-114.

<sup>35</sup> Park WW “Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion” (2003) 19 *Arbitration International* 279, 280-281.

<sup>36</sup> Rutledge P B “Whither Arbitration?” (2008) 6(2) *Georgetown Journal of Law & Public Policy*.

<sup>37</sup> Werner J “Where Do you Come from, Arbitration? Some Reflections on *Quo Vadis* Arbitration?” (1999) 16(4) *Journal of International Arbitration* 185-188.

particularly in advance. “Constructive Dispute Resolution”<sup>38</sup> is this writer’s innovative term for the technique or a combination of techniques a decision-maker<sup>39</sup> may adopt which defies conventional classification. The technique is recognised in dispute settlement in Kenya and other African traditional societies.<sup>40</sup>

One can envisage a serious conflict situation or a critical emergency in which the very fabric of social, economic or political order is threatened by serious conflict;<sup>41</sup> or where the factual circumstances of the conflict or dispute have substantially altered after the commencement of arbitral proceedings through circumstances beyond the control of the parties, who then request a review of the circumstances with the assistance of the arbitrator; or a situation where parties who were originally not on speaking terms with each other subsequently request the arbitrator’s participation in restructuring the way forward. It is also conceivable that disputants appoint a person as an arbitrator and subsequently agree that such person must decide their dispute not as an arbitrator but as an expert and is therefore not subject to the requirements of arbitration legislation.<sup>42</sup> It is submitted that in situations involving changed circumstances, or demanding urgency and the like, an arbitrator or decision-maker (“constructive arbitrator”, for short) ought to be able to adopt an innovative approach or technique which, while sacrificing arbitral form for a speedy solution, may not

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<sup>38</sup> The technique can be used by a decision-maker (arbitrator, mediator or adjudicator) with party agreement.

<sup>39</sup> The decision-maker in arbitration is the arbitrator or arbitral tribunal: see *Russell on Arbitration* 8 par 1-016.

<sup>40</sup> The phenomenon of overlapping techniques is acknowledged by Chukwuemerie A “The Internationalization of African Customary Law Arbitration” (2006) 14(2) *African Journal of International and Comparative Law* 143-175. He advocates the internationalization of customary law by the inclusive interpretation of Article 7 of the Model Law regarding the definition of “arbitration agreement”.

<sup>41</sup> When Mr. Kofi Annan, former UN Secretary General, intervened in the disputed Kenyan presidential election results of December 2007, he publicly disclaimed a formulaic approach to a solution, preferring instead a constructive engagement of the Kenyan people in finding a solution. His mediation team thereafter morphed into the “National Dialogue and Reconciliation Committee”. See Torgbor E “Constructive Dispute and Conflict Resolution: A Technique for Resolving Serious Conflicts in Africa” (2009) 25 *Arbitration International* 121 at 122. See further Kindler HS *Managing Disagreement Constructively: A Practical Guide for Constructive Conflict Management*; Crawley J *Constructive Conflict Management* (1995); Nordlinger EA “Conflict Regulation in Divided Societies Harvard” University Centre for International Affairs – Number 29 January 1972; Barsky AE *Conflict Resolution for Helping Professions*, 2<sup>nd</sup> ed (2007). See also Davies JE *Constructive Engagement?* (2007).

<sup>42</sup> The extent of the court’s power to review the decision of such an expert is uncertain. *Schuldes v Compressor Valves Pension Fund* 1980 4 SA 576 (W) is cited as authority that the court would interfere where the expert’s decision was not *bona fide* or honest.

compromise the procedural safeguards and other fundamental considerations that ensure a just and binding result.<sup>43</sup>

Constructive dispute resolution is arguably therefore either an ADR technique or an arbitration hybrid. As stated above it could arise from an appointment as arbitrator, or through a person being approached to act as arbitrator.

The precise role to be played by a constructive decision-maker depends on the stage before or after the commencement of the arbitration, at which the technique is to be used. Prudence suggests that the role be agreed upon in writing by the parties and duly recorded as part of the terms of reference. Effectiveness of the technique is enhanced if the parties would also agree for the outcome to be binding and enforceable.<sup>44</sup>

Similarities are apparent between the constructive dispute resolution technique and others such as “settlement facilitation”,<sup>45</sup> “neutral listening”,<sup>46</sup> “amiable composition”, “conciliation” and “negotiation”. It should suffice to observe that conciliation and negotiation are the commonest and most extensively used forms of

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<sup>43</sup> This can be aided by the provisions Art 19(2) of the Model Law and its national derivatives. Art 19(1) allows the parties the freedom to agree on a procedure (unspecified) to be followed by the tribunal, and in the event of disagreement, Art 19(2) allows the tribunal itself to conduct the proceedings in a manner (again unspecified) it considers appropriate. Both paragraphs are subject to the mandatory provisions of Arts 18 & 24(2) and (3) to ensure due process.

<sup>44</sup> For ground rules, the institutional rules offer some guidance. For example the ICC Rules of Arbitration empower the tribunal to assume the powers of an *amiable compositeur* or to decide *ex aequo et bono* but only with the agreement of the parties. Article 1(2) of the UNCITRAL Conciliation Rules (1980) emphasizes the primary role of party autonomy. The Nigerian Arbitration and Conciliation Act of 1988, s 22(3) and s 47(4), and art 33(2) of the Arbitration Rules in the First Schedule of that Act, like the Model Law art 28(3), as well as the ICC Arbitration Rules of 1998 art 17(3) referred to below, all make it clear that the arbitrator may only act as *amiable compositeur* with the agreement of the parties.

<sup>45</sup> For a discussion of this technique see Plant DW “The Arbitrator as Settlement Facilitator” (2000) 17(1) *Journal of International Arbitration* 143-146 and the authorities cited.

<sup>46</sup> See Redfern & Hunter *International Commercial Arbitration* 40 par 1-83 and para 1 – 84.

dispute resolution in Africa.<sup>47</sup> One bears in mind that approaches to negotiation differ according to the subject matter as well as the skills drawn upon for its success.<sup>48</sup>

On occasion one comes across a contract that provides for the parties in dispute first to attempt settlement “amicably” or “by negotiation” prior to arbitration or litigation.<sup>49</sup>

Procedural dilemmas fostered by procedural flexibility may manifest early and sometimes from the very beginning of an arbitration. In ad hoc arbitrations the appointment of the tribunal is not always straightforward or free from controversy “as any party that considers an arbitration as contrary to its interest can capitalize on every opportunity to obstruct the appointment process, or to challenge a tribunal once appointed”.<sup>50</sup> For example, a party may refuse to appoint an arbitrator in order to obstruct the process, or a party-appointed arbitrator might refuse to cooperate to appoint the third arbitrator.<sup>51</sup> In such instances the crisis of arbitration is the ironical situation whereby parties who have consciously chosen arbitration in preference to litigation have often first to resort to litigation for court assistance to constitute the arbitral tribunal. In this connection arbitrators may be rightly envious but can hardly justify any hostility to judicial intervention if, at one end of the spectrum arbitration needs court assistance to launch the arbitral process, and at the other end, to enforce its awards, not to mention other support, assistance and even supervision in between.

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<sup>47</sup> Sempasa SL “Obstacles to International Commercial Arbitration in African Countries” (1992) 41 KLQ 387 and (1992) 41 *International and Comparative Law Quarterly* 408; see also Sobek (1994) 1(1) *Negotiation & Dispute Resolution Journal* 29-39; Nader L “From Legal Processing to mind processing” (1992) 30 *Family and Conciliation Courts Review* 468 – 473; Gadzama JK “Integration of Arbitration, Mediation and Conciliation in Dispute Resolution Management” a paper delivered at ADR Conference, Sandton, Johannesburg, 14<sup>th</sup> June 2006; Asouzu AA “Conciliation Under the 1988 Arbitration and Conciliation Act of Nigeria” (1993) 5 *African Journal of International and Commercial Law* 825, 829; Genn H *Mediation in Action* (1999) 15 – 20; Dana D *Managing Differences* (2006) 47 – 76.

<sup>48</sup> Avruch K *Culture and Conflict Resolution* (1998) 39. Negotiation between States goes by the special name, diplomacy. See Albert J *Negotiation Skills A Handbook*, Conflict and Peace Studies Series No. 2 (1986).

<sup>49</sup> See for example *Cable & Wireless plc v IBM (United Kingdom) Ltd* [2002] EWHC 2059 (Comm), where clause 40 of the contract between the parties contained elaborate provisions for referring any dispute to negotiation before resorting to mediation and, as a last resort, litigation. The court nevertheless apparently accepted that an agreement to negotiate is not enforceable under English law, citing *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297(CA).

<sup>50</sup> Landau T “Composition and Establishment of the Tribunal” (1998) 9 *American Review of International Arbitration* 45.

<sup>51</sup> Akseli O “Appointment of Arbitrators as Specified in the Agreement to Arbitrate” (2003) 20(3) *Journal of International Arbitration* 247-254.

Furthermore, it is an adjunct to its deference to the courts that although arbitration inspires and contributes directly to the development of arbitration law, judicial intervention is necessary to transform that contribution into arbitration case law precedent.<sup>52</sup>

The malleability of the arbitral procedure is revealed not only by external comparisons with other dispute resolution mechanisms but also manifested by the internal manipulations of the arbitral procedure and the ferment of tensions, if not conflict, through the interaction of doctrines such as “party autonomy” and the freedom it gives to the arbitral parties to adopt a procedure of their preference and “the autonomy of the arbitrator” that ostensibly makes him master of the procedure. On the one hand and within the limits of mandatory provisions of arbitration legislation,

“the parties are free to concoct their own procedural recipe. They can ‘legislate’ for liberality of procedure or for traditional methods: they can choose great formality or great informality: they can give to the tribunal a very wide jurisdiction or a very narrow one.”<sup>53</sup>

On the other hand, and within the limits of the arbitration agreement<sup>54</sup> and the governing statute, the arbitrator

“controls the procedure of the arbitration ... [and is able] to tailor the procedure to the needs of the particular dispute, rather than to take off the peg a procedure (e.g. litigation procedure) designed to cater for widely differing situations.”<sup>55</sup>

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<sup>52</sup> Indeed the arbitral tribunal is not a direct source of arbitration law as each tribunal is private, completely isolated and accountable only to the parties; and law making is not the primary function of the arbitral tribunal anymore than it is that of the courts. Nevertheless, notable publications of arbitration experts and scholars are subsidiary sources of arbitration law and, on the international plane, Article 38 (1)(d) of its Statute enjoins the International Court of Justice to apply, *inter alia*, judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for determining the rules of international law.

<sup>53</sup> Bernstein, Tackaberry, & Marriott *Handbook of Arbitration Practice* 90.

<sup>54</sup> Thus the powers of the arbitrator are subject to party autonomy.

<sup>55</sup> Bernstein, Tackaberry, & Marriott *Handbook of Arbitration Practice* 90. It must also be noted that the two autonomies (of parties and arbitrator) do not necessarily harmonise and collisions occur requiring the master of the procedure to be flexible in accommodating the wishes of the parties but also remaining firm and decisive.

While some practitioners laud this arbitral flexibility others see a trail of uncertainties in the wake of such flexibility that sometimes leads to frustration and puts into question the effectiveness of the arbitral process. Park<sup>56</sup> poignantly exposes the crisis of arbitration by arguing that the absence of procedural constraints on the arbitral tribunal creates more problems than it solves, often giving the impression of an “ad hoc justice” that can only debase the perceived value and legitimacy of arbitration. Arbitrations show enormous variation in the mechanisms used to establish fact and law,<sup>57</sup> partly because the spectrum of arbitrable matters is so large and the moral flavour of arbitration so dramatically different from context to context. Park therefore rightly points out that the public image and aura of arbitration depends on one’s perspectives and that while in Western Europe arbitration stands on a high moral ground,<sup>58</sup> in developing countries it is viewed with suspicion.<sup>59</sup>

Skepticism about the benefits and attractiveness of arbitration is even found amongst some of its most prominent teachers and ardent exponents. Cato has observed:

“There is a tendency for arbitration, notwithstanding the influence of the 1996 [English] Arbitration Act, to mimic the processes involved in full-blown litigation. It is rarely, it seems, a quicker or cheaper expedient than litigation for major disputes. There is evidence that clients are being advised not to select arbitration as a means for dispute resolution in contracts because of perceived drawbacks involving, principally, lack of compulsory joinder possibilities and the lack of control over arbitral nominees. For the first time in JCT contracts there is the requirement now to make an express choice between arbitration and litigation; previously the express forum, by default, was arbitration.”<sup>60</sup>

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<sup>56</sup> Park (2003) 19 *Arbitration International*, especially at 283-284.

<sup>57</sup> For example a “documents only procedure” can be used to arbitrate a straightforward dispute involving a letter of credit; but a more protracted procedure involving disclosure of documents and an oral hearing may be used in a construction dispute.

<sup>58</sup> By being treated as an exercise in self-governance by the commercial community.

<sup>59</sup> Domestic arbitration is frequently used in Africa but international arbitration is distrusted: see Park (2003) 19 *Arbitration International* at 280-281.

<sup>60</sup> Cato M unpublished paper on Role of Judges at Judges Conference, Mombasa, 2000. “JCT” stands for “Joint Contracts Tribunal” an English regulatory body that produces standard form contracts for the construction industry. Cato is a leading arbitrator, tutor at the Chartered Institute of Arbitrators, London, and currently Professor of Law in China.

Preferring predictability to flexibility and arbitrator discretion, Professor John Uff challenges the benefits of discretion by noting that arbitrator discretion results in uncertainties of both costs and the length of proceedings; that in most cases it is a matter of pure chance whether arbitral parties end up with what might be called a good resolution of their dispute and so urges that fundamental procedural decisions should be made when the arbitration agreement is concluded.<sup>61</sup>

The two extreme positions that encapsulate the crisis of arbitration with regard to its relationship with the courts appear from the following statement by Lord Saville:

“It can be said on the one side that if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court system should play no part at all, save perhaps to enforce awards in the same way as they enforce any other rights and obligations to which the parties have agreed. To do otherwise is unwarrantably to interfere with the parties’ right to conduct their affairs as they choose. The other extreme position reaches a very different conclusion. Arbitration has this in common with the court system; both are a form of dispute resolution which depends on the decision of a third party. Justice dictates that certain rules should apply to dispute resolution of this kind. Since the state is in over-all charge of justice, and since justice is an integral part of any civilized democratic society, the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as public tribunals.”<sup>62</sup>

But, despite the potential pitfalls inherent in its flexibility, arbitration, because of its versatility, is growing in strength and popularity<sup>63</sup> as a favoured and preferred procedure for dispute resolution. That, indubitably, is an encouraging development for

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<sup>61</sup> Uff J “Predictability in International Arbitration” in Berkeley A & Mimms (eds) *International Commercial Arbitration: Practical Perspectives* (2001) 151.

<sup>62</sup> Saville M “The Denning Lecture 1995: Arbitration and the Courts” (1995) 61 *Arbitration* 157.

<sup>63</sup> See Sorieul R “UNCITRAL’s Current Work in the Field of International Commercial Arbitration” (2005) 22(6) *Journal of International Arbitration* 543 544. The popularity of arbitration is also demonstrated by the growth of literature on the subject, the increasing numbers of arbitrators and arbitration institutions and centres. See also Bernstein, Tackaberry & Marriot *Handbook of Arbitration Practice* 6 para 1-08; Redfern & Hunter *International Commercial Arbitration* 1 n 1 and 2 n 4. Arbitration’s progress and popularity can also be measured by (i) modernization of legislation in many countries; (ii) development of institutional arbitration; (iii) increased accessions to international conventions; and (iv) judicial support – see Russell F, Sutton D, Gill J & Walton A *Russell on Arbitration* 21<sup>st</sup> ed (1997) 31.

the proponents, enthusiasts and reformers of arbitration who desire the removal of the deficiencies in arbitral practice to render it more efficacious.

Crises provoke change. Consequently if arbitration is truly in crisis then it is a timely and opportune crisis of identity and evolution, necessitated by transformation. There is also the need for modernization and improvement in the face of competition and challenges arbitration must overcome, through legislation and good practices, not merely to enhance private resolution of disputes, but also by the delivery of improved arbitral services and, ultimately, arbitral justice.

### **1.3 The Research Question**

The dissertation is prompted and motivated by the need to investigate selected recurrent problems in arbitration practice in Kenya. As such, and for that reason, a conversance with Kenyan arbitration culture and environment, and some insight into and experience of how the arbitration process unfolds in that jurisdiction, are advantages brought into the investigation.

Kenya is therefore the primary, though not the only, jurisdictional source and foundation for this research and the focal point of reference. It is apparent from the title, and later substance, that the core of the dissertation is the discussion in Chapter 3 on the selected problems introduced here and formulated below as six research questions:

- i. The quest for genuine consent: how genuine is the consensual basis of arbitration?
- ii. Frequent challenges to arbitrators and to the arbitral jurisdiction: how can these be curbed?
- iii. The powers of the arbitral tribunal: are they adequate for the effective management and conduct of the arbitral proceedings and efficient disposal of disputes?
- iv. Frequent adjournments, postponements and delays: how can these be minimized?

- v. Constraints on the granting of interim measures by the arbitral tribunal: are they a help or hindrance to arbitration?
- vi. Enforcement of the arbitral award: what improvements can be made to facilitate the speedy enforcement and execution of arbitral awards?

These problems and questions are frequently encountered in arbitration proceedings, with a tendency to cause or contribute to frustration, uncertainty, delay and expense in arbitration practice in Kenya. They can be seen as impediments and disadvantages that ought to be removed in order to shorten arbitration time, save costs, alleviate the unnecessarily heavy burden on both arbitral tribunals and courts in dealing with them, reduce procedural obstacles and the uncertainties attendant to them, facilitate the achievement of finality, and ultimately the speedy enforcement of the award. The problems persist, partly because they are either only partially regulated by national legislation or not at all; and while some of them can be addressed by improved legislation, others seem to defy easy solution. Arbitrators with diverse educational and professional training, cultural backgrounds and differing levels of practical experience, differ in their approaches to these issues. This often leads to controversial rulings and decisions, a result that does not promote consistency in arbitration practice or the development of sound arbitration norms and standards.

The selection of these problems for scrutiny is based on, and informed by, the writer's experience of arbitration practice. They may not be unique to Kenya but their frequent recurrence in Kenyan arbitration practice requires and justifies close examination and the search for possible solutions that can be a unique contribution to scholarship and the practice of arbitration in Africa. This is what this dissertation attempts to achieve. The writer's selection and formulation of the research questions were also informed by Stellenbosch University's published doctoral research criteria with a requirement for "the motivation and study objective" (the term "research question" is not used in the published criteria) to be satisfactorily formulated. This is done by the clear and concise formulation of the six research questions and the methodology in paragraph 1.5 and the justification for the research in paragraph 1.4 below.

It must be emphasised from the onset that the field of study is domestic arbitration law and practice in an African context as distinct from international commercial

arbitration. In the search for solutions to the research questions there are frequent comparative references to the selected kindred jurisdictions of Nigeria and Zimbabwe which, together with Kenya, can be described as the three earliest African states that adopted or adapted the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) to their national arbitration statutes: The Arbitration and Conciliation Act 1988 of Nigeria, The Arbitration Act 1995 of Kenya and The Arbitration Act of 1996, Zimbabwe. The three jurisdictions are therefore referred to, interchangeably either, as “selected”, “kindred”, “counterpart” or “UNCITRAL” jurisdictions. The reasons for their selection are elaborated in paragraph 1.4. The experience of other jurisdictions such as England and South Africa are also highlighted for reasons that become apparent in the discussions. The UNCITRAL Model Law of 1985, in relevant parts, is brought into the discussion and used both as a point of reference and departure for this study. There are references also to the literature on international arbitration where pertinent and relevant to the discussion of the six research questions in the context of the domestic or national arbitration laws under consideration, as such laws are to some extent calibrated by international arbitration principles, standards and instruments.<sup>64</sup> Such references also demonstrate the writer’s conversance with the literature available and accessible in the chosen study field in the period of investigation between 2005 and 2008.

#### **1.4 The Concept, Rationale and Justification for this Research**

Arbitration is increasingly used in Africa for solving various disputes in a rapidly changing world. This dissertation seeks to investigate recurrent problems and the causes of avoidable inefficiency in the arbitral process. If the purpose of arbitration is understood to be the achievement of the right solution to a dispute with least cost and expense,<sup>65</sup> then the underlying causes and problems that induce or contribute to procedural rigidity, inordinate delays and frustration, all of which render arbitral justice expensive, must be identified and expunged.

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<sup>64</sup> For example, section 35 of the Nigerian arbitration statute allows arbitral parties to an international commercial agreement to refer their dispute to arbitration conducted under the UNCITRAL Arbitration Rules. The 1958 New York Convention, an international instrument governing the recognition and enforcement of foreign arbitral awards, is specifically incorporated by reference in the three national statutes of Nigeria (preamble and section 54(1)), Kenya (section 36(2), Arbitration Amendment Act), and Zimbabwe (preamble to the 1996 Arbitration Act).

<sup>65</sup> Compare the object of arbitration in s 1(a) of the English Arbitration Act of 1996.

Apart from those selected for closer scrutiny in this dissertation there are several other common procedural problems in arbitration such as the failure of formalized and traditionally structured pleadings to identify and define the real issues in dispute, the frequent abuse of the discovery process, excessive emphasis on oral testimony and lengthy debate by lawyers in final submissions and argument. The failure of the arbitral tribunal to address these problems effectively, either from the lack of adequate arbitral powers, or the inadequate use of existing powers,<sup>66</sup> or the lack of will, is a contributory factor that keeps the door open for frequent judicial intervention which in turn diminishes the confidence and authority of the arbitral tribunal to assume the fullest control of the proceedings. The same factor exposes the arbitrator in Kenya to intimidation by legal representatives and makes the arbitrator unwilling to be assertive or to intervene to prevent delay and other procedural abuses, for fear of affording grounds for applications to set aside the eventual award. Applications of this kind are not infrequent in Kenya. This may be described as the arbitrator's dilemma. That this phenomenon, if no longer its frequency, is not confined to Kenya, is reflected in the words of Lord Roskill:

“[I]n matters like this an arbitrator has for all practical purposes both first and last word and I often think he fears that if he is firm someone may thereafter accuse him in the courts of ‘misconduct’,<sup>67</sup> that dreadful word. I can understand the fear though I sincerely believe it to be unjustified. It has, I think, an historic basis and stems from the days when the courts were hostile to arbitrations ... but I do not believe that any court would presume to criticize an arbitrator who was firm in dealing with disobedience to his orders, so long as he acted fairly.”<sup>68</sup>

Individual African judges may share these encouraging sentiments; but generally, African courts appear too ready to assume jurisdiction in arbitral matters, both from

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<sup>66</sup> Existing legislation such as Art 19(2) of the Model Law and its corresponding provisions in the national arbitration statutes of Kenya (the Arbitration Act of 1995 s 20(2)), Nigeria (the Arbitration Act of 1988 s 15(2) and (3)), and Zimbabwe (the Arbitration Act of 1996 sch 1 Art 19(2)) contain procedural powers that, it is submitted, do not clearly address these problems in addition to the fact that party autonomy can limit these powers. See further para 2.4.4.5(vii) below for a discussion of these provisions.

<sup>67</sup> See the clarification of “misconduct” in para 2.5.3 below.

<sup>68</sup> Lord Roskill “Third Alexander Lecture, March 8, 1977” (1977) 44 *Arbitration* 4 6.

insufficient appreciation of the dynamics of arbitration and a lack of familiarity with arbitration law and practice,<sup>69</sup> and an African arbitrator may also not be persuaded that arbitrators have “both [the] first and last word” in arbitrations due to the frequency of challenges to arbitral decisions that end up in court.<sup>70</sup>

Therefore, in the African context, it is submitted that effective sanctions are necessary for the effective management and conduct of arbitral proceedings.<sup>71</sup> This recommendation is taken up and pursued in chapter three. The way forward must perforce include strengthening the existing laws and empowering arbitrators and others concerned with arbitration to play their proper roles to ensure better services for willing users. While the arbitral process must be freed from unreasonable apprehension of excessive court intervention, it must widen its reach and strengthen its outcomes for arbitration to be seen as a truly effective and respected alternative to litigation and other competing dispute resolution techniques.

Some benefits claimed for both domestic and international arbitration such as speed, cost reduction and finality of the award are often not readily realizable or realizable at all because of recurrent problems that require attention and reappraisal. Constraints abound which, in their diverse manifestations, can and do adversely affect the outcome of proceedings and consequently the integrity of the award. Pre-hearing constraints include:

- (i) improper and doubtful challenges to the arbitral jurisdiction that in practice quite commonly delay the proceedings and increase costs;
- (ii) unmerited complaints about the suitability of the appointed arbitrator;
- (iii) preliminary objections being taken as to the arbitrability of the subject matter in dispute; and
- (v) the hearing and determination of questions as to the appropriate forum and choice of procedure.

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<sup>69</sup> See Okekeifere AI “Salient Issues in the Law and Practice of Arbitration in Nigeria” unpublished conference paper, arbitration symposium at Senate House, University of London, June 2003.

<sup>70</sup> In Kenya recalcitrant parties commonly succeed in obtaining court orders to stay arbitration proceedings and then do nothing to proceed in court with a full hearing of the complaint for which the stay was granted by the court. *EpcO Builders Limited v Marjan and United States International University* Civil Suit no 274/2004, in which the Kenya Chief Justice dismissed an application challenging an arbitral ruling, was hailed as a “landmark decision” by the Kenyan Branch of the Chartered Institute of Arbitrators.

<sup>71</sup> See para 3.7 below.

At and during the hearing other procedural and evidential issues emerge that severely test and reveal the inadequacy of the powers and competence of the arbitral tribunal to determine such issues. Examples are the lack of arbitral power to issue a witness summons to compel the attendance of a particular witness without court assistance and the inability to deal with contempt committed in the face of the tribunal. Although recourse to court in some instances may neither be justified nor beneficial, it is nevertheless available to recalcitrant parties and their representatives who may not be keen on the expeditious disposal of the dispute. After all that, at the end of the proceedings the award may be challenged, or set aside by the court, or be undelivered and so never see the light of day if the hapless arbitrator is compelled to exercise a lien for non-payment of his fees. These problems can be addressed by the role players in arbitration and with legislation that can make arbitration more attractive to users. Arbitral justice cannot be delivered by a procedure so hobbled and beset by constraints that diminish its efficacy and blunt its cutting edge. The goal is not the achievement of perfection but an efficient arbitration regime for the delivery of arbitral justice particularly in the context of domestic arbitration, taking into account the principles of the equality of the parties, economy, proportionality and expedition.<sup>72</sup>

### **1.5 Comparative and Compatible Methodology**

The term “comparative and compatible methodology” has been coined by the writer to describe the methodology adopted for this study. Research methodology is not static but variable. The choice may be influenced or determined by the subject matter and the intended purpose or objective. In considering the choice of methodology it is emphasised that the investigation of the six problems in Chapter 3 is the heart of this dissertation. It does not therefore set out to test a thesis or a proposition as may be expected in the investigation or debunking of an “idea” or “theory”, for example, in jurisprudential, philosophical, theological or doctrinal research. That may be a traditionalist approach but not the only method for researching a “problem” in all

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<sup>72</sup> These principles were enunciated by Lord Woolf in the report “Access to Justice” HMSO, London (1996). The Woolf Report was perhaps the first, firm and official indication that the English courts would, in future, encourage other more creative ways for resolving disputes. There was a suggestion from this eminent member of the judiciary that parties might be “ordered” to participate in mediation before coming to court.

academic fields because a “proposition” differs from a “problem”. A proposition typically asserts something that is either true or false, whereas one asks a question or poses a problem that is neither an assertion nor a denial and therefore cannot be judged to be true or false.<sup>73</sup> An in depth investigation of a problem - whether legal, social, economic or clinical - in search of a solution (say for the prevention or cure of a disease) is therefore a legitimate academic exercise and process that can contribute to knowledge, which is a core requirement of a doctoral dissertation.<sup>74</sup> Methodology is therefore not cast in stone.

The study is comparative only to the limited extent and purpose of opening up the field of investigation to compatible arbitration jurisdictions, to afford the opportunity for useable comparisons as well as contrasts for purposes of the conclusions drawn in chapter 3. A choice of compatible systems (as opposed to incompatible or disparate systems) is preferred because the compatibles are similar, familiar and so rendering the investigation results readily cognisable, perhaps even attractive and more amenable to ready acceptance.

There is also the fact that, in the African context and as elaborated in paragraph 2.4.3 below, the Francophone OHADA system of arbitration, a major alternative system in operation in Africa, is not yet an established reference point for law reform in either the Common Law or the Southern African Development Community (SADC) regions of Africa; and that the OHADA Uniform Act on Arbitration (“UAA”) is clearly intended to apply only in countries which become members of OHADA involving the acceptance of other OHADA laws. Additionally, the high degree of compatibility between the popular UNCITRAL Arbitration Rules and the UNCITRAL Model Law, is a clear advantage over OHADA because of the international standing of the UNCITRAL Rules and their general acceptance and use in international arbitration. The comparative and compatible approach adopted here does not require resort to a method that involves the investigation of disparate laws or legal systems. Again, the compatibility approach is not confined to Africa and, outside the continent, it enables the use of the advanced and well established English arbitration system as a point of

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<sup>73</sup> See Copi IM and Cohen C *Introduction to Logic* 9<sup>th</sup> ed (1994) 2.

<sup>74</sup> See the published Stellenbosch University criteria for a doctoral thesis, and seminar lectures on “The Changing Landscape of Academic Research” 10<sup>th</sup> May 2011, Stellenbosch.

reference. The dissertation is restricted in time, scope, purpose and substance, and is not intended as an investigation of every aspect of arbitration laws either in the comparable jurisdictions or worldwide.

Although Kenya remains throughout the primary jurisdictional source and foundation for this study, the legal framework of arbitration discussed in Chapter 2 contextualises and extends the discussion where appropriate and relevant to the selected kindred jurisdictions in Africa. The limitation commends itself as the continent is a huge terrain of diverse and disparate systems of arbitration traditions and systems. The selective approach is therefore deliberate with a concentration on arbitration practice in Kenya relative to the counterpart jurisdictions. Nigeria offers an expansive, rich and relevant arbitration literature and jurisprudence. Zimbabwe's arbitration tradition and experience, drawn from African customs, Roman-Dutch Law and Common Law, attractively expands the comparative space and dimension within a convenient single jurisdiction.<sup>75</sup>

The **reasons** for the restrictive selection of the three African states are manifold but can be summarized broadly as – common origins, similar problems, shared experiences and similar statutes. The reasons can be elaborated. The three states were among the earliest sub-Saharan African states to domesticate the UNCITRAL Model Law - Nigeria in 1988, Kenya in 1995 and Zimbabwe in 1996 - spawning a not inconsiderable combined period of some twenty two years of modern arbitration literature, jurisprudence and experience that make the selection and comparison of these states both attractive and compelling. Further, and in view of their regional distribution these states may be considered representative examples of African jurisdictions with modern arbitration statutes in their respective regional areas of the continent. Related to this is the fact that their geographical locations and continental spread are also indicative of the breadth of acceptance accorded to the Model Law in the mainly Common Law jurisdictions of Eastern, Western and Southern Africa. The three states are also inspired, and to an extent, bonded by their colonial experience that places them within the same Commonwealth legal tradition. This paves the way

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<sup>75</sup> The writer is grateful to the former Chairman of the Zimbabwe Chartered Institute of Arbitrators (Mr. Muchadeyi Ashton Masunda, now mayor of Harare), who introduced him to some sources of Zimbabwean arbitration material. See Donovan IA, McMillan AR and Masunda MA *Sourcebook of Arbitration Materials* (1996).

for a comparative/compatibility approach that also contrasts the divergent developments in respect of colonial arbitration ordinances and post-independence statutes from common English sources. This common legal tradition no doubt facilitated and influenced the incorporation in their national statutes of the Model Law that had been designed primarily for international commercial arbitration. This provides a further template for comparison between the approaches of the legislatures in the three countries. The Common Law heritage furthermore enables a resort to the English Arbitration Act of 1996 as a benchmark for a critical evaluation of the arbitration laws of the three jurisdictions.

However the limited purpose, scope and function of the comparisons must be borne in mind. It is therefore clarified that neither the title of the dissertation nor its substance calls for the discussion of all problems in arbitration practice or all aspects of the laws of Nigeria, Kenya and Zimbabwe. It is certainly not intended that the comparison of the Kenyan version of the Model Law with its Nigerian and Zimbabwean counterparts, by itself, should necessitate or require a full discussion of the counterpart jurisdictions or result in detailed recommendations for substantial changes to the arbitration statutes of all three states. It is rather intended to demonstrate that the conclusions reached in Chapter 3 regarding the six recurrent problems are equally applicable to arbitration in the two jurisdictions selected because of their similar legislation. This is entirely in line with the methodology preferred and adopted for this study. It is emphasised therefore that aspects of the arbitration laws of Nigeria and Zimbabwe (the main African comparators) are referred to only in so far as they relate to or are relevant to the six research issues investigated and discussed in Chapter 3.

The same limitation by purpose, scope and function applies to the references to the UNCITRAL Model Law and the English Law provisions or indeed other national or institutional provisions that are introduced as reference points, where relevant to the Chapter 3 issues on which the Nigerian, Kenyan and Zimbabwean arbitration provisions are either silent or inadequate.

## 1.6 Structure and Content

The work consists of three chapters. The first is mainly introductory with an overview of arbitration. The Research Questions and the Methodology for their exploration are stated. The Concept, Rationale and Justification for the study are elaborated, preceded by the Structure and Content of the dissertation. As a contribution to originality and knowledge the writer offers his definition of arbitration and introduces a system of dispute resolution the writer terms “Constructive Dispute Resolution”. The field of study being domestic arbitration, a distinction between it and international arbitration, is provided as relevant foundation for the further distinction drawn between the enforcement of domestic and international awards which is one of the problem areas discussed in Chapter 3. A study in African arbitration cannot be complete without reference to Customary Law Arbitration. The term is clarified with reference to judicial authorities and the recognition of its valuable contribution to dispute resolution in Africa. The chapter concludes with a reflection on the crisis of arbitration as a dynamic for reform and modernization of arbitration law and practice in Kenya and elsewhere in Africa and with a vision of arbitration as a free-standing system of dispute resolution.

The second chapter focuses on the legal framework of arbitration in Africa. It includes a review of the progress of arbitration law and practice in Kenya and to a relevant extent the comparables of Nigeria and Zimbabwe, including an elaboration of customary arbitration and the development of current modern legislation. The three states, it has been noted, represent common-law jurisdictions in the Eastern, Western and Southern regions of the African continent. The UNCITRAL Model Law, which purports to set universal standards with the potential of harmonizing national arbitration laws regionally and internationally, receives considerable attention as the foundation of the modern arbitration statutes of the three African states. The arbitration experience of other jurisdictions, like Ghana, South Africa and England are drawn upon where relevant, and instructive on the research problems. The discussion in this chapter is therefore foundational to the consideration of the research questions in chapter three.

The third and core chapter examines six recurrent problems in arbitration practice primarily in the context of domestic arbitration. These problems, as noted, relate to (i) the illusiveness of consent as the basis for consensual arbitration; (ii) challenges to the arbitral jurisdiction with regard to the existence, validity and scope of the arbitration agreement and the suitability, competence and impartiality of the arbitrator; (iii) the procedural powers of the arbitral tribunal; (iv) the disruptive effect of adjournments and postponements on the arbitral process; (v) constraints on the granting of interim relief pending an award on the merits; and (vi) the enforcement and execution of the arbitral award. The benefits of combating these problems successfully have been stated in paragraph 1.3. The proposed remedies include a Code of Sanctions and the introduction of punitive damages in arbitration.

The concluding section of chapter 3 contains reflections on the future of arbitration in Africa with particular reference to the need for modernization and harmonization of arbitration laws and the removal of avoidable inefficiency in arbitration. The potential contribution of the arbitral parties themselves, their lawyers, the arbitrators, judges and arbitration institutions for the enhancement of arbitration in Africa, is emphasized. At the national level, addressing the problems highlighted in this research can enhance arbitration practice with the potential of promoting peaceful settlement of disputes and better economic relations across the continent.

## **1.7 Conclusion**

In the foregoing introductory paragraphs, an attempt is made to delineate the rubric of arbitration with reference to its nature, purpose and varied forms that distinguish and define its uniqueness from other procedures. The conceptual foundations of arbitration are outlined at this stage first, as essential introduction for the substantive discussions in the ensuing chapters. But a second and perhaps deeper reason is to establish a basis for exploring the connection between concept, form and the philosophical unifying core essence of arbitration, that is the delivery of a complete and final arbitral justice outside the court system.<sup>76</sup> The expectation from this is to be

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<sup>76</sup> The courts nevertheless have a supportive and corrective role in arbitration. See generally Boyd SC *The Role of National Law and the National Courts in England* in Lew JDM (ed) *Contemporary Problems in International Arbitration* (1986) 149-163.

better equipped to assess the cumulative potential of arbitration for dealing effectively with the diverse practical challenges to be discussed in this dissertation.<sup>77</sup>

Arguments drawn only from the purpose<sup>78</sup> of arbitration to combat its practical problems have limitations. They are neither enough nor always of much value. For example, it cannot be enough to say with Lane that:

“[i]t is our function as participants in the process of arbitration not to lose sight of the goal posts, namely dispute resolution in an efficient and cost effective fashion.”<sup>79</sup>

It is necessary also to explore and investigate the effectiveness of the methods of reaching the goal posts. Nor can one simply concur with Varady that:

“[s]ince arbitration has established itself as the main vehicle of settling international trade disputes, it has become a framework for a wide variety of contests and contestants, and it is increasingly difficult to identify traits which are fitting for all cases (or even for the majority of them).”<sup>80</sup>

The investigation cannot be abandoned here because of the difficulty of identifying common traits that fit all arbitrations. After all, the diversity of form can provide the potential for reform and the momentum for uniformity.<sup>81</sup>

The drive for reform may have been prompted mainly by the UNCITRAL Model Law and its unifying promise for both international and domestic arbitration. But the defining challenge still remains regarding the extent to which the Model Law, an incomplete law, can be perceived to capture or reflect the ethos of arbitration or its common essence as a better option for dispute resolution in African cultures

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<sup>77</sup> See particularly ch 3 below.

<sup>78</sup> On the function and purpose of arbitration, see Bernstein, Tackaberry & Marriott *Handbook of Arbitration Practice* 3-4.

<sup>79</sup> Lane P “Cost-effective arbitration” (1997) 63 *Arbitration* 5 7.

<sup>80</sup> Varady T “The Courtesy Trap: Arbitration if no amicable settlement can be reached” (1997) 14(4) *Journal of International Arbitration* 5.

<sup>81</sup> Leahy E & Bianchi C “The Changing Face of International Arbitration” (2000) 17(4) *Journal of International Arbitration* 19-61; Alvarez G & Park W “The New Face of Investment Arbitration” (2003) 28 *Yale Journal of International Law* 365.

dominated by traditional modes of dispute settlement.<sup>82</sup> Lord Wilberforce provides a visionary insight into the core philosophical-practical essence of arbitration with this statement:

“I would like to dwell for a moment on one point to which I personally attach some importance. That is the relationship between arbitration and the courts. I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure, and free to develop its own substantive law, yes, its substantive law. I have always hoped to see arbitration law moving in that direction.”<sup>83</sup>

The conclusion is that the crisis of arbitration is a dynamic for the adaptation and modernization of the arbitral system. Its diversity of form but unity of essence are important potentialities that in careful balance and combination would endorse what arbitration already is: a procedure that allows parties to keep private the details of their dispute; to choose their own rules of procedure with scope for minimising acrimony and keeping costs down; to appoint a “judge” with expert knowledge of the field of dispute and skills not commonly shared with judges of state courts. The arbitrator has the opportunity to establish a rapport with the parties and so obtain greater insights than ordinarily possible for a state court judge. The vision of arbitration as a freestanding system and developing its own substantive law is an attractive proposition. Indeed, in the Kenyan and African context generally, it would be equally attractive for arbitration law to incorporate and internationalize the traditional systems of dispute resolution.<sup>84</sup>

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<sup>82</sup> The complexities (for example, in the characterization of the arbitration agreement) the tensions between doctrines (for example, party and tribunal autonomies) and the sometimes troublesome relationships between arbitral tribunal and court are explored in Chapter 2.

<sup>83</sup> Hansard, 18 January 1996, col 778, cited with approval by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2005] UKHL 43 para 18. Lord Wilberforce, a former senior English judge, is credited with playing a major role in the enactment of the English Arbitration Act when the Bill was considered by the House of Lords.

<sup>84</sup> Chukwuemerie (2006) 14 (2) *African Journal of International and Comparative Law* 143-175.

## CHAPTER TWO

### THE LEGAL AND CONTEXTUAL FRAMEWORK FOR THE DISCUSSION OF THE RESEARCH QUESTION

*“[W]here two parties to a dispute voluntarily submit their matter in controversy to arbitration according to customary law, and agreed expressly or by implication that the decisions of the arbitrators would be accepted as final and binding, then once the arbitrators reach a decision, it is no longer open to either party to subsequently back out of such a decision.”<sup>1</sup>*

*“People do not have to go to court if there are better ways to solve their problems”<sup>2</sup>*

#### 2.1 Introduction

This chapter sets out the legal framework and contextual environment within which consensual arbitration in Kenya operates, with particular reference to the chapter three research questions. Its focus is on domestic arbitration law in Kenya with comparative references to the selected and compatible African states that have adopted the UNCITRAL Model Law. The discussion covers Kenya (East Africa), Nigeria (West Africa) and Zimbabwe (Southern Africa) Commonwealth countries that are currently using the UNCITRAL Model Law with varying degrees of modification.<sup>3</sup> Their selection is explained in paragraph 1.4 of chapter one.

The chapter starts with an overview of the legal framework of arbitration as a basis for the examination of the Chapter Three problems. This will be followed by a discussion of customary-law arbitration and the pertinent aspects of the arbitration statutes of Nigeria (1988), Kenya (1995) and Zimbabwe (1996). Customary arbitration, as known in Nigeria, Kenya and Zimbabwe, is governed by principles and

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<sup>1</sup> [1992] 6 NWLR Part 249, 561 at 586-587; compare Ikpeazu J in *Phillip Njoku v Felix Ekeocha* (1972) 2ECLR 199 cited below at p. 58fn 111.

<sup>2</sup> Per Lord Irvine, The Lord Chancellor, White Paper, *Modernizing Justice*, December 1998.

<sup>3</sup> “The special strength of the Commonwealth lies in the combination of the diversity of its members with their shared inheritance in language, culture and the rule of law”: see the Harare Commonwealth Declaration 1991 of 20 October 1991. The focal point for the discussion law in Kenya, based on the writer’s experience of arbitration practice in Kenya.

practices of dispute resolution that have evolved with some assistance of the courts and recognized over the years through common application and usage by the African societies in these jurisdictions. Although the main focus of this discussion is on consensual arbitration governed by the current statutory laws drawn from the UNCITRAL Model Law, it is important for the reader to appreciate that the legal environment in which consensual arbitration operates in Africa comprises both customary and statutory arbitration. Consequently a review of the legal framework for arbitration would be incomplete without reference to customary arbitration, involving conciliation and negotiation, by which most African societies settle their differences. The principles of customary arbitration law are well developed, particularly in West Africa where Nigeria is located.<sup>4</sup> There are also significant focal points at which some of the fundamental principles of both statutory and customary arbitration law converge.

At this stage it suffices to state that a major difference between statutory and customary arbitration law is that, unlike the former, the latter does not require an arbitration agreement to be in writing; and that this is a throw back to the African past and the rarity then of the written form of communication. It follows that today an arbitration agreement written in an African language would be amenable to both statutory and customary arbitration.<sup>5</sup>

The chapter then reviews the development of arbitration legislation in Africa from the colonial era leading to the present broad classification of African states with modern arbitration legislation into the OHADA<sup>6</sup> and UNCITRAL Model Law groups. Only a brief distinguishing comment on the OHADA system of arbitration is intended. Being a system designed for mostly Francophone African states, OHADA does not appear to have attracted states with a common-law background, for which the UNCITRAL

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<sup>4</sup> Duru L “Fundamentals of Arbitration Law and Practice In Nigeria” unpublished presentation at the Professional Foundation Course on ADR, Abuja, April 2006 stated: “Customary arbitration, which is rarely written, is the type of arbitration imperceptibly resorted to by a great majority of people in our local communities, clubs, mosques, churches and so on. In all parts of Nigeria, the colonialists met societies that had their own essential machinery for maintenance of law and order, their rights and duties obligations, prohibitions and sanctions.”

<sup>5</sup> *Owonyin v Omotosho* (1961) 1 All NIR 304; *Rotibi v Savage* (1944) 17 NLR 77; *Boniface Ofomata v E. Anoka* (1974) 4 ECSLR 21. These cases concerned the writing of customary arbitration agreements and are cited by Okekeifere AI “Salient Issues in the Law and Practice of Arbitration in Nigeria” unpublished paper, Univ. of London, Senate House, June 2003.

<sup>6</sup> See para 2.4.3 below for explanation of OHADA.

Model Law is probably more attractive.<sup>7</sup> Indeed Kenya and the kindred jurisdictions in this study are selected because they all share a common tradition and foundation in the Model Law and, as noted, their geographical placement and regional spread is indicative of the breadth of acceptance accorded to the Model Law in mainly common-law jurisdictions in the Western, Eastern and Southern regions of the African continent.

The chapter continues with a discussion of the aims, the guiding principles and relevant aspects of the UNCITRAL Model Law and the derivative arbitration statutes of the selected African jurisdictions indicating the extent of their respective modifications to the Model Law.

References will also be made to examples of arbitration law and judicial decisions from other jurisdictions such as Ghana, South Africa and England where relevant. The jurisprudential tradition and experience shared by these countries are not only of historical and comparative relevance but are also illustrative and instructive on the topics discussed in this study. As background to the references to modern English case law, the principles underlying the English Arbitration Act of 1996 are briefly discussed.<sup>8</sup> Again, where appropriate, there will be references to Rules<sup>9</sup> and Institutions<sup>10</sup> used in international commercial arbitration, which have stimulated cross-fertilization with domestic arbitration and have calibrated and harmonized arbitral practices and standards in jurisdictions across the continents of the world.

The chapter concludes with the progression towards the modernization of arbitration law in Kenya and Africa and the move towards harmonization and unification through the impact of the UNCITRAL Model Law.

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<sup>7</sup> See further para 2.4.3 below.

<sup>8</sup> See para 2.6 below.

<sup>9</sup> Such as the UNCITRAL Arbitration Rules (1976) and the LCIA Rules (1998).

<sup>10</sup> Such as the ICC International Court of Arbitration and the Permanent Court of Arbitration (PCA). In the case of the latter institution, one of the parties involved must be a state. See Redfern A & Hunter M *International Commercial Arbitration* 4<sup>th</sup> ed (2004) 59.

## 2.2 The Legal Framework of Arbitration

The legal framework of domestic arbitration comprises the substantive and procedural laws of arbitration in the relevant state and the interlocking relationships between those laws, the arbitration agreement and the rules of arbitration practice. For international arbitration it may be expected that bilateral treaties and multi-lateral conventions will form part of the legal framework.<sup>11</sup>

A country's arbitration legislation can be classified as "monistic" or "dualistic". Under the "monism" approach the same arbitration law applies to both domestic and international arbitrations, as in Kenya, Nigeria, Zimbabwe and England. Under the "dualism" approach domestic and international arbitrations are subject to separate regimes, as in Canada, Australia, Singapore and Mauritius.<sup>12</sup>

Arbitration depends upon the existence of an agreement between the parties that disputes which already exist or which may arise between them in future will be submitted for the final and binding decision of an arbitrator instead of a national court. In many instances this simple accord is all there is between the parties to start an arbitration; but it should take no time to realize that this is not enough and so in practice, it becomes necessary to augment this agreement by a further and more detailed agreement specifying, for example, how an arbitrator is to be appointed if the parties fail to do so, the place of arbitration, the language of the proceedings and other essentials of effective arbitration. The parties may also agree on a set of arbitration rules to govern the proceedings. Therefore as important as the initial agreement is in setting the process in motion, other subsequent agreements are often needed to guide the process through to its conclusion. Such agreements are permissible in accordance with the principle of party autonomy.<sup>13</sup>

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<sup>11</sup> See for example the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

<sup>12</sup> See Berger KP "International Economic Arbitration in Germany: A New Era" (1992) 8 *Arbitration International* 101 at 109. See SA Law Commission Report *Arbitration: A New Arbitration Act for South Africa* (July 1998) 14 n 4 and the Mauritius International Arbitration Act of 2008 regarding the examples in the text of monistic and dualistic systems.

<sup>13</sup> See also para 3.1.1 below.

Arbitration institutions, chambers of commerce, trade and professional associations and similar entities have established sets of arbitration rules for this purpose and so arbitral parties have at their disposal a choice of rules and procedures to adopt or adapt for their purposes. When adopted by incorporation or reference such rules become legally part of the parties' contract and assist in clarifying the operation of the chosen procedure within the legal framework of arbitration. The law facilitates and enables parties to agree a procedure for arbitration but does not normally predetermine or impose any rules of procedure.<sup>14</sup> Therefore the use of arbitration rules is voluntary rather than compulsory; but once adopted the rules assume contractual force and effect under the governing arbitration laws.<sup>15</sup> National arbitration law such as the 1995 Kenyan Arbitration Act therefore supports arbitration practice in important respects. For example, the Act enables the parties to opt for arbitration rather than resort to court. But it does not create their arbitral agreement or process any more than it creates their dispute. The Act also requires national courts to recognize and enforce arbitration agreements and awards. The same Act also delimits the extent of court intervention in arbitration and establishes the mandatory procedural requirements that must be observed in order to satisfy the concepts of equal treatment of parties, fairness and the public policy of Kenya.<sup>16</sup>

The relationship between national laws and arbitration rules is exemplified by the UNCITRAL Arbitration Rules under Article 1(2) which provides:

“These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”

It is abundantly clear therefore that the arbitration rules and procedures are subordinate to the mandatory provisions of the governing arbitration laws of the state.

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<sup>14</sup> See however the Nigerian Arbitration Act of 1998 s 14 and the Rules in the First Schedule, discussed in para 2.5.2 below, by which procedural rules for a domestic arbitration in Nigeria are prescribed.

<sup>15</sup> See Redfern & Hunter *International Commercial Arbitration* 46-47 on the choice of rules and the UNCITRAL Model Law Article 19(1) on the interaction between the chosen rules and the mandatory provisions of the applicable arbitration statute.

<sup>16</sup> The key principles recognised by the Act are: party autonomy, non-intervention by court, *kompetenz-kompetenz*, neutrality and equality, flexibility, finality of awards, and recognition and enforcement of the award. See para 2.4.4 (v) below regarding Article 18 of the Model Law and see para 2.6 below regarding the relevant provisions of the English Arbitration Act.

In general, domestic arbitration awards are implemented voluntarily; if not, the state law provides the machinery for enforcement.<sup>17</sup> On the international plane, national laws, the arbitration agreement, procedural rules, and the relevant treaty or convention combine to determine the mode of enforcement.

A unified framework for arbitration that includes the national laws, the arbitration agreement and rules of procedure is in fact recognized by UNCITRAL as reflected in the 1979 Commission Report<sup>18</sup> and the legislative history of the Model Law, which showed that a national arbitration law does not stand alone but is a closely related part of the unified legal framework including contracts, arbitration rules and enforcement conventions. The drafters of the Model Law therefore took care to ensure that the Model Law would synchronise with this interrelated legal system.<sup>19</sup>

Arbitration in Kenya and Africa is deeply rooted and age-old; but despite the long history of domestic arbitration in Africa, African states have continued to be suspicious of international commercial arbitration as a product of Western conspiracy represented by multi-lateral corporations operating in the African continent. Although some progress has been made to allay these fears by the harmonization of arbitration systems through OHADA and the UNCITRAL Model Law, the suspicion still lingers as evidenced by the comparatively slow acceptance of the Model Law in Africa.<sup>20</sup> This underscores the need for Africans to evolve and improve their own systems and mechanisms for conflict and dispute resolution in harmony with universally accepted national and international norms and standards.

One paradoxical reason for the sluggish growth of international commercial arbitration law in Africa is the distrust of African national courts harboured by foreign

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<sup>17</sup> See the Model Law Articles 35 and 36 and the detailed discussion in para 3.6.

<sup>18</sup> A/34/17 para 81; see also Holtzman HM and Neuhaus JE *A Guide to The UNCITRAL Model Law On International Commercial Arbitration* 6-9.

<sup>19</sup> See Holtzmann & Neuhaus *Guide to The UNCITRAL Model Law* 6, who refer to the fourth paragraph of the UN General Assembly Resolution of 11 December 1985 approving the Model Law (quoted in Holtzmann & Neuhaus 1236-1237) as recognizing that the Model Law, the New York Convention and the UNCITRAL Arbitration Rules together contribute significantly to the establishment of a unified legal framework for the fair and efficient settlement of international commercial disputes.

<sup>20</sup> According to UNCITRAL's website ([www.uncitral.org](http://www.uncitral.org)) ten African states as at 2008 have adopted the Model Law, namely Egypt (1994), Kenya (1995), Madagascar (1998), Mauritius (2008), Nigeria (1988), Rwanda (2008), Tunisia (1993), Uganda (2000), Zambia (2000) and Zimbabwe (1996).

investors and traders who prefer arbitration and other ADR mechanisms to African courts. The point is poignantly made by Asouzu that:

“[w]hile some African states are parties to the multilateral treaties on arbitration and have enacted specific laws dealing with international commercial arbitration and foreign investment, these same states have misgivings about the international commercial arbitral process. They feel that arbitration runs counter to their interests, undermining national judicial sovereignty and generating considerable expense. Often, cities in these states are not chosen as venues for international arbitral proceedings, nor are their nationals frequently appointed as international arbitrators.”<sup>21</sup>

Oduntan, an African jurist, dispels the notion that arbitration is European with no contribution to its development by Africans.<sup>22</sup> These brief observations on international commercial arbitration are deemed appropriate in this study as international commercial arbitration law is, to an extent, domesticated in arbitration law of Kenya and elsewhere in Africa, where for example the New York Convention is incorporated in the arbitration statute of Nigeria (preamble and section 54(1)), Kenya (section 32(2) of 1995 Act as amended) and Zimbabwe (preamble to the 1996 Arbitration Act).

### **2.3 Arbitration in Africa**

Observations about arbitration in general or relating to Africa apply to Kenya as an African country or where Kenya’s experience is sparsely documented or not at all or again where there are parallels with, or lessons to be drawn and shared with Kenya.

Dispute resolution by means other than courts has existed from time immemorial.<sup>23</sup> It is said to predate written history and was practiced by almost all societies.<sup>24</sup> Evidence

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<sup>21</sup> Asouzu AA *International Commercial Arbitration and African States* (2001) 1. See also Torgbor E., *Arbitration & Alternative Dispute Resolution in Africa* (2007) 28 – 37.

<sup>22</sup> Oduntan G “Africa Before the International Court of Justice and the Permanent Court of Arbitration: The Generational Gap in International Adjudication and Arbitration.” Unpublished conference paper, University of London (June 2003).

<sup>23</sup> By a quirk of English Law, “time immemorial” dates back to 1189, being the first year of the reign of Richard I and the start of the Plea Rolls. See Redgment J *Introduction to the Legal System of Zimbabwe* (1981) 20.

of the historical origins and use of arbitration and adjudication appear in the Bible and the Quran.<sup>25</sup> Roebuck asserts that the earliest substantial body of evidence of the way a community resolved disputes by arbitration is in the Greek language; but he is also quick to acknowledge earlier sources from other civilizations which point to the use of arbitration in ancient Mesopotamia, where Assyrian merchants regularly used arbitration and mediation in the nineteenth and eighteenth centuries BC and similar processes were applied to family disputes.<sup>26</sup> Settlement of private or communal conflicts by negotiation and arbitration was not unknown in Kenyan and African customary life and many instances exist of resort to African customary arbitration.<sup>27</sup>

Domestic arbitration law in Africa, as noted, comprises customary and statutory regimes. Consequently the law and practice of arbitration in Africa has evolved two apparently separate but coterminous systems, with some interaction. An African writer acknowledges the position in traditional societies that preceded the modern nation states with the observation that in these early societies customary law arbitration and ADR were in much more frequent use than customary litigation; and that arbitration and ADR were generally conciliatory and aimed at preserving existing relationships rather than the mere declaration of rights and liabilities that did not necessarily achieve enduring justice. Scholars on African culture and traditions will have no difficulty in agreeing that arbitration, conciliation and negotiation are more in consonance with African cultural life, disposition and beliefs than adversarial litigation.<sup>28</sup> Again, there can be no disagreement that the old customary pre-colonial

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<sup>24</sup> Tiewal SA & Tsegah FA “Arbitration and Settlement of Commercial Disputes” (1975) 24 *International Commercial Law Quarterly* 393 cited by Powell Smith V in “Settlement of Disputes by Arbitration under Sharia and at Common Law” (1995) 34 *Islamic Studies Quarterly Journal* 5. See also Bukar BA & Adamu MA “Legal Framework for the Resolution of International Commercial Disputes” (1999) 16(1) *Journal of International Arbitration* 47-53.

<sup>25</sup> For example: Isaiah ch 2:4; the Quranic basis of arbitration is found in 4:35 and 49: 9-10.

<sup>26</sup> Roebuck D *Ancient Greek Arbitration* (2001).

<sup>27</sup> For Kenya see the text to footnotes 69, 70 and 71 below. Other African examples are cited below at footnote 69 from the West African Court of Appeal Reports (WACA). See also Azouzu AA *International Commercial Arbitration and African States* (2001) 15-16. See further generally Gluckman M *Ideas and Procedures in African Customary Law* (1969); Chanock M *Law Custom and Social Order* Cambridge University Press 1998; Comaroff J & Roberts S *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981); Roberts R and Mann K (eds) *Law in Colonial Africa* (1991); Snyder F “Colonialism and Legal Forms: the Creation of Customary Law in Senegal” (1981) 19 *Journal of Legal Pluralism* 49-90.

<sup>28</sup> Okekeifere AI “Salient Issues In the Law and Practice of Arbitration in Nigeria” Paper delivered at Arbitration Colloquium, London University (June 4 – 5, 2003); Van Velsen J “Procedural Informality, Reconciliation, and False Comparisons” in Gluckman M (ed) *Ideas and Procedures in African Customary Laws* (1969) 137-149; Harvey WB *Introduction to the Legal System in East Africa*

societies had constant recourse to arbitration, mediation, conciliation and negotiation<sup>29</sup> (today's ADR techniques) for resolving domestic, commercial, political, land and boundary disputes; and that the communal, extended family, age grade and village lifestyle ensured less litigation than is the position today.<sup>30</sup>

### 2.3.1 Customary-Law Arbitration

#### 2.3.1.1 Customary-Law Arbitration

Customary-law arbitration, is a distinct form of arbitration in traditional African societies, particularly in West Africa. Concerning the significance and centrality of “tradition” a distinguished scholar has written:

“The stress on the constraining power of the ‘traditional’ can be found in colonial conceptions of the ‘customary law’ of subject peoples, and is deeply embedded in Durkheim’s (1961) vision of ... ‘the elementary forms of social unanimity’. It is also found in Weber’s (1978: 226 – 40) conception of ‘traditional authority’. This view is reiterated in some of Habermas’s (1979: 78 – 84, 157) evolutionary writings about law and society. A powerful version of the cultural argument is found in Geertz’s (1983: 232 – 3) commentary on law. Tradition also looms large in Rouland’s (1988) textbook overview.”<sup>31</sup>

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K29MIH37: comment on arbitration 348-352, reconciliation 385-390, native law and custom 425-428; Wilson R “Reconciliation and Revenge in Post-Apartheid South Africa” (2000) 41(1)*Current Anthropology* 75-98; Avruch K *Culture and Conflict Resolution* (1998).

<sup>29</sup> On culture and negotiation see Avruch K *Culture and Conflict Resolution* (1998) 39-41; Chanock M *Law Custom and Social Order*; Moore SF “History and the Redefinition of custom on Kilimanjaro” in Starr J & Collier J (eds) *History and Power in the Study of Law* (1989) 277-301; Nader L “From Legal Processing to Mind Processing” (1992) 30 *Family and Conciliation Courts Review* 468-473; Chase OG *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context* (2007).

<sup>30</sup> Kellor FA in *American Arbitration: Its History, Functions and Achievements* (1948) states that “the arbitral process has roots deep in history. Resolving disputes by agreeing to be bound by the decision of a third party trusted by the disputants existed long before law was established or courts were organized or judges had formulated principles of law.”

<sup>31</sup> Moore, SF *Law and Anthropology: A Reader* (2005) 347. The sources referred to are Durkheim E *The Elementary Forms of the Religious Life* Collier, New York (1961); Weber M *Economy and Society* University of California Press, Berkeley (1978); Habermas J *Communication and the Evolution of Society* Beacon Press, Boston (1979); Geertz C *Local Knowledge: Further Essays in Interpretive Anthropology* Basic Books, New York (1983); and Rouland N *Anthropologie Juridique* Presses Universitaires de France, Paris (1988) translated as *Legal Anthropology*, Stanford University Press (1994).

It cannot be far fetched to assert that all human societies, by culture and experience, have evolved their ways, means and methods of resolving societal conflicts and disputes and their terminologies for describing such phenomena.<sup>32</sup> African societies could not have originally called or described such methods and procedures by European or foreign names. That is a reason why non-Africans experience difficulties in comprehending the complexities of the variable African concepts and techniques for dispute resolution.<sup>33</sup> Conversely, it must be for the same reason that Africans also struggle with non-African concepts imposed by colonialists.<sup>34</sup> It is therefore a tragedy for the evolution of African culture, concepts and experience, that unless their practices and procedures are recognised by colonialist language or nomenclature, they are either condemned or ignored.<sup>35</sup> At best the development and evolution of such procedures are stunted or, sadly, even unacknowledged by some Africans themselves. Consequently, the African contribution to human knowledge, advancement and experience, in the global context, is either unrecognized, minimized, marginalized or devalued.<sup>36</sup>

It seems however that while including the African traditional proceedings among the forms of arbitration it is, paradoxically, the informality of such proceedings that distinguish them from both domestic and international arbitration.

“African traditional legal and social systems are replete with informal mechanisms for settling disputes which have been characterized as arbitration. African customary arbitration in Ghana, for example, has the following basic ingredients: (a) a voluntary submission of the dispute by the parties to a third party for the purpose of having the

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<sup>32</sup> In the Ga language (of Ghana) the word for a dispute or quarrel is “bei” and the word for its solution or repair “saamo”. Other examples are available in the Akan language of Ghana, the Kamba, Kikuyu or Luo languages of Kenya and indeed in the diverse languages of Nigeria, Zimbabwe and elsewhere on the African continent.

<sup>33</sup> Chukwuemerie A “The Internationalization of African Customary Law Arbitration” (2006) 14 *African Journal of International and Comparative Law* 143-175. He asserts that: “Arbitration and ADR were certainly not called these English names and in several places may not even have had names distinguishing one from the other. Their characteristics (such as between arbitration and conciliation) were also no doubt overlapping. That is why those trained in the British and other European or American systems have often had difficulties distinguishing between them”.

<sup>34</sup> For example the distinction between civil and criminal offences was unknown in Kenya and other early African societies.

<sup>35</sup> Armah AK “Remembering the Dismembered Continent” February 2010 (No. 492) and March 2010 (No. 493) *New African* pt 2.

<sup>36</sup> Armah “Remembering the Dismembered Continent”.

dispute decided informally, but on the merits; (b) prior agreement by both parties to accept the award of the arbitrators; (c) publication of the award.<sup>37</sup>

Asante asserts that:

“[t]he accent here is on the informality of the traditional proceeding. This ingrained idea of the essentially informal character of traditional African arbitration collides sharply with the modern concept of international arbitration. It comes as a surprise to many African lawyers and executives to realize that a party to international commercial arbitration has to navigate through a bewildering and complex maze of arbitration institutions, rules and procedures with rigid formalities and set deadlines, which can only be breached to the great detriment of the unwary party. Modern international commercial arbitration has all the characteristics of formal adjudication, a far cry from the informality associated with traditional customary arbitration. The highly technical nature of this process again reinforces the idea of an alien system.”<sup>38</sup>

What must be clarified here is that it is not the arbitral process that is alien to Africa. It is the nature and degree of its informality that set African customary arbitration apart from others, because in general the informality of arbitration is a universal characteristic that distinguishes any arbitration from, for example, litigation. The additional observation is that the informality of customary-law arbitration does enable the arbitrator to assume decision-making roles which, as noted above,<sup>39</sup> contribute to constructive resolution of disputes in complex and sometimes awkward cases encountered in customary African societies for which the more rigid and formalized arbitration procedures are not necessarily suited.

### *2.3.1.2 Integration of Customary-Law and Statutory Arbitration*

It has been noted that customary law arbitration is an integral part of the arbitral regime in Africa. There are focal points of convergence between it and statutory arbitration. Some fundamental principles and basic elements that reflect this convergence and indeed the integration and interaction of customary and statutory

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<sup>37</sup> Asante SKB “The Perspectives of African Countries on International Commercial Arbitration” (1993) 6 *Leiden Journal of International Law* 331.

<sup>38</sup> Asante (1993) 6 *Leiden Journal of International Law* 331.

<sup>39</sup> See para 1.9.1 above.

arbitration are firstly, that both systems of arbitration though distinct, are consensual; secondly, any one can be an arbitrator in both systems, a principle that opens customary arbitrations to non-Africans;<sup>40</sup> and thirdly, parties to a commercial arbitration dispute may opt for either system of arbitration. Therefore and significantly, the Model Law which recognizes the integration and interaction between it and other national laws governing arbitration<sup>41</sup> cannot and should not be given an interpretation that would exclude or negate the application and use of customary arbitration in African arbitral jurisdictions.

The terms “African”, “custom” and “law” may be used in differing senses depending on the user’s intent and approach. One has to bear in mind that the term “African” embraces a diversity of the inhabitants of the African Continent who do not live within the same territorial or jurisdictional boundaries or necessarily share the same social ties, habits and practices.<sup>42</sup> Custom usually describes the distinctive practices and conventions of a people, community or locality. Law, as an embodiment of rules of a community, therefore shares that sense of established usage also inherent in custom.<sup>43</sup> The juxtaposition and integration of custom and law into customary law therefore emphasise the fact that both custom and law embody recognizable and well-established rules of action and conduct with enforceable sanctions.<sup>44</sup>

A judicial description of customary law was given in *Oyewunmi v Ogunesan* as follows:

“Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static. It is regulating in that it controls the lives and transactions of the community subject to it.

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<sup>40</sup> *Obodo v Oline* SCNLR 298; *M. Ifeanyi Ojibah v Ubaka Ojibah* (1996) NWLR 86.

<sup>41</sup> Article 1(5).

<sup>42</sup> One observation is that most African states are “multi-tribal confections, many with fissiparous tendencies” *The Economist*, 10 April 2010, Leaders, 13.

<sup>43</sup> Chambers Concise 20<sup>th</sup> Century Dictionary; Nader L *The Life of the Law* (2002) 18.

<sup>44</sup> This is distilled from the writer’s judicial experience in Kenya and in the use and interpretation of customary law in African societies; see also Ajayi FA “The Interaction of English Law with Customary Law in Western Nigeria” (1960) 4 *Journal of African Law* 98 108; and regarding the integration of law in culture 326-353; Nader *The Life of the Law* 18-71 and 72-116.

It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.”<sup>45</sup>

For the Bantu<sup>46</sup> peoples of Africa,

“Bantu Law is that evolved by custom, and its expounders are the old men who have learnt it by precedent and the experience of age.”<sup>47</sup>

Various descriptions of customary law appear in African legislation and interdisciplinary literature<sup>48</sup> on legal pluralism,<sup>49</sup> anthropology, culture and, in context, dispute resolution. An example of a statutory definition is:

“‘Customary Law’ means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African community and accepted by such community in general as having the force of law ... .”<sup>50</sup>

The well-established status of customary law in the developing legal systems of African states therefore is not in doubt. In many colonial African territories the governing powers recognized that, side by side with the general law introduced by

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<sup>45</sup> Per Obaseki JSC (1990) 3 NWLR (pt 137) 182 at 207.

<sup>46</sup> The name given to a large group of African languages and the people speaking them in Southern and Central Africa.

<sup>47</sup> Dundas, cited by Harries CL *The Laws and Customs of the Bapedi and Cognate Tribes of the Transvaal* (1929). See also Schapara S “A Handbook of Tswana Law and Custom” in Moore SF (ed) *Law and Anthropology* (2005); Gluckman M “The Judicial Process Among the Barotse of Northern Rhodesia” reprinted in Moore SF (ed) *Law and Anthropology* (2005) 84-86, and Bohannan P “Justice and Judgment Among the Tiv” in Moore SF (ed) *Law and Anthropology* (2005) 87-94.

<sup>48</sup> Examples of legislation: Interpretation and General Clauses Ordinance s 2(1) (Tanganyika, as amended by the Magistrates Courts Act 1963, 6<sup>th</sup> schedule, Tanzania); Interpretation Act 1960 s 18(1) and (2) (Ghana); Magistrates Courts Act 1964 (Uganda); and Magistrates’ Courts’ Act s 2 (ch 10 of the Laws of Kenya). Moore (ed) *Law and Anthropology* 347 states regarding law and culture: “Culture is simply a label denoting durable customs, ideas, values, habits and practices. Those who treat law as culture mean that law is a particular part of that package, and that the combined totality has internal systemic connections.” For further literature see Caplan P (ed) *Understanding Disputes* Oxford 1995; Avruch AK *Culture and Conflict Resolution*; Chase OG *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context* (2007); Rosen L *Law as Culture* (2006); Brace DH *Exploring Law and Culture* (2006).

<sup>49</sup> Legal pluralism, in a narrow sense is the co-existence of various officially recognized State Laws. In a wider sense it includes religious and unofficial indigenous laws. See Griffiths J “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55. See also Van Niekerk GJ “Legal Pluralism” in Bekker JC, Labuschagne JMT & Vorster LP *Introduction to Legal Pluralism in South Africa* (2002) 3-18.

<sup>50</sup> Interpretation and General Clauses Ordinance s 2(1) (Tanganyika).

these powers, there also existed local rules regarded as enforceable where such local norms were infringed. One writer observed that

“[a]lthough we have no native paramount chief in the Transvaal now in the strict sense in which there is one in Basutoland and other native territories, yet there are chiefs of considerable importance with large followings and many petty or sub-chiefs and indunas under their jurisdiction. According to native law, they are subject to no authority higher than their own, and as far as their respective tribes are concerned they claim to be paramount chiefs. For example, the chief Sekukuni claims to be the paramount chief of Bapedi.”<sup>51</sup>

The local or customary courts were commonly established to administer such law and integration occurred because these courts were generally authorized to apply part of statute law of the country in addition to customary law.<sup>52</sup> In the result, whilst customary law as a body of unwritten rules recognized by communities continued to exist, there also emerged law in the form of adjudications and decisions of recognized courts. Customary law therefore developed along two routes: through the decisions of the courts and through the interpretation of a folk system of social control. Whilst lawyers would readily recognize the former route, others such as anthropologists may be expected to prefer the latter route. For present purposes, it is this writer’s view that customary law in the former sense would involve rules regarded as legal rules which the courts will uphold and that customary arbitration is founded on such recognized rules and principles.

Customary law remains part of the “common law” of African jurisdictions. This statement is anything but simple. It is laden with dichotomies and not a little complexity.<sup>53</sup> As with the differing senses in which the terms “custom” and “law” are

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<sup>51</sup> Harries CL *The Laws and Customs of the Bapedi and Cognate Tribes of the Transvaal*.

<sup>52</sup> See White CMN “African Customary Law: The problem of Concept and Definition” (1965) 9 *Journal of African Law* 86-89; Koyana DS & Bekker JC “The Courts: Application of Indigenous Law and the Repugnancy Clause” in Bekker et al *Introduction to Legal Pluralism* 152.

<sup>53</sup> Bekker et al *Introduction to Legal Pluralism in South Africa*: “There is in South Africa a vast field of official customary law, that is, legislation and case law. It is part of the law of the land, but it has not been integrated into what is called the common law. The South African Law Commission is engaged in various projects to harmonise customary law and common law.” They also explain that there is no consistency in the use of terminology, for example, a tribe is a community, but all communities are not tribes. There may even be different communities within a tribe. A chief is a traditional leader, but all traditional leaders are not chiefs.

used, there are at least two major senses in which the term “common law” is applied. In the first sense, common law is the law common to a whole country consisting of rules and principles that form the basic law of that country in areas not covered by legislation. In this sense it is contrasted with statutes and customs observed in particular localities and communities. In a second sense, the contrast is with civil law. Continental European countries (such as France and Germany) with codified laws based on Roman law typify civil law. England, the United States and Commonwealth African countries with legal systems developed from court decisions consider themselves members of the “common-law family”.<sup>54</sup>

The evolution of the common law of Zimbabwe, formerly Southern Rhodesia, is an interesting example of the integration of differing laws in a legal system. Section 13 of The High Court Act of Southern Rhodesia provided that:

“[s]ubject to the provisions with regard to Native law and custom contained in the Native Law and Courts Act. Cap 73, the law to be administered by the High Court and by the Magistrates’ Courts shall be the same as the law in force in the Colony of the Cape of Good Hope on the tenth day of June, 1891, as modified by subsequent legislation having in this Colony the force of law.”<sup>55</sup>

With that, the Roman-Dutch law of the Cape Colony became the common law of the Colony of Southern Rhodesia,<sup>56</sup> a fact of history that introduces the legal history of the Cape into the evolution of Zimbabwean law. It is acknowledged that the influence of the Cape was strong in the first half of the twentieth century and that, even after the establishment of the Union of South Africa in 1910, the Cape Supreme Court dealt with appeals from Southern Rhodesia.<sup>57</sup> For these reasons the common law inherited

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<sup>54</sup> Redgment *Introduction to the Legal System of Zimbabwe*.

<sup>55</sup> High Court Act of Southern Rhodesia s 13.

<sup>56</sup> Redgment *Introduction to the Legal System of Zimbabwe*; Christie RH *Rhodesian Commercial Law* (1961).

<sup>57</sup> Christie *Rhodesian Commercial Law* and Redgment *Introduction to the Legal System of Zimbabwe* trace the development of the Rhodesian common law: from the Twelve Tables – a short record of the existing customary law of Early Rome – to the Classical Age of Roman Law and the importation of the *Corpus Juris Justinianus* to the Netherlands; and then from the writers of Holland including, notably, Grotius (Hugo de Groot) the renowned international-law jurist, Johannes Voet whose *Commentary* remains a classic work and Simon van Leeuwen said to be the first to use the term “Roman-Dutch” in 1652, to the Cape Articles of Capitulation in 1806 that secured to the inhabitants the Laws as then existed, to the sweeping changes introduced by the Charters of Justice of 1827 and 1832; and finally from the Cape to Southern Rhodesia and Zimbabwe.

by Zimbabwe is said to be, in its basic principles, much the same as that in South Africa.<sup>58</sup> It has therefore been customary to regard Southern Rhodesian or Zimbabwean common law as Roman-Dutch, in the first sense in which the term common law has been explained. The influence of the inherited laws and the need to adapt customary law to modern needs would justify the classification of that law as “mixed”.<sup>59</sup>

Nevertheless, despite the influence of Justinian’s Code, the writings of the Dutch jurists of the classic period of Roman-Dutch law, the system of law carried by the seafarers of the Netherlands to Guiana, Ceylon, the East Indies and to the Cape Colony, and from there to Rhodesia, Zimbabwe today categorically belongs to the common-law fraternity rather than to the civil-law tradition, especially as regards its law of civil procedure and much of its commercial law. Two plausible reasons are that, although the Roman law is basic to Zimbabwean law, Zimbabwean law was never codified. In addition, the Cape was a British colony for just over a century. Without a Code, and with English influence, Zimbabwean law has developed in the courts in the tradition of the common law-system.<sup>60</sup> The vectors of Roman law influence in the Netherlands can nevertheless be said to be the ancestral agents of the importation of Roman-Dutch law to Zimbabwe.

Granted that in modernized African jurisdictions such as Kenya, Nigeria and Zimbabwe the customary law may have been assimilated into common law and even been legislated into statutes: the fact still remains that the common law was neither abrogated nor repealed. In Nigeria and Zimbabwe for example, the introduction of arbitration legislation based on the English Arbitration Act of 1889 did not repeal the common law of arbitration,<sup>61</sup> and in South Africa the colonial arbitration legislation did not repeal the Roman-Dutch common law so that even today, an oral reference to arbitration pursuant to an oral arbitration agreement is regulated only by the Roman-Dutch common law as adapted in South Africa.<sup>62</sup> Moreover, as part of the interaction between the common law and statutory arbitration law, the court’s statutory powers

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Orojo JO & Aromo MA *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) 12; Donovan IA “Zimbabwe” in Cotran E & Amissah A (eds) *Arbitration in Africa* (1996) 179.

<sup>62</sup> Cotran & Amissah (eds) *Arbitration in Africa* 195 and 201-202.

under the Arbitration Act 42 of 1965 are supplemented by the court's powers relating to arbitration under the South African common law.

With particular reference to Nigeria it is acknowledged that expatriates and companies now enter into commercial relationships concerning pieces of land held under customary land tenure which are routinely acquired for commercial ventures. It is a point of interest that the Nigerian arbitration statute of 1988<sup>63</sup> is restricted to "commercial arbitration". Commenting on the definitions of "commercial", "party", "arbitration" and "arbitral tribunal" under section 57 of the Nigerian Act, Okekeifere correctly asserts that these definitions do not in any way exclude customary law principles, that therefore a party to a commercial arbitration before a tribunal under customary law has the same status as any other party in an arbitration under the Act.<sup>64</sup> His point of emphasis is that parties to a customary arbitration agreement<sup>65</sup> can, if they so elect, avail themselves of the practices and procedures under the Act and their award can be enforced in a customary court and, should the need arise, with a right of appeal to the High Court for the recognition and enforcement of the award.

It is submitted that this is an acceptable view of the integration between customary and statutory arbitration as is Okekeifere's further and firm opinion that the Model Law as enacted in Nigeria recognizes customary law arbitration and is capable of enhancing and promoting customary-law arbitration. This ought also to be true and applicable to Kenya. Even on the crucial requirement of "writing" for the validity of the arbitration agreement it seems that UNCITRAL was not averse to the recognition of arbitral proceedings based on an oral agreement that initiated the proceedings and was not objected to by any party or where an original defect in form was cured by waiver or submission.<sup>66</sup> It is submitted that a liberal interpretation of "writing" that extends beyond the formal written agreement to terms like "the reference", "submission" and "statements of claim and defence"<sup>67</sup> would be favourable to the use

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<sup>63</sup> Arbitration and Conciliation Act, Cap 19 s 57(1).

<sup>64</sup> Okekeifere "Salient Issues in the Law and Practice of Arbitration In Nigeria"; see also Okekeifere AI "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Courts (1998) 1 *Abia State University LJ* 41;

<sup>65</sup> Whether this agreement takes the form of a clause in a contract or a separate agreement.

<sup>66</sup> Seventh Secretariat Note Analytical Commentary on Draft Text A/CN.9/264, Article 35 n 91.

<sup>67</sup> See Article 7(2) of the original version of the Model Law (1985) which also regards an arbitration agreement as being in writing if it is contained "in an exchange of statements of claim and defence in which the existence of an [arbitration] agreement is alleged by one party and not denied by another."

of customary law arbitration. In 2006, UNCITRAL issued a revision of Article 7 of the original Model Law. One of the two options for a definition of “arbitration agreement” approved by UNCITRAL reads:

“‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”<sup>68</sup>

It will be noted that there is no reference in this definition to the requirement of writing.<sup>69</sup> This new optional definition therefore follows the approach of the New Zealand Arbitration Act, by recognizing an oral arbitration agreement.<sup>70</sup> The point of significance is that an oral arbitration agreement of the type common in customary arbitration could now fall within the ambit of UNCITRAL’s revised definition of arbitration agreement. However, the revised optional definition will only apply if adopted by legislation in Kenya and other African states.<sup>71</sup>

For present purposes it may be mentioned that neither the Kenyan Arbitration Act of 1995 nor the Zimbabwe Arbitration Act of 1996, which are identically worded on this point, and define arbitration as “any arbitration whether or not administered by a permanent arbitral institution”<sup>72</sup> excludes customary arbitration from its purview. Moreover, neither of these statutes is restricted to commercial arbitration.<sup>73</sup> The existence of a plurality of arbitration laws and the development of multiple arbitral jurisprudence within a unitary domestic arbitral jurisdiction like Kenya is therefore a tenable proposition. It is suggested that customary arbitration, traditionally concerned with land and boundary disputes, trespass, succession and inheritance issues, is today also a viable dispute resolution procedure for commercial disputes and available

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<sup>68</sup> This is the second option. The first option retains the requirement of an arbitration agreement in writing, but the concept of a written agreement has been widened. The basic requirement of either signature or an exchange of documents by the parties, derived from the New York Convention, has been omitted.

<sup>69</sup> See the Report of the UNCITRAL Working Group, 39<sup>th</sup> session 19 June – 7 July 2006 (UN doc A/61/17). See further para 2.4.4.5(ii) below.

<sup>70</sup> See the New Zealand Arbitration Act of 1996, Schedule 1, Article 7(1), which reads in part: “An arbitration agreement may be made orally or in writing.”

<sup>71</sup> See para 2.4.4.5(ii) below.

<sup>72</sup> See the Kenyan Act s 3(1) and the Zimbabwean Act 1<sup>st</sup> Schedule Article 2.

<sup>73</sup> See para 2.4.4.5(ii) below.

together with statutory arbitration to parties in dispute.<sup>74</sup> The alternative conclusion would be that the Acts do not apply to customary arbitration. It is submitted however that there is no express indication of such an intention and no necessity to adopt such an interpretation.

### *2.3.1.3 Customary-Law Arbitration in Operation*

Customary arbitration systems existed in East Africa before the advent of colonialism. Anthropological and juridical studies show that the area now called Kenya was inhabited by acephalous communities known as the Kikuyu, the Masai, the Luo, the Kalenjin and others<sup>75</sup> and that these communities resolved their conflicts either at the family level or at clan conclaves. The procedure was informal with no formalized concepts or distinction between crimes and civil wrongs because all social conflicts were treated in the same way. The aim in such social and political systems was the need for harmony and mutual accommodation. A crucial factor in the traditional conflict settlement was the making of amends and this required the wrongdoer to make good the loss caused to the complainant. The emphasis was on the settlement of claims and reparation of damages rather than the punishment of the offender and compensation was payable to the complainant in cases such as assaults, homicide, theft, adultery and so on.

There were four broad categories of disputes: (i) those arising from counterclaims to assets, (ii) those arising from personal injuries, (iii) those based on breaches of general communal norms, and (iv) those caused by intra-family differences. In all these cases the informal tribunals deliberated and passed verdicts which were binding on the parties. The detailed rules for solving such disputes sometimes differed from one ethnic community to another. Relying on his interviews with tribesmen, Ojwang records that among the Luo and Kikuyu a cattle thief, if found guilty, was ordered by the tribunal to return the animal plus an additional one as punishment; but the two

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<sup>74</sup> Duru “Fundamentals of Arbitration Law and Practice in Nigeria”; Usman I “Domestic Arbitration Practice and Procedure” unpublished presentation at an ADR Seminar, Balalaika Hotel, Sandton Johannesburg, August 2007.

<sup>75</sup> Fortes M & Evans-Pritchard EE *African Political Systems* (1970); Ojwang JB “Rural Dispute Settlement in Kenya” (1975/1977) *Zambia Law Journal* 7-9; Wagner G *The Changing Family among the Bantu Kavirondo* (1939).

communities applied different rules in, for instance, land disputes and homicide cases.<sup>76</sup>

The legal basis of Kenya's formal conflict resolution system was prescribed by various laws such as the East Africa Native Courts Amendment Ordinance of 1902, the Village Headman Ordinance of 1902, and the Penal Code and Evidence Act of 1932. It will suffice to state that the legal history of colonial Kenya was characterized by an increase in social conflict as colonialism introduced a new phase of institutional life and recourse to state tribunals; but this did not signal the end of customary and traditional procedures for settlement of disputes, as practically all matrimonial disputes and land cases were still settled by the informal customary processes. As noted by Ojwang:

“Informal procedures were sufficient to cope with virtually all social conflicts. With the advent of colonialism a new society was introduced which changed the character of dispute settlement by increasing the frequency of human interactions and the areas of potential conflict.”<sup>77</sup>

In West Africa, particularly in the tribal societies of Nigeria and Ghana for example, chiefs, elders and trusted individuals were constituted as dispute settlers in which capacity they played the role of arbitrators or courts. As arbitrators, mediators or conciliators, the same individuals received a party's complaint, summoned the other party, heard their evidence and gave an opinion which the parties were entitled mutually to accept or reject. If either party rejected the opinion of the arbitrator, that would be the end of the process. When they sat as a court they conducted customary litigation, as distinct from the customary arbitration. They had coercive powers and persons summoned before them were bound to appear. They could impose fines in both criminal and civil matters under the existing customary law rules and practices.<sup>78</sup>

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<sup>76</sup> Ojwang “Rural Dispute Settlement in Kenya”.

<sup>77</sup> Ojwang “Rural Dispute Settlement in Kenya”.

<sup>78</sup> *Chief Kweku Assampong v Kweku Amuaku & Others* (1932) WACA 192; *Kobina Foli v Akese* (1930) 1 WACA 1; *Essie Gyesiwa v Kobina Mensah* (1947) WACA 45; *Opanin A Kwasi v Joseph Larbi* 13 WACA 7; also (1952) WACA 76. Okefeifere “Salient Issues in the Law and Practice of Arbitration In Nigeria” 5 puts forward the interesting view that the UNCITRAL Model Law as enacted in Nigeria covers customary-law arbitrations and is capable of enhancing and promoting customary-law arbitration resulting in the Model Law being a greater asset than many have acknowledged.

Asouzu emphasizes this fact with regard to the existence and status of customary arbitration by stating that before the conquest or annexation and consequent colonization of most African societies by alien powers, those societies had their informal dispute resolution methods which they have retained. Each community had unique rules and norms for the resolution of controversies over property and other rights. In centralized communities, the chief or a central political authority maintained a traditional court over which he presided, or delegated judicial powers to a specialized officer. However acephalous societies<sup>79</sup> had a community-based means of dispute settlement anchored to the council of elders, heads of families and traditional social groups and institutions. In either society the customary dispute resolution processes were governed by customary law rules. Asouzu affirms that the basic aims of customary-law dispute resolution are reconciliation, peaceful co-existence and assuagement of feelings in order to avoid the dislocation of social cohesion and to promote communal solidarity.<sup>80</sup>

In Southern Africa, the distinction in the arbitral and judicial roles and functions of Chiefs, Headmen and Kraal Elders was recognised by the early writers on African customary practices.<sup>81</sup> Harries observed:

“The powers and functions (of chiefs et cetera) were sanctioned or curtailed by legislation or by the Supreme Courts. For example, legislation in 1885 changed the chief’s position and limited his jurisdiction to the hearing and determination of civil disputes between natives of their tribes or locations. Only chiefs appointed in terms of this law were entitled to such jurisdiction.”<sup>82</sup>

With particular reference to Southern Rhodesia, as modern Zimbabwe was known, Goldin and Gelfand state that:

“Africans usually endeavour to settle their disputes by themselves peacefully or, failing to do so, they resort to arbitration by a tribal ruler or respected elder of the

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<sup>79</sup> I.e. societies without a head or chief.

<sup>80</sup> Asouzu *International Commercial Arbitration* 115-117.

<sup>81</sup> The distinction with regard to West Africa was noted in para 2.3.1 above.

<sup>82</sup> Harries CL *Laws and Customs of the Bapedi* Chapter VI.

tribe. If a dispute arises between members of the same family, they expect the head of the family to restore harmony by resolving differences.”<sup>83</sup>

Conciliation, as an integral part of the process towards reconciliation of the disputing parties, was commonly used.<sup>84</sup> Disputes, minor or serious, but likely to disturb the communal peace were settled by the Chiefs or Headmen informally and privately and in a manner akin to arbitration. Goldin and Gelfand assert that the existence of this “arbitrative system” explains the survival of the “*dare*” among the Shona or the “*enkundeleni*” of the Ndebele before the tribal courts were established by law in about 1937 and is a system that has subsisted concurrently with but as an alternative to the tribal court system established by legislation. The point therefore is that while Chiefs and Headmen exercised judicial functions under legislation<sup>85</sup> they also settled disputes as arbitrators. The consensual basis of customary arbitration and ADR was given statutory recognition by a proviso to section 28 of the African Law and Tribal Courts Act 1969 to the effect that “nothing in this section shall be deemed to prohibit any arbitration or like settlement in any matter with the consent of the parties thereto.”<sup>86</sup>

Holleman uses two extensive case reports as comparative material on dispute settlement in tribal societies of Southern Rhodesia.<sup>87</sup> From his personal experience of rural societies such as the Mashona, Holleman deduced that the life of the African individual was wrapped up in the life of the community such that a legal dispute of any consequence was not confined to the individual parties. Therefore, the indigenous administration of justice, in contrast to the European system of justice, aimed at

<sup>83</sup> Goldin B & Gelfand M *African Law and Custom in Rhodesia* (1975).

<sup>84</sup> Allott AN *African Law* cited by Goldin & Gelfand *African Law and Custom in Rhodesia* 119; Nader L “From Legal Processing to Mind Processing” (1992) 30 *Family and Conciliation Courts Review* 468-473.

<sup>85</sup> Such as statutory recognition through their appointment by the Minister of Internal Affairs under the African Law and Tribal Courts Act 24 of 1969 ss 6 and 28.

<sup>86</sup> *S v Madhliwa Khumalo*, unreported High Court judgment dated 16 November 1972.

<sup>87</sup> Holleman JF *Issues In African Law* (1974). The cases are “The Case of the Troublesome Father” Case Report, 1946 and “The Case of the Irate Headman” Case Report, 1951. On the question whether the native system or the British system was better Holleman says: “If you ask an Engineer, ‘which is better, Tungsten Steel or Chromium Steel’, he will likely tell you it is really a silly question because it all depends on the particular purposes for which you want to use the steel.”

Other early works on customary law and on the administration of justice in tribal societies include Holleman JF *Shona Customary Law* (1952) and Holleman JF *Chief, Council and Commissioner* (1969); Goldin & Gelfand *African Law and Custom in Rhodesia*; Child HF *The History and Extent of Recognition of Tribal Law in Rhodesia* (1976); Khumalo JAM *Civil Practice & Procedure of All Courts for Blacks in Southern Africa* 3<sup>rd</sup> ed (1984).

solving the conflict between the parties rather than deciding its legal aspects in terms of law, so that justice, instead of the rational and impartial application of abstract rules of law, was a process of persuasion with the accent on reasonable behaviour of all concerned in a spirit of give and take. The African tribal court or tribunal convened at any suitable place, usually outdoors, under a shady tree in summer time, or on a warm flat rock in winter time. It was a public affair with always a fair number of people from nearby villages in attendance. The presiding officer was the chief or headman, assisted by two or more assessors and an intermediary between the parties *inter se* who was also the intermediary between the parties and the tribunal. The process of presentation of each party's case and cross-examination with the participation of the attendant public led to a final decision which the parties accepted or were eventually persuaded to accept.

As to whether there was a sanction of law behind the indigenous process, Holleman asserts that the party who had agreed to a decision or solution which seemed fair to the majority of the people will subsequently not lightly refuse to fulfill his commitments; and further that the closely interwoven life of an individual with that of the community, the interdependence of its social, ritual and economic life and the fear of losing the goodwill and support of one's neighbours were very effective sanctions.

With particular reference to Zimbabwe it has been said that:

“[t]he traditional emphasis on the community means that the object of the law is a restoration of group solidarity: an example of this is that compensation rather than punishment is important in criminal law.”<sup>88</sup>

From the perspective of arbitration and ADR, Holleman's comment on the goal of indigenous justice as “reconciliation” is pertinent. He acknowledged that for the Shona peoples, reconciliation meant something more specific: “a distinct, unequivocal, overt act, which dramatizes the end of the ‘hatred’ between two parties which had threatened social peace and unity and the resumption of their friendly relationship as a solvent of social poison.” Reconciliation involved the use of words to indicate its purpose of making estranged parties “live well together”, “see each other”

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<sup>88</sup> Redgment *Introduction to the Legal System of Zimbabwe* 17.

or “return to each other” again. The resonance with the declared goals of modern ADR and arbitration practice is unmistakable.

The historical connection between South Africa’s legal history and evolution of Zimbabwean law is explained in paragraph 2.3.1 above. In describing the recognition and application of customary law and courts for Blacks in the period before the Union of South Africa came into being, Khumalo states that before the advent of white people in Southern Africa the various tribes had their own social traditions inherited from past generations. The Chief or King was the leader in times of peace and war, in whom all judicial and legislative powers vested. His counselors were drawn mainly from the heroes and elders of the community and as these were pre-literate communities their laws were unwritten but nevertheless known to most members of the community. Conflict resolution was usually conducted under a tree in a procedure presided by the Chief. Such courts were of first and final instance in pre-colonial times and the remedy granted was usually compensation although the courts also attempted to reconcile the parties through a process that led to a more amicable solution to the dispute.<sup>89</sup>

Traditional leadership has been central to the lives of African people for centuries and pivotal in dispute resolution in rural South Africa. As an institution it was influenced by both colonisation and the apartheid systems of government.<sup>90</sup> One of the most important pieces of legislation applicable to traditional leadership was the Black Administration Act<sup>91</sup> until the Traditional Leadership and Government Act<sup>92</sup> was passed in 2003 to deal more comprehensively with and transform the institution of traditional leadership in line with the Constitution of the Republic of South Africa.<sup>93</sup> Therefore customary law as known today in South Africa is a hybrid of African practices and aspects of the Western system of law<sup>94</sup> and the administration of justice

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<sup>89</sup> Khumalo JAM *The Civil Practice of All Courts For Blacks In Southern Africa* cites other informative writers on the subject such as Koyana DS *Customary Law in a Changing Society* 128; Goldin B & Gelfand M *African Law and Custom in Rhodesia* (1975) 23 and Kaunda K A *Humanist In Africa: Letters to Colin Morris* 25.

<sup>90</sup> See Boyana T *Traditional Justice in Practice: A Limpopo Case Study* (2005).

<sup>91</sup> Act 38 of 1927.

<sup>92</sup> Act No. 41 of 2003.

<sup>93</sup> Boyana *Traditional Justice in Practice* 9.

<sup>94</sup> Boyana *Traditional Justice in Practice* 13.

in rural South Africa is predominantly carried out by chiefs' courts which administer justice largely on the basis of customary law.<sup>95</sup>

In its discussion paper on Community Dispute Resolution Structures the South African Law Reform Commission observed that:

“[i]n contrast to the Roman-Dutch legal system based on retributive justice, where the object is to establish blame and administer punishment, the informal structures attempt to promote healing and enforce community values by using social pressure. Restorative justice and reiterative shaming are two of the most important tools of the enforcement process. The approach and reasoning used are elements which echo indigenous African procedures.”<sup>96</sup>

The discussion paper acknowledged further that these African procedures also reflected the practices known as *makgotla*, *tinkundla*, *ibunga* and *imbizos* where community members participate directly through questions and decisions; and that these popular justice systems have evolved and their practices have been adapted to urban circumstances.<sup>97</sup>

It can be concluded that the processes of dispute settlement in Eastern, Western and Southern Africa represented in this study by Kenya, Nigeria and Zimbabwe in pre-colonial times were akin to each other in approach if not in form, substance or detail.

Of interest and relevance is the argument of Woodman<sup>98</sup> that customary law is by nature well known to those who are subject to it and that the lack of access to knowledge of customary law and especially lack of access to written information

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<sup>95</sup> Boyana *Traditional Justice in Practice* 19.

<sup>96</sup> Discussion Paper 87 (1999) 4 para 1.2.5. See also Harries *The Laws and Customs of the Bapedi*. Chapter VI on Native Courts is particularly informative and instructive. Harries describes the laws and customs of other tribes including principally the Zulu tribe, and the Bavenda under Venda Law (85-88) with several illustrative cases (88-89) on the powers and functions of “paramount chiefs” whose powers were either sanctioned or curtailed by legislation or the Supreme Courts between 1885 and 1927.

<sup>97</sup> Discussion Paper 87 4 para 1.2.5. See also Koyana & Bekker “The Courts: Application of Indigenous Law and the Repugnancy Clause” in Bekker et al *Introduction to Legal Pluralism* ch 9 “The Courts” regarding Makgotla (“Community Courts”) para 9.3.1; Peoples Courts, para 9.3.2 and the application of Indigenous Law and the Repugnancy Clause, para 9.4.

<sup>98</sup> (1994) 34 *Journal of Legal Pluralism*. Uwaizee EE “Model of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria (1994) 34 *Journal of Legal Pluralism* 87.

about it was a problem mainly for the colonial administrators from outside the community. Consequently, modern writers on the subject owe much to existing sources of the law and practice of customary dispute resolution such as (i) transmission by oral history, (ii) the knowledge and experience of those who participated in the making of such history, (iii) unreported but informally recorded cases of customary dispute settlement and (iv) reported court decisions.<sup>99</sup>

The acknowledgement of this unsatisfactory situation has prompted action by some states to review their arbitration laws with relative degrees of urgency and success.<sup>100</sup>

### 2.3.2 The Progress of Customary Arbitration through the Cases: the West African Experience

The dearth of documentation on customary arbitration cases in Kenya and East Africa generally necessitates the exemplary reference to the West African experience for purposes of this study. The jurisprudence of customary arbitration in Africa has been developed with the assistance of the courts. Judicial decisions on customary arbitration in West Africa are abundant.<sup>101</sup> They turned on issues such as challenges to the existence of the arbitration agreement, the consent to arbitrate and voluntary submission to arbitration, arbitrability, the binding effect and enforcement of the award and on the very concept of arbitration under customary arbitration law and practice. Because the core of this study relates to recurrent problems in arbitration law and practice, the historical contribution, as well as the attitude, of the state courts in taking on and dealing with these challenges through customary law arbitration are of particular interest and relevance in this research. A few of the leading judicial decisions are used as examples.

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<sup>99</sup> Asouzu *International Commercial Arbitration* 118.

<sup>100</sup> Allott A "Arbitral Proceedings in Customary Law: Suggestions for a Model Ordinance" (1957) 2 *Journal of African Administration* 96 is an attempt to elaborate a Model Ordinance for Arbitral Proceedings in Customary Law. Ghana has been planning a proposed Arbitration Act of Ghana since 1988 intended to codify separately customary and statutory arbitration law: 13<sup>th</sup> Annual Report of the Law Reform Commission of Ghana, Accra, Govt. Printer 1988.

<sup>101</sup> Kolajo AA *Customary Law in Nigeria through the Cases* (2000).

One of the early Gold Coast cases was *Kwabena Mensah v Ernestina Takyiampong*.<sup>102</sup> The plaintiff claimed the recovery of two pieces of land, mesne profits and an injunction. The decision turned on whether or not the dispute between the plaintiff and defendant had already been determined by the voluntary submission of the same parties to arbitration and an arbitral award, as alleged by the defendant. The trial judge found as facts that there was indeed an arbitration in accordance with native customary law, that both parties agreed to the arbitration and the award and to the subsequent demarcation of boundaries, but ruled that the award had no legal effect. The appellate court upheld the findings of fact and allowed the appeal, but disagreed with the lower court that the award had no legal effect. In the opinion of the appellate court there was nothing cited in the Ordinances before the court that could alter the binding effect of the arbitration upon the parties *inter se*.

Two points of jurisprudential interest can be made on the findings and conclusions of the appellate court. The first concerns whether or not a land dispute affected by a written testamentary will was arbitrable under native law and custom. On this point the court found that the sole question for decision was “which of the properties were family property” – a question eminently suitable for decision either by a Native Tribunal or by a native or natives in an arbitration held in accordance with native law and custom. The existence of a will concerning the land did not make the matters in dispute such as could not be submitted to arbitration in accordance with native law and custom.

The second juridical point is that the court drew a distinction between the validity of a customary arbitration award and its enforcement, by acknowledging the validity of a customary arbitration between the parties, but declined to lend support for its enforcement. In the words of the court:

“The award is not such that it will be enforced by the Supreme Court in the sense that the successful party can invoke the aid of the Court to proceed to execution upon it, but this is very different from holding it to be invalid in the sense that it is not binding upon the parties. In our opinion it is as binding upon the parties as such decisions upon arbitration in accordance with native law and custom have always been, that the

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<sup>102</sup> 1940 6 WACA 118.

unsuccessful party is barred from re-opening the question decided, and that if he tries to do so in the Courts the decision may be successfully pleaded by way of estoppel.”

A further pertinent observation is the fact that customary arbitration in the Gold Coast was in common use long before the judgment in this case was delivered in Accra on 21 May 1940 by the West African Court of Appeal, on an arbitration award that was made on or about 15 September 1932. Of historical interest too is the reference by the court to the headnote to *Ekua Ayafie v Kwamina Banyea*,<sup>103</sup> which read:

“Where matters in difference between two parties are investigated at a meeting, and in accordance with customary law and general usage a decision is given, it is binding on the parties, and the Supreme Court will enforce such a decision.”

If that was then the true position under customary law, the later decision of the Supreme Court that restricted recognition of a customary arbitration award to questions of validity but not to enforcement was a vestige of colonial judicial ambivalence and sophistry.<sup>104</sup>

*Opanin Asong Kwasi & Ors v Joseph Richard Obuadabang Larbi*<sup>105</sup> is a historical *cause célèbre* on the principles of customary arbitration concerning the validity of arbitral proceedings before Elders, the distinction between negotiation for a settlement and a formal arbitration and the issue of consent to arbitration. The plaintiff claimed against the defendant a declaration of title to certain land and an injunction. The “Findings of Special Arbitration” were recorded in a formal document setting out the arbitral proceedings “with great clearness and considerable detail”. The West African Court of Appeal found that the proceedings before the Elders were not a mere negotiation for a settlement but a formal arbitration and so dismissed the contention that the award was not under customary law binding on the appellants, who had withdrawn from the proceedings at the time of the inspection of the land. The Privy Council agreed with the appellate court and opined that in native customary law the Elders have a recognized judicial function and are in fact a tribunal before which

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<sup>103</sup> (1884) Sarbah’s Fanti Law Reports 38.

<sup>104</sup> Other decisions of historical interest mentioned in this case were *Asiedu v Kwamena Ofori & Another* decided on 6 December 1932; *Benasko v Andoh* decided in 1930; and *Adejatu Tomole v Ilugbo Aru* decided in 1933 and cited from Divisional Court Judgments, 1931-1937.

<sup>105</sup> (1952) 3 WACA 76.

natives could bring their disputes for judicial decision.<sup>106</sup> Moreover, the proceedings had no resemblance to negotiations for a settlement but had all the marks of a well conducted formal arbitration, and “it would be unfortunate if so convenient a procedure were prohibited”.

On the question whether the native customary law recognized the right to resile from arbitral proceedings, the Privy Council concluded there is no such right after the award, and no authority was cited to it on the question of the right to resile before the award. On the issue of consent to arbitration, the Privy Council stated that “since it is established that the parties gave their consent to the submission of the dispute to the Elders without any express reservation of a right to resile, and there is no right to resile after the award is made, and the appellants had failed to satisfy the Board that a right so contrary to the basic conception of arbitration is recognized by native customary law, the appeal should be dismissed.”

The concept of arbitration, the issue of voluntary submission to arbitration and the very status of customary arbitration in the regime of arbitration laws in Africa came under consideration and close scrutiny in the leading case of *Raphael Agu v Christian Ozurumba Ikewibe*.<sup>107</sup> The plaintiff claimed against the defendant a declaration of title to a piece of land and damages for trespass. Interestingly it was submitted by the appellant that the concept of arbitration at customary law was unknown to the Nigerian legal system.<sup>108</sup> In rejecting this argument, the Supreme Court firstly acknowledged customary arbitration as founded on the voluntary submission of the parties to the decision of arbitrators who are Chiefs or Elders of their community, with the additional clarification that customary arbitration is not an exercise of the judicial power under the constitution, because it is not a function undertaken by the courts. Secondly, customary law, by virtue of the Nigerian Constitution<sup>109</sup> is an “existing law” being a body of rules in force immediately before the coming into force of the 1979 Constitution; and customary law includes customary arbitration. The Court elaborated further that one of the many African customary modes of

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<sup>106</sup> The Privy Council quoted with approval a relevant passage from Danquah *Akan Laws and Customs*, London (1928) 83.

<sup>107</sup> (1991) 3 NWLR (pt 180) 385.

<sup>108</sup> This was in reliance on *Okpuruwu v Okpokam* (1988) 4 NWLR (pt 90) 554.

<sup>109</sup> S 274(3) and (4)(b).

settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to that point. The court was categorical that this is a common method of settling disputes in all indigenous Nigerian societies and of the kind considered in *Chief Kweku Assampong v Kweku Amuaku & Ors.*<sup>110</sup>

In demonstrating that the selection of arbitrators was not restricted to only Chiefs or Elders the Supreme Court accepted the following exposition of customary-law arbitration by Ikpeazu J in *Phillip Njoku v Felix Ekeocha*:<sup>111</sup>

“Where a body of men, be they chiefs or otherwise, act as arbitrators over a dispute between two parties, their decision shall have a binding effect, if it is shown firstly that both parties submitted to the arbitrators, secondly, that the parties accepted the terms of the arbitration, and thirdly, that they agreed to be bound by the decision, such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel.”

The court deduced from the numerous authorities it cited that Nigerian law recognized arbitration at customary law which is distinct and different from arbitration under statute if the following conditions are satisfied:

- “(a) if the parties voluntarily submit their dispute to a non-judicial body to wit, their Elders or Chiefs as the case may be for determination; and
- (b) the indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied; and
- (c) that neither of the parties has resiled from the decision so pronounced.”<sup>112</sup>

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<sup>110</sup> (1932) 1 WACA 192.

<sup>111</sup> (1972) 2ECLR 199.

<sup>112</sup> These conditions were present, according to the Supreme Court, in the following cases: *Assampong v Amuaku supra*; *Mbagbu v Agochukwu* (1973) 3 ECSR (Pt 1) 90; *Phillip Njoku v Ekeocha supra*; *Ofomata v Anoka* (1974) 4ECSR 251; *Inyang v Essien* (1957) 2F.SC39, (1957) SCNLR 112; *Idika v Erisi* (1988) 2 NWLR (Pt 78) 573; *Mensah v Takyiampong* (1940) 6 WACA 118; *Kwasi v Larbi* (1952) 3 WACA 76 **but not** in *Foli v Akese* (1930) 1 WACA 1 where the arbitration was not conducted by an Elder, Chief or community member, but by a Judge of the Supreme Court.

The majority decision concluded that customary arbitration was governed by rules of customary law and has maintained its flexibility.<sup>113</sup>

In his dissenting judgment Nnaemeku-Agu JSC opined with reference to old English Chancery and Exchequer cases that the common-law principles of arbitration entered the African concept of customary arbitration law “from the very beginning” through the West African Court of Appeal decisions<sup>114</sup> and that although “most of these were Gold Coast cases”, they derived from the same common-law principles and the trend continued also in Nigeria even after the split-up of the West African Court of Appeal. He deduced four ingredients which led him to the conclusion that there was in this case no arbitration that complied with these ingredients or established an estoppel.

These ingredients of customary arbitration are:

- (i) voluntary submission by the parties to an arbitrator;
- (ii) agreement by the parties expressly or impliedly to accept the arbitrator’s decision as final and binding;
- (iii) the arbitration was in accordance with the custom of the parties or of their trade or business, and
- (iv) the arbitrators reached a decision and published their award.

According to the dissenting judge these ingredients were neither pleaded on well established principles nor proved by acceptable evidence, for which reason he disagreed with the majority and would have allowed the appeal.

The judicial recognition of customary arbitration has come a long way since *Ekua Ayafie v Kwamina Banyea* in 1884, *Kwasi v Larbi* in 1952 and *Agu v Ikewibe* in 1991. Since then there have been reappraisals, reaffirmations, refinements and restatements of the principles and elements of customary arbitration in numerous subsequent cases in West Africa.<sup>115</sup>

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<sup>113</sup> The Court cited with approval the decision to that effect by Osborne CJ in *Lewis v Bankole* (1909) 1NLR 100-101.

<sup>114</sup> The learned judge cited in support: *Ankrah v Darba* (1956) 1WALR 89; *Gyesiwa v Mensah* (1947) WACA 45.

<sup>115</sup> These include *Eugene Nnaekwe Egesimba v Ezekiel Onu Zuruike* (2002) 15 NWLR 466; *Afada Ehoche v Abu Ijegwa* (2003) 7 NWLR 139; *Sunday Ufomba & Ors v Wosu Ahuchaogu & Ors* (2003) 8 NWLR 130 and *Linus Okereke & Another v Chinyere Nwankwo & Another* (2003) 9 NWLR 592.

It seems therefore that the problem is no longer whether or not customary arbitration exists or is recognized as part of modern African arbitration law but whether its well established ingredients or elements, in a disputed case, are proved to the satisfaction of the court.

Judicial insights on related arbitral issues have been provided by the Supreme Court of Nigeria. On whether or not the findings of native arbitrators and those of the High Court qualified as concurrent findings, Tobi JSC in *Ufomba v Ahuchaogu* commented as follows:

“A customary arbitration does not qualify as a court of law within the Constitution. It is not even an inferior court outside the Constitution, as for example, the magistrate’s court. ... Decisions of magistrates in Nigeria do not come within the purview of *stare decisis*, not to talk of decisions of native or customary arbitration. A customary arbitration is essentially a native arrangement by selected elders of the community who are versed in the customary law of the people and take decisions which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Native or customary arbitration is only a convenient forum for the settlement of native disputes and cannot be raised to the status of a court of law! ...

While I concede ... that a customary arbitration could be binding on the parties when certain ingredients are fulfilled, the decisions of such body do not qualify as ‘concurrent findings’ with those of the High Court.”<sup>116</sup>

The question of the constitutionality of customary-law arbitration in Nigeria was raised in *Okpuruwu v Okpokam*,<sup>117</sup> in which a majority of the Court of Appeal held that Nigerian law did not recognize arbitration dealing with customary law, further that the vesting of the constitutional judicial powers in the courts rendered ineffective and incongruous any other exercise of judicial powers. Although it is now a settled principle in Nigeria that customary-law arbitration (and for that matter statutory arbitration under the Arbitration Act of 1988 or under Nigeria’s international treaty

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<sup>116</sup>(2003) 8 NWLR 130 at 160.

<sup>117</sup>(1988) 4 NWLR (pt 90) 554.

obligations) is not an exercise of judicial powers,<sup>118</sup> the constitutional validity of customary-law arbitration is upheld by the Nigerian courts and is no longer in doubt.<sup>119</sup>

A long line of authoritative judicial decisions has established the pre-conditions for a valid and binding customary-law arbitration that can raise and sustain the plea of estoppel. These are:

- (i) that there has been a voluntary submission of the matter in dispute to the arbitration of one or more persons;
- (ii) that it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding;
- (iii) that the said arbitration was in accordance with the custom of the parties or of their trade or business;
- (iv) that the arbitrator(s) reached a decision and published their award; and
- (v) that the decision or award was accepted at the time it was made.<sup>120</sup>

Anything short of these requirements, it seems, will make it difficult for a customary arbitration award to receive recognition by the Nigerian courts.

The following critical observations may contribute to knowledge on the subject. First, the statement in *Ufomba v Ahuchaogu* (supra) that a customary arbitration is essentially a native arrangement by selected elders of the community and that native or customary arbitration is only a convenient forum for the settlement of native disputes reflects colonial terminology in the pejorative sense in phrases like “native arbitration” and “native disputes” in common use in colonial administrative laws and regulations prescribed for Africans. That a Supreme Court judge of a modern state of

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<sup>118</sup> *Ahiwe Okere v Marcus Nwoke* (1991) 8 NWLR (pt 209) 317, 347.

<sup>119</sup> *Agu v Ikewibe*, (1991) 3 NWLR (pt 180) 385 per Karibi-White JSC. See further Asouzu AA “Arbitration and Judicial Powers in Nigeria” (2001) 18(6) *Journal of International Arbitration* 617-640.

<sup>120</sup> *Okereke v Nwanko* 9 NWLR (2003) per Edozie JSC citing with approval *Agu v Ikewibe* (1991) 3 NWLR (pt 180) incorporating a large number of West African Court of Appeal decisions such as *Assampong v Amuaku* (1932) WACA 192; *Gyesiwa v Mensah* (1947) WACA 45; *Kwasi v Larbi*; (1952) WACA 76; *Mensah v Takyiampong* 6 WACA 118. *Afada Enoche v Abu Ijegwa* (2003) 7 NWLR 139 per Uwaifo JSC, citing with approval *Duruaku Eke & Others v Udeozor Okwaranya & Others* (2001) 12 NWLR (pt 726) 181 at 208; and (2001) 86 LRCN 1403 at 1428-1429; *Egesimba v Onuzuruike* (supra) per the dissenting judgment of Tobi JSC at 529-530.

Nigeria can condescend to the use of such terminology to demean a system of dispute resolution that has served African communities for so long is questionable and inappropriate. Such statements ought to be discountenanced and disavowed in the judicial pronouncements in relation to practice of modern arbitration. It may be added that even the term “custom” is not uncommonly used by writers who wish to demean it by relying on colonial superiority rather than any understanding. Secondly, the impression conveyed in *Afada Enoche v Abu Ijewa* and other cases<sup>121</sup> that an award must be accepted at the time it was made before its recognition by the courts must be corrected. The writer does not share or support this view of customary arbitration award for being both inaccurate and undesirable in modern practice. It is not supported by practice in other African states like Kenya, Uganda and Zambia. The undesirability is based on the following submissions: First, to require party agreement before court recognition will place the arbitration from which the award emanated in the category of mediation. Secondly, an award, customary or statutory, that is valid and binding is, in the majority of instances, voluntarily implemented, without more, by the parties without judicial involvement. In the relatively fewer instances that the award is not accepted by a party or is challenged, the challenge provisions and procedures of law do not require prior acceptance of the award by the parties before it can be countenanced by the court; and the court’s jurisdiction and power to determine the challenge does not depend on a pre-condition of the acceptance of the award by the parties before the determination, recognition or enforcement of the award. Thirdly, the dichotomy, intentional or inadvertent, introduced by the court between the recognition of a customary law award and other awards has no basis in law and is undesirable. The problem of award enforcement is a research question discussed in Chapter 3. It should suffice to submit here that the requirement of acceptance of the award before recognition is unsatisfactory and the rectification of this situation should not be left to judicial speculation or ambivalence but to legislation.

As a further clarifying contribution to knowledge on the subject it needs to be added that the tendency of African judges looking down on African customary law and procedures is an inherited colonial legacy that traces back to a colonial sense of superiority that reduced customary law to a status inferior to that of inherited law and

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<sup>121</sup> See cases listed in footnote 115 above.

procedures and the failure of the African judicial officer to innovatively outgrow that legacy. But that is not all. There is also an insufficient appreciation of customary law and a misunderstanding of the true essence of arbitration and its timeless role and efficacy for achieving a complete settlement and social equilibrium for the community to which the disputing parties belonged.

The reference to community is noteworthy because customary law included the law of a different kind of community from a state, ancient or modern. That community was and is not primarily concerned with rights but with the restoration of harmony. Communities other than the state provided means of resolving disputes. They included the church and the separate religious communities and trade organizations or associations similar to the craft and merchant guilds of early England. When members of such communities were involved in differences in the nature of a serious dispute that required external intervention the community itself became interested in its resolution by arbitration rather than litigation. As it was never doubted that the solutions found satisfactorily and effectively disposed of the dispute, it is neither persuasive nor necessary for a court to look down on the outcome or refuse to recognise it because of an unwarranted pre-condition for its prior acceptance by the disputing parties at the time the award was made. It ought to be sufficient for purposes of recognition and enforcement that the parties chose a system of arbitration that resolved the dispute. The pre-conditions for arbitration, if needed, must precede the arbitration process not after it.

### 2.3.3 Conclusion

It can be concluded and recognised that as customary-law arbitration was and is an important segment of arbitration law in Africa, and in frequent use in the settlement of disputes under customary law, its practices and evolution should not be ignored in the development of modern arbitration laws in Africa and in a jurisdiction such as Kenya's. Indeed, the argument has been advanced that the Model Law recognizes existing arbitration laws in national jurisdictions that adopt it, which laws by

implication include customary arbitration law.<sup>122</sup> Furthermore, it is also apparent that judicial intervention in arbitral matters and the assistance and contribution of the courts in resolving challenges to the arbitration agreement, the arbitral jurisdiction and its processes demonstrate that these challenges have long historical and evolutionary roots in the forms and procedures of both customary-law arbitrations and those conducted under national arbitration statutes.<sup>123</sup> The fact that these challenges and the related problems raised by the Chapter 3 questions have persisted for so long is good reason for seeking solutions with the aid of modernized legislation and appropriate practice rules where the existing statutes like the Kenya Arbitration Act of 1995 are inadequate.

Through modern scholastic effort to understand, reappraise and reconstruct African customary-law practices, the literature is truly large as reflected in the treatises, essays and commentaries.<sup>124</sup> There is also the fact that Africa today is not one homogeneous whole but an amalgamation of diverse cultures. Therefore what is needed to harness the energy of this diversity is the marshalling of creative thought and initiative to reinterpret African customary practices more accurately and add on to it the results and outcomes of vigorous research and intelligent reappraisal of the customs, traditions and institutions of Africa today for the benefit of Africa tomorrow. If in

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<sup>122</sup> See Okefeifere “Salient Issues in the Law and Practice of Arbitration In Nigeria” and Holtzman & Neuhaus *Guide to the UNCITRAL Model Law* 39 who explain, citing 4<sup>th</sup> Secretariat Note A/CN9/WGII/WP50 para 4 that Article 1(5) was included in the Model Law partly to clarify that the Model Law is not a self-contained and self-sufficient legal system “which would exclude the application of all other national provisions of law dealing with arbitration.”

<sup>123</sup> See para 2.4.1 below for a discussion of the development of statutory arbitration in Kenya, Nigeria and Zimbabwe.

<sup>124</sup> For sample literature on the subject see:

**Nigeria:** Igbokwe VC “The Law and Practice of Customary Arbitration in Nigeria” 1997 *Journal of African Law* 41; Kolajo AA *Customary Law in Nigeria through the Cases* (2000); Ezejiolor G *The Law of Arbitration in Nigeria* (1997); Ehiribe I “The Validity of Customary Law Arbitration in Nigeria” (1996) *Comparative Law Yearbook of International Business Law* 18; Allot A *Essays In African Law* (1960); Park AEW *Sources of Nigerian Law* (1963 & 1975).

**Kenya:** Ojwang JB “Rural Dispute Settlement in Kenya” (1975-1977) *Zambia Law Journal* 7-9.

**Southern Africa:** Chomba FM “Zambia: Alternative Forms of Adjudication.” unpublished paper 1990 Meeting of Commonwealth Law Ministers and Senior Officials; Tshehla B *Traditional Justice in Practice* ISS Monograph Series no 115 April 2005; Goldin & Gelfand, *African Law and Custom in Rhodesia*.

**Other works:** Ghana: 13<sup>th</sup> Annual Report of the Law Reform Commission of Ghana, Accra, Govt Printer 1988; Cotran & Amissah *Arbitration in Africa* 113-119; Kom ED “Customary Arbitration” (1987) 16 *Review of Ghana Law* 148.

Tanzania: Cole JSR and Denison WN *Tanganyika: The Development of its Laws and Constitution* (1964).

Uganda: Allen APJ *An Introduction to the Law of Uganda* (1968); Morris HF & Read JS *Uganda, The Development of its Laws and Constitution* (1996).

that endeavour some of Africa's most cherished traditional values,<sup>125</sup> including amicable methods of conflict resolution, are revived and strengthened then it will not have been an exercise in futility.

## **2.4 Arbitration Legislation in Africa**

### **2.4.1 The Experience of Nigeria, Kenya and Zimbabwe**

The unwritten form of African customary laws in general including arbitration law hindered the recognition of such laws and the dispute resolution processes as well as the tribal courts in the colonial period. Written arbitration law was introduced in Africa by the former colonial powers. As the three African jurisdictions in this study underwent similar colonial experiences under the United Kingdom the influence of English legislation and the impact of the colonial administrators in these jurisdictions on arbitration and dispute resolution are noteworthy. For purposes of this study a summary of the main historical landmarks in the colonial administration of Nigeria, Kenya and Zimbabwe and the enactment of their respective arbitration legislation is appropriate.

Nigeria, a British colonial creation, came into being in January 1914 with the amalgamation of the Colony of Lagos which was annexed in 1861, the Southern Protectorates which were established between 1885 and 1894, and the Northern Protectorates which had been pacified and subdued by 1903. The three entities had hitherto been administered separately by the UK. The Project Niger Company which had been given a Royal Charter in 1886 to administer the Niger River and Northern Nigeria proved ineffective and on 31 December 1899 its charter was terminated. British forces under Frederick Lugard then began a period of conquest into the northern reaches of the territories which by 1906 came under British control and the

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<sup>125</sup> There has been a tendency to overlook these values, particularly in the arbitration of commercial disputes, in view of the dominance of the arbitration legislation introduced during the colonial era. On the wider subject of the recovery of lost history and culture in the period of antiquity see Armah A "Remembering the Dismembered Continent" New African IC Publication no 492, February 2010, 26-31.

process was completed in 1914 when, as noted, Lagos Colony and the two Protectorates were amalgamated into the unitary state of Nigeria.<sup>126</sup>

Colonial Lagos was a busy cosmopolitan port. Although local rulers continued to administer their territories, consular authorities assumed jurisdiction for the equity courts established earlier by the foreign mercantile communities. It is not surprising that it was in the same year that Nigeria was created that the first arbitration statute of 1914 was promulgated.

The 1914 statute was promulgated as the Arbitration Ordinance 1914 and came into force on 31 December 1914.<sup>127</sup> It was based on the English Arbitration Act of 1889 and was applied to the whole country, which was then administered as a unitary State. In 1954 when Nigeria was divided into Regions and later a Federation, the Ordinance became the law of the Regions and the States of the Federation. Nigeria achieved independence from the UK on 1 October 1960. The Ordinance was designated the Arbitration Act in 1963 and was the governing statutory arbitration law until March 1988 when the Arbitration and Conciliation Decree of that year came into force. Among the Decree's achievements is the implementation of the New York Convention to which Nigeria acceded in 1970.<sup>128</sup> Before then, it was apparent that the limitations of the 1914 Act had made it unsuited for modern arbitration.<sup>129</sup> It will suffice to acknowledge here that while the 1914 Act was based on the English Act of 1889, the 1988 Decree was in turn based on the UNCITRAL Model Law of 1985. The salient contents of both the Decree<sup>130</sup> and the Model Law will be discussed below.<sup>131</sup>

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<sup>126</sup> Source: British Foreign and Commonwealth Office, [www.infoplease.com](http://www.infoplease.com) and US Library of Congress.

<sup>127</sup> Orojo JO & Ajomo MA *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) 13.

<sup>128</sup> See Ajibola B "Nigeria" in Cotran E & Amisshah A (eds) *Arbitration in Africa* 108-111, on the regimes for recognising and enforcing arbitral awards, as well as provisions implementing the New York Convention in s 54(1) and the Second Schedule to the Act.

<sup>129</sup> Assouzu *International Commercial Arbitration* 122 and 125.

<sup>130</sup> In 2007 the Nigerian National Assembly passed an Act repealing the 1990 Laws of the Federation of Nigeria (*Nigerian Guardian* 14 August 2007 16). The writer understood from interviews with Nigerian lawyers that there is now an Arbitration and Conciliation Act of 2004 in Nigeria (Federal Laws of Nigeria 2004 Cap 18) containing the same provisions as the 1988 Decree (Federal Laws of Nigeria 1990 Cap 19.)

<sup>131</sup> See paras 2.4.4 and 2.5 below.

Colonial rule came to Kenya in 1886 with the partition of East Africa between the UK (which took most of Kenya), the Germans and the Sultan of Zanzibar.<sup>132</sup> The Order in Council of 1897 that established the Protectorate of Kenya applied the common-law doctrines of equity and statutes of general application in force in England on 12 August 1889 to the Protectorate. The Order in Council that subsequently established the Colony and Protectorate of Kenya in 1920 and the Judicature Act of 1967 contained the same provisions. As in Nigeria, the Arbitration Ordinance of 1914 that was promulgated for Kenya was based on the English Arbitration Act of 1889. However, after Kenya gained independence from the UK in 1963, the subsequent Arbitration Act of 1968 was taken from the English Arbitration Act of 1950,<sup>133</sup> and an Arbitration (Foreign Awards) Ordinance that had been passed in 1930 to facilitate enforcement of certain foreign awards also became part of the 1968 Act,<sup>134</sup> which was amended in 1992 to provide for the application of the New York Convention of 1958.<sup>135</sup> The 1968 Act (Cap 49 of the Laws of Kenya) was repealed<sup>136</sup> and replaced by the Arbitration Act of 1995 based on the UNCITRAL Model Law.<sup>137</sup>

Most arbitrations in Kenya occurred in tribal communities and were conducted by tribal elders. The disputes related mostly to land, succession and livestock. This is because few Africans in tribal areas made wills and the Law of Succession Act excluded from the rules of intestacy agricultural land and livestock in most tribal areas. The disputing parties usually agreed on the arbitrating elders and to their award. Where a party filed a claim in the magistrate's court in land cases it was common practice for magistrates to refer the case to arbitration by elders. Each party appointed two elders presided over by the local District Officer or an umpire appointed by him. Commercial arbitration increased considerably over the years, due to the shortcomings of the court system such as the use of inexperienced judicial officers,

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<sup>132</sup> Ojwang "Rural Dispute Settlement in Kenya" (1975-1777) *Zambia Law Journal* 7-9.

<sup>133</sup> See Couldrey J "Kenya" in Cotran E & Amisshah A (eds) *Arbitration in Africa* 51 at 52.

<sup>134</sup> This part of the Act provided for the recognition of arbitration agreements in certain prescribed countries pursuant to the Protocol on Arbitration Clauses adopted by the Assembly of the League of Nations in 1923. A Convention on the Execution of Foreign Arbitral Awards, made in Geneva in 1927 was also adopted in the 1968 Act.

<sup>135</sup> See Couldrey "Kenya" in Cotran & Amisshah (eds) *Arbitration in Africa* 52.

<sup>136</sup> See s 42(1).Kenya Arbitration Act 1995

<sup>137</sup> The Bill adopted the UNCITRAL Model Law for both domestic and international arbitration: Couldrey "Kenya" in Cotran & Amisshah (eds) *Arbitration in Africa* 51. See also the discussion of the wording of the long title in para 2.5 below.

delay and the perceived advantage of having technical disputes arbitrated by technical experts (engineers, architects and the like) rather than the courts.<sup>138</sup>

British annexation and occupation of Rhodesia<sup>139</sup> started with the incorporation of the British South Africa Company by Royal Charter on 29 October 1889. Matabeleland and Mashonaland were the main regions that constituted the area that came to be known as Rhodesia before 1898. The territory was officially designated Southern Rhodesia by the Southern Rhodesia Order in Council of 1898.<sup>140</sup> It seemed that following a rebellion by the tribesmen of Mashonaland in 1896 the UK colonial administration became more concerned with security and the political and economic control of the tribespeople. Subsequently however, the preservation of customary laws and tribal courts received scant attention until 1937 when the Native Law and Native Courts Act was introduced.<sup>141</sup> This Act, which provided for the establishment of tribal courts, was repealed by the African Law and Tribal Courts Act 1969,<sup>142</sup> by which customary law was given wider application generally and the jurisdiction of the tribal courts was extended.<sup>143</sup> The declared and acknowledged aim of the statute was to enable the tribal court to arrive at decisions that reconciled the litigants.<sup>144</sup> Southern Rhodesia attained independence from the UK on 18 April 1980 and was renamed Zimbabwe.

In the intervening period an Arbitration Act of 1928<sup>145</sup> was implemented in Southern Rhodesia, which was derived from the English Arbitration Act of 1889. After Zimbabwe attained independence, the 1928 Act was repealed and replaced by the

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<sup>138</sup> Ojwang "Rural Dispute Settlement in Kenya" (1975-1977) *Zambia Law Journal* 7-9; Couldrey "Kenya" in Cotran & Amisshah (eds) *Arbitration in Africa* 53-54.

<sup>139</sup> It appears that the Charter of 1889 was granted in respect of a territory without a name but described as "the region of South Africa lying immediately to the north of British Bechuanaland and to the north and west of the South African Republic and to the west of the Portuguese Dominions" However in honour and recognition of Cecil John Rhodes who was primarily responsible for procuring the charter of 1889 and the establishment of a newly created geographic and political state, Mashonaland and Matabeleland and other territories came to be known by popular use as "Rhodesia". See Goldin & Gelfard *African Law and Custom in Rhodesia* 7.

<sup>140</sup> Goldin & Gelfard *African Law and Custom in Rhodesia* 1-2, citing the case of *In re Southern Rhodesia* 1919 AC 211, in which Lord Sumner summarized the historical background and beginning of Rhodesia.

<sup>141</sup> Act 33 of 1937.

<sup>142</sup> Act 24 of 1969.

<sup>143</sup> Goldin & Gelfard *African Law and Custom in Rhodesia* 21.

<sup>144</sup> Goldin & Gelfard *African Law and Custom in Rhodesia* 23. This was acknowledged in the so-called Robinson Commission Report, 1961, 180-181.

<sup>145</sup> Act 8 of 1928.

Arbitration Act of 1996, based on the UNCITRAL Model Law.<sup>146</sup> The two most significant departures of this Act from the Model Law are the following. Firstly, the Act is not restricted to international arbitrations but applies to all arbitrations in Zimbabwe irrespective of the nationality or places of business or residence of the parties to the arbitration.<sup>147</sup> Secondly, the Act is not restricted to commercial disputes but applies to the arbitration of any matter capable of being determined by arbitration.<sup>148</sup> A further important observation is that the 1996 Arbitration Act does not repeal the common law of arbitration which is the Roman law as developed by the Roman-Dutch commentators.<sup>149</sup> The common law, as noted above,<sup>150</sup> therefore continues to apply where the agreement to arbitrate is verbal and the arbitrator's award can be made an order of court and enforced as such. A further relevant factor is that Zimbabwe is a party to the New York Convention without any reservations and also a party to the ICSID Convention both of which have been legislatively implemented domestically.<sup>151</sup> The Commercial Arbitration Centre, Harare, and the Zimbabwe Arbitration Association are actively functioning arbitral institutions in Zimbabwe today.

It has been said that the enactment of arbitration legislation in Africa, a legacy of colonialism, was partly necessitated by the inability of the colonial administrators to appreciate the nature and philosophy of the African customary traditions for the settlement of disputes.<sup>152</sup> Most African states like Kenya attained statehood after the colonial era and for such states that underwent colonialism, the first arbitration legislation was enacted by their colonial administrators. The distinctive feature of such colonial arbitration legislation included the fact that it applied only to domestic disputes based on written arbitration agreements. But it also at least by implication recognized and preserved African native customs, traditions and institutions, subject

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<sup>146</sup> Donovan IA "Zimbabwe" in Cotran & Amisshah (eds) *Arbitration in Africa* 177-180.

<sup>147</sup> S 3. There was therefore no definition of an "international" arbitration which is omitted from Article 1.

<sup>148</sup> S 4(2) specifies matters not capable of determination by arbitration or which first require leave of the High Court.

<sup>149</sup> Johannes Voet is considered the most important Roman-Dutch authority: see Donovan "Zimbabwe" in Cotran E & Amisshah A (eds) *Arbitration in Africa* 179; See also para 2.3.1 above.

<sup>150</sup> See para 2.3.1.

<sup>151</sup> Regarding the former see the long title to the Arbitration Act of 1996. Regarding the latter see the Arbitration (International Investment Disputes) Act 16 of 1995 (ch 7:03).

<sup>152</sup> Goldin & Gelfard *African Law and Custom in Rhodesia* 22 with reference to Rhodesia, and Asouzu *International Commercial Arbitration* 119 with reference to Africa generally.

to statutory and judicial limitations. In particular, the validity of customary dispute resolution processes was preserved,<sup>153</sup> hence the opportunity for the integration of customary and statutory arbitral traditions in Africa.

Asouzu conveniently and innovatively categorises the arbitration legislation of African states into first, second and third generation arbitration laws.<sup>154</sup> The first category spanned the period 1898 to 1960 and in the British colonies, was influenced by the English Arbitration Act of 1889. The second category occupied the period between 1960 and 1984 and was influenced by the English Arbitration Act of 1950, which has now been largely repealed.<sup>155</sup> The notable features of such legislation were their retention, as in previous laws, of the case-stated procedure, their non-recognition of the specific requirements of the international commercial arbitral regime and institutional arbitration, the absence of provisions for conciliation and the retention of wide judicial powers for reviewing arbitral decisions and for intervention in arbitration.<sup>156</sup> The third generation arbitration laws were those enacted after 1984, which specifically provided for international arbitration. It is said that this development was neither consistent nor uniform. This was because of the divergent legislative techniques adopted by various countries. Some African countries adopted the UNCITRAL Model Law wholly or partly.<sup>157</sup> Nigeria (1988), Kenya (1995) and Zimbabwe (1996) fall into this category. Three French speaking countries reformed their arbitration laws in this period and incorporated provisions on international arbitration, namely Togo (1989), Cote d'Ivoire (1993) and Senegal (1998). This development has since been overtaken by the OHADA Uniform Act on Arbitration of 1999 in those and other OHADA member states.<sup>158</sup>

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<sup>153</sup> Cotran & Amissah *Arbitration in Africa* 186; Allott AN *Essays in African Law* (1960) 142-144. Although Asouzu *International Commercial Arbitration* 121 states that customary law was expressly recognised by the colonial powers, this express recognition was not necessarily in the colonial arbitration statutes.

<sup>154</sup> Asouzu *International Commercial Arbitration* 120-124.

<sup>155</sup> See the Arbitration Act 1996 s 107(2) read with sch 4.

<sup>156</sup> By way of example, the South African Arbitration Act 42 of 1965 was described by the South African Law Commission in 1998 as an arbitration statute that was widely perceived as totally inadequate for international arbitration (see SA Law Commission Report on *Arbitration: an International Arbitration Act for South Africa* (1998) para 1.3; Asouzu *International Commercial Arbitration* 123-124.

<sup>157</sup> See the list of countries in n 159 below.

<sup>158</sup> Asouzu *International Commercial Arbitration* 125-126.

Consequently African states with modern arbitration legislation such as Kenya can be classified basically in one of two groups, the OHADA group and those countries with statutes based on or influenced by the Model Law (including Mozambique).<sup>159</sup> Because the OHADA system of arbitration was designed by and for mainly French-speaking African states and has not attracted the Anglophone African states to that system, a brief discussion of the OHADA system will be a sufficient prelude to the discussion of the Model Law and the law of the three jurisdictions inspired by it.

#### 2.4.2 Modern Arbitration Statutes

In context, modern arbitration statutes in Africa are those that came into force after the UNCITRAL Model Law of 1985. On this basis the three arbitral jurisdictions of Nigeria, Kenya and Zimbabwe whose statutes were enacted in 1988, 1995 and 1996 respectively can be regarded as having modern arbitration statutes.

The three jurisdictions are selected for this study because of their common foundation in the UNCITRAL Model Law and a discussion of their interaction with the Model Law is the main focus of this part of the dissertation. Before that, however, a brief sketch of the OHADA system of arbitration is deemed appropriate and offered here, first to distinguish it from the UNCITRAL system and, second because it is also in operation in Africa and like the UNCITRAL Model Law, it is conceived and aimed at the modernization, harmonization and unification of arbitration laws in the countries that have embraced it. It appears however that, although OHADA membership is open to any member of the African Union,<sup>160</sup> it has not so far attracted the English-speaking African jurisdictions based on the common-law traditions and systems of arbitration law and practice.

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<sup>159</sup> The African states which have adopted the UNCITRAL Model Law are, in alphabetical order, Egypt, Kenya, Madagascar, Mauritius (for international arbitrations only), Nigeria, Rwanda, Tunisia, Uganda, Zambia, and Zimbabwe. For a complete list of jurisdictions which have adopted the Model Law see UNCITRAL's website at <http://www.uncitral.org>. Mozambique, although not a Model Law jurisdiction, has an arbitration law compatible with the Model Law. Five of the African jurisdictions which have adopted the Model Law have a French civil-law tradition, at least as regards arbitration and civil procedure, namely Egypt, Madagascar, Mauritius, Rwanda and Tunisia (see regarding Egypt and Tunisia, Cotran & Amisshah *Arbitration in Africa* 233 and 261).

<sup>160</sup> See Martor B, Pilkington N, Sellers DS & Thouvenot D *Business Law in Africa: OHADA and the Harmonization Process* 2 ed (2007) 3 n 14.

### 2.4.3 The Uniform Act on Arbitration and Arbitration under the OHADA Treaty<sup>161</sup>

The harmonization of arbitration laws as in English-speaking Africa is also in progress in the French-speaking countries of Africa and therefore it is a development that is noteworthy in this study. The post-1985 arbitration legislation in most French-speaking African countries is not based on the UNCITRAL Model Law but consists of the Uniform Act on Arbitration adopted by the OHADA Council of Ministers on 11 March 1999 within the framework of the OHADA Treaty. Aspects of the Tunisian Arbitration Code on international arbitration which reflect the Model Law are therefore exceptional.<sup>162</sup>

OHADA is an international organization formally created by the treaty signed in Port-Louis, Mauritius on 17 October 1993 by fourteen African states. It now has sixteen members.<sup>163</sup> Except Guinea all OHADA members are members of the Franc Zone; again except Equatorial Guinea and Guinea-Bissau where Spanish and Portuguese are spoken, and the English-speaking provinces of Cameroon, all OHADA member states are French-speaking.<sup>164</sup> The principal aims of OHADA from its Treaty are to unify business law throughout the member states and to promote arbitration as a means of settling contractual disputes.<sup>165</sup> The Uniform Acts provide an overall legal framework based, in general, on civil law; but the declared aim of OHADA is to reach beyond the original members and embrace other African countries. To that end the OHADA Treaty<sup>166</sup> provides that any of the member states of the Organization for African

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<sup>161</sup> OHADA is the French acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organisation for the Harmonisation of Business Law in Africa) and therefore occasionally referred to in English as "OHBLA"); see Martor et al *Business Law in Africa* 1; Douajani GK "OHBLA Arbitration" (2000) 17(1) *Journal of International Arbitration* 127-132; Douajani GK "Recent Developments in OHADA Arbitration" (2006) 23(4) *Journal of International Arbitration* 363.

<sup>162</sup> Asouzu *International Commercial Arbitration* 125. However, although Tunisia is exceptional in the context of former French colonies in North and West Africa, as noted above, there are also four other African states with a French orientated code of civil procedure which have adopted the Model Law (see n 159 above.)

<sup>163</sup> The member states are, in alphabetical order, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Federal Islamic Republic of Comoros, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. In February 2006 the Democratic Republic of the Congo expressed its intention to accede to the treaty (see Martor et al *Business Law in Africa* 2.) See also OHADA's website <http://www.ohada.com>.

<sup>164</sup> Martor et al *Business Law in Africa* 2. French is the working language of OHADA in terms of the OHADA Treaty article 42, but Martor et al *Business Law in Africa* 14 state that an amendment of the Treaty to provide for greater flexibility in this regard is being considered.

<sup>165</sup> See the OHADA Treaty Article 1.

<sup>166</sup> Article 53.

Unity, now the African Union since July 2002, and also non-members of the African Union, if so invited unanimously by the OHADA member states, may join OHADA by acceding to the Treaty.<sup>167</sup>

OHADA as an international organization has its own juristic personality and enjoys privileges and immunities with regard to its property and employees.<sup>168</sup> Its institutions are: a Council of Ministers as the legislative arm,<sup>169</sup> a Common Court of Justice and Arbitration (CCJA) which is supranational and based in Abidjan,<sup>170</sup> a Permanent Secretariat in Yaoundé<sup>171</sup> and a Regional Training Centre for Legal Officers (ERSUMA).<sup>172</sup>

OHADA has introduced a situation whereby it is now possible for parties to a contract to include an arbitration clause that provides for arbitration proceedings in any of the member states under a modern arbitration law.<sup>173</sup>

OHADA has created two sets of legislation for arbitration. The first is the OHADA Treaty, which provides for institutional arbitration under the CCJA Rules of Arbitration.<sup>174</sup> The second is the Uniform Act on Arbitration with basic rules applicable to any arbitration where the seat of arbitration is in one of the member states.<sup>175</sup>

The implication is that if a contractual arbitration clause simply provides for arbitration under the Uniform Act, there will be no institutional framework as the Uniform Act will govern certain matters relating to the proceedings. But if the clause stipulates arbitration under the OHADA Treaty or under the CCJA Rules then this will establish an institutional framework for the arbitration. But where a clause

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<sup>167</sup> Martor et al *Business Law in Africa* 3.

<sup>168</sup> OHADA Treaty Articles 46-49.

<sup>169</sup> Articles 3 and 27-30.

<sup>170</sup> See Article 31 and Martor et al *Business Law in Africa* 8.

<sup>171</sup> See Article 3 and Martor et al *Business Law in Africa* 6-8.

<sup>172</sup> See Article 3 and Martor et al *Business Law in Africa* 12-13.

<sup>173</sup> Martor et al *Business Law in Africa* 259.

<sup>174</sup> See Martor et al *Business Law in Africa* 271-283 for a brief discussion of arbitration under the CCJA Rules. They note that the CCJA Rules are very similar to the ICC Rules of Arbitration of 1988, although there are also some fundamental differences.

<sup>175</sup> See Martor et al *Business Law in Africa* 260 and 262, who point out that the Uniform Act makes no distinction between domestic and international arbitration.

provides for arbitration in one of the member States in accordance with institutional rules other than CCJA Rules, then the Uniform Act would apply to matters not governed by such institutional rules.<sup>176</sup>

The Uniform Act on Arbitration was signed on 11 March 1999, entered force 90 days later and is applicable to arbitrations that had not commenced before its entry into force. Few of its provisions are mandatory. The Act supersedes the existing national laws on arbitration but subject to any provisions of such national laws that do not conflict with the Uniform Act.<sup>177</sup> A Uniform Act has direct application and enjoys supremacy in the territory of a contracting state.<sup>178</sup> Article 1 of the Uniform Act on Arbitration applies to all arbitrations where the seat of arbitration is located in one of the member states.<sup>179</sup> Individuals and corporate bodies as well as States and other territorial public authorities may submit to arbitration under the Uniform Act.<sup>180</sup>

A Cameroonian commentator and member of the ICC International Court of Arbitration, writing on OHADA arbitration in 2000, concluded:

“OHBLA arbitration is thus composed of two bodies of rules (the Uniform Act conceived essentially for ad hoc arbitration and the CCJA Rules of Arbitration, an institutional arbitration system) comparable to international standards and conceived with the purpose of serving the potential users of arbitration in the OHBLA area. For a long time, Africa was nearly a desert for arbitration. The two texts presented above are likely to create in Africa an area for the development of international arbitration full of promise for the future.”<sup>181</sup>

It can be appreciated from a comparison of the UNCITRAL and OHADA arbitration systems why Common Law and Southern African Development Community (SADC) jurisdictions in search of a common arbitration law for international commercial

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<sup>176</sup> See Martor et al *Business Law in Africa* 260.

<sup>177</sup> See Martor et al *Business Law in Africa* 261.

<sup>178</sup> See the OHADA Treaty Article 10 and Martor et al *Business Law in Africa* 18.

<sup>179</sup> See also Martor et al *Business Law in Africa* 261.

<sup>180</sup> See the Uniform Act Article 2. Compare the OHADA Treaty Article 21 and Martor et al *Business Law in Africa* 272 regarding parties who may submit disputes to institutional arbitration under the CCJA Rules.

<sup>181</sup> Douajani (2000) 17(1) *Journal of International Arbitration* 131. Other informative articles are Leboulanger P “Arbitration under the OHADA System”, IBA Conference Paper Durban, South Africa 22 October 2002 and Douajani GK “The Recognition and Enforcement of Arbitral Awards in OHADA Member States” (2003) 20(2) *Journal of International Arbitration* 205-210.

arbitration in Africa would prefer the Model Law to the OHADA Uniform Act on Arbitration (“UAA”). Firstly, because the Model Law is in several respects inherently superior to the UAA as regards, for example, the powers of the court exercisable both before and after the award; the arbitral powers for conducting the arbitration proceedings effectively even where a party does not co-operate, and the arbitral powers to grant enforceable interim measures. The *travaux préparatoires* of the Model Law are available as interpretation aids to users in both the common-law and civil-law traditions of arbitration. In contrast the official text of the UAA is in French with a noticeably substantial influence of French law on the UAA.

Secondly, four members of SADC have already adopted the Model Law.<sup>182</sup> A third reason is that the Model Law has been adopted by a number of major SADC trading partners in Europe, the Pacific Rim and also in Africa.<sup>183</sup> Fourthly, the OHADA system is not yet an established reference point for law reform in the SADC region and OHADA law-making is less transparent as the laws are passed by the OHADA Council of Ministers.

A fifth reason is the high degree of compatibility between the popular UNCITRAL Arbitration Rules and the UNCITRAL Model Law, which is a clear advantage over OHADA because of the international standing of the UNCITRAL Rules and their general acceptance and use in international arbitration.<sup>184</sup> Lastly, the UAA is clearly intended to apply only in countries which become members of OHADA involving the acceptance of other OHADA laws as well.<sup>185</sup>

A cautionary note must however be sounded. The Model Law is not an easy piece of legislation. Some twenty four years after its approval by the UN General Assembly,

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<sup>182</sup> Zimbabwe, Zambia, Madagascar for domestic and international arbitration and Mauritius for international arbitration only. See n 155 above. However, one SADC member, the Democratic Republic of the Congo, is apparently committed to becoming a member of OHADA. See n 159 above.

<sup>183</sup> Examples include European countries like Germany, Spain, Ireland, Scotland, and the Russian Federation; nations in the Pacific Rim like India, Singapore, Malaysia, Hong Kong as a special administrative region of China, Japan, Australia, New Zealand and Canada; and in Africa Nigeria, Tunisia, Egypt, Kenya and Uganda.

<sup>184</sup> A relevant example in an African context is the Africa ADR Rules for the Conduct of Arbitrations which rules are clearly based on those of UNCITRAL. Africa ADR is a recently launched Southern African private-sector initiative promoting international arbitration and ADR in the region. See <http://www.africaadr.com>.

<sup>185</sup> The writer adopts these arguments that were advanced and canvassed in discussion papers at International Arbitral Workshop in Mauritius, 12 April 2007.

only ten African states have adopted it. As aptly observed by the South African Law Commission:

“The Model Law’s provisions sometimes represent a compromise between different legal traditions and its wording differs from that customarily used by some legislatures. Therefore courts, arbitrators, parties to arbitrations and their legal advisers may have some difficulty in interpreting some of its provisions. Moreover, the choice of wording for the English text was sometimes influenced by the need to facilitate translation without ambiguity into all six languages used by UNCITRAL.”<sup>186</sup>

Neither the French-influenced OHADA systems nor the Western-influenced Model Law, however useful, should be adopted, particularly for domestic arbitration, without giving careful thought to integration and interaction with customary arbitration law of the relevant jurisdiction.<sup>187</sup> In Africa the pitch for reform of arbitration law ought, of practical necessity and essence, to include express provisions for the recognition of the customary forms of dispute resolution.

#### 2.4.4 The UNCITRAL Model Law

##### 2.4.4.1 Introduction

The following observations provide a foundation and background to the discussion of the Model Law. Firstly, although the Model Law was crafted for international commercial arbitration its ambit has been extended by many states adopting it for domestic arbitration as well and has greatly influenced the legislative practices of both developed and developing states<sup>188</sup> and also the commercial activities of their nationals, particularly when drafting dispute resolution clauses.<sup>189</sup> Secondly, the impact of the Model Law in the jurisprudence and case law of countries that have adopted it would be apposite and relevant in the evaluation of arbitration

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<sup>186</sup> Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.52.

<sup>187</sup> The extent to which foreign-oriented legislation captures or reflects the ethos and common essence of arbitration as a better option for dispute resolution for African users ought to be a paramount consideration.

<sup>188</sup> African states such as Kenya, Nigeria, Zimbabwe and Mozambique. See n 155 above.

<sup>189</sup> Asouzu AA “Arbitration In Africa: Agenda for Reform” (1997) 6 *Arbitration and Dispute Resolution Law Journal* 377.

jurisprudence in Africa.<sup>190</sup> Furthermore, although England did not adopt the Model Law, very close attention was paid to the Model Law when drafting the English Arbitration Act of 1996 and both the structure and the content of the Act owe much to the Model Law.<sup>191</sup> The English courts have dealt with many cases<sup>192</sup> involving the English Arbitration Act 1996 and have considered issues that have not yet arisen for consideration in the three African jurisdictions.<sup>193</sup> English judicial precedents are not only routinely cited in Kenyan and African courts and tribunals of the common-law tradition but are also persuasive sources of authority on the same or similar issues in disputes between African parties.<sup>194</sup>

Thirdly, because the Model Law is a partial law and not a comprehensive code there is scope for domestic arbitration law in Africa to fill the gaps. This means that for the time being significant areas of arbitration practice that are either not covered at all or not adequately covered by the Model Law will be governed by the existing domestic or common law on arbitration.<sup>195</sup> Alternatively, jurisdictions adopting the Model Law for domestic arbitration as well, may decide to supplement its provisions for that

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<sup>190</sup> For a review of decisions from other jurisdictions between 1985 and 2001 see Alvarez HC, Kaplan N & Rivkin DW *Model Law Decisions* (2003). Even in a non-Model Law jurisdiction like South Africa, the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC), [2009] ZACC 6 paras 225-232 recently and carefully considered the approach of the Model Law regarding the setting aside of awards to inform the court on how the grounds for setting aside in s 33 of the South African Arbitration Act should be properly and constitutionally interpreted.

<sup>191</sup> See Departmental Advisory Committee on Arbitration Law (DAC) *1996 Report on the Arbitration Bill* para 4.

<sup>192</sup> An important example is the judgment in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43.

<sup>193</sup> See also Shackelton S “Annual Review of English Judicial Decisions on Arbitration – 2000” (2001) 4 *International Arbitration Law Review* 178-201.

<sup>194</sup> Orojo & Aromo *Law and Practice of Arbitration and Conciliation in Nigeria* 12. It is stated in Cotran & Amisshah (eds) *Arbitration in Africa* 200 that “[b]ecause of the influence of English legislation on the South African statute [the 1965 Act] and because of the wealth of English case law on arbitration, South African courts tend to refer to English cases in the absence of South African authority.” The same applies in Kenya. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC), [2009] ZACC 6 paras 225-232 the SA Constitutional Court referred to the English Arbitration Act in addition to the Model Law to determine the constitutionally correct interpretation of s 33 of the SA Arbitration Act regarding the grounds on which a court can set aside an award.

<sup>195</sup> As noted earlier the common law applies where the arbitration agreement is oral (see para 2.3.1.1 above). It may also be added that while acknowledging that England’s initial outright rejection of the Model Law was a mistake, Lord Mustill also acknowledged the value of the Model Law first as providing confidence that international arbitration can be conducted in any state that has adopted the Model Law; secondly that acceptance of the Model Law will make it easier for developing countries to attract international arbitration to their territories: see Asouzu “Arbitration in Africa: Agenda for Reform” (1997) 6 *Arbitration and Dispute Resolution Law Journal* 373 377.

purpose.<sup>196</sup> Fourthly, because the Model Law applies to both international and domestic arbitration in the three selected African jurisdictions it will be beneficial to start with a brief historical background, followed by a statement of its aims and guiding principles. There will then follow a general overview of its content before proceeding to a discussion of its interaction and correlation with the legislation of the selected jurisdictions.

Quite obviously the adoption of the Model Law cannot guarantee the achievement of the objectives sometimes attributed to it such as an increased flow of trade and investment in the adopting state. The hope may nevertheless be expressed that the acceptance of the legal framework of the Model Law could lead to the development and improvement of an active arbitration environment in the adoptive African states.

#### *2.4.4.2 The UNCITRAL Model Law: The Background*

UNCITRAL is the acronym for the United Nations Commission on International Trade Law. This body was established by the United Nations General Assembly in December 1966 to work on the harmonization and unification of international trade law.<sup>197</sup> UNCITRAL was active in the field of arbitration long before the Model Law was crafted.<sup>198</sup> For example, after its establishment, UNCITRAL promoted accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>199</sup> and drafted the UNCITRAL Arbitration Rules (1976) and in 1986 it published recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules.<sup>200</sup>

In view of attempts to show that the Model Law pays insufficient regard to the interests of developing countries, it is important to note that the decision to undertake

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<sup>196</sup> See for example the Kenya Arbitration Act s 39, which contains contract-in procedures for referring a question of law to the court for an opinion and for taking a question of law in an award on appeal to the court; and the New Zealand Arbitration Act 99 of 1996 sch 2.

<sup>197</sup> General Assembly Resolution 2205 of 17 December 1966.

<sup>198</sup> On the functions of UNCITRAL within the UN see Holtzman & Neuhaus *A Guide to the UNCITRAL Model Law* 4-5; Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 2 ed (2005) 8-9.

<sup>199</sup> UN A/CN.9/168.

<sup>200</sup> UN A/34/17 para 81. On the drafting of the Model Law by the Working Group on International Contract Practices, see UN. A/36/17 para 70. See also Davidson F *Arbitration* (2000) 35-39.

the drafting of the Model Law was made pursuant to an initiative of the Asian-African Legal Consultative Committee.<sup>201</sup> The Model Law went through five drafts as at March 1984 before the analytical compilation of comments from governments and interested international organizations was produced.<sup>202</sup> This was followed by the UNCITRAL secretariat's own analytical commentary<sup>203</sup> and the approval of the final text by UNCITRAL on 21 June 21 1985 culminating on 11 December 1985 with the resolution of the UN General Assembly approving the Model Law and requesting the UN Secretary General to transmit the text of the Model Law to governments, arbitral institutions and interested bodies to be considered for adoption in national law.<sup>204</sup> The records of the various drafting sessions form part of the *travaux préparatoires*.<sup>205</sup>

The *travaux préparatoires* tell the drafting story of the Model Law and are a useful tool for interpretation of the articles of the Model Law. The extent, if any, to which the Model Law *travaux* can be used to interpret articles of domestic law adaptations of the Model Law must be a matter for national practice and legislation. The *travaux préparatoires* are voluminous and comprise the material that emerged from the drafting process.<sup>206</sup> They represent the various drafts of the Model Law and accompanying notes, the working group reports, the reports and notes of the secretariat, the analytical compilation of government comments, the analytical commentary on the draft by the secretariat, the summary record of the session of UNCITRAL in June 1985 to consider the draft text, and the report following that session. UNCITRAL itself thought that only the *travaux préparatoires* of the session at which the Model Law was adopted should be forwarded together with the text of the Model Law as an interpretative aid to governments and other interested parties,<sup>207</sup>

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<sup>201</sup> See the SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.7 citing Sornarajah M "The UNCITRAL Model Law: a Third World Viewpoint" (1989) 6(4) *Journal of International Arbitration* 7-20. On the idea behind the Model Law and the contribution of the African-Asian Legal Consultative Committee (AALCC) see UN A/32/17 para 39 and Binder *International Commercial Arbitration* 9.

<sup>202</sup> UN A/CN.9/263.

<sup>203</sup> UN A/CN.9/364.

<sup>204</sup> See further Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 9-15; Binder *International Commercial Arbitration* 9-10.

<sup>205</sup> General Assembly Resolution 40/72. See also Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 9.

<sup>206</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 15-16, 19-20; Binder *International Commercial Arbitration* 11; Broches A *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990).

<sup>207</sup> See the 1985 Commission Report A/40/17 para 333.

and this recommendation was adopted by the General Assembly.<sup>208</sup> Quite obviously notes and guidelines that have come into existence after the adoption of the Model Law<sup>209</sup> will also be useful aids to the better understanding and acceptance of the Model Law and states may well take cognizance of that fact by appropriate legislative provisions in their national laws. There is however a lack of uniformity by states adopting the Model Law in specifying what constitutes the *travaux préparatoires* that may be used as an interpretative aid.<sup>210</sup>

A primary goal of the Model Law is acknowledged to be the promotion of uniformity of national laws applying to international commercial arbitration. Uniform interpretation of the Model Law is therefore desirable. To that end it will be helpful if those interpreting that law have access to the *travaux préparatoires* and indeed several Commonwealth countries expressly permit reference to the *travaux* by adopting one of two methods, either a reference to specific documents<sup>211</sup> or a general reference to the *travaux préparatoires*.<sup>212</sup> In recommending that South Africa should implement the Model Law, the Law Commission also recommended that the enacting legislation should authorize reference to an expanded but specified list of documents as an interpretation aid.<sup>213</sup>

<sup>208</sup> Binder *International Commercial Arbitration* 11.

<sup>209</sup> Such as the Explanatory Note by the UNCITRAL Secretariat on the Model Law (1986) and the updated version (2008) published with the original and amended versions of the Model Law. These Explanatory Notes have a disclaimer in a footnote to the effect that the relevant note is for informational purposes only and is not an official commentary on the Model Law.

<sup>210</sup> See the text below.

<sup>211</sup> Two such specific documents are: *The Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*; and *The Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (3 – 21 June, 1985)*.

<sup>212</sup> See the SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.56-2.57. For example, the Canadian (Federal) Commercial Arbitration Act of 1986 s 4(2) permits reference to only two specific documents, whereas the Zimbabwean Arbitration Act s 2(3) makes only a general reference to the *travaux préparatoires* that may be consulted.

<sup>213</sup> See the SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.58-2.59. The list is as follows:

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/323 of 10 November 1982);
- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983);
- (f) Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984)

In addition the Law Commission's own report was recommended to be sanctioned as an interpretation aid for the Model Law and the implementing legislation. The justification for relaxing the ordinary rules of statutory interpretation<sup>214</sup> to accommodate this recommendation was said to be the twin goals of promoting harmonization and the desirability of the Model Law being applied in South Africa in a way compatible with the intention of its drafters.<sup>215</sup> It is nevertheless perhaps surprising that the Explanatory Note by the UNCITRAL Secretariat, prepared subsequent to its adoption and published with the Model Law, as a guide to its adoption, was not included by the Law Commission on its list.

With regard to the internationality of the Model Law, it has been observed by the UNCITRAL Secretariat in its *Analytical Commentary* that:

“In accordance with the mandate of the Commission, the Model Law is designed to establish a special regime for international cases. It is in these cases that the present disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. Furthermore, in these cases more flexible and liberal rules are needed in order to overcome local constraints and peculiarities. Finally, in these cases the interest of a State in maintaining its traditional concepts and familiar rules is less strong than in a strictly domestic setting. However, despite this design and legislative self-restraint, any State is free to take the model law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law. ... Unless a State opts for such unitary treatment, the test of “internationality” set forth in article 1(2) is of utmost importance and crucial for the applicability of ‘this Law’.”<sup>216</sup>

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- (g) Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/263 of 19 March 1985), including the three addenda dated 15 April 1985, 21 May 1985 and 31 July 1985);
  - (h) Analytical Commentary on draft text of a Model Law on international commercial arbitration (A/CN9/264 of 25 March 1985); and
  - (i) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (A/40/17 of 21 August 1985).

<sup>214</sup> The Commission (para 2.53 n 53) also pointed out that relaxation of the traditional rule in any event permitted reference to parliamentary material to clarify ambiguities, citing *S v Makwanyane* 1995 3 SA 391 (CC) 405C-E and *Pepper (Inspector of Taxes) v Hart* 1993 AC 593 (HL) 634D-E:

<sup>215</sup> See the SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* (1998) paras 2.59 and 2.61.

<sup>216</sup> A/CN9/264 para 22, quoted in Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 71.

The Model Law is expressly subject to other laws of the adopting state by which certain disputes may not be submitted to arbitration, as well as to treaty obligations of the adopting state. Each of these will be briefly discussed.

Article 1(5) states that the Model Law shall not affect any other law of the adopting state pursuant to which certain disputes may not be arbitrable or can only be arbitrated under other laws. As the Model Law does not itself deal with what disputes are arbitrable, some countries in adopting the Model Law have, in the interests of greater certainty, included a definition of arbitrability in their version of the Model Law.<sup>217</sup> Article 9 of the Model Law adopts a similar approach insofar as it leaves the extent of the court's powers to grant interim measures in support of arbitration to be determined by domestic law.<sup>218</sup> UNCITRAL also considered the situation where the Model Law conflicts with other laws dealing with arbitration procedure. In such cases it must be deemed implicit that the Model Law, as *lex specialis*, prevails within its sphere of application.<sup>219</sup> This appears logical in jurisdictions where the Model Law is adopted for international commercial arbitration only, but the position is more complex when the Model Law is adopted for domestic arbitration as well.<sup>220</sup>

Under Article 1(1) the Model Law applies subject to any agreement in force between the adopting state and any other state or states. Examples of multi-lateral treaties covered by this provision include the Geneva Protocol on Arbitration Clauses (1923), the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965). The provision is wide enough to cover treaties devoted to other subject-matters but which contain a provision on arbitration. The *travaux préparatoires*, for example, mention Article 22(3) of the Hamburg Convention on the Carriage of Goods by Sea (1978), which provides for the place of arbitration to be

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<sup>217</sup> See Binder *International Commercial Arbitration* 26-27 and see para 3.2.3 below regarding the Zimbabwe Arbitration Act s 4.

<sup>218</sup> The position is not fundamentally altered by Article 17J of the 2006 amendments: the extent of the court's power to grant interim measures is still determined by legislation or rules outside the Model Law.

<sup>219</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 38; Binder *International Commercial Arbitration* 26.

<sup>220</sup> See para 2.4.4.5(i) for a discussion of relevant ambiguities in the arbitration legislation in the three African states giving effect to the Model Law and para 2.4.4.4 for the interaction between the Model Law and customary arbitration law in the three jurisdictions.

determined at the option of the claimant and is thus inconsistent with Article 20 of the Model Law which allows the parties to determine the place of arbitration. The former provision as a treaty obligation would clearly override the latter.<sup>221</sup>

The provision in Article 1(1) of the Model Law also clearly applies to dispute resolution clauses in bilateral investment treaties.

Another important provision regarding the scope of application of the Model Law is Article 1(2), in terms of which most of the provisions of the Model Law apply only if the place of arbitration is in the adopting state. This territorial scope of application is subject to the exceptions created by Articles 8, 9, 35 and 36. Article 8 requires the court before which an action in a matter subject to a valid arbitration agreement is brought to refer the parties to arbitration.<sup>222</sup> It is submitted that this provision's extra-territorial application reflects the recognition that an arbitration agreement cannot be fully effective unless it prevents a party from taking the arbitral dispute to the court of any state. Article 9 provides that it is not incompatible with an arbitration agreement for a party to request and a court to grant an interim measure of protection.<sup>223</sup> The inference is that although a court of an adopting state may not permit a party to litigate an arbitral dispute in that state, that court may nevertheless entertain and grant a request from such party for an order, for example, to preserve a crucial piece of evidence for purposes of the arbitration, as was done by the High Court of Hong Kong in *The Lady Muriel*.<sup>224</sup> The powers granted by Articles 8 and 9 were so conferred, it would seem, on the courts of the adopting state irrespective of the place of arbitration or the law under which the arbitration was conducted.<sup>225</sup> It can be seen therefore that the Model Law recognizes the need for interaction between the Model Law and domestic arbitration laws and the need for the state courts to respect the integrity of the arbitral process even if the arbitration is not being conducted in that particular state. The other two provisions with extra-territorial application are Articles 35 and

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<sup>221</sup> Analytical Commentary (on Article 1), A/CN.9/264 para 11; Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 69-70.

<sup>222</sup> See para 2.4.4.5(i) below.

<sup>223</sup> Article 1(2) of the Model Law was amended in 2006 so that the new provisions regarding court involvement with interim measures, including enforcement of interim measures granted by the tribunal also have extra-territorial application. These provisions are Articles 17H, 17I and 17J.

<sup>224</sup> *The Lady Muriel* [1995] 2 HKC 320 – a case in which the Hong Kong High Court granted an order to permit the inspection of a ship in Hong Kong waters. See further para 3.5 below on interim measures.

<sup>225</sup> UN A/40/17 para 75.

36, which provide for the recognition and enforcement of arbitral awards by the court of the adopting state, irrespective of the jurisdiction in which the arbitration took place.<sup>226</sup>

The territorial criterion under Article 1(2) is also of particular practical importance because the functions of arbitration assistance and supervision set out under Articles 11, 13, 14, 16 and 34 are to be provided by the national court of the state in which the arbitration takes place.<sup>227</sup>

The objective of UNCITRAL in adopting the Model Law for international commercial arbitration was the development and harmonization of arbitration law.<sup>228</sup> This is because UNCITRAL, through its global survey of national laws on arbitration, found domestic law to be disparate and unsuitable for international cases in particular. This is not entirely surprising as in general, national laws are primarily designed for national purposes. The form of the Model Law was preferred to the form of treaties or conventions because it afforded states more flexibility for adaptation.<sup>229</sup> As such the Model Law held out the promise of facilitating the goals of improving and harmonizing national arbitration laws. As noted by Fleischhauer,<sup>230</sup> the advent of the UNCITRAL Model Law on International Commercial Arbitration constituted a most remarkable development and influential accomplishment in the field of commercial arbitration.

The declared aims of the Model Law are the liberalization of international arbitration by emphasizing party autonomy and allowing the parties the freedom to choose how their disputes should be determined while also reducing the role of the national courts in arbitration; establishing a defined core of mandatory provisions to ensure fairness and due process; providing a framework for conducting an international commercial arbitration so that if the parties failed to agree on the procedure the arbitration could

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<sup>226</sup> See para 3.6.3 below.

<sup>227</sup> For purposes of articles 11, 13 and 14, the adopting state may designate another competent authority instead of a court to perform the relevant function.

<sup>228</sup> See the Explanatory Note by the UNCITRAL Secretariat on the Model Law and Commentary in A/CN.9/264; UNCITRAL Yearbook Vol XVI, 1985.

<sup>229</sup> See Binder *International Commercial Arbitration* 11-12.

<sup>230</sup> The Legal Counsel and Head of the Office of Legal Affairs of the UN Secretariat that serviced and assisted UNCITRAL's work on the Model Law in his foreword to Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* v.

nevertheless proceed to completion; and providing for the recognition and enforcement of the award.<sup>231</sup>

#### 2.4.4.3 *The Model Law and Domestic Arbitration*

Although the Model Law is specifically designed for international<sup>232</sup> commercial arbitration, the drafters recognized that states were free to adopt the Model Law for domestic arbitration as well.<sup>233</sup> Thus the application of the Model Law will depend on the wording of the national legislation adopting it.<sup>234</sup> Where a jurisdiction adopts the Model Law for international commercial arbitration only, the legislature may nevertheless also include an “opt-in” provision, giving the parties the choice to apply it to a domestic arbitration as well. Therefore in Scotland, for example, it is open to parties to arbitrations which are international but not commercial or vice versa or neither international nor commercial to invoke the Model Law.<sup>235</sup>

The principles and individual solutions adopted in the Model Law are aimed at reducing or eliminating the disparities between national laws and the problems and undesirable consequences created by uncertainties in national arbitration laws.<sup>236</sup> It is necessary to bear in mind that although the Model Law is adaptable by national legislation to domestic arbitration, its core essence was dictated by the drafters’ concerns with international commercial arbitration.<sup>237</sup> This fact therefore reinforces the need for national legislators not simply to take the Model Law on face value in deciding to apply it to domestic arbitration, but to be careful to ensure that the

<sup>231</sup> See the SA Law Commission’s Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.7. See also the Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration A/CN.9/207, 14 May 1981 paras 16-27; Merkin R *Arbitration Law* (1991) 1-11.

<sup>232</sup> See particularly Article 1(1) and the definition of “international” in article 1(3).

<sup>233</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 28.

<sup>234</sup> Note the earlier comments on monistic and dualistic arbitration legislation in para 2.2 above.

<sup>235</sup> See Davidson *Arbitration* 40, citing s 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act, which states:

“The parties to an arbitration agreement may, notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of article 1 of the Model Law as set out in Schedule 7 to this Act, agree that the Model Law as set out in that Schedule shall apply, and that in such a case the Model Law as so set out shall apply to that arbitration.”

The SA Law Commission in its Report *Arbitration: an International Arbitration Act for South Africa* (1998) paras 2.271-2.276 in recommending that South Africa adopt the Model Law for international commercial arbitration only, concluded that an opt-in provision was not desirable.

<sup>236</sup> See UNCITRAL’s Secretariat’s Explanatory Note (1986) para 7.

<sup>237</sup> Article 1(1).

modifications intended or desired for domestic purposes are such as will best serve the ends of domestic arbitration law.

#### *2.4.4.4 A Brief Overview of the Model Law and its Enactment in the Three Jurisdictions*

The Model Law, as originally adopted in 1985, has eight chapters.<sup>238</sup> The first Chapter contains General Provisions under Articles 1 to 6. The remaining chapters follow the chronology of an arbitration, starting with the definition and enforcement of an arbitration agreement (Chapter II); then the composition of the arbitral tribunal including the procedures for the appointment of arbitrators (Chapter III); the jurisdiction of the arbitral tribunal (Chapter IV); the conduct of the arbitral proceedings (Chapter V); the requirements of an arbitral award and the termination of the proceedings (Chapter VI); the procedure for challenging an award in the courts (Chapter VII) and finally the recognition and enforcement of the award by the courts (Chapter VIII).

Because of the controversies revealed by its legislative history the consensus reached by the drafters of the Model Law on the principles and major issues of international arbitration practice is a substantial achievement. The brevity and succinctness of the Model Law may have been intended to enhance its worldwide appeal and acceptance.

As already noted however the Model Law is not comprehensive as there are certain important areas in practice that it does not cover. These will be identified later in this chapter, also with reference to the 2006 amendments to the Model Law.<sup>239</sup>

It has also been noted that there are no official criteria for deeming any state a Model Law state<sup>240</sup> and none were set by UNCITRAL. Redfern and Hunter<sup>241</sup> have published a list of countries that have adopted arbitration legislation based on the

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<sup>238</sup> As part of the 2006 amendments to the Model Law, a new chapter, Ch IV A “Interim Measures and Preliminary Orders” was added. This chapter only applies in Model Law jurisdictions which specifically adopt it. The three African states under consideration have yet to do so. These 2006 amendments are discussed in para 3.5.3 below.

<sup>239</sup> See Para 2.4.4.6 below.

<sup>240</sup> See Binder *International Commercial Arbitration* 12.

<sup>241</sup> Redfern & Hunter *International Commercial Arbitration* 633.

UNCITRAL Model Law.<sup>242</sup> Kenya, Nigeria, Zimbabwe are included in the list. The criteria for inclusion are stated by Redfern and Hunter as firstly, that the legislation must give the impression of having taken the Model Law as a basis with amendments and additions without just taking the Model Law as one from various models or following only its principles; secondly that about 70 to 80 per cent of the Model Law provisions are included; and thirdly, that the legislation contains no provisions incompatible with modern international commercial arbitration.<sup>243</sup>

The arbitration statutes of Kenya, Nigeria and Zimbabwe qualify as “Model Law jurisdictions” by the stated criteria. However, the legislatures of these states adopted the bulk of the Model Law through differing legislative techniques. Kenya’s Arbitration Act of 1995<sup>244</sup> substantially enacts the provisions of the Model Law under eight Parts which correspond to the eight Chapters of the Model Law under the same or similar headings. The Act which came into force on 2 January 1996<sup>245</sup> repealed the previous arbitration law under Chapter 49 of the Laws of Kenya. An important difference between the Act and the Model Law is that the Act applies to both domestic and international arbitrations<sup>246</sup> unlike the Model Law, which applies to international commercial arbitration.<sup>247</sup>

The Nigerian Arbitration and Conciliation Act,<sup>248</sup> while enacting all the substantial provisions of the Model Law, differs in structure from that law and those of Kenya and Zimbabwe. The Act is in four parts. Part I deals with arbitration under thirty-six sections, Part II covers conciliation, and Part III contains additional provisions relating to international commercial arbitration and conciliation. The Act concludes with miscellaneous provisions under Part IV.

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<sup>242</sup> For the full current list of jurisdictions that are recognized by UNCITRAL as Model Law states see <http://www.uncitral.org>.

<sup>243</sup> Redfern & Hunter *International Commercial Arbitration* 633; Binder *International Commercial Arbitration* 12-13.

<sup>244</sup> Act 4 of 1995.

<sup>245</sup> By Legal Notice 394 of 1995 pursuant to s 2 of the Act.

<sup>246</sup> S 2.

<sup>247</sup> Model Law Article 1(1).

<sup>248</sup> Decree 11 of 1988; subsequently Chapter 19 of the Laws of Nigeria (1990) and Chapter 18 of the Laws of Nigeria (2004). Orojo & Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* refer to this enactment as a “Decree” and not as an “Act” in conformity with the Revised Edition (Laws of the Federation of Nigeria)(Amendment) Decree 55 of 1992. Reference to the 1988 Decree as the 1988 Act would now seem acceptable.

The long title states that the Act is “to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards [The New York Convention] to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.”<sup>249</sup> Although the order of presentation differs from that of the Model Law, there is no doubt that the Act has borrowed heavily from the provisions of the Model Law, for which reason Nigeria is listed by UNCITRAL as a Model Law state. For purposes of comparative study we are concerned mainly with the provisions of Parts I and III.<sup>250</sup>

Zimbabwe is another African country that has embraced the Model Law for both domestic and international arbitration and the manner of its adoption in Zimbabwe is both simple and exemplary. The Arbitration Act 1996<sup>251</sup> is an enactment under seven brief sections into which the Model Law, with minor modifications,<sup>252</sup> is incorporated under the First Schedule to the Act. In this way the Zimbabwe adoptive technique of the Model Law differed from that of Kenya which, as noted, in its 1995 Act substantially re-enacted the provisions of the Model Law for both domestic and international arbitration and also from the Nigerian Decree of 1988 which expanded the Model Law to provide specifically for domestic and international arbitration as well as for conciliation.

The territorial scope of application of the Zimbabwean Act follows that of the Model Law and is subject to the same exceptions,<sup>253</sup> but the Model Law definition of international arbitration is omitted from the Zimbabwean statute which applies in any event to both domestic and international arbitration.<sup>254</sup>

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<sup>249</sup> The Nigerian statute is therefore mainly monistic.

<sup>250</sup> It seems that the structure of this Act has confused even distinguished jurists and provoked controversy. See Idornigie PO “The Relationship between Arbitral and Court Proceedings in Nigeria” (2002) 19(5) *Journal of International Arbitration* 443 446.

<sup>251</sup> Act 6 of 1996.

<sup>252</sup> For example under sch 1 Article 10(2), the number of arbitrators, failing determination by the parties shall be one in a domestic arbitration in contrast to three under Article 10(2) of the Model Law.

<sup>253</sup> See the Zimbabwe Act s 3 and compare the Model Law Article 1(2), discussed in para 2.4.4.2 above.

<sup>254</sup> See the long title of the Act. This makes the arbitration legislation in Zimbabwe monistic, subject to the exception in sch 1 Article 10(2), referred to in n 249 above and para 2.4.4.5 (i) below.

UNCITRAL includes Scotland in the list of Model Law jurisdictions. England and Wales are however intentionally omitted, because the English Arbitration Act 1996 does not satisfy the first criterion referred to above.<sup>255</sup> Nevertheless, it has been acknowledged that the English Act took several provisions directly from the Model Law<sup>256</sup> and “follow[s], as far as possible, the structure and spirit of the Model Law”.<sup>257</sup> The English response to the Model Law is discussed in more detail below.<sup>258</sup>

The relevance of the English Act for purposes of this study is that although the Act follows the Model Law in many respects, in some ways it represents an advance on the Model Law.<sup>259</sup> It deals with common issues in domestic arbitration as do the monistic statutes of Kenya, Nigeria and Zimbabwe. Compared to previous English Arbitration Acts, there is in the 1996 Act a distinct shift away from judicial supervision of the arbitral process towards an increased party and tribunal autonomy.<sup>260</sup> Powers to order parties to take certain steps to advance the arbitral proceedings are conferred on the tribunal rather than on the court.<sup>261</sup> In Part I of the Act dealing with arbitration pursuant to an arbitration agreement, its drafters attempted to restate within a logical structure the basic principles of English arbitration law, but without providing an exhaustive code.<sup>262</sup> Part I of the Act is based on three fundamental principles.<sup>263</sup>

The English example of a shift from judicial supervision is instructive for Kenya as the English arbitration law upon which Kenyan arbitration tradition is based was traditionally suspicious of arbitration. Whereas the earlier English legislation differentiated between domestic and international arbitration in some respects<sup>264</sup> the

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<sup>255</sup> See the text to n 235 above.

<sup>256</sup> See the Departmental Advisory Committee on Arbitration Law (“DAC”) *Report on the Arbitration Bill* (1996) para 4.

<sup>257</sup> See the DAC *Report on the Arbitration Bill* (1996) para 2, quoting the DAC’s Interim Report of April 1995.

<sup>258</sup> See para 2.6 below.

<sup>259</sup> Davidson *Arbitration* 7; Davidson F “The New Arbitration Act - A Model Law” 1997 *Journal of Business Law* 101; Merkin *Arbitration Law* 1-11. Compare too Kerr M “International Commercial Arbitration – Worldwide” in Cotran E & Amisah A (eds) *Arbitration in Africa* 15 at 20, who states that England’s formal rejection of the Model law was a mistake and that prior to the reforms of 1996, English arbitration law provided too many opportunities for court intervention.

<sup>260</sup> For important differences between the English Act and the Model Law see Merkin *Arbitration* 1-11.

<sup>261</sup> See for example s 38.

<sup>262</sup> See the DAC *Report on the Arbitration Bill* (1996) para 9.

<sup>263</sup> See s 1, the DAC *Report on the Arbitration Bill* (1996) para 18 and para 2.6 below.

<sup>264</sup> See for example the Arbitration Act 1979 ss 3 and 4.

1996 Act makes no such distinction with both systems of arbitration now governed by the same flexibilities and freedoms.<sup>265</sup> Therefore if the English Act is seen as exemplifying a modern system of arbitration law it can in that sense be a pattern for the development of Kenyan arbitration law.

#### 2.4.4.5 *The Core Provisions of the Model Law*

It is not intended to discuss the Model Law provisions in full. In what follows the salient features of the Model Law are identified and elaborated upon insofar as they are relevant to this dissertation.

##### (i) Scope of Application

Although the Model Law, as noted, applies to international commercial arbitration,<sup>266</sup> it is relevant for this dissertation because its provisions also set out the basic requirements of domestic arbitration law<sup>267</sup> such as, for example, the form of the arbitration agreement, the composition of the arbitral tribunal, the jurisdiction of the tribunal, the basic procedural rules governing the conduct of an arbitration, the making of the award and its enforcement. These important provisions of the Model Law are substantially replicated in the statutes of the three jurisdictions in this study.

Article 1(1) delineates the scope of application by providing that the Model Law will apply to international commercial arbitration. In terms of Article 1(3), an arbitration is “international” if it falls into one of five categories. The first is where the parties have their place of business in different states. It is recognized that the majority of international arbitrations will fall into this category.<sup>268</sup> In addition arbitration is also

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<sup>265</sup> Ss 85-87 concerning domestic arbitration agreements were not brought into effect with the rest of the Act, because they were perceived as being a restriction on the freedom to provide services and therefore incompatible with European Community law (see the DAC *Supplementary Report on the Arbitration Act 1996* (1997) paras 47-50.

<sup>266</sup> See Article 1(i).

<sup>267</sup> Herrmann G “The Role of the Courts under the UNCITRAL Model Law Script” in *Contemporary Problems in International Arbitration* (1986) 164 167. Herrmann, an authority on the Model Law, argues that it would be suitable also for any advanced system of domestic arbitration. See also Binder *International Commercial Arbitration* 23 who states that 23 of the first 61 jurisdictions to adopt the Model Law applied it to domestic arbitration as well.

<sup>268</sup> Explanatory Note by UNCITRAL Secretariat para 10; Binder *International Commercial Arbitration* 25.

international if, secondly, the place of arbitration or, thirdly, the place of contract performance or, fourthly the place with which the subject-matter of the dispute is most closely connected, is situated in a state<sup>269</sup> other than that where the parties have their place of business. The fifth category is where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.<sup>270</sup> In summary, arbitration is international if either the parties have their places of business in different states or when they are located in the same country, if the contract is to be performed or any dispute resolved in some other country. Consequently the parties or their dispute will determine the internationality of the arbitration.<sup>271</sup>

The fifth category of international arbitration, referred to above, as defined in Article 1(3)(c) appears as if it is an “opt-in” provision. It has drawn the criticism that such exercise of party autonomy would enable parties to evade mandatory provisions of law including those providing for exclusive court jurisdiction;<sup>272</sup> and further that even parties from the same state may want to avoid the application of inconvenient provisions of their domestic law and rules which prevent the arbitration of certain disputes by choosing to arbitrate outside their state.

Holtzmann and Neuhaus respond to this provision and its criticism with the argument that:

“the opt-in party autonomy provided by the Law in Article 1(3)(c) is merely the power to select, for the sake of certainty, either of two systems adopted by the State’s legislature in cases in which the parties wish to arbitrate in their home State. It is not the power to choose a system that is unjust. Moreover the courts of the State maintain a measure of control in cases regarded as egregious because they have the power to

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<sup>269</sup> For example, where the parties conduct normal business in Nairobi, Kenya but one party was to deliver goods to Kampala, Uganda, as the place of contract performance or where the subject-matter of dispute is most closely connected with Kampala.

<sup>270</sup> Article 1(3)(c), discussed below.

<sup>271</sup> Merkin *Arbitration Law* para 1.9; see also SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* (1998) para 2.107, which describes the definition in Article 1(3) as using a “dual criterion”, one of which must be met.

<sup>272</sup> UN A/40/17 para 28; Gaillard E & Savage J (eds) *International Commercial Arbitration* 52-53 para 103 criticise these criteria used in Article 1(3)(b)(i) and (c) for being entirely in the control of the parties. See also the SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* (1998) paras 2.273-2.274.

set aside or refuse enforcement of an award that is contrary to public policy. They also may be able to refuse to refer such cases to arbitration under Article 8.”<sup>273</sup>

This explanation is not at all convincing as Article 1(3)(c) does indeed provide an escape route and an opportunity for national parties to evade inconvenient provisions of domestic law, especially as parties could include a foreign seat for an arbitration that according to the other criteria would be a domestic arbitration.<sup>274</sup>

In context, the three jurisdictions deal with the problems of definition differently. Unlike the Model Law that understandably contains no definition of domestic arbitration, the monistic Kenyan Arbitration Act of 1995 that applies to both domestic and international arbitration, defines both systems of arbitration<sup>275</sup> and the definition of international arbitration substantially replicates the Model Law provisions of Article 1(3). Therefore both the criticisms and responses to Article 1(3)(c) are apposite in the Kenyan context.<sup>276</sup>

The Nigerian arbitration statute of 1988<sup>277</sup> contains a definition of international arbitration which replicates the Model Law provisions<sup>278</sup> with an additional paragraph that provides:

“the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.”<sup>279</sup>

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<sup>273</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 32. See too Binder *International Commercial Arbitration* 26. Holtzmann & Neuhaus explain further that domestic arbitration laws tend to provide protections that are not needed by the sophisticated parties likely to use the opt-in provision. Obviously legislatures that object to this opt-in provision need not adopt it and may design their own.

<sup>274</sup> S 57(2)(d) of the Nigerian arbitration statute of 1988, discussed below, lends some weight to this criticism.

<sup>275</sup> S 3(2) and 3(3) respectively. In addition to other requirements, an arbitration can only be domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya.

<sup>276</sup> The distinction between domestic and international arbitration is important in the context of s 39 of the Act, concerning the reference of a question of law to the court for an opinion and the possibility of an appeal against an award on a question of law, which only applies in a domestic arbitration. See cross-ref regarding s 39.

<sup>277</sup> The definition is particularly relevant for ss 43-54 in Part III, which apply only to international commercial arbitration.

<sup>278</sup> See s 57(2)(a)-(c), which correspond to Article 1(3) of the Model Law.

<sup>279</sup> See s 57(2)(d).

Therefore the nature of the parties' contract is not determinative on internationality<sup>280</sup> under the Nigerian statute and the parties enjoy greater freedom in deciding whether or not their arbitration is international.

As the Zimbabwean Arbitration Act is monistic, the definition of "international" is omitted from Article 1 of the Model Law in the First Schedule to the Act. A minor but noteworthy point of detail concerning the composition of the arbitral tribunal is that although Article 10 of the Model Law and the Zimbabwe statute are *in pari materia* in providing for a tribunal of three arbitrators unless the parties otherwise agree, the Zimbabwean Article 10 introduces an exception for domestic arbitration by providing for a single arbitrator unless the parties otherwise agree. For this purpose, an arbitration is domestic if both parties have their principal place of business in Zimbabwe.

As mentioned above the Model Law only applies to "commercial" arbitration.<sup>281</sup> Generally a commercial contract may be understood as the kind of contract concluded in the course of business by and between merchants and traders. The term "commercial" is undefined in the text of the Model Law. The literature<sup>282</sup> on this subject reveals that the UNCITRAL working group on the Model Law did not reach consensus on a definition of "commercial" or on its inclusion in the text of that law. They settled instead on an illustrative list of commercial relationships in a footnote to Article 1.<sup>283</sup> Although the New York Convention allows states adopting it to make the so-called commercial reservation, confining its application to "legal relationships ... which are considered as commercial under the national law" of the adopting state,<sup>284</sup> it was decided that this wording was inappropriate.<sup>285</sup> It was thought that the inclusion of the illustrative list in the text of the Model Law might offend against the legislative

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<sup>280</sup> Under French law the determining feature is the nature of the transaction: Article 1492 of the French New Code of Civil Procedure provides that "an arbitration is international when it involves the interests of international trade".

<sup>281</sup> See Article 1(1).

<sup>282</sup> First Working Group Report, A/CN.9/216 45-46 para 19.; Second Working Group Report A/CN.9/232 48-49 para 32; Third Working Group Report A/CN.9/233 51-52 para 53, 56; Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 32-35; Davidson *Arbitration* 48-50.

<sup>283</sup> According to the Secretariat's Explanatory Note (1986) para 11, the illustrative list emphasizes the width of the suggested interpretation, and indicates that the test is not based on what the national law may regard as "commercial".

<sup>284</sup> See Article I(3).

<sup>285</sup> UN A/CN.9/207 para 31.

techniques of some states by the list being construed by some legislatures as complete and by others as either too wide or too vague.<sup>286</sup> UNCITRAL itself recommended that the term be given a wide interpretation to cover matters arising from all relationships of a commercial nature whether contractual or not. Primarily therefore claims in contract and tort would be within the ambit of the term “commercial”.<sup>287</sup> On this basis it would seem that a relationship could qualify as commercial even where one or both parties were not commercial individuals or institutions, the emphasis being on the nature of the transaction rather than on the status or designation of the parties.<sup>288</sup>

The legislative history also provided examples of relationships that were not considered commercial such as labour and employment disputes, ordinary consumer claims despite their relation to business<sup>289</sup> and family-law matters.<sup>290</sup>

Both the Kenyan<sup>291</sup> and Zimbabwean<sup>292</sup> statutes omit the word “commercial” when determining the application of the Act,<sup>293</sup> but under the Zimbabwean statute a matter concerning a consumer contract is not arbitrable unless the consumer has, by a separate agreement, agreed to arbitration.<sup>294</sup> In effect, additional formalities are imposed for a valid arbitration agreement relating to a particular type of non-commercial matter.<sup>295</sup> In contrast, for purposes of the Nigerian arbitration statute of

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<sup>286</sup> Third Working Group Report, *supra*. A United Kingdom recommendation to define commercial in general terms in the text with an explanatory commentary was rejected in preference for the footnote under Article 1 which was in the nature of an “incipient agreed commentary”. See Holtzmann & Neuhaus, *Guide to the UNCITRAL Model Law* 74.

<sup>287</sup> The footnote to Article 1 urges the term to be widely interpreted. Professor Sornarajah criticises the description of “commercial” as too wide, arguing that it would work to the detriment of developing countries which would not be able to retain control over foreign trade and investment if this wide definition was adopted. In other words the public interest laws that are intended to protect the weaker party would be frustrated if these disputes are resolved by private arbitration. See Sornarajah M “The UNCITRAL Model Law: A Third World Viewpoint” 6 *Journal of International Arbitration* (2002) 19(2) p.130. He acknowledges that the Model Law footnote on “commercial” is not binding but merely recommendatory.

<sup>288</sup> UN/A/40/17 paras 21-26 quoted in Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 94-95. See also the Ontario case of *Carter v McLaughlin* (1996) 27 O R (3d) 792.

<sup>289</sup> UN Analytical Commentary on Article 2; A/CN.9/264 para 18.

<sup>290</sup> UN A/CN.9/207 para 31.

<sup>291</sup> See s 2.

<sup>292</sup> See the First Schedule, Article 1.

<sup>293</sup> Note the use of the phrase “commercial relationship” in s 3(2)(c) and 3(3)(b)(ii) of the Kenyan Arbitration Act is probably an error as the application of the Act is not confined to only commercial relationships. Compare the SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* (1998) paras 2.101-2.105. The Commission favoured the retention of “commercial” in Article 1(1), but without the term being defined.

<sup>294</sup> See s 4(2)(f).

<sup>295</sup> See SA Law Commission *Report on Domestic Arbitration* (2001) paras 3.283 and 3.285.

1988, “arbitration” in Nigeria means a commercial arbitration whether or not administered by a permanent arbitral institution, and the definition of “commercial” without more replicates all the relationships exemplified in the footnote to Article 1 of the Model Law, referred to above.<sup>296</sup> It appears that the application of the entire statute is confined to commercial arbitration. The definition of “commercial” is also relevant for Part III of the statute, which only applies to cases relating to international commercial arbitration.<sup>297</sup>

Because “arbitration”, the third word of the phrase “international commercial arbitration”, is indeed the core subject-matter and the very activity covered by the Model Law the omission of its definition is remarkable.<sup>298</sup> Instead what the Model Law offers is a clarification of arbitration under Article 2(a) by which arbitration means “any arbitration whether or not administered by a permanent arbitral institution”. The Kenyan and Zimbabwean provisions are in the same terms.<sup>299</sup> As noted, the Nigerian statute confines arbitration to “commercial” arbitration whether or not administered by a permanent arbitral institution.<sup>300</sup> Therefore both institutional and ad hoc arbitrations are governed by the Model Law and the statutes of the three jurisdictions.

Before leaving the scope of application of the Model Law defined under Article 1, it is relevant to observe that Article 1(2) confines the territorial scope of application to the territory of the enacting State, subject to the exceptions referred to above.<sup>301</sup> The provision is replicated in the Zimbabwean statute,<sup>302</sup> but there appears to be no corresponding provision in the Nigerian and Kenyan statutes.

## (ii) The Arbitration Agreement

Article 7(1) of the Model Law defines “arbitration agreement” as an agreement of the parties “to submit to arbitration all or certain disputes which have arisen or which may

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<sup>296</sup> S 57(1).

<sup>297</sup> S 43.

<sup>298</sup> See too the discussion of this point by Binder *International Commercial Arbitration* 30-32.

<sup>299</sup> S 3(1), Kenya; First Schedule Article 2(a), Zimbabwe.

<sup>300</sup> S 57(1).

<sup>301</sup> See the text above.

<sup>302</sup> S 3.

arise between them in respect of a defined legal relationship whether contractual or not.” An existing dispute (*compromis*) and a future dispute (*clause compromissoire*) are therefore both covered.<sup>303</sup> Article 7(2) of the Model Law, as originally approved in 1985,<sup>304</sup> requires the arbitration agreement to be in writing and it is in writing if:

- (a) “it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another” or
- (b) there is a reference in a contract to a document containing an arbitration clause provided the contract is in writing and the wording of the reference is sufficient to incorporate the provision.<sup>305</sup>

The Kenyan statute omits the definition of an arbitration agreement provided by the Model Law but repeats the requirements regarding form.<sup>306</sup> The Zimbabwe statute adopts the Model Law formulation on the definition and form of an arbitration agreement without modification. The Nigerian statute omits Article 7(1) of the Model Law in its entirety,<sup>307</sup> but adopts the wording of Article 7(2) in describing the form of an arbitration agreement.<sup>308</sup> Subject to this minor modification in the case of Nigeria, it can be said that the three jurisdictions have adopted the substantive contents of the provisions of the Model Law as to the form of an arbitration agreement.

The provisions of Article 7 demonstrate UNCITRAL’s attempt to unify national arbitration statutes by enabling an arbitration agreement to embrace both existing and

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<sup>303</sup> See Binder *International Commercial Arbitration* 61.

<sup>304</sup> See para 3.1 below regarding the 2006 amendment to Article 7, first option.

<sup>305</sup> On the inadequacy of this definition see Kaplan N 1996 “Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?” 12 *Arbitration International* 27. The author suggests the inclusion of an arbitration agreement evidenced in writing but not necessarily signed by the parties and agreements made orally but by reference to terms that are in writing.

<sup>306</sup> Compare s 4 of the Kenyan Act with Article 7(1) of the Model Law. The definition of an arbitration agreement, referred to above, is set out in the first sentence of Article 7(1).

<sup>307</sup> Thus not only the definition is omitted but also the provision to the effect that the arbitration agreement may take the form of either an arbitration clause or a separate agreement.

<sup>308</sup> See s 1(1) and (2) of the Nigerian arbitration statute.

future disputes and so eliminating the distinction that still exists in some jurisdictions that deny effect to the latter category of agreements (*clause compromissoire*).<sup>309</sup> Curiously the fact that Article 7(1) is permissive but Article 7(2) is restrictive demonstrates an inconsistency on the part of UNCITRAL. This may be due perhaps to UNCITRAL's reluctance to depart from the New York Convention's requirement (under Article II(2)) of a written form of agreement; apart from which UNCITRAL's own global survey revealed that most legal systems require a written form of agreement.<sup>310</sup> The relatively strict formal requirements are arguably indicative of an intention of ensuring that there is indeed consent to arbitration by both parties.<sup>311</sup>

It is submitted as an additional point of clarification that as the Model Law does not outlaw arbitration under other arbitration laws,<sup>312</sup> an oral arbitration agreement of the kinds encountered in customary-law arbitration are nationally enforceable. Furthermore, with regard to arbitration under Model Law regimes, any objection to such oral agreement may be deemed waived (pursuant to Article 4) by the failure to raise the objection timeously. In other words an oral agreement is enforceable to the extent that the requirement of writing may be deemed waived by the application of Article 4.<sup>313</sup> This interpretation would be of particular significance in the African jurisdictions in which customary arbitration law is recognized and enforced as such.

Kenya has added provisions to its version of the Model Law on the effect of the death or bankruptcy of a party to the arbitration agreement,<sup>314</sup> whereas the Nigerian statute has an addition regarding the effect of the death of a party.<sup>315</sup> The Zimbabwean Act has no such additions.

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<sup>309</sup> An explanatory commentary on Article 7 appears in UNCITRAL's Explanatory Note on this article; and Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 258.

<sup>310</sup> First Secretariat Note, A/CN.9/207 paras 40-41 and Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 260.

<sup>311</sup> See the Commission's Report para A/40/17 para 84 quoted in Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 300. However, UNCITRAL's Working Group in 2006, when revising Article 7, regarded the purpose of writing as being to ensure that there is clarity as to the content of the agreement, rather than as ensuring that there is indeed consent. See Report of the Working Group on the work of its 44<sup>th</sup> session (New York 23-27 January 2006, UN Doc A/CN.9/592) paras 57, 59 and 61-62. See too UNCITRAL's Report on its 39<sup>th</sup> Session (19 June – 7 July 2006 UN doc A/61/17) para 153. Compare too the revised Article 7(3) (option 1) "An arbitration agreement is in writing *if its content* is recorded in any form ..." (emphasis added).

<sup>312</sup> See Article 1(5) and Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 38.

<sup>313</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 260-261.

<sup>314</sup> See the Arbitration Act s 8 and s 38.

<sup>315</sup> See the Nigerian arbitration statute s 3.

(iii) The Arbitration Agreement and the Courts

The relationship between the arbitration agreement and the role of the courts is regulated in part by Article 8 of the Model Law dealing with the arbitration agreement and a substantive claim before the court and Article 9, which deals with the effect of the arbitration agreement on interim measures by the court.<sup>316</sup> The statutes of all three African jurisdictions contain modifications to Articles 8 and 9 of the Model Law. Some of the implications of these Articles and their modification will be elaborated in Chapter Three.<sup>317</sup>

Article 8 obliges the court to refer the parties to arbitration when seized with a claim on the same subject-matter unless the court finds that the arbitration agreement is null and void, inoperative or incapable of performance. The court action notwithstanding, the arbitration may commence and proceed to an award.<sup>318</sup> It is contemplated that simultaneous proceedings may prompt a quick resolution of the arbitration.<sup>319</sup>

The debatable question is the standard to be applied by the courts in deciding whether the arbitration agreement is null and void, inoperative or incapable of performance. More specifically are the courts required to inquire into the merits of the existence and validity of the arbitration agreement or must they restrict their inquiry to a *prima facie* verification that the arbitration agreement exists and it is valid for purposes of conducting the arbitration? It is submitted that by virtue of the principle of “competence-competence” which empowers the arbitral tribunal to rule on its own jurisdiction including the existence and validity of the arbitration agreement the courts should limit their inquiry under Article 8(1) to a *prima facie* determination that the agreement is not null and void, inoperative or incapable of being performed in order not to negate the tribunal’s power to rule on that issue. In other words, the courts must

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<sup>316</sup> The Model Law also refers to the validity of the arbitration agreement in the context of court applications for the setting aside or enforcement of the award (see Articles 34(2)(a)(i) and 36(1)(a)(i)).

<sup>317</sup> See paras 3.1 and 3.5 below.

<sup>318</sup> Article 8 (2).

<sup>319</sup> Commission Report A/40/17 paras 91-93; Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 306.

normally refrain from hearing substantive arguments on the arbitrator's jurisdiction until the tribunal has had the opportunity to do so.<sup>320</sup>

Section 6(1) of the Kenyan statute substitutes the word "proceedings" for "action" in the Model Law Article 8(1) and a party "applies" not "requests", not later than the time when that party enters appearance or files any pleadings or takes any other step in the arbitration, for the court to "stay" the proceedings and refer the parties to arbitration. An additional ground to those of the Model Law for refusing the application is if there is not in fact any dispute between the parties.<sup>321</sup>

The Zimbabwean statute similarly substitutes "proceedings" for "action" but, in line with the Model Law provisions, the proceedings may be stayed and the parties referred to arbitration by request (Article 8(1)). This was done, for example, in the Zimbabwe cases of *Bitumah Ltd v Multicom Ltd*<sup>322</sup> and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd*.<sup>323</sup> In *Bitumat* the plaintiff sued the defendant for money owed. The defendant sought and was granted a stay of proceedings and a reference to arbitration in accordance with the parties' agreement pursuant to Article 8 of the First Schedule to the Arbitration Act. The same Article was relied on to refer a dispute to arbitration in the *ZBC and Flame Lily* case. However, the court found that there was no dispute to refer to arbitration in the case of *Eastern and Southern African Trade and Development Bank (PTA) v Elanne (Pvt) Ltd and R.G. Paterson and M.E. Paterson*<sup>324</sup> as the defendant had not alleged that there was an actual dispute. Consequently Article 8 did not apply and the special plea was dismissed.

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<sup>320</sup> See Gaillard E "Prima Facie Review of Existence, Validity of Arbitration Agreement" in (2005) 225 *New York Law Journal*. The author discusses this issue with supportive reference to the Indian Supreme Court Case of *Shin-Etsu Chemical Co. Ltd v Aksh Optifibre Ltd and Another* (2005) 7 SCC 234.

<sup>321</sup> S 6(1)(b).

<sup>322</sup> Zimbabwe: Harare High Court Judgement N0. HH144 – 2000, 24 and 31 May 2000: CLOUT Case N0. 370.

<sup>323</sup> Harare High Court Judgement N0. HH249 – 99; 15 December 1999; CLOUT Case N0. 322 Yearbook Comm Arb XXV (2000).

<sup>324</sup> Harare High Court Judgment N0. HH19 – 2000; CLOUT Case N0. 324; Yearbook Comm Arb XXV (2000).

A stay of proceedings and public policy were considered in *Waste Management Services v City of Harare*.<sup>325</sup> Here the plaintiff, a contractor, had sued the defendant municipality for payment for refuse collection services. The defendant asked for a stay of the proceedings and a reference to arbitration. The plaintiff challenged the arbitration clause for being contrary to public policy because it conferred discretion on an official of the defendant party to determine the dispute contrary to the principle that “nobody should be a judge in his own cause”. The court held that, were the official’s decision to be final it would be contrary to public policy. But here it was saved by the plaintiff’s right to refer the matter to arbitration if dissatisfied with the official’s decision. The court found Article 8 to be applicable and, since the defendant had so requested, the court granted the stay of proceedings and referred the dispute to arbitration. The statutes of Zimbabwe and Kenya, like the Model Law, confer power on the arbitral tribunal to commence and continue with the arbitration to the making of an award while the application is pending before the court.<sup>326</sup>

In Nigeria, the power of the court to stay proceedings is granted by section 5 upon the application of any party; and the application is granted if the court is satisfied that there is no sufficient reason to bar the reference to arbitration, and the applicant had been ready and willing at all material times to do all things necessary for the proper conduct of the arbitration. This provision therefore departs from the Model Law and, reminiscent of older English legislation and the current South African Arbitration Act, gives the court a wide discretion not to enforce the arbitration agreement if a sufficient reason is furnished.<sup>327</sup> Section 5 is difficult to reconcile with section 4 based on Article 8 of the Model Law, which requires a court to stay an action that is subject to an arbitration agreement, if a party so requests. Section 4 differs from Article 8, in that the circumstances in which the court is not required to refer the

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<sup>325</sup> Zimbabwe: Harare High Court Judgement No HH20-2000, 18<sup>th</sup> and 26<sup>th</sup> January 2000, CLOUT Case 321.

<sup>326</sup> S 6(2) of the Kenyan Statute conferring this power is not faithfully applied by the Kenyan courts which tend to stay arbitral proceedings until the application is heard and determined however long it takes. This writer is not aware of any instance in which an arbitration has proceeded to an award while an application under Section 6(1) is pending.

<sup>327</sup> Compare s 5(2) with the English Arbitration Act of 1950 s 4(1) and the South African Arbitration Act of 1965 s 6(2). S 5 of the Nigerian statute, unlike its counterparts in Zimbabwe and Kenya, also confers no discretion on the arbitral tribunal to proceed with the arbitration while the court application is pending.

matter to arbitration are omitted.<sup>328</sup> It therefore appears that sections 4 and 5 should be read together, so that the Nigerian court may decline to enforce an arbitration agreement if there are compelling reasons for such refusal.<sup>329</sup> As in Kenyan and Zimbabwean statutes, the arbitral tribunal may proceed with the arbitration while the court application is pending.<sup>330</sup>

Article 9 of the Model Law<sup>331</sup> reinforces two principles: first, that a party does not forfeit or waive the right to arbitrate merely by requesting and obtaining an interim measure of protection from the court and second, that a national court is not prevented by the arbitration agreement from granting such measures. Interim measures of protection by a national court are therefore deemed compatible with arbitration.<sup>332</sup>

Article 9 of the Model Law is replicated in the Kenyan and Zimbabwean statutes and confers the power on the High Court.<sup>333</sup> Article 9(2) of the Zimbabwean statute is new and defines the scope of the High Court's powers to grant measures to include an order for the preservation, interim custody or sale of any goods in dispute, an order for securing the amount in dispute or the costs of the arbitral proceedings and an interdict.<sup>334</sup>

Under the Nigerian statute the power to order interim measures of protection is, unless otherwise agreed by the parties, given to the arbitral tribunal under section 13, which is based on article 17 of the 1985 version of the Model Law.<sup>335</sup> The Nigerian Arbitration Act inexplicably omits any equivalent to Article 9 of the Model Law, with the result that the extent of a Nigerian court's power to grant interim measures in the context of an arbitration does not appear from the Nigerian Arbitration Act.

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<sup>328</sup> Namely if the arbitration agreement is "null and void, inoperative or incapable of being performed".

<sup>329</sup> See Asouzu *International Commercial Arbitration* 46 n 162.

<sup>330</sup> The Nigerian Arbitration Act s 4(2).

<sup>331</sup> Article 9 reads: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

<sup>332</sup> First Working Report A/CN 9/216 para 33.

<sup>333</sup> See the Kenyan Act s 7(1) and the Zimbabwe Act sch 1 Article 9(2).

<sup>334</sup> Under Article 17(2) it seems the tribunal's power to grant an interdict or an interim measure of protection is subject to the parties' agreement otherwise. Also under Article 31(5) the costs and expenses of an arbitration are as fixed and allocated by the arbitral tribunal in its award.

<sup>335</sup> The Kenyan Arbitration Act s 18 and the Zimbabwean Arbitration Act sch 1 Article 17 contain comparable provisions.

(iv) The Basis for and Overview of the Powers of the Court

Several interlocking provisions of the Model Law concerning the powers of the court demonstrate the degree of complexity involved and necessitate recourse to its legislative history. A “court” under the Model Law means a body or organ of the state judicial system.<sup>336</sup> Article 5, with the heading “Extent of Court Intervention”, fulfills an important object of the Model Law in delimiting national court involvement in international arbitration by providing:

“In matters governed by this Law no court shall intervene except where so provided in this Law.”

The word “intervene” incorporated by Article 5 may be deemed crucial and controversial in the national jurisdictions that have adopted a provision designed for international arbitration law without alteration, in so far as they purport to delimit the extent of judicial intervention by the national court in domestic arbitration.<sup>337</sup>

The drafters of Article 5 urged that the provision should not be construed as showing hostility to court intervention or assistance but as ensuring a measure of certainty as to the circumstances when court intervention is appropriate and permissible. As a consequence, the drafters of statutes adopting the Model Law were obliged to state the instances in which judicial control is justified so as to exclude any general or residual powers of the court other than those which are conferred by the Model Law.<sup>338</sup> Again the meaning of the word “intervene” is deemed to include “assistance” to, rather than just intervention in, the arbitration;<sup>339</sup> while the phrase “in matters governed by this Law” is to be understood as determining whether a court’s power to intervene is governed by the Model Law or by other provisions of domestic law including general and residual powers to supervise arbitrations.<sup>340</sup> It seemed that its drafters intended

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<sup>336</sup> Model Law Article 2(c).

<sup>337</sup> The Law Commission of South Africa has expressed the view that, “bearing in mind the desirability of promoting uniformity in Model Law jurisdictions no other powers are necessary in the context of an international commercial arbitration.” Report July 1998 para 2.117.

<sup>338</sup> The Seventh Secretariat Note A/CN.9/264 para 2. See also Christie RH “Arbitration: Party Autonomy or Curial Intervention” *International Commercial Arbitration* (1994) 3 *South African Law Journal* at 362 – 365:

<sup>339</sup> Summary Record, A/CN.9/309, para 40.

<sup>340</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 216.

Article 5 to embrace only matters that were in fact governed by or regulated in the Model Law either expressly or impliedly.<sup>341</sup>

As the substance of Article 5 is reproduced in the statutes of the three African jurisdictions it may be taken that the meaning and interpretation of the provisions of that Article as urged by the drafters would apply *mutatis mutandis* in all the three jurisdictions.<sup>342</sup> A further point of detail in connection with the phrase “no court shall intervene” is that all three jurisdictions use the word “shall” in line with the Model Law. Other jurisdictions use different wording, for example, the corresponding provision of the English Arbitration Act states “in matters governed by this Part, the court *should* not intervene ... .”<sup>343</sup> Insofar as the word “should” could be deemed “recommendatory” or “advisory” the implication is that the court might possibly intervene in situations other than those specifically provided for in the Act despite the strong general principle against intervention.<sup>344</sup> It would nevertheless be unfortunate if Article 5 which is intended to provide uniformity in international arbitration law is given different interpretations by national jurisdictions which have adopted the Model Law.<sup>345</sup>

In light of this analysis it can be concluded that the impression of hostility to court involvement given by Article 5 is superficial as the provision is not intended to oust the jurisdiction of the court but to prescribe the maximum extent of judicial intervention, which embraces the supportive and supervisory roles of the national courts in matters governed by the Model Law.<sup>346</sup> A non-exhaustive list of matters not governed by the Model Law was provided by the Working Group and the Secretariat to which further reference will be made later in this chapter.<sup>347</sup>

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<sup>341</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 217.

<sup>342</sup> See s 10, Kenyan Arbitration Act; s 34 Nigerian Arbitration and Conciliation statute and Article 5 Zimbabwean Arbitration Act.

<sup>343</sup> S 1(c), italics added.

<sup>344</sup> In contrast South African Draft Arbitration Bill (s 2(c)) uses the phrase “the court must not intervene except as provided by this Act” The implication is that the prevention is absolute.

<sup>345</sup> Christie (1994) *South African Law Journal* 365. This commentator notes that “it would be disastrous if the court came to the conclusion that the jurisdiction to set aside an arbitration agreement for good cause shown (under s.3(2)(a), S.A. Arbitration Act 42 of 1965) was a matter not governed by the Model Law and therefore not excluded by Article 5”.

<sup>346</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 228-229 and 237-239.

<sup>347</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 218.

Article 6 empowers a designated national court or other competent authority to perform the various functions referred to in Article 11(3) and (4) (appointment of arbitrators), Article 13(3) (deciding challenges), Article 14 (termination of the mandate of an arbitrator), Article 16(3) (ruling on the jurisdiction of the arbitral tribunal), and Article 34(2) (deciding on an application for setting aside an arbitral award). All these Articles apply only when the arbitration takes place within the territory of the adopting state.<sup>348</sup> It is apparent that Article 6 does cover all functions involving a court under the Model Law.<sup>349</sup> Moreover, the Analytical Commentary<sup>350</sup> shows that whereas only a “court” as defined in Article 2(c) could decide on the jurisdiction of the arbitral tribunal under Article 16(3) and on applications for setting aside the award under Article 34(2), a non-judicial authority may be designated to discharge the functions of the court or other competent authority under Articles 11, 13, and 14 regarding the appointment and removal of an arbitrator. A further observation is that each of the Articles referred to in Article 6 contains provisions governing the procedure before the designated national court or authority. Each Article specifies who may make an application to the designated court or authority and, with the exception of Article 34 each Article bars an appeal from the decision of the court or other competent authority. It seems that the functions listed under Article 6 may only be performed in an arbitration to which the relevant Articles apply in an adopting state. Therefore the appointment of arbitrators and challenges to them in an arbitration in which the place of arbitration has not yet been selected are matters not governed by the Model Law and are therefore not referred to in Article 6.

It should also be noted that Article 6 does not mention Article 8 (referral of matters to arbitration) and Article 9 (request for interim measures) because, it seems, these provisions apply irrespective of the seat of the arbitration and are addressed to all courts of the adopting state. Finally because each of the Article 6 functions is assigned to a court or other authority connected to the arbitration, Article 6 does not mention Article 27<sup>351</sup> (court assistance in taking evidence) or Articles 35 and 36 (recognition and enforcement of awards). These provisions relate to functions that must be

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<sup>348</sup> Compare Article 1(2).

<sup>349</sup> See, for example, the text below regarding Articles 8, 9, 27, 35 and 36.

<sup>350</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 240.

<sup>351</sup> It is likely that the competent court under Article 27 whose assistance would be requested for taking evidence would in most jurisdictions, be identified by another law of the state concerned; hence the omission from Article 6 of any reference to Article 27.

performed by a competent state court depending, for example, on the location of evidence or witnesses in the case of Article 27<sup>352</sup> or of the assets of the losing party.<sup>353</sup>

There is no equivalent provision to Article 6 in the statutes of the three African jurisdictions. It is apparent from various provisions that the court to which arbitral matters are referred for determination in Kenya is the High Court.<sup>354</sup> Under section 57 of the Nigerian statute “court” means the High Court of a state, the High Court of the Federal Capital Territory, Abuja, or the Federal High Court. Model Law Article 6 is deleted in the Zimbabwe version of that law but under Article 2 court means “a body or organ of the judicial system of a state.” The several specific references in the Zimbabwe statute to the High Court suggest the predominance of the High Court in matters governed by that statute.<sup>355</sup>

The complexities of Articles 5 and 6 with particular reference to international commercial arbitration aside, other significant provisions of the Model Law with reference to domestic arbitration are Article 8 that confers powers on the court to enforce the arbitration agreement and Article 9 regarding the power to order interim measures of protection.<sup>356</sup> The court’s powers concerning the appointment of an arbitrator and challenge or termination of the arbitrator’s mandate appear under Articles 11, 13 and 14. The power to review an arbitral tribunal’s ruling on its own jurisdiction in certain circumstances is granted by Article 16(3). Other powers are for affording assistance in taking evidence under Article 27; and express powers for the setting aside and the recognition and enforcement of the arbitral award are granted under Articles 34, 35 and 36. Therefore the availability of the court’s powers of intervention and supervision is more prominent after an award has been made.<sup>357</sup> For this reason these provisions are briefly revisited later in this Chapter.<sup>358</sup>

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<sup>352</sup> In terms of Article 1(2), Article 27 is not one of the provisions that have extra-territorial application.

<sup>353</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 241.

<sup>354</sup> For example, under ss 7, 2(2)(d), 12(4)(c), 15(3), 17(6), 18(3), 35 and 36. See however s 14(3), which provides for a challenge of the arbitrator under certain circumstances to be referred to a competent authority designated by the Attorney-General.

<sup>355</sup> Articles 9, 11, 13, 14, 16, 17, 27, 34, 35 and 36.

<sup>356</sup> See para 2.4.4.5(iii) above.

<sup>357</sup> Christie (1993) *Arbitration International* 153 – 65. Gaillard & Savage 631 – 632 state generally that although courts will sometimes assist in setting up the arbitral tribunal, once the tribunal is constituted, the courts are expected to refrain from interfering in the arbitral proceedings until brought in to enforce or set aside an award. See also Hwang M & Muttath RC, “The role of courts in the course of arbitral

The position on appeals against decisions of the court under the Model Law is not entirely consistent. Where the Model Law allows judicial intervention during the arbitral proceedings, there is usually no right of appeal against the court's decision.<sup>359</sup> The right of appeal can be abused as a delaying tactic and these restrictions are no doubt intended to prevent the possibility of a right of appeal being abused as a delaying tactic, at least until the tribunal has made an award. Nevertheless the Model Law does not provide for an appeal from a decision of the court regarding the enforcement of an agreement to arbitrate or regarding interim measures.<sup>360</sup> There is moreover no bar to the right to appeal from a court decision regarding the setting aside of the award under Article 34 or regarding the recognition and enforcement of an award under Articles 35 and 36 of the Model Law.<sup>361</sup> In a recent decision of the Kenya Court of Appeal,<sup>362</sup> the court upheld the appellant's right of appeal against the decision of the High Court denying the appellant's general right of appeal against a decision by the court under section 35 of the Kenyan Act, 1995.<sup>363</sup> However the Appellate Court dismissed the Notice of Appeal on the ground that the appeal itself had no chance of success under the limited grounds of section 39 of the Kenyan Act.<sup>364</sup> In this writer's opinion the position on appeals under section 35 of the Kenyan statute can be clarified by the amendment of the section to allow or not to allow appeals from a decision of the High Court.

However when the Model Law permits a court to intervene in an arbitration before the award as under Articles 8(2), 13(3) and 16(3) it is the arbitral tribunal, and not the court, which is given the discretionary power to continue with the arbitral proceedings

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proceedings: Singapore and Other Asian Perspectives" (2002) 68 *Arbitration* 223 – 237; see also Closter E "Attempts to Thwart the Arbitration Process" (2007) 73 *Arbitration* 4.

<sup>358</sup> See para 2.4.4.5(viii) below.

<sup>359</sup> See Articles 11(5), 13(3), 14(1) and 16(3).

<sup>360</sup> See Articles 8 and 9, but see further the addition to the Zimbabwe Arbitration Act as sch 1 Article 9(4), whereby a decision by the High Court on a request for interim measures is not subject to appeal.

<sup>361</sup> As a further safeguard against abuse of arbitration, the court of first instance may raise issues of arbitrability and public policy on its own initiative. See Articles 34(2)(b) and 36(1)(b).

<sup>362</sup> *Kobil Petroleum Limited v Kenya Shell Limited*, Civil Application no NAI 57 of 2006 (30/2006 UR).

<sup>363</sup> The equivalent of Article 34 of the Model Law regarding applications to court for setting aside an award.

<sup>364</sup> Section 39 enables questions of law in domestic arbitration to be taken on appeal to the court on a contract-in basis and this decision may be taken on appeal as provided by s 39(3).

to the making of an award while the court proceedings are still pending.<sup>365</sup> In practice Kenyan parties do not hesitate in seeking the intervention of the court to stay the arbitral proceedings and frustrate the exercise of the arbitral discretion until the court application is heard and determined.<sup>366</sup>

(v) Composition of the Arbitral Tribunal

Party autonomy receives particular prominence and emphasis in the provisions of the Model Law regulating the composition of the arbitral tribunal and the choice of procedure. Under Article 10 the parties can determine the number of arbitrators, failing which there shall be three arbitrators. Article 11 enables the parties to agree on the procedure for appointing the tribunal, failing which the court may do so.

In Kenya upon the parties' failure to determine the number of arbitrators the Arbitration Act provides for one (and not three) arbitrators.<sup>367</sup> In similar circumstances the Nigerian statute follows the Model Law in providing for three arbitrators.<sup>368</sup> Although the Zimbabwean statute also follows the Model Law in providing for a tribunal of three arbitrators this applies in international arbitrations, as there is an exception in domestic arbitrations which provides for a single arbitrator unless the parties otherwise agree.<sup>369</sup>

The use of a single arbitrator in domestic arbitration is common and makes sense by saving some expense. Conversely it is acceptable in an international arbitration involving large sums of money to have three arbitrators whose combined experience may inspire greater confidence in the tribunal as well as promoting greater probity

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<sup>365</sup> This discretion is expressly conferred on the arbitral tribunal in all three instances in the Kenyan version of the Model Law: see ss 6(2), 14(3) and 17(8).

<sup>366</sup> This is from the writer's personal experience both as judge and arbitrator. A court ruling on this point is clearly contrary to s 10 of the Kenyan Act, corresponding to Article 5 of the Model Law (see para 2.4.4.5(iv) above).

<sup>367</sup> S 11(2).

<sup>368</sup> S 6.

<sup>369</sup> See proviso to Article 10(2).

and an acceptable award. Ultimately however the parties have the freedom in the first instance to determine the composition of their tribunal.<sup>370</sup>

Article 11(1) of the Model Law, by providing that no party shall be precluded by his nationality from acting as arbitrator, aims at removing any obstacle to the appointment of foreign arbitrators.<sup>371</sup> In terms of party autonomy, the parties may nevertheless impose their own restrictions. Article 11 further allows a state adopting the Model Law to choose between the court and another body when deciding who should have the power of appointment when parties fail to agree or when the default appointment mechanism chosen by the parties has failed.<sup>372</sup> Regarding Kenya, Nigeria and Zimbabwe, in all three jurisdictions the specified appointing authority is the High Court.<sup>373</sup>

Article 12 of the Model Law contains provisions that prescribe the basis and procedure for challenging the appointment of an arbitrator for lack of impartiality or independence.<sup>374</sup> The Model Law imposes an ongoing duty on a prospective arbitrator to disclose circumstances likely to affect that arbitrator's independence and impartiality.<sup>375</sup> In the event that a challenge under the procedure agreed to by the parties is unsuccessful, the Model Law provides for the challenging party to refer the matter to court. In permitting this application to be brought immediately during the arbitration, it was necessary to guard against the application being used as a delaying tactic. The risk of delay is reduced by three factors: a short time of 30 days is provided for seeking court review; there is no appeal from the court's decision, and the tribunal has the discretion to continue with the arbitration during the court proceedings.<sup>376</sup> The effect of a failure to raise the challenge within the stipulated time

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<sup>370</sup> In recent times the appointment of two arbitrators is becoming noticeable in Kenya as the choice of a Sole Arbitrator by one party is often rejected by the opposing party who prefers to have his own nominee as second arbitrator.

<sup>371</sup> A/CN. 9/264 and commentary on Article 11 para. 1. In the Nigerian Act, this provision only applies to international commercial arbitration (s 44(10) read with s 43).

<sup>372</sup> See Article 11(4) read with Article 6.

<sup>373</sup> See the Kenyan Arbitration Act s 12; the Nigerian Arbitration Act s 7 read with s 57 and the Zimbabwean Arbitration Act sch 1 Article 11.

<sup>374</sup> Articles 12 and 13.

<sup>375</sup> Contrast the English Arbitration Act, section 24(1) requiring an arbitrator to be impartial, and not independent and impartial, because the lack of independence is deemed important where it raises justifiable doubts of the arbitrator's impartiality.

<sup>376</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 407.

limit is not specifically dealt with, but it is likely that such failure will be construed as a waiver.<sup>377</sup>

Whereas Article 12 of the Model Law lays the basis for challenging an arbitrator because of his presumed bias or lack of independence, Article 14 provides for an arbitrator to be challenged due to his inability to perform his functions.<sup>378</sup> The grounds and the methods for terminating the arbitral mandate are given under Article 14. The grounds are (i) de jure or (ii) de facto inability to perform the functions of an arbitrator and (iii) any other failure to act without undue delay. The methods are (i) by the withdrawal or death of the arbitrator (ii) by agreement of the parties and (iii) by the court or designated authority.

Article 15 provides for the appointment of a substitute arbitrator where the arbitral mandate is terminated under Article 13 or 14; or an arbitrator withdraws from office for any other reason; or the mandate is terminated by the parties' agreement; or in any other case of the termination of the mandate.

In all these cases the substitute arbitrator is appointed under the rules for appointing the replaced arbitrator. A helpful clarification is that using the applicable rules of appointing the original arbitrator does not mean using exactly the same method; so that if a party defaulted in appointing an arbitrator who was appointed by the court through a default procedure, the replacement arbitrator can be appointed by the defaulting party and not necessarily by the court.

It seems however that arbitral parties enjoy unlimited freedom to terminate the arbitral mandate because arbitration is consensual and that an arbitrator likewise also has an unlimited freedom to resign as he could not be forced to arbitrate.<sup>379</sup>

The statutes of the three African jurisdictions substantially adopt the terminology of the Model Law in the corresponding provisions governing the appointment and challenging of arbitrators, the grounds and procedure for challenge, the termination of

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<sup>377</sup> See Article 13 read with Article 4.

<sup>378</sup> See Binder *International Commercial Arbitration* 130.

<sup>379</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 464-465.

the arbitral mandate and the substitution of arbitrators. So, for examples, the Model Law phrases such as the disclosure of “circumstances likely to give rise to justifiable doubts” as to an arbitrator’s “impartiality or independence, “the lack of qualifications agreed to by the parties” as grounds for challenging an arbitrator, and the restricted time limits of 15 days for submitting a written statement of the reasons for the challenge and 30 days for the appointment of multiple arbitrators – all these are replicated with slight differences of wording in the three statutes.<sup>380</sup>

In certain particular respects, differences in detail exist in the three jurisdictions and in contrast to the Model Law. For example, under section 14(3) of the Kenya statute where the challenge in a prescribed manner is unsuccessful, the challenging party may apply to “such competent authority as the Attorney General may by notice in the Gazette designate to decide on the challenge and the decision of such competent authority shall be final and not be subject to appeal.” There is no equivalent provision in the other two African jurisdictions. Under section 9(3) of the Nigerian statute the challenge ends with the decision of the arbitral tribunal while under Article 13(3) of the Zimbabwean statute it is the High Court that decides on the challenge with no recourse to appeal. Section 14(3) of the Kenyan statute is unimaginative and unnecessary as the Attorney General is a frequent party in domestic arbitrations and is hardly an independent authority. Moreover the process of first approaching the Attorney General who in turn will designate a “competent authority” to whom the application for a decision is to be made is likely to be protracted and therefore delay the arbitral process. Further, the bar on an appeal from the decision of such authority is unattractive.<sup>381</sup> Perhaps, in line with the general tenor and approach of a modern arbitration statute the provisions of Article 13(3) of the Zimbabwean statute are to be preferred for being less controversial both in the designation of the High Court as the competent authority on challenges and the finality of its decision in the interest of expediting the arbitration.

Other useful and similarly worded clarifications in the Zimbabwean and Kenyan statutes that are absent from the Nigerian statute and the Model Law relate to the

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<sup>380</sup> Kenyan statute ss 12-16; Nigerian statute ss 7-11; and the Zimbabwe statute First Schedule Articles 12-15.

<sup>381</sup> This writer is not aware of any arbitration in which the procedure under s 14(3) has been invoked, a fact that perhaps demonstrates its unattractiveness.

effect of the substitution of an arbitrator on evidence already received and rulings made by the tribunal. These appear under Articles 15(2) and (3), and sections 16(2) and 3 of the Zimbabwe and Kenyan statutes respectively. These are to the effect that except by agreement of the parties on the replacement of a sole arbitrator or presiding arbitrator, any previous hearing shall be repeated; otherwise on the replacement of an arbitrator other than a sole arbitrator or a presiding arbitrator any fresh hearing shall be at the discretion of the arbitral tribunal; and the mere substitution of an arbitrator does not invalidate previous procedural rulings.<sup>382</sup>

(vi) The Arbitral Tribunal's Powers to Rule on its Own Jurisdiction and Interim Measures

Before discussing the arbitral tribunal's powers to conduct the arbitration proceedings it is necessary to consider its powers to rule on its own jurisdiction and to grant interim measures.<sup>383</sup> Article 16 empowers the arbitral tribunal to rule on its own jurisdiction including objections to the existence and validity of the arbitration agreement. This has come to be known in international arbitration literature as the principle of *Kompetenz-Kompetenz*,<sup>384</sup> although the expression is not used in the Model Law<sup>385</sup> and other arbitration statutes. This principle is adopted by the three African statutes.<sup>386</sup> One practical problem in the experience of this writer is whether the right of a party to challenge the jurisdiction of the tribunal includes a challenge to the constitution of the tribunal. The Model Law Article 16 and the corresponding provisions in the African jurisdictions do not specifically deal with this problem. It is suggested here that once the tribunal is constituted, the tribunal's power to rule on its

<sup>382</sup> See also the South African Law Commission Report, July 1998, para 2. 178.

<sup>383</sup> See para 2.4.4.5(vii) below. In the 1985 version of the Model Law jurisdictional rulings and interim measures by the tribunal were dealt with in Ch IV of the Model Law. After the 2006 revisions, the two matters are dealt with in separate chapters, namely Ch IV and IV A.

<sup>384</sup> The German expression can be translated into English as Competence/Competence and is a useful form of shorthand for the competence of the tribunal to rule on its own competence (see Redfern & Hunter *International Commercial Arbitration* 252). Compare Gaillard & Savage *International Commercial Arbitration* 395-397 for the view that the expression *Kompetenz-Kompetenz* was traditionally understood as the power of the tribunal to rule finally on its jurisdiction, with no possibility of court review. Such a construction is not accepted today, either in German law or other Model Law jurisdictions.

<sup>385</sup> "*Kompetenz*" is not used in the equivalent to Article 16 in the German Arbitration Act of 1998, which is based on the Model Law, namely Article 1040.

<sup>386</sup> See the Kenyan Arbitration Act s 17(1); the Nigerian Arbitration Act s 12(1) and the Zimbabwean Arbitration Act sch 1 Article 16(1).

own jurisdiction should also include the power to rule on whether the tribunal itself is properly and lawfully constituted when the issue is raised.<sup>387</sup>

Because *Kompetenz-Kompetenz* is not incorporated in all national laws and was thought to be somewhat controversial, UNCITRAL has noted that states that are unwilling to adopt this principle might change the Model Law provision.<sup>388</sup> Article 16(3) and its corresponding provisions in the three African jurisdictions show that a decision by the tribunal on its jurisdiction is subject to court control. There is a rather subtle and minor difference between Article 16(3) of the Model Law and the Zimbabwean version. Under the former if the tribunal rules as preliminary question that “*it has jurisdiction*” then the finding is subject to immediate court review. As a result only a positive jurisdictional finding is subject to immediate court review. However under the Zimbabwean provision, immediate court review is available if the tribunal rules on “*such a plea [as to its jurisdiction] as a preliminary question*”. The change in wording extends court review to the tribunal’s negative jurisdictional finding as well.<sup>389</sup> Further, Article 16(3) ensures that the arbitral tribunal may continue with the arbitration and make an award while a court review of the tribunal’s decision on its jurisdiction is pending. As pointed out above, this is intended to reduce the danger of the review process being abused as a delaying tactic.

Article 16(1) also deals with the severability of the arbitration clause.<sup>390</sup> It first provides that jurisdictional objections may extend to the existence and validity of the arbitration agreement and that for this purpose, an arbitration clause forming part of a contract shall be treated as an agreement independent of the other terms of that contract. Moreover, the tribunal’s decision that the contract is null and void does not by itself invalidate the arbitration clause.

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<sup>387</sup> A recent case in Kenya illustrates this problem. A representative of the Attorney General contended that a challenge relating to the tribunal’s constitution was not a matter for the arbitral tribunal under s 17 of the Kenya statute. The arbitral tribunal overruled the contention, proceeded with the arbitration and made an award.

<sup>388</sup> Commission Report, A/40/17 para 151; Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 479.

<sup>389</sup> The wording of Article 16 was not altered by the 2006 amendments to the Model Law.

<sup>390</sup> The Model Law deals with the doctrines of *Kompetenz-Kompetenz* and severability in the same paragraph. However, where the challenge to jurisdiction does not relate to the validity or existence of the arbitration clause, *Kompetenz-Kompetenz* operates without the need for the doctrine of separability. The English Arbitration Act therefore deals with them in separate sections (ss 7 and 30-31).

Article 17 of the 1985 version of the Model Law, which grants the *arbitral tribunal* the power to order any party to provide an interim measure of protection in respect of the subject matter of the dispute as well as appropriate security for such measure, brings to mind Article 9, which permits a party to request from a *court* an interim measure of protection.<sup>391</sup> The main difference in approach between these two related but distinct Articles is that whereas Article 17 actually confers the power on the arbitral tribunal to grant certain interim measures of protection, Article 9 merely states the principle that a request to a court for an interim measure is not inconsistent with an arbitration agreement.<sup>392</sup> Furthermore, the tribunal's power under Article 17 is narrower than the court's under Article 9.<sup>393</sup> In any event there was no provision in the Model Law of 1985 for court enforcement of interim measures ordered by the arbitral tribunal.<sup>394</sup> This omission has been dealt with in the 2006 amendments.<sup>395</sup>

The tribunal's power to order interim measures and the provision of security for these measures is conferred by section 18(1) of the Kenyan statute. The statute departs from the standard version of the Model Law by providing additionally that either the tribunal or a party with the approval of the tribunal may seek court assistance with interim measures but the arbitral proceedings shall continue while the assistance is under consideration by the court.<sup>396</sup> Section 13 of the Nigerian statute enables the tribunal to grant an interim measure and security for such measure at a party's request before or during the arbitral proceedings, but makes no provision for court support as exists in Kenya. The Zimbabwean Act contains an expanded version of Article 17 of the Model Law.<sup>397</sup> The effect of the provisions is that, unless the parties otherwise agree, the tribunal has the power to grant an interdict or other interim measure and to order the parties to make a deposit for the fees and costs of the arbitration. Further, the

<sup>391</sup> See also para 3.5.3.3 below.

<sup>392</sup> See however Article 17 J of the 2006 amendments, which does deal with the extent of the court's powers. See para 3.5.3.3 below.

<sup>393</sup> Compare the wording of Article 17 (1985 version) with the considerably wider definition of "interim measure" in Article 17(2) of the 2006 version.

<sup>394</sup> For this reason some jurisdictions have expanded their version of Article 17. The SA Law Commission Bill recommended a s 17(3) which states: "The provisions of articles 31, 35 and 36 shall apply to an order under paragraph (1) and (2) of this article as if such order were an award." Other examples referred to are s 23 of the Australian International Arbitration Act of 1974; sch 7 of the Scottish legislation article 17(2) and s 26 of the Bermuda International Conciliation and Arbitration Act 1993. (see SA Law Commission Report para 2. 183 and n 200).

<sup>395</sup> See Articles 17 H and 17 I of the 2006 version of the Model Law.

<sup>396</sup> Ss 18(2) and (3). Note too the restrictions imposed by s 7(2) on court review of interim measures ordered by the tribunal.

<sup>397</sup> See the Zimbabwean Act sch 1 Article 17(1)-(4).

tribunal or a party with the tribunal's approval may request executory assistance from the High Court for the enforcement of the tribunal's order.

(vii) The Arbitration Proceedings

A matrix of powers and duties come into play once the tribunal is constituted. The freedom of the parties to agree on the procedure for appointing the tribunal and the procedure for challenging an arbitrator<sup>398</sup> find resonance in the freedom of the parties under Article 19(1) to agree on the procedure for conducting the proceedings, subject to the mandatory provisions of the Model Law.<sup>399</sup> In the absence of agreement and subject to the same restriction, Article 19(2) confers the power on the tribunal to conduct the proceedings in such manner as it considers appropriate. The integration of principle and procedure is apparent in these provisions regulating the conduct of the arbitral proceedings. Thus Article 19(1) stresses the principle of party autonomy by which in the first place, and subject to the mandatory provisions of the Model Law, the parties have the freedom to agree on the procedure for conducting the arbitration. Secondly, and only to the extent that they fail to do so, the kindred principle of the autonomy of the tribunal, sets in by allowing the tribunal, subject to the provisions of the Model Law, to conduct the proceedings in a manner it considers appropriate. The third aspect of Article 19 is the power conferred on the tribunal to determine the admissibility, relevance, materiality and weight of any evidence adduced before it.<sup>400</sup>

Again as a statement of principle, Article 18 enjoins that the parties be treated with equality and for each party to be given a full opportunity to present its case.<sup>401</sup> Although this brief statement does not expressly indicate to whom it is addressed the analytical commentary shows that the fundamental precepts of Article 18 were addressed to actions taken by both the tribunal and the procedural agreements reached by the parties.<sup>402</sup> Article 18 may therefore be regarded as the "due process" clause of

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<sup>398</sup> Under Articles 11(2) and 13(1).

<sup>399</sup> In this context, primarily Articles 18 and 24(2) and (3).

<sup>400</sup> Article 19(2).

<sup>401</sup> Compare section 33(1) of the English Arbitration Act that uses the term "reasonable opportunity"; also see Uff J *Cost-Effective Arbitration* (1993) 59 *Arbitration* 31 33 and comment on "reasonable opportunity."

<sup>402</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 550 citing A/CN.9/264 article 19 para. 1.

arbitration, more particularly under the Model Law, by its emphasis on the principles of equality, fairness and the right to present one's case.

Consequently Articles 18 and 19 are considered the “Magna Carta of Arbitral Procedure” and possibly the most important provisions of the Model Law.<sup>403</sup> Article 18 is also recognized as a compulsory provision that places fundamental restrictions on the autonomies granted to the parties and the tribunal by Article 19.<sup>404</sup> It might be thought therefore that non-compliance with these principles could lead to the rejection of the award for violating public policy.

The Kenyan and Zimbabwean statutes<sup>405</sup> follow the wording of the Model Law on the equal treatment of parties and determination of rules of procedure. But both statutes depart from the Model Law by inserting an additional provision granting the same privileges and immunities to witnesses and persons appearing before the arbitral tribunal as are accorded to witnesses and advocates in court proceedings.<sup>406</sup>

The Nigerian statute specifically enjoins only the arbitral tribunal to ensure equal treatment of the parties and a full opportunity for each party to present its case.<sup>407</sup> The statute expressly requires<sup>408</sup> the proceedings to be conducted in accordance with the procedural rules set out in the First Schedule to the Act;<sup>409</sup> and in the absence of pertinent rules relating to any matter in the proceedings the tribunal has power to conduct the proceedings in a manner it considers appropriate to ensure fair proceedings.<sup>410</sup> The tribunal's power to determine the admissibility, relevance,

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<sup>403</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 564.

<sup>404</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 564. The Model Law provisions regarding procedure and the award deemed compulsory are Articles 18, 23(1), 24(2) and (3); 27, 30(2), 31(1), (3) and (4), 32, 33(1)(a), (2), (4) and (5): see Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 264 and 583; Binder *International Commercial Arbitration* 186.

<sup>405</sup> The Kenyan Arbitration Act ss 19 and 20; the Zimbabwe Arbitration Act sch 1 Articles 18 and 19.

<sup>406</sup> The Kenyan Arbitration Act s 20(4); the Zimbabwe Arbitration Act sch 1 Article 19(3).

<sup>407</sup> S 14. This wording is consistent with Articles 1 and 15(1) of the Arbitration Rules in the 1<sup>st</sup> schedule of the Act

<sup>408</sup> S 15(1) commences: “The arbitral proceedings shall be conducted ... .”

<sup>409</sup> The Rules are based on the UNCITRAL Arbitration Rules of 1976. Therefore Article 15(1) of the Rules does give the discretion to the tribunal to determine procedure, subject to the Rules and mandatory provisions of the statute (see the Rules Article 1). In effect therefore the Nigerian statute, particularly s 15(1), appears to impose severe limitations on party autonomy, rather than tribunal autonomy, when compared to the standard version of Article 19 of the Model Law.

<sup>410</sup> S 15(2).

materiality and weight of any evidence granted under the Nigerian statute<sup>411</sup> is in the same terms as those granted by the equivalent provisions of the Kenyan and Zimbabwean statutes.

The provisions of the Model Law as to the place of arbitration (Article 20), commencement of arbitral proceedings (Article 21), choice of language (Article 22), and delivery of statements of claim and defence (Article 23) have been substantially adopted in the arbitration statutes of the three African jurisdictions.<sup>412</sup> Party autonomy and/or the autonomy of the tribunal are therefore reflected in the corresponding provisions of the African jurisdictions to the same extent as in the Model Law. On the face of it, these provisions create no serious problems for domestic arbitration. However, in international arbitration it may, for example, be necessary to apply Article 20, regarding the place of arbitration, in relation to other Model Law provisions. The place of arbitration may firstly be the factor that determines whether the arbitration is international.<sup>413</sup> Secondly, the place of arbitration will also determine the extent to which the Model Law applies to the arbitration, if at all, primarily because most of its Articles apply only if the place of arbitration is in the enacting State.<sup>414</sup> Again the place of arbitration will determine what state courts will perform the functions of assistance and supervision under Articles 6 and 27 and the place where the award is made for purposes of its recognition and enforcement.<sup>415</sup>

Article 21 on the commencement of arbitration proceedings is important in domestic arbitration because it provides a mechanism for deciding for purposes of national legislation whether an arbitral claim is time-barred.<sup>416</sup> The right of the parties to agree on the language or languages to be used in the arbitration under Article 22 will obviously ensure the appointment of suitable arbitrators who are competent in the language or languages chosen. The procedural safeguards for delivery of the

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<sup>411</sup> See s 15(3).

<sup>412</sup> See the Kenyan Arbitration Act ss 21-24; the Nigerian Arbitration Act ss 16-19 and the Zimbabwean Arbitration Act sch 1 Articles 20-23.

<sup>413</sup> See Article 1(3) for the factors to be taken into account in determining whether or not an arbitration is international.

<sup>414</sup> See Article 1(2) and para 2.4.4.5(i) above.

<sup>415</sup> See for example Article 36(1)(a)(v); Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 593.

<sup>416</sup> See Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 610.

statements of claim and defence are obviously intended to ensure fairness of procedure.<sup>417</sup>

Noticeable modifications and differences of wording emerge between the provisions of the Model Law and the corresponding provisions of the three African jurisdictions on the conduct of hearings (Article 24), default by a party (Article 25), the appointment of experts by the tribunal (Article 26) and court assistance in taking evidence (Article 27).

Both the Kenyan and Zimbabwe statutes incorporate provisions in similar wording not found in the Model Law or the Nigerian statute enabling parties to appear or act in person or to be represented by any other person of their choice.<sup>418</sup> In the context of a party who is in default, both the Kenyan and Zimbabwean statutes confer an additional power not found in the Model Law or the Nigerian statute for the arbitral tribunal to dismiss an unprosecuted claim or to give directions for the speedy determination of the claim.<sup>419</sup> The Zimbabwean and Nigerian statutory provisions governing the appointment of experts by the arbitral tribunal replicate those of the Model Law.<sup>420</sup> The Kenyan statute incorporates an additional provision permitting a party to request an expert witness to produce for examination all documents, goods or other property provided to him in order to prepare his report.<sup>421</sup>

A court or judge has power to issue a writ of subpoena ad testificandum or subpoena duces tecum to compel the attendance of a witness<sup>422</sup> or a writ of *habeas corpus ad testificandum* to produce a prisoner for examination before an arbitral tribunal.<sup>423</sup> In contrast the Nigerian statute incorporates provisions empowering the arbitral tribunal

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<sup>417</sup> The provisions of Model Law Article 23 are adopted by all the three African statutes. Note that unlike Model Law Article 24(3) that requires statements, documents and other information supplied to the tribunal by one party to be communicated to the other party, section 20(3) of the Nigerian statute adds the specific clarification that every such document etc supplied by the tribunal (not a party) to one party shall also be supplied to the other. Therefore both party and tribunal are obliged to exchange documents supplied to or by them.

<sup>418</sup> See the Kenyan Arbitration Act s 25(5) and the Zimbabwean Arbitration Act sch 1 Article 24(4).

<sup>419</sup> See the Kenyan Arbitration Act s 26(d) and the Zimbabwean Arbitration Act sch 1 Article 25(d). S 21 of the Nigerian statute governing default proceedings, which is akin to the Model Law Article 25, does not contain this additional power.

<sup>420</sup> See the Zimbabwean Arbitration Act sch 1 Article 26, the Nigerian Arbitration Act s 22 and the Model Law Article 26.

<sup>421</sup> S 27(3).

<sup>422</sup> S 23(1).

<sup>423</sup> S 23(2) and (3).

to administer oaths to or take the affirmation of the parties and their witnesses<sup>424</sup>; and any party may take out a writ of subpoena ad *testificandum* or subpoena *duces tecum*, but without compelling a witness to produce a document he could not be compelled to produce in the trial of an action.<sup>425</sup>

Model Law Article 27 granting the power to a tribunal or party to request court assistance in taking evidence is reproduced by section 28 of the Kenyan statute and Article 27 is not adopted by the Nigerian statute but perhaps the purposes intended by that Article are substantially served by sections 22 and 23 of the Nigerian statute as noted.<sup>426</sup>

Article 27 of the Zimbabwean version of the Model Law expands the original provisions of that Law by empowering the High Court to issue a subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents.<sup>427</sup> The High Court may order a witness to submit to examination on oath before the tribunal or before an officer of the court or any other person.<sup>428</sup> The High Court again has the power to order discovery of documents or interrogatories,<sup>429</sup> to issue a commission or request evidence to be taken out of the jurisdiction,<sup>430</sup> or to make an order for the detention, preservation or inspection of any property or thing in issue in the arbitral proceedings.<sup>431</sup> The analytical commentary shows that the drafting of Model Law Article 27 involved the task of regulating the interaction of arbitration and court procedures. Three particular problems were encountered – integration of arbitration with existing court procedures, the possibility of abusing recourse to court resulting in delay, and seeking national court assistance for international arbitration; and the final text of Article 27 is the solution found by the drafters of that law.<sup>432</sup>

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<sup>424</sup> S 20(5).

<sup>425</sup> S 20(6).

<sup>426</sup> It is argued that the subpoena *duces tecum* can be granted under Model Law Article 27 by the court if requested by an arbitral tribunal or party with the approval of a court per Kaplan J in the Hong Kong case of *Vibro Flotatron AG v Express Builders Co. Ltd* (unpublished): CLOUT The facts appear in Alvarez, Kaplan & Rivkin *Model Law Decisions* 197.

<sup>427</sup> Article 27(a).

<sup>428</sup> Article 27(b).

<sup>429</sup> Article 27(c)(i).

<sup>430</sup> Article 27(c)(ii).

<sup>431</sup> Article 27(c)(iii).

<sup>432</sup> Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 734.

The Zimbabwean clarification in response to Article 27 confirms that the court can only give assistance if approached by the tribunal or a party with the approval of the tribunal. To that extent the tribunal can prevent requests for court assistance being abused.

(viii) The Award and Termination of Proceedings

Article 28 dealing with rules applicable to the substance of the dispute confers party autonomy for the parties to choose the applicable law to govern their dispute, but the choice of substantive law shall not include the conflict of law rules applicable under that substantive law; and in the absence of a choice by the parties, the tribunal shall apply the law determined by such conflict of law rules it considers applicable. The freedom of parties to choose their preferred “rules of law” and designate the law or legal system of a given state complements the parties’ autonomy in the choice of their arbitrator, their procedure and now their law and or rules of law.<sup>433</sup>

Article 28 (3) introduces the principles of “*ex aequo et bono*” and the “*amiable compositeur*”.<sup>434</sup> The tribunal can only use such principles with the express authorization of the parties. The terms “*ex aequo et bono*” or “*amiable compositeur*” are adopted by the Model Law and its national versions. The notion that they might be synonymous terms is suggested by a practice that owes its origin to French law which construes the role of the *amiable compositeur* as that of deciding in equity. But as Rubino-Summartano<sup>435</sup> explains the power to decide *ex aequo et bono* is a discretionary power conferred on an arbitrator to mitigate strict law in arriving at his decision; whereas the *amiable compositeur* is more of a conciliator who makes suggestions to bring the parties to a settlement. Be that as it might it can be said that *ex aequo* and *amiable compositeur* are quite distinct conceptually and in practice, the former being principles, while the latter is procedure. They have separate histories. An *amiable* does not adjudicate, perhaps just about “concludes”. Section 22 of the Commercial Arbitration Act 1984 of the Australian State of Victoria exemplifies a

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<sup>433</sup> See The Explanatory Note by UNCITRAL Secretariat on Model Law A/CN 0/264; UNCITRAL Yearbook Vol. XVI 1985.

<sup>434</sup> These were encountered in the discussion of section 22(3) of the Nigerian statute.

<sup>435</sup> Rubino-Summartano M “*Amiable Composition (Joint Mandate to settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law)*”; Apparent Synonyms Revisited” (1992) 9(1) *Journal of International Arbitration* 5-16.

common-law jurisdiction that allows the arbitrator to determine issues according to law unless authorized by the parties to determine “by reference to considerations of general justice and fairness”. For examples, the clause conferring the authority may provide simply that the arbitrator “is authorized to decide as *amiable compositeur*” or that “in reaching his decision he shall not be obliged to follow the strict rules of law” or that “he may determine any question by reference to considerations of general justice and fairness”. Grouping the terms “*amiable compositeur*”, “equity clauses” and “*ex aequo et bono*” together, Redfern and Hunter, while acknowledging that arbitration agreements sometimes require arbitrators to use such techniques, associate “*ex aequo et bono*” with agreements drafted by public international lawyers or scholars; otherwise the terms are not meant to be mutually exclusive. The authors suggest also that the terms are likely to come into frequent use because of the influence of the Model Law and national provisions like section 46 of the English Arbitration Act that allows parties to agree what “considerations” should govern the substance of the dispute. The tribunal is required further to decide in accordance with the terms of the contract taking into consideration the usages of trade applicable to the transaction.<sup>436</sup> Significantly under section 22(3) of the Nigerian Act the tribunal shall not decide *ex aequo et bono* or as *amiable compositeur* without express authorization by the parties.<sup>437</sup>

The problem of choosing the rules applicable to the substance of the dispute is less pronounced in domestic arbitration than in international arbitration. A domestic arbitration tribunal will not usually be faced with a multiplicity of potentially applicable rules regulating the choice of the applicable law. A domestic tribunal is likely to adopt the domestic conflict rules of the place of arbitration, or automatically apply the substantive law of the state in which the parties reside, or the contract was to be performed or where the arbitration takes place; whereas the factors that determine whether an arbitration is international, such as the place of arbitration, the place of performance, or the country of residence of one party, can be expected to introduce a potentially different rule of private international law.<sup>438</sup> Section 29 of the

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<sup>436</sup> Article 28(4) Model Law and the Nigerian statute s 23(4).

<sup>437</sup> The same provision is found under Article 28(3) of the Model Law; also the Nigerian statute s 47(4) and the Nigerian Arbitration Rules Article 33(2).

<sup>438</sup> This may explain why s 47 of the Nigerian statute replicating Model Law Article 28 is restricted to international arbitration.

Kenya statute follows the substantive provisions of Model Law Article 28 and substitutes the phrase “*considerations of justice and fairness without being bound by the rules of law*”<sup>439</sup> in subsection (4) for the Model Law phrase “*ex aequo et bono or as amiable compositeur.*” Zimbabwe arbitration law follows the exact wording of Model Law Article 28 which is not adopted for domestic arbitration in its original formulation in the Nigerian statute, although section 47, in substantially the same wording as Article 28, applies to international commercial arbitration in Nigeria by virtue of the provisions of section 43 thereof.

Unless otherwise agreed by the parties a majority decision is permissible by the Model Law and questions of procedure can be decided by the presiding arbitrator (Article 29). Where the parties settle their dispute during the arbitration Article 30 enables them to request the tribunal to make an award in terms of the settlement which has the same status as an award on the merits and is enforceable as such. But the tribunal has discretion to refuse the request to prevent an abuse of this provision.<sup>440</sup>

An award must be in writing, stating the reasons upon which it is based unless the parties have agreed otherwise or the award is on agreed terms (Article 31). The termination of proceedings and the process for correction, interpretation or an additional award are regulated by Articles 32 and 33.

The Model Law provisions on decision making by the arbitrators (Article 29), settlement of a dispute by parties (Article 30), the form and content of the award (Article 31), termination of proceedings (Article 32) and correction of errors, interpretation of the award and additional awards (Article 33) are substantially reproduced in the statutes of the three African jurisdictions. Although these topics are in the main non-controversial there are some significant modifications and clarifications in the Kenyan and Zimbabwean statutes on the form and contents of the award. Both of these statutes unlike the Model Law provide for the costs and

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<sup>439</sup> For commentary and clarification of “*ex aequo et bono*” and “*amiabile compositeur*” see SA Law Commission Report, para 2.226-2.230 and Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 770; Rubino-Sammartino (1992) 9(1) *Journal of International Arbitration* 5-16.

<sup>440</sup> Such as an attempt to obtain an award against public policy or a settlement on illegal terms. Otherwise the Model Law provides no guidelines for the exercise of the discretion to refuse to record agreed settlement terms. Fraud, illegality and unconscionable terms may be relevant factors for refusal.

expenses of the arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal to be determined and apportioned by the arbitral tribunal in the award or additional award in the absence of which each party is responsible for his own legal and other expenses and for an equal share of the tribunal's fees and expenses.<sup>441</sup> The Zimbabwean statute goes even further and incorporates an additional provision enabling the tribunal to award interest at such rate and on such sum and for the period it may specify in the award (Article 31(6)). Again further, Article 31(7) empowers the tribunal, unless otherwise agreed by the parties to make an interim, interlocutory or partial award.<sup>442</sup>

The Nigerian statute provides for costs to be fixed by the tribunal<sup>443</sup> for international commercial arbitration which costs include the fees of each arbitrator, travel and other expenses of the arbitrators and witnesses, the costs of expert advice and the costs of legal representation. Section 50 enables the arbitral tribunal to request from each party a deposit of costs in equal amounts in advance.

(ix) Challenging and Enforcing the Award

Recourse against the award is by an application to set it aside on the limited grounds prescribed by Article 34(2) which are:

- (a)
  - (i) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the applicable law.
  - (ii) a party was unable to present his case.
  - (iii) the award deals with extraneous issues.
  - (iv) the composition of arbitral tribunal was contrary to the arbitration agreement.
  
- (b) The award may also be set aside if the court finds that:
  - (i) the subject-matter is not capable of settlement by arbitration under the law of the state of arbitration.

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<sup>441</sup> Kenya Arbitration Act s 32(6)(a) and (b); Zimbabwe Arbitration Act First Schedule Article 31(5)(a) and (b).

<sup>442</sup> Compare the tribunal's power to grant an interim order under Article 17(2)(a).

<sup>443</sup> S 49.

(ii) the award contravenes public policy of that state.

It is noteworthy that there is no mention of error of law as a ground for setting aside the award or for appeal against the award. It is a gap that can be filled by domestic law as desired.

Recognition and enforcement are regulated by Article 35 and the grounds for refusing recognition or enforcement are set out under Article 36. These are in essence the same grounds as for setting aside the award under Article 34 plus the further grounds that an enforcing state can decline recognition or enforcement if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which the award was made.<sup>444</sup>

It is the provision that recognition or enforcement may be granted or refused irrespective of the country in which the award was made that gives Articles 35 and 36 their universality beyond the reciprocity reservations taken by states; otherwise the fact that the Model Law is not a treaty has enabled states to adopt or adapt its provisions at will as done by Kenya, Nigeria and Zimbabwe.

Kenya has adopted the Model Law provisions for setting aside the award, its recognition and enforcement and the grounds for its refusal by similar wording under sections 34, 35 and 36 respectively of its Arbitration Act. Zimbabwe has done the same except for partial definition of public policy by Article 34(5) and Article 36(3). By these provisions an award would be in conflict with public policy of Zimbabwe if it was induced or affected by fraud or corruption or by breach of the rules of natural justice.

Model Law Articles 33 and 34(2)(b)(iii) were relied on in *Zimbabwe Electricity Supply Commission (ZESA) v Genius Joel Maposa*<sup>445</sup> in which an employer suspended employees pending disciplinary hearings into alleged misconduct. The employer sought an arbitral award given in favour of an employee to be set aside for factual errors in the calculation of back-pay which the employer contended rendered

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<sup>444</sup> Article 36(i)(v).

<sup>445</sup> *ZESA v Genius Joel Mapos*, SC114/99.

the award contrary to public policy under Article 34. The court found that the error of calculation was correctable under Article 33 and that an award that would be contrary to public policy would be one that could undermine the integrity of the system of international arbitration put in place by the Model Law and that this would include cases of fraud, corruption, bribery and serious procedural irregularities; but that in this case as no moral turpitude attached to the arbitrator's conduct the award was not in conflict with public policy under Article 34. A commentator laments, with reference to some selected decisions, that the Zimbabwe courts are in effect acting as courts of appeal against arbitration awards deeming the courts to be out of step and to have strayed from the public policy principles for interfering with arbitral awards. He discerns a tendency by the Zimbabwe courts to use the power under Article 34 to set aside an arbitral award with whose reasoning or conclusions the courts disagree.<sup>446</sup>

Although the drafters of the Model Law reportedly<sup>447</sup> found "public policy" difficult to define, no doubt because of the diversities in its national, political and moral appraisal, they understood the term not to be equivalent to the political stance or international policies of a state but as comprising the fundamental notions and principles of law and justice, in substance as well as in procedure. The International Law Association (ILA) has also noted that an overly broad interpretation of public policy would defeat arbitral finality and the objectives of arbitration.<sup>448</sup>

For domestic arbitration the Nigerian statute contains modifications to the Model Law provisions. The grounds for setting aside the award under section 29(2) are restricted to decisions beyond the scope of the arbitral submission and to misconduct by the arbitrator under section 30(1). A Nigerian award may be enforced in the same manner as a judgment or order of the court<sup>449</sup> and, any party may request the court to refuse the recognition or enforcement of the award.<sup>450</sup> The grounds for refusal are not stated

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<sup>446</sup> Tannock Q "Public Policy as a Ground for Setting Aside an Award: Is Zimbabwe out of Step?" (2008) 74 *Arbitration* 1, 72-81. Cases referred to include: *Pamire v Venture Capital Corporation of Zimbabwe*, HH36 – 2001; facts outlined in (2007) 73 *Arbitration* 216, 220; *Origen Corporation v Delta Operations*, HH101 – 2005; facts in (2007) 73 *Arbitration* 220-221. See also Reid-Rowland J: "Arbitration in Zimbabwe: the UNCITRAL Model Law in practice in a Developing Country" (2007) 73 *Arbitration* 216- 223.

<sup>447</sup> UNCITRAL Report, 18<sup>th</sup> Session, 3-21 June, 1985 UN doc A/40/17 para 297.

<sup>448</sup> ILA Interim Committee Report, accessible at [http://w.w.w.ila-hg.org/htm\\_layout\\_committee.htm](http://w.w.w.ila-hg.org/htm_layout_committee.htm)

<sup>449</sup> S 31(3).

<sup>450</sup> S 32.

under this section. For international commercial arbitration Nigerian legislation has reproduced the wording of the Model Law under section 48 (setting aside an award), section 51 (recognition and enforcement) and section 52 (the grounds for refusing recognition and enforcement).

Neither the Model Law nor the African jurisdictions lay down the procedural details for recognition and enforcement. Contrary to the notion that no practical need exists for unifying such procedural details it is this writer's view that the formulation of an enforcement procedure will provide a useful standard guidance for the enforcement of domestic awards.

#### 2.4.4.6 Matters Not Covered by the Model Law

The Model Law is partial law and as such does not deal with or fully with certain aspects of arbitration law or practice. Matters not covered include: multi-party proceedings; arbitrability; the capacity, duties, liability and immunities of arbitrators; power to provide security for costs; dissenting opinions, power to award expenses or interest; remuneration of administrative staff, and the grant of substantive remedies including injunctions. Quite obviously if these omissions persist the courts might be tempted or prompted to intervene in arbitral matters not specifically covered by the Model Law and its national equivalents. Revision of the Model Law is therefore a desirable and continuing challenge.

#### 2.4.4.7 Revision of the UNCITRAL Model Law

UNCITRAL's work on the Model Law has continued. By a Note from the UNCITRAL Secretariat dated 6<sup>th</sup> April 1999, UNCITRAL assigned thirteen topics for consideration and revision by a Working Group.<sup>451</sup> Priority was given to three topics: Conciliation, Interim Measures of Protection (Article 17) and the Written Form of the Arbitration Agreement (Article 7). Pursuant to this a new UNCITRAL Model Law on

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<sup>451</sup> UN Doc A/CN.0/469.

International Commercial Conciliation was completed and approved by the General Assembly on 19<sup>th</sup> November 2002.<sup>452</sup>

In 2006 UNCITRAL published a revision of Articles 1, 2, 7, 17 and 35.<sup>453</sup> Under the revised Article 1(2) the exceptions to the territorial scope of the Model Law now include new Articles 17H, 17I and 17J in addition to the original Articles 8, 9, 35 and 36. The new Article 17 is discussed below.<sup>454</sup>

Revised Article 2A contains provisions under two paragraphs on interpretation of the Model Law and a statement of general principles. The first paragraph under Article 2A requires the international origin of the Model Law, the need to promote uniformity, and the observance of good faith to be taken into consideration in the interpretation of the Model Law. Under the second paragraph questions on matters governed by the Model Law that are not expressly covered by that Law are to be determined in conformity with the general principles upon which that Law is based.

The revised Article 7 offers two options for the definition and form of the arbitration agreement. The first option, containing six paragraphs, retains the original definition of an arbitration agreement and the requirement for it to be in writing and under the new sub-paragraph 3 it is in writing, “if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.” A signed document is no longer a requirement and the written requirement is satisfied by an “electronic communication” and “data messages” as defined in sub-paragraph 4. The arbitration agreement may also be contained in an exchange of statements of claim and defence (sub-paragraph 5) or by reference in a document containing an arbitration clause which makes clear that the clause is part of the parties’ contract (sub-paragraph 6).

The second option under revised Article 7 defines an arbitration agreement as an agreement to submit all or certain disputes which have arisen or may arise between

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<sup>452</sup> See a critical appraisal of this Law by Van Ginkel E The UNCITRAL Model Law on International Commercial Conciliation (2004) 21(1) *Journal of International Arbitration* 1–65.

<sup>453</sup> Report of UNCITRAL on the work of its thirty-ninth session 19 June - 7 July 2006 (UN doc A/61/17).

<sup>454</sup> See para 3.5.3 below.

the parties in a defined legal relationship whether contractual or not. The UNCITRAL revision is commendable both for its succinctness and breadth of scope. As such revised Article 7, second option, retains only the first sentence of the original version of Article 7(1). Adherents and proponents of customary and common law arbitration would welcome this option which should facilitate the integration of those forms of arbitration with the Model Law and its African derivatives. As observed under paragraph 2.4.4.5 this option replicates the definition of arbitration agreement under section 2(1) of the New Zealand Arbitration Act of 1996 which also recognises an arbitration agreement made orally or in writing under section 7 thereof.

Revised Chapter 4 of the Model Law introduces Chapter IVA<sup>455</sup> headed “Interim Measures and Preliminary Orders” with the provisions of the new Articles 17 A – 17 J set out under five sections. Section 1 confers powers on the arbitral tribunal to order interim measures. It defines an “interim measure” and states the conditions for granting such measures. Section 2 governs the applications and the conditions for granting preliminary orders as a means for preserving the status quo until the tribunal grants an interim measure adopting or modifying the preliminary order. Two conditions in the nature of safeguards under Article 17 A are that an irreparable harm may result if the measure is not ordered, and there is reasonable possibility that the applicant will succeed on the merits of the claim.

Article 17 B allows a party, without notice to any other party, to request an interim measure together with a preliminary order directing a party not to frustrate the purpose of the interim measure requested; and the Article also permits the tribunal to grant the preliminary order if the prior disclosure of the request for interim measure risks frustrating the purpose of the measure. These provisions, which are in the nature of ex-parte orders but in the guise of preliminary orders, were not available for granting interim measures ex-parte in the original version of the Model Law.

Article 17 C contains safeguards requiring the arbitral tribunal to give to the party against whom the preliminary order is directed prompt notice of the application and the preliminary order itself if made, and an opportunity for that party to present its

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<sup>455</sup> See UNCITRAL Secretariat Explanatory Note 31.

case at the earliest practicable time. The order subsists for twenty days only and it binds the parties but does not constitute an enforceable award.

Section 3 prescribes the rules applicable to both preliminary orders and interim measures. Provisions regulating the modification, suspension and termination of the interim measure or a preliminary order, the provision of security, disclosure of any material change in the circumstances upon which the measure was granted, and on costs and damages, are covered under Articles 17 D, 17 E, 17 F and 17 G respectively.

Section 4, under its Articles 17 H and 17 I,<sup>456</sup> is an innovation that establishes a regime for the recognition and enforcement of interim measures modeled on the provisions of Article 35 and 36 on the recognition and enforcement of arbitral awards.

Section 5 contains Article 17 J headed “Court-ordered interim measures” and grants the court the same power to issue an interim measure relating to arbitral proceedings as it has in court proceedings, “irrespective of whether their place is in the territory of the enacting State.” Some tension can be foreseen between the operation of the wider powers exercisable by the court under Article 17 J and the limitation of the scope of the court’s powers under Article 5.

Revised Article 35 merely requires the party relying on or applying for enforcement of the award to supply the original award or its copy in the official language of the state in which the application for enforcement is made. Production of the original arbitration agreement is therefore no longer a requirement.

In context there would be justification for the African jurisdictions in this study to adopt the revisions under Article 1 paragraph 2 (territorial application), and the second option of the definition of arbitration agreement under Article 7. Also recommended for adoption are Article 17 (the power to order interim measures), Article 17 A (the conditions for granting interim measures) and Article 17 B (Applications and Conditions, for granting preliminary orders). Article 17 C (the

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<sup>456</sup> The UNCITRAL Report points out that the condition under Article 17 I are intended to limit the circumstances in which the court may refuse to enforce an interim measure and that it is open to a state to adopt fewer circumstances in which enforcement may be refused.

specific regime for preliminary orders) is more controversial: it can be of some value to the expeditious disposal of arbitral disputes, but can impose an onerous burden on the arbitral tribunal. The extent to which an arbitral preliminary order that is not enforceable by the court can be held to be binding on the parties is uncertain. For these reasons revised Article 17C is not necessarily attractive for adoption.

The provisions of Articles 17 D, 17 E, 17 F, 17 G, 17 H and 17 J are matters of practical importance in arbitration and are commended for the critical consideration and/or adoption by the national jurisdictions in this study. The possible tension between Articles 5 and 17 J has been noted. Otherwise there is no serious objection to the court having and applying the same powers in relation to arbitration as to litigation in dealing with interim measures. There is also no objection to revised Article 35 paragraph 2 which should facilitate the enforcement process as there is now no need to supply the arbitration agreement but only the award.

The other ten topics for revision relate to: (i) Consolidation (ii) Fees and Costs (iii) Interest (iv) Liability of Arbitrators and Arbitral Institutions (v) Arbitrability (vi) Sovereign Immunity (vii) Confidentiality (viii) Set-Off (ix) Truncated Arbitral Tribunals, and (x) Enforcement of An Award Set Aside in the State of Origin.

Full scale consideration of several of these highly controversial subjects is beyond the scope of this study. Professor Pieter Sanders<sup>457</sup> has applied himself to the task and produced an elaborate survey, Article by Article, of the Model Law and the areas of revision with his recommendations on (i) topics that may be included in a revised Model Law, (ii) topics that should be left for national legislation, (iii) topics that may be included in Arbitration Rules and (iv) topics to be left for the determination by the court.<sup>458</sup>

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<sup>457</sup> Honorary President of the Netherlands Arbitration Institute, Honorary President of the International Council for Commercial Arbitration (ICCA) and Professor Emeritus of the Faculty of Law, Erasmus University, Rotterdam.

<sup>458</sup> Sanders P “UNCITRAL’s Model Law on International and Commercial Arbitration: Present Situation and Future” (2005) 21(4) *Arbitration International* 443-491. See also Sorieul R “UNCITRAL’s Current Work in the Field of International Commercial Arbitration” (2005) 22(6) *Journal of International Arbitration* 543-568; and his earlier article “Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration.” (2000) 17 (3) *Journal of International Arbitration* 163-184. See also Sekolec J “International Dispute Resolution: Areas where Further Research may be Useful” (2003) 20(1) *Journal of International Arbitration* 35-66.

Sanders recommends Consolidation,<sup>459</sup> Claims for Set-Off,<sup>460</sup> Liability and Immunities of Arbitrators and Arbitral Institutions, and Truncated Arbitral Tribunals<sup>461</sup> for inclusion in a Revised Model Law. With regard to a Truncated Tribunal the provision will allow the two arbitrators, at their request to the court, to render an award where the third arbitrator refuses or is unable to act; alternatively this could also be dealt with by Arbitration Rules. Also to be left for Arbitration rules are Fees and Costs and Confidentiality of Information in Arbitral Proceedings such as the Rules of the World Intellectual Property Organisation (WIPO) which regulates confidentiality in detail in relation to intellectual property disputes and the IBA Rules on Taking Evidence (1999). In Sander's opinion Arbitrability should be left to national laws noting that countries like Zimbabwe and Zambia have legislated on arbitrability; that Interest on Awards and State Immunity are difficult topics and too controversial for inclusion in a revised Model Law but that the Enforcement of Annulled Awards should be left to the court and not the Model Law.

With greatest respect for his experience and stature in the arbitration world this writer does not share Sanders' views on what may or may not be included in the revised Model Law. These topics have been identified for consideration and possible inclusion in the Model Law because, despite their obvious importance, they are either inadequately regulated or not at all by national laws and the current Model Law. There is of course the problem and difficulty of seeking and obtaining consensus on the solutions to these problems but in so far as these topics are important and recurrent in arbitration practice they deserve effective regulation and the search for consensus must continue. In this writer's respectful opinion all the matters proposed for consideration are amenable to regulation by Law in preference to Rules. The allocation of topics, some for regulation by laws and others by rules is arbitrary and pampers to arbitral conservatism and outmoded predilections instead of authoritative regulation of practical problems by effective legislation. It does no good for arbitration for arbitral issues emanating from these topics to be constantly referred to

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<sup>459</sup> The Dutch Arbitration Act 1986 and the English Arbitration Act 1996 provide for consolidation although through different routes.

<sup>460</sup> Claims for set-off can be provided for under Article 19(3) in words such as "the Respondent may make a counterclaim arising directly out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off" according to Sanders. See also the Swiss Rules of International Arbitration (2006) article 21(5).

<sup>461</sup> Where a panel of three arbitrators is reduced to two due to non-cooperation by the third arbitrator.

the court which, in terms of pertinent knowledge and technical expertise, is not any the better placed without the aid of specific legislation than the expert arbitral tribunal to determine such issues.

In the context of this discussion, while the lack of consensus and uniformity on these matters persist on the international plane, it is proposed that national legislation from the common law traditions should take the initiative to regulate matters not covered by the Model Law for international arbitration which after all was and is the main focus of the Model Law. Perhaps the dissenters on the international plane may then be inspired to follow the examples of national arbitration law and practice.

On the interesting question whether, after the revision exercise, the current Model Law of 1985 will be replaced by a revised edition or whether there will be two Model Laws living apart together, this writer's view is that state practice on new legislation is a useful precedent whereby the new law may re-enact and retain the desirable provisions of the old law and repeal the undesirable or obsolete provisions. This writer does not therefore share Professor Sanders' opinion to present the results of the revision in the form of a "Document of Recommendations". A single revised and authoritative Model Law is preferable to a "Document of Recommendations" of dubious authority, force and effect. If the problem of lack of uniformity persists uniformity may be sacrificed for progress by willing states adopting the revised version of the Model Law or enacting the revisions.

Nothing said here underrates the importance of Rules or Courts in arbitration. This writer uses Arbitration Rules frequently and procedurally to facilitate and smoothen the conduct of arbitral proceedings. But virtually on any substantive issue including those comprised in the Model Law revision exercise this writer, as arbitrator, has had always to look for support from existing laws for his rulings and decisions. The development of substantive rules of law will be better assisted by provisions of law on these arbitral problems. That, in this writer's submission, is the way to go.

But to demonstrate that it is not arbitration itself that poses the problems or defies solutions but the attitude of practitioners from diverse arbitration systems and cultures

that exacerbate the problems one need go no further than quote the following remarks of another eminent arbitrator:-

“It is well known that the views and reviews of the role which national courts play or should play on the arbitration scene differ widely and, it seems, without there being hope for consensus. At one end of the spectrum you may find the view that arbitration would turn into an unacceptable theatre of the absurd or a tragedy if it is not constantly monitored, protected and assisted by a judicial director, stage-hand or, in case of emergency, deus ex machina (all courtesy of the local court). At the other end you may find the view that arbitration - like any good play – would suffer from outside interference and that the artistic freedom of the cast, i.e. parties and arbitrators, must not be impeded by local law barriers or benches. It is no secret that a certain sympathy with the first view could be detected, for example, in the UK, while the second view seems to be prominently represented in the Paris-Geneva connection (recently extended to Djibouti). Such strong and divergent views, admittedly overdrawn in the above picture, may be rooted in traditional legal concepts, deeply ingrained attitudes and well-established practices, often cultured by prevailing interests. This may account for the fact that, somewhat surprising to the innocent bystander, dramatically opposed views equally claim to present the most advanced state of development and, of course, to reflect best the needs of arbitration practice. Yet, a closer look at the arbitration scene and its perennial discussion of the proper role of courts may help to gain perspective as a possible basis for reconciliation.”<sup>462</sup>

It is not for nothing that UNCITRAL has commissioned the revision exercise. The experience of great arbitrators in the international arena may well incline them to caution in proposing and negotiating modest provisions in an international legal instrument such as the UNCITRAL Model Law. However, the persistent problems encountered in arbitration practice without the aid of supportive legislation, nationally and internationally, makes it critically imperative, when the opportunity for revision has arisen, to take the arbitral bull by the horns and harness its enormous power and force to transform it into the effective working tool that it ought to be. While in no way under-estimating or under-stating the immense difficulties the revision exercise entails, it is this writer’s submission that the opportunity of revising the Model Law

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<sup>462</sup> Herrmann G “The Role of the Courts under the UNCITRAL Model Law Script” 1986 *Contemporary Problems in International Arbitration* 164. Herrmann was then Legal Officer of the UNCITRAL Secretariat.

can be utilized to fill in the yawning gaps in this universally acclaimed Model Law for the benefit of all users. Therefore some twenty years down the line since the Model Law came into operation the revision exercise is an opportune moment not to be missed through concessions to arbitral conservatism. As the saying goes “nothing ventured nothing gained”

## **2.5 Particular Aspects of the Selected African Arbitration Statutes**

Since the Model Law came into force certain requirements may be deemed established for the evaluation of arbitration legislation. These are provisions for (i) party autonomy, (ii) substantial procedural powers for the arbitral tribunal to the extent that these are not provided by the arbitration agreement, and (iii) a balance of powers between the arbitral tribunal and the court. In varying degrees of detail and elaboration the arbitration statutes of the three jurisdictions in this study fulfill these requirements as seen from the preceding integrated discussion of these statutes with the Model Law. Each jurisdiction has applied its own national legislative technique to introduce substantially the provisions of the Model Law into its national arbitration law. Because the relevant provisions of these national statutes dealing with the main stages of arbitration proceedings have already been discussed in the context of the Model Law, what follows at this stage is an integrated commentary on certain characteristic features of the three national arbitration statutes, such as the long title of each statute, the mode of adoption of the provisions of the Model Law and the differing structures of each statute. Certain incongruities suggestive of tension in the provisions of these statutes are also pointed out.

### **2.5.1 The Long Title**

Kenya adopted the substantial provisions of the Model Law through the enactment of the Arbitration Act 1995 by its publication in the Kenya Gazette. The long title of the Act reads:

“An Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes.”

The words “repeal” and “re-enact” are significant. Section 42(1) of the Act confirms the repeal of the previous arbitration statute of 1968.<sup>463</sup> But it is questionable whether the Model Law-based 1995 Act was a re-enactment of the Common-Law-based Cap 49 which was different in substance and structure. Because the 1995 Act is substantially new legislation, the implication from its long title that the Act was a re-enactment with amendments to Cap 49 can be misleading.

Nigeria adopted the provisions of the Model Law through the promulgation of the Arbitration and Conciliation Decree of 1988 by the military government of the day.<sup>464</sup>

The long title of this decree which is now also referred to as the Arbitration and Conciliation Act (Chapter 19) states:

“An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.”

Zimbabwe enacted the Model Law with modifications as the First Schedule to the Arbitration Act of 1996. The long title confirms that the Act was intended:

“To give effect to domestic and international arbitration agreements; to apply, with modifications, the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21<sup>st</sup> June, 1985, thereby giving effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on the 10<sup>th</sup> June 1958; to repeal the Arbitration Act (Chapter 7.02); to amend the High Court Act (Chapter 7.06); and to provide for matters incidental to or connected with the foregoing.”

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<sup>463</sup> Cap 49 of the Laws of Kenya.

<sup>464</sup> Because the exact contents of this Decree (Cap. 19) are reproduced in the Arbitration and Conciliation Act of 2004 the terms “Decree”, “Act” and “Statute” are used in this study interchangeably because of their textual sameness with reference to the progress of arbitration legislation in Nigeria. Otherwise it is accurate to refer to the statute as the Arbitration and Conciliation Act of 1988.

Because the Nigerian statute did not specifically repeal previous legislation and applies only to commercial arbitration it can be argued that the 1914 Arbitration Act was never repealed and still applied to arbitration in the States within the Nigerian federation without restriction to commercial activity. This is in contrast to both the Kenyan and Zimbabwean statutes that repealed previous legislation and, without restriction to commercial activity, apply to both domestic and international arbitration.

Unlike the Kenyan statute which makes no reference to the New York Convention despite the application of the statute to international arbitration, both the Nigerian and Zimbabwean statutes acknowledge the New York Convention by specific references to it in their long titles.

### 2.5.2 The Structure

The diversity of legislative techniques in the adoption of the provisions of the Model Law is reflected in the differences in the structure of the three national statutes. As already noted, Kenya re-enacted the provisions of the Model Law under eight parts that resemble the eight chapters of the Model Law and cover all stages of arbitration. Part 1, headed “Preliminary” contains the important provisions on the extension of the application of the Act to both domestic and international arbitration<sup>465</sup> and a definition of “domestic arbitration”<sup>466</sup> that is not provided by the Model Law. The definition of international arbitration which is akin to that of the Model Law needs no repetition or further comment here.

The Act characterizes arbitration as domestic

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

(a) the parties are nationals of Kenya or are habitually resident in Kenya

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<sup>465</sup> S 2.

<sup>466</sup> S 3(2).

- (b) in the case of a body corporate, the body is incorporated in or its central management and control is exercised in Kenya; or
- (c) the place where a substantive part of the obligations of the **commercial** relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is Kenya.”<sup>467</sup>

As the Kenyan Act is not restricted to commercial arbitration, as does the Nigerian statute or the Model Law, the reference to “commercial” in sub-paragraph (c) above may well be an oversight. It is apparent from section 3(2)(c) that domestic arbitration includes not only commercial but also other activities as long as the subject-matter of the dispute is closely connected to Kenya. Further, as the term “commercial” is not defined, the illustrative list provided by the Model Law<sup>468</sup> could assist the interpretation of that term in the Kenyan context.

The Act also defines an “arbitration agreement”<sup>469</sup> and an “international arbitration”<sup>470</sup> in terms corresponding to Model Law Articles 7(1) and 1(3) respectively, which are already encountered and discussed; and the pertinent point is that the arbitration agreement as defined by the Kenyan Act and the Model Law is not confined to contractual relationships only but extends to other legal relationships such as occasioned by tortious acts and omissions.<sup>471</sup>

Part II of the Act contains “General Provisions” principal among which are those that prescribe the form of the arbitration agreement,<sup>472</sup> the principle enabling parties to request interim measures of protection from the High Court<sup>473</sup> and the extent of court intervention.<sup>474</sup>

Part III headed “Composition and Jurisdiction of Arbitral Tribunal” combines under sections 11 – 18 the provisions of the Model Law Articles 10 to 17 while Part IV deals with the Conduct of the Arbitral Proceedings. It starts with Section 19 which

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<sup>467</sup> S 3(2)(a), (b) and (c).

<sup>468</sup> See the footnote to Article 1.

<sup>469</sup> S 3(1).

<sup>470</sup> S 3(3).

<sup>471</sup> S 3(1).

<sup>472</sup> S 4.

<sup>473</sup> S 7.

<sup>474</sup> S 10.

requires equal treatment of the parties, the delivery of statements of claim and defence (section 24), the hearing (section 25) and concludes with court assistance in taking evidence under section 28. But the provision that the High Court, in executing the request, may do so in accordance with its rules on taking evidence is in marked contrast to section 2 of the Evidence Act Cap 80 which excludes the application of the Evidence Act in arbitral proceedings.

Equal treatment of the parties and affording each one “full opportunity” to present his case is considered a cardinal principle in arbitration law and practice. “Full opportunity” has the potential of compelling the arbitral tribunal to conduct an investigation of its meaning and implications and, if necessary, to hear the parties’ submissions on these points. Therefore an arbitrator would need to adopt a firm approach in determining how far the investigation of a particular issue should be taken in order to avoid an unduly protracted examination of witnesses.<sup>475</sup>

Sections 20 to 34 under Part V deal with the Arbitral Award and Termination of Proceedings, particularly the form and contents of the award. The award of costs and expenses are provided for under section 32.

The provisions for challenging and enforcing the award under sections 35, 36 and 37 of Parts VI and VII correspond to Model Law Articles 34, 35 and 36. Part VIII concludes the Act with a Miscellany of Provisions on Bankruptcy and sets out limited conditions on which questions of law may be referred to the High Court and appeals from it to the Court of Appeal.

Although the Nigerian Arbitration and Conciliation statute, like the Kenyan and Zimbabwean counterparts, is monistic for applying to both domestic and international arbitrations, and covers all stages of arbitration, it is structurally different from the latter two statutes. A further distinction is that, unlike the two latter statutes, the Nigerian statute, as noted, applies only to commercial arbitration disputes.

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<sup>475</sup> The rules of natural justice (to which the phrase “full opportunity” may owe its origin required each party to be given a “reasonable opportunity” to present evidence and argument and to test the case against him; but it was never taken to confer a right to conduct an interminable examination of witnesses. See Mustill & Boyd *Commercial Arbitration* 299-302.

Part I which deals with domestic arbitration sets out General Provisions, not at the beginning but under sections 33 to 36 including principally the extent of its application<sup>476</sup> and the extent of court intervention.<sup>477</sup> Section 1 through to section 32 contain the usual provisions of domestic arbitration, describing the form of the arbitration agreement, the composition of the arbitral tribunal and its jurisdiction. The proceedings are conducted under provisions akin to those of the Model Law and its African derivatives. Again the challenge procedures against the arbitral tribunal and the provisions governing the making of the award, the termination of proceedings, the challenge and enforcement of the award are similar to the Model Law scheme. All these come under Part 1 of the Act. Part II governs Conciliation with which this study is not concerned. Part III sets out what is described as “Additional Provisions Relating to International Commercial Arbitration and Conciliation” under sections 43 to 52. Section 43 makes clear that “this part of the Act” applies solely to international commercial arbitration and conciliation” but “in addition to other provisions of this Act.” A reasonable inference is that the provisions for domestic arbitration under this statute together with those specified under this part will also apply to international commercial arbitration and conciliation; but that those provisions governing international commercial arbitration and conciliation will not apply to domestic arbitration and conciliation.

Except for the provisions on costs and deposit of costs under sections 49 and 50 respectively the remaining sections of Part III replicate the Model Law provisions from the appointment of the tribunal to the enforcement of the award.

Two additional provisions under Part III require comment. Section 53 offers arbitral parties in international arbitration a choice of rules to govern their arbitration, being either the Arbitration Rules set out in the First Schedule to the Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties. To an extent therefore this provision brings into contrast the mandatory provisions of section 15 of Part I which require domestic arbitration proceedings to be conducted, without options, in accordance with the Rules in the First Schedule of the

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<sup>476</sup> S 35 excludes the Act from applying to other laws by which certain disputes may not be arbitrated, or may be arbitrated only in accordance with such laws.

<sup>477</sup> S 34.

Act. Section 54 makes applicable the New York Convention to any award made in Nigeria or in any Contracting State, subject to reciprocity and only to differences that arise out of a contractual legal relationship.

The Miscellany of Provisions under Part IV, the final part, contains principally the interpretation provisions of section 57 of the Act.

The Zimbabwean arbitration statute is, in structure, form and presentation the closest of all the African statutes to the Model Law already discussed at some length in this chapter. Its seven sections include section 4 which prescribes what is arbitrable<sup>478</sup> and what is not.<sup>479</sup> A requirement under any other law for a matter to be determined by arbitration is deemed an arbitration agreement and the provisions of that law shall prevail if inconsistent with the Arbitration Act.<sup>480</sup> Section 6 confirms the repeal of the previous Arbitration Act (Chapter 7:02) and, pursuant to section 2, the Model Law provisions with modifications, is incorporated as the First Schedule to the Act.

### 2.5.3 Some Distinctive Features of the Three African Statutes

Certain singularities exist in the law and practice of arbitration in the three African jurisdictions. To an extent this is due to the fact that arbitration is regulated by laws other than the principal statutes of 1995 (Kenya), 1988 (Nigeria) and 1996 (Zimbabwe) respectively, the extent of interaction between each of these statutes and the other applicable arbitration laws in each jurisdiction and the provisions relating to paramountcy contribute to their singularities.

With regard to Kenya the phrase “Except as otherwise provided in a particular case” in section 2 prefixing the application of the provisions of the Act to domestic and international arbitrations is ambiguous. Because “a particular case” is not the same thing as “a particular enactment” the clarification offered by section 5 of the Zimbabwean statute on the relationship between that statute and other arbitration laws and the paramountcy of such other laws in the event of conflict is preferable. A

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<sup>478</sup> S 4(1).

<sup>479</sup> S 4(2).

<sup>480</sup> S 5.

reasonable inference from the phrase “except as otherwise provided in a particular case” is that the Kenyan Arbitration Act would recognize an arbitration conducted under other arbitration laws which it is submitted would include customary arbitration law and practice. In Kenya disputes involving land have been resolved by panels of elders for many years,<sup>481</sup> a customary practice that is now enacted in the Magistrates Courts Act, Chapter 10 of the laws of Kenya. Although this statute does not import the word “arbitration” it is not disputed that the process used by the elders is “arbitral” in essentials starting with the consent of the parties to the process and enforcement of the outcome with the assistance of the court. An arbitral regime is also embedded in the Land Disputes Tribunals Act 1990 which repealed the Magistrates Jurisdiction [Amendment] Act 1981 and established a land Disputes Tribunal for every district in Kenya to deal with disputes affecting the division of land, claims to occupy or work land and trespass to land. This Act in effect transformed the existing Panel of Elders into a Tribunal whose decision was filed and entered as a judgement of the magistrate court.<sup>482</sup>

The Civil Procedure Act, Chapter 21 of the Laws of Kenya also provides for arbitration by a referral order of court<sup>483</sup> enabling parties in a suit by agreement to refer a disputed issue to arbitration.<sup>484</sup> This option is not imposed by the court but warranted by the statute and exercised by the parties’ agreement. After the referral order the court ceases to deal with the suit except in the manner and to the extent provided by the referral order<sup>485</sup> such as fixing the time limit for the delivery of the award. Although this procedure is pursuant to the Civil Procedure Act, it is open to the parties to obtain a referral order for the arbitration to be conducted under the more elaborate Arbitration Act. Some support for this view and the interaction between the Civil Procedure Rules and the Arbitration Rules is found in section 11 of the Arbitration Rules 1997 made pursuant to section 40 of the Arbitration Act which

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<sup>481</sup> An elder is a person in the community who, because of his age and experience is recognized by custom as competent to resolve issues between disputing parties – see The Magistrates Courts Act, Cap 10. The ambivalence as to whether this customary practice is “consensual” or “statutory arbitration” arises from the fact that what started as a customary arbitration practice is now recognised in statutory form by Cap 10 and by implication the 1995 Arbitration Act (s 2).

<sup>482</sup> It is clarified in para 3.6.4 below that in Kenya a judgment entered in terms of an arbitral award or decision of a tribunal is treated as a court judgement and enforced as such.

<sup>483</sup> S 59 requires all references to arbitration by an order in a suit to be governed by the prescribed Rules under Order XLV.

<sup>484</sup> Order XLV Rule 1.

<sup>485</sup> Rule 3(2).

allows the application of the Civil Procedure Rules, “*so far as is appropriate*”, to all court proceedings under the Arbitration Rules.

The intervention of the Magistrates Court in the customary arbitral process created an anomalous practice that was recognized and perpetuated by the Court of Appeal of Kenya which required arbitral parties in land cases first to file a suit in court and then obtain a referral order for arbitration.<sup>486</sup> In *Nzasu Ndundu v Nzambulo Munyasya*<sup>487</sup> the High Court, after reviewing the existing legislation concluded inter alia, that a “valid suit” and a “valid reference” were not legal pre-requisites for the exercise of jurisdiction by the panel of elders. The court reasoned that an issue that must be resolved without legal technicalities by a panel of elders often with no formal education or legal training needed not be framed as a technical lawsuit before being referred to the elders.<sup>488</sup>

It is submitted that the scope of application of the Arbitration Act 1995 is wide enough to cover a variety of arbitral disputes including those affecting land provided the arbitration is conducted in accordance with this statute. It is to be noted that the 1995 Act repealed and re-enacted with amendments the earlier Arbitration Act Chapter 49 of the Laws of Kenya which declared itself as an “Act of Parliament to make provision in relation to the settlement of differences by arbitration” a phrase omitted in the 1995 Act. Further, the filing of a suit and a referral order of arbitration are not prerequisites under the 1995 Act.<sup>489</sup>

It may be that the frequency of judicial interference in arbitration promoted in no small measure by the preservation of judicial control of the arbitration process under these various statutory regimes could be curtailed by amendments towards the harmonization of arbitration practice and clarification of the relationship between the principal Act of 1995 and all other statutory arbitral regimes.<sup>490</sup>

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<sup>486</sup> *Benjamin Khayadi v Herbert Aganda* CA N0. 176 of 1986.

<sup>487</sup> Civil Appeal No 27 of 1989.

<sup>488</sup> To this writer’s knowledge this decision of the High Court has not been reversed by the Court of Appeal and therefore still stands.

<sup>489</sup> Under s 6(1) of the Kenya Statute and Article 8(1) of UNCITRAL Model Law the court is enjoined to refer arbitral disputes to arbitration but there is no pre-requisite of a valid suit or “valid reference” prior to arbitration.

<sup>490</sup> The Magistrates Courts Act, The Land Disputes Tribunals Act 1990, the Civil Procedure Act and the Arbitration Act 1995.

A final point of detail on the Kenyan Arbitration Act is that section 40 empowers the Chief Justice to make Rules of Court for all proceedings in court under this Act. Pursuant to this provision the Chief Justice has made eleven Rules known as The Arbitration Rules, 1997. These Rules apply only to applications in arbitral matters in the High Court but do not apply to the conduct of arbitration or proceedings of any sort before an arbitral tribunal.<sup>491</sup> The Rules are inadequate for the purposes intended and could be expanded to clarify, facilitate and expedite arbitration matters in court proceedings. They differ in scope and substance, for instance, from the Arbitration Rules of the Chartered Institute of Arbitration (Kenya Branch) or the Arbitration Rules comprised in the First Schedule of the 1988 Nigerian statute which govern domestic arbitration by virtue of section 15 of that statute.

A concluding observation is that the Kenyan Arbitration Act of 1995 is overdue for revision to provide (a) sanctions and remedies for breaches of, and non-compliance with, interim orders where only the arbitral tribunal is involved in granting them, (b) procedural powers for the tribunal to grant orders for security for costs and (c) on the international plane, to empower the courts to enforce foreign interim measures and orders.

Arbitration Law in Nigeria includes Customary and Muslim Arbitration Laws, Common Law, Doctrines of Equity and Statutory Laws. Customary Law arbitration is well established and grounded in the spate of judicial decisions as referenced earlier in this study.<sup>492</sup> The Common Law basis of arbitration also comprises the case law of Nigeria and the principles of English Common Law and Equity applicable in Nigeria. The first statute on arbitration in Nigeria was the Arbitration Ordinance 1914 which became Chapter 13 of the Revised Laws of Nigeria 1958 and was the Law of the Regions and later the States.<sup>493</sup> The Arbitration and Conciliation Decree of 1988 which was in current use at the start of this research is now renamed the Arbitration and Conciliation Act of 2004. It first came into force on 14<sup>th</sup> March 1988 and applies

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<sup>491</sup> This limitation is a frequent source of confusion for unwary practitioners who have sought to rely on these Rules in arbitral proceedings.

<sup>492</sup> Such as *Agu v Ekiwibe* (1991) 3 NWLR (pt. 180) 385; *Okereke v Nwanko* (2003) 9 NWLR 592 and *Igwego v Ezeugo* (1992) 6 NWLR Pt 249, 561 at 586 – 587.

<sup>493</sup> Orojo & Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* 3.

to both domestic and international commercial arbitration but restricted to only disputes from commercial transactions.<sup>494</sup>

Numerically the majority of Nigerians are Muslims and the constitution of Nigeria allows them to regulate their civil activities in conformity with Islamic traditions and injunctions. Indeed the Quranic basis for arbitration has been noted earlier to be enshrined under 4:35 and 49:9 – 10.<sup>495</sup> The point of departure from the Model Law and indeed the Arbitration and Conciliation statute is that Islamic Laws<sup>496</sup> and Customary Laws which are part of the Nigerian legal system also offer and provide for arbitration as alternative systems of dispute resolution. Customary Law is described as “a mirror of accepted usage”.<sup>497</sup>

The complexity of the Nigerian Arbitration and Conciliation statute is traceable to its diverse origins and influences. The statute incorporated the New York Convention of 1958, it was largely influenced by the UNCITRAL Model Law and the UNCITRAL Arbitration Rules while some of its provisions were also based on the Arbitration Act 1889.<sup>498</sup> It also seems incongruous that the “unified legal framework” intended by the statute also created under the same rubric two separate arbitration regimes for domestic as well as international arbitration. Tension may therefore be expected not only in the interaction between the two systems but also between the Arbitration and Conciliation statute and other arbitration laws.

In discussing the relationship between the Arbitration and Conciliation statute and the State Arbitration Laws, Orojo and Aromo point out that although the former applies to commercial arbitration throughout the Federation the arbitration laws applicable in the States of Nigeria (before the 1988 statute) which derived from the 1914 arbitration statute were not expressly repealed by the 1988 statute. The authors therefore argue that the State Arbitration Laws are still applicable to non-commercial arbitration

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<sup>494</sup> S 57(1) of the 1988 Decree/2004 Act. The contents of the Decree and Act are the same.

<sup>495</sup> Bukar & Adamu (1999) 16(1) *Journal of International Arbitration* 47-53. The authors cite para 4. 35 as follows: “And if you have reason to feel that a breach might occur between a couple, appoint an arbiter from among his people; if they both want to set things alright God may bring about the reconciliation. Behold, God is indeed all knowing and wise”.

<sup>496</sup> The application of Sharia in family law arbitration is recognised in the Canadian province of Ontario. Report of Attorney General Marion Boyd *Dispute Resolution in Family Law* December 2004.

<sup>497</sup> Bariramian FJ in *Owoyin v Omotosho* (1961) 1 All NLR 304 AT 309.

<sup>498</sup> Orojo & Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* 3.

disputes but the 1988 statute being federal law would prevail over State legislation in commercial arbitration.<sup>499</sup> But the authors also make the interesting but unconvincing submission that the 1988 statute will supersede any conflicting legislation including the Nigerian Constitution itself because arbitration is a matter within the residuary legislative competence of the States.<sup>500</sup> In this connection however the 1988 statute itself recognizes its own limitation under section 35 which defines and curtails its scope of application by providing that the Act shall not affect any other law by virtue of which certain disputes (a) may not be submitted to arbitration or (b) may be submitted to arbitration only in accordance with the provisions of that or another law.

A possible source of tension is that section 15 (a) of the Act requires proceedings to be conducted in accordance with the procedure in the Arbitration Rules set out in the First Schedule to the Act. Article 1 of the Rules states that the Rule shall govern any arbitration proceedings. The Rules therefore apply to both domestic and international arbitral proceedings; but while they are optional in respect of international arbitration they are mandatory for domestic arbitration. In consequence the respect for party autonomy which is otherwise demonstrated by several provisions of the Act<sup>501</sup> is curtailed by the interaction of section 15 and Article 1 of the Rules under the Act.

Again section 43 extends Part III of the Act solely to international commercial arbitration but “in addition to the other provisions of this Act”. This provision demonstrates the incompleteness of the arbitral regime under Part III that purports to govern international commercial arbitration but contains only a limited number of Model Law provisions, other provisions being contained under Part 1.

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<sup>499</sup> Orojo & Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* 25.

<sup>500</sup> Orojo & Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* 25. The learned authors discuss the doctrine of “covering the field” with reference to the authoritative decisions in *Attorney-General of Ogun State v Attorney-General of the Federation of Nigeria* (1982) NCLR 166, and *Oseni v Dawodu* (1994) 4 NWLR 390. The supercession of the Constitution by the 1988 statute is questionable and unconvincing because it is the Federal Constitution that facilitated both Federal and State Legislation.

<sup>501</sup> Such as s 16 (choice of place of arbitration); s 17 (commencement of proceedings) and s 18 (choice of language of proceedings); s 22(3) (deciding disputes *ex aequo et bono* only with party’s authorization). Of course the restrictions on party autonomy is not unique to the Nigerian Act. The *lex arbitri* (the law of the place of arbitration generally restricts party autonomy as the enforcement of an award may be refused where the tribunal’s procedure was not in accordance with the law of the country of arbitration. In this respect section 52 of the Act containing the grounds for refusal of recognition and enforcement is in line with the Model Law and the New York Convention. See also *James Miller v Whitworth Street Estate* [1920] 1 All ER 196 HL.

Presumably therefore the reason why the appointment of the arbitral tribunal is dealt with in Part III and not in Part 1 is because in a domestic arbitration the appointment would be covered by the Rules in Schedule 1 (by virtue of section 15) which otherwise do not apply to an international arbitration (by virtue of section 53). For another example there is nothing in Part III governing the time limit for setting aside an international award which is provided for domestic arbitration by section 29. Further it is not clear for example how section 48 under Part III which contains the grounds for challenging an award can be applied in consonance with sections 29 and 30 of the same Act containing the only provisions relating to the challenge of domestic awards in court.

Despite the incorporation and influence of the doctrines of equity in the arbitration laws of Nigeria section 22(3) of the Act forbids the arbitral tribunal from deciding a dispute *ex aequo et bono* or as *amiable compositeur* (also known as the “equity clause”) without the express authorization of the parties and if the law applicable to the arbitral procedure permits such arbitration.<sup>502</sup>

It is therefore not surprising that the structure and complexity of the principal Nigerian arbitration statute has provoked some controversy amongst Nigerian legal scholars and jurists.<sup>503</sup>

It may be concluded that in Nigeria a special regime was created for international commercial arbitration and conciliation while the general provisions applicable to domestic arbitration and conciliation may also apply to international arbitration where appropriate; and that the tensions and seeming incongruities noted can be avoided on the one hand by judicious and consistent application of these interlocking provisions inter se, and on other hand, by the consistent application of the 1988 statute in relation

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<sup>502</sup> Article 33 (3) Arbitration Rules (First Sch. To the Act).

<sup>503</sup> Idornigie explains that although Part III of the statute relates to international commercial arbitration, these provisions are additional to the provisions of Part 1 which deal with domestic arbitration. Therefore he does not agree with Justice Akpata that ss 29 and 30 of the statute in Part 1 relate solely to domestic arbitration; or with Gaius Ezejiofor that the time for setting aside an international award is not stated in the statute (as it is not provided for under Part III) because it is provided for by s 29(1) of Part 1 being three months: see Idornigie PO “The Relationship Between Arbitral and Court Proceedings in Nigeria” (2002) 19(5) *Journal of International Arbitration* 443 446. The author cites in support *Araka v Ejeagwu* (2000) 15 NWLR (pt 692) 684 wherein the Supreme Court of Nigeria affirmed the three month period for setting aside an arbitral award. See Akpata E *The Nigerian Arbitration Law in Focus* (1997) and Ezejiofor G *The Law of Arbitration in Nigeria* (1997).

to other arbitration laws in Nigeria. An innovative addition to the definition of international under the statute<sup>504</sup> which is not contained in the Model Law is that an arbitration is “international” if the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.<sup>505</sup> Curiously however, the concept of misconduct which has been difficult to grapple with in other jurisdictions has been retained, without definition, as a ground for removing an arbitrator<sup>506</sup> and for attacking an award.

The Zimbabwean version of the Model Law which corresponds, Article by Article, to the UNCITRAL Model Law requires no further analytical comment here as that Law is extensively discussed under the preceding paragraph 2.4.4 with some significant cases illustrated in paragraph 2.4.4(5). The simplicity of the Zimbabwean Arbitration Act is demonstrated by the fact that the thirty-six Articles of the First Schedule incorporating the Model Law makes the schedule longer than the Act of only seven Sections. The following observations on Zimbabwean arbitration law are pertinent.

The Zimbabwean Arbitration Act, Chapter 12, derived from the 1889 United Kingdom Arbitration Act. It was originally enacted as Act 8 of 1928 and underwent minor amendments in 1985 and 1992 with regard to arbitration agreements relating to matters under the land acquisition legislation.<sup>507</sup> Arbitration legislation in Zimbabwe, a former British colony, was therefore not different from other colonial arbitration statutes based on English arbitration legislation. However Zimbabwe is among the

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<sup>504</sup> S 57(2)(d) of the Decree.

<sup>505</sup> See Asouzu *Arbitration and African States* 166-167.

<sup>506</sup> S 30(2). Although misconduct is not defined in the Act, Idornigie (2002) 19(5) *Journal of International Arbitration* 447-448 points out that case law on misconduct is legion and cites *Taylor Woodrow (Nig) Ltd v S.E GMBH Ltd* (1993) 4 N.W.L.R (Pt 286) 127 where the court quoted with approval the definition of *Halsbury's Laws of England*, vol 2, 4<sup>th</sup> Ed at 330-331 that it “includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere “technical” misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement or reference”. However the refusal by an arbitrator to consider matters outside his jurisdiction does not amount to misconduct. Similarly, a mere error of fact or law, delay of the arbitrator and misunderstanding of submissions of counsel, may not amount to misconduct. Other cases cited are: *KSUDB v Fanz Construction Ltd* (1990) 4 N.W.L.R (Pt 142) 1; *Araka v Ejeagwu*, (2002) 15 N.W.L.R (Pt 692) 684; and *Savoia Ltd v Sonubi* (2000) 7 S.C (pt 1) 36. Ten examples of misconduct are given by *Halsbury* as referenced and include principally, exceeding authority, inconsistent or ambiguous awards, irregularity in the proceedings, infraction of the right to a fair hearing, acquisition of interest in the subject matter and delegation of authority to a stranger. In England the concept of ‘misconduct’, whether technical or otherwise has now been laid to rest by the 1996 Arbitration Act and replaced by the term “serious irregularity” as defined in s 68 dealing with challenges other than on the grounds of substantive jurisdiction.

<sup>507</sup> See Title IV Administration of Justice, ch 12.

few African countries that has moved substantially away from colonial arbitration law. The Law Development Commission of Zimbabwe in its interim report of May 1993 advocated the introduction of the UNCITRAL Model Law for both domestic and international arbitrations. The Final Report of January 1994 contained recommendations which were accepted and incorporated in the Arbitration Act of 1996 with minimum modifications.<sup>508</sup>

The Final Report of the Zimbabwean Law Development Commission had recommended that the Arbitration Law to be adopted should cover every subject matter that could lawfully be arbitrated and not confined to commercial arbitration only.<sup>509</sup> This is reflected in the provisions of section 4(1) subject to the exceptions to arbitrability listed under section 4(2). A presumption in favour of arbitrability is created by section 4(3) in that the fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration. While it is easy to infer a preference for arbitration from this provision it is also easy to see a possible source of tension with other enactments conferring jurisdiction on a court or other tribunal. The provision does not go as far as stating which law or forum shall prevail in the event of conflict but section 5(2) offers an interpretative aid with the statement that where an enactment provides for the determination of any matter by arbitration those provisions shall prevail to the extent that they are inconsistent with this Act. Further, and although Model Law Article 1(5) is omitted in its original form in the Zimbabwean version of that law, it is partially contained in section 4(2)(b) by which a dispute not arbitrable under any law shall also not be arbitrable under this Act.

A final observation is that, unlike the Kenyan Arbitration Act, the Zimbabwe statute does not specifically define either “international” or “domestic” arbitration; and except for some modifications regarding default provisions on the number of

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<sup>508</sup> Law Development Commission of Zimbabwe *Interim Report on Arbitration*, Report No 24, May 1993; and *Final Report* No 31, January 1994.

<sup>509</sup> *Final Report* 5-8.

arbitrators for domestic arbitration the Act creates a uniform regime for all arbitrations in Zimbabwe.<sup>510</sup>

#### 2.5.4 The Trend towards Uniformity in African Arbitration

The legislation of each of the three African countries belongs to the cluster of arbitration laws that has been innovatively labeled “third generation arbitration laws.”<sup>511</sup> These are arbitration statutes enacted in Africa since 1984, the year immediately preceding the coming into force of the UNCITRAL Model Law in 1985 which purportedly set minimum international standards for modern national laws on commercial arbitration. A trend towards uniformity could be set if new arbitration legislation after 1985 followed the Model Law whose provisions in relevant parts could be adapted for domestic arbitration.<sup>512</sup> While the need for uniformity clearly existed for international arbitration law, the desire for updating and improving arbitration law for non-international cases could be fulfilled as more and more states modernize their legislation for both categories of arbitration.

Among those who speculated glowingly about the harmonizing force and effect of the UNCITRAL Model Law was Professor Martin Hunter. Writing in 1966 in the wake of the English Arbitration Act which, after the initial English resistance to the Model Law, had eventually and substantially adopted the core concepts of the Model Law,<sup>513</sup> Hunter opined:

“It is now clear that legislators around the world will not even think about introducing new arbitration laws without paying due regard to the structure of the Model Law and

<sup>510</sup> Asouzu *Arbitration and African States* 162-165. In effect Article 10(2) contains a definition of domestic arbitration for purposes of the default provision on the number of arbitrators.

<sup>511</sup> Asouzu *Arbitration and African States* 124. Asouzu classifies arbitration legislation in Africa enacted between 1898 to 1960 as “first generation arbitration legislation and those between 1960 and 1984 as “second generation arbitration legislation.” See also Reid AS “The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are The Two Systems Poles Apart?” (2004) 21 (3) *Journal of International Arbitration* 227-238.

<sup>512</sup> Asouzu observes that the International Arbitration Code of Djibouti of 13 February 1984 ushered in the third generation arbitration legislation, followed by Nigeria (1988), Togo (1989), Algeria (1993), Tunisia (1993), Egypt (1994), Kenya (1995), Zimbabwe (1996), Madagascar (1998), Zambia (1999) Uganda (2000) and Ghana (2000) and that South Africa has been working on a new arbitration law since 1994. Djibouti, Togo and Algeria are not in the Model Law camp.

<sup>513</sup> Such as respect for party autonomy in the choice of arbitral procedure, reduction of judicial intervention in arbitration, fairness and due process in arbitration, and provisions for recognition and enforcement of awards.

the concepts it contains. This means that the Model Law has already become a potent force for harmonization of national arbitration law. Furthermore, 1996 saw the adoption by UNCITRAL of its Notes on Organising Arbitration Proceedings which in the medium to long term is also likely to become a significant influence for the harmonization of procedures practiced by tribunals in international arbitration.”<sup>514</sup>

Ten years later, despite the gradual recognition of the Model Law globally, the evidence on the African ground does not indicate an overwhelming reception of the Model Law<sup>515</sup>. For example, South Africa, a key player in international trade and commerce has neither adopted nor adapted the Model Law.<sup>516</sup>

For present purposes however there is no denying the impact of the Model Law in the arbitration statutes of the three African jurisdictions in this study. In nearly all significant respects the Arbitration Acts of Kenya, Nigeria and Zimbabwe replicate the substantive provisions of the Model Law. In that respect all three statutes recognize the principle of fair and equal treatment of arbitral parties and their right to full opportunity to present their case. The statutes also recognize party and tribunal autonomies in the choice of procedure and the conduct of proceedings characterized by flexibility and effective disposal of the dispute. In essence therefore it is possible to commence and complete arbitral proceedings in any of these jurisdictions without court interference.

But there is room for revision and improvement in all three statutes, to cover topics such as the consolidation of claims and the liability of arbitrators and arbitral institutions.

Apart from the Model Law influence these three African countries also share a common arbitration heritage as their pre-Model Law legislation derived, inter alia,

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<sup>514</sup> Hunter M “The Procedural Powers of Arbitrators under the English 1996 Act” (1997) 13 *Arbitration International* 345.

<sup>515</sup> At the date of this research the States listed by UNCITRAL as Model Law states in sub-Saharan Africa are: Kenya, Mauritius, Nigeria, Rwanda, Uganda, Zambia and Zimbabwe. For any new additions the reader may refer to the UNCITRAL website [www.uncitral.org](http://www.uncitral.org).

<sup>516</sup> There is no public explanation of the delay in following the recommendations of the South African Law Commission for South Africa to adopt the Model Law for international commercial arbitration.

from English statutes and jurisprudence.<sup>517</sup> Generally, and also because of their common law tradition, the principles, the procedures for the hearing and reception of evidence in arbitration, are similar in all three jurisdictions.

The fact remains however that the current arbitration law in the three countries is neither identical nor uniform; and apart from the divergence of technique in the reception of the Model Law there are substantial differences in the stages of development of arbitration rules, institutional support and relative orientation to arbitration in the three countries.

It can be concluded however that despite their distinctive characteristics as national statutes and their contrasting legislative techniques the three statutes substantially demonstrate a general trend towards uniformity and a new approach to arbitration in line with the standards envisaged and promoted by UNCITRAL towards the modernization and unification of arbitration laws globally. If an inspiration is needed it is found in the statement that:

“it would be a pity to miss the opportunity to enrich our social and legal culture by some imaginative fusion of distinctly African models of, for example, dispute settlement. The blind and hegemonic push for uniformity around a non-African standard simply increases resentments that have been simmering since colonial times. We are dealing with a people who have grounds for being suspicious of the purveyors of “modernization”, which in their minds translates into ‘westernization’, a process not characterized in the past by too much respect for the African viewpoint.”<sup>518</sup>

## **2.6 The English Response to The UNCITRAL Model Law**

The common heritage of English arbitration culture shared by the three African jurisdictions makes the English response to the Model Law instructive for Kenya. Despite its wide acclaim the Model Law was not universally welcomed and England was a notable country that resisted the wholesale adoption of the Model Law. This

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<sup>517</sup> Such as the English Arbitration Act 1889 and the judicial decisions of the English Courts on English statutes.

<sup>518</sup> Nhlapo RT “The Status of Customary Law in Africa: From the Age of Law and Modernization to the Era of ‘Human Rights and Constitutionalism’ in Ajibola B and Van Zyl D (eds) *The Judiciary in Africa* (1987).

fact may well explain UNCITRAL's exclusion of England (but not Scotland) from its list of Model Law countries. Nevertheless the English Arbitration Act 1996 has similar provisions to those of the Model Law despite the fundamental distinction between the underlying philosophies of the two arbitral regimes.<sup>519</sup>

The English Act starts with a statement of three general principles upon which English arbitration would be based.<sup>520</sup> The first states the object of arbitration, that is, "to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."<sup>521</sup> Formal recognition of this principle has been long overdue as, despite the need for a just result, an arbitral procedure that is unnecessarily slow or expensive, would be a contradiction for being in reality unfair and unjust.<sup>522</sup> The second principle is party autonomy, subject to those safeguards necessary in the public interest. The third principle delimits the extent of Court intervention to those instances specifically provided for in the Act.<sup>523</sup>

In support of the first principle section 33 imposes a twofold statutory duty on the arbitral tribunal first to act fairly and impartially between the parties, giving each party a reasonable opportunity to put its case and to deal with that of its opponent;<sup>524</sup> and secondly to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined."<sup>525</sup> The first stated duty reflects the tenor of Article 18 of the Model Law except the substitution by the Act of the word "reasonable" for "full" opportunity used by the Model Law. The second stated duty has no equivalent in the Model Law but reflects the tenor of the general principle of

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<sup>519</sup> For the history of the Act see Saville M: two Reports of 1996 and 1997 published in (1997) 13 *Arbitration International* 275 – 330 and (1999) 15 *Arbitration International* 413-433; Saville "An Introduction to the 1996 Arbitration Act" (1996) 62 *Arbitration* 165, 166. His huge contribution to this Act earned Lord Saville the epithet "midwife" of the then new English Arbitration Act of 1996. See also Harris B, Planterose R & Tecks J *The Arbitration Act 1996: A Commentary* 3rd ed (2003) and Hong-lin Yu "Five Years On: A review of the English Arbitration Act 1996" (2002) 19(3) *Journal of International Arbitration* 209-225.

<sup>520</sup> Reid (2004) 21 (3) *Journal of International Arbitration* 227-238.

<sup>521</sup> This provision and the related ss 33(1)(b), 34(1)(e) & (h), 40 and 65 are an important development with no equivalent in the Model Law or previous English arbitration legislation.

<sup>522</sup> See Saville M "An Introduction to the 1996 Act" (1996) 62 *Arbitration* 165, 166.

<sup>523</sup> Note that Model Law Article 5 uses the expression "no court *shall* intervene except where so provided in this Law" whereas section 1 of the English Act uses the expression "the court *should* not intervene except as provided by this Part" (of the Act).

<sup>524</sup> S 33 1(a).

<sup>525</sup> S 33 1(b).

section 1(a) intended to counteract unnecessary delays and expense. As a mandatory provision, section 33 cannot be excluded by agreement of the parties and the importance of the section is endorsed by the fact that a tribunal's failure to comply with this provision can constitute a serious irregularity empowering the court to set aside an award.<sup>526</sup> In addition, sections 34, 38 and 41 inter alia, empower the tribunal to fulfill the duty imposed by section 33. For the parties, a duty is also imposed by section 40 to do everything necessary for the proper and expeditious conduct of the proceedings. The tribunal's power granted by section 65 to limit recoverable costs has an implication for the parties to use cost-effective methods to reduce the overall cost burden.<sup>527</sup> A list of suggested procedures is also given to the tribunal by section 34 for disposing of procedural and evidential matters. A degree of innovation in English arbitration is introduced by sections 34(2), (e), (f) and (g) enabling the tribunal to formulate questions to be answered by the parties to decide whether to apply strict rules of evidence as to admissibility, relevance or weight of any material sought to be tendered on any matters of fact or opinion, and whether the tribunal itself should take the initiative in ascertaining the facts and the law.

It can be said therefore that the powers of the tribunal and the sanctions it may impose on defaulting parties or the failure to comply with a peremptory order are perhaps more radical and extensive than those of the Model Law. There are important lessons therefore from the English Act for Kenya in all the noted areas where the English Act is in advance of the Model Law upon which the Kenyan statute is based.<sup>528</sup>

But followers of the English legal tradition have to be aware of the tensions lurking in some of the provisions of the 1996 Act. A major example is that between party autonomy and commercial pragmatism which raises the question as to how to reconcile the commercial way to justice with the right of parties to choose their own way to justice. The tension is between the words "justice" and "commerce". The party

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<sup>526</sup> S 68(1) and (2).

<sup>527</sup> It is a departure from English adversarial principles that the tribunal can radically limit costs and reduce delay. See Bernstein et al *Handbook of Arbitration Practice* 27.

<sup>528</sup> The English Arbitration Act is under review to ascertain its effectiveness since coming into force on 31 January 1997 after a difficult gestation. It is a mark of the breadth of the survey that it is world wide involving the participation of this writer under the auspices of the IDRC entitled "Arbitration Act 1996 Survey" undertaken in 2006. This was under the chairmanship of Bruce Harris. The IDRC Survey Committee sent out a questionnaire to "significant players in the world of arbitration" to ask for help in reviewing the 1996 Act.

autonomy proclaimed by section 1(b) of the Act and the duties imposed on participants to proceed with expedition and avoid unnecessary expense express two Parliamentary visions of arbitral justice; but they also disclose a dilemma, if not a collision, between the right of the parties to choose the method and the right of the state to insist that the method shall be workable and efficient. The drafters of these provisions who could not have been unaware of this conundrum must have preferred to leave it for the English courts to resolve.

It has been observed that:

“with the passage of 10 years since its enactment, the Arbitration Act 1996 continues to be interpreted and applied with its intended purpose, i.e., giving primary place to the will of the parties and then upholding the authority of the arbitrators to conduct proceedings appropriately in the circumstances of the case.”<sup>529</sup>

The four main areas where reported decisions of the English courts have covered important areas of the 1996 Arbitration Act are: (i) the Court’s use of the principle of party autonomy to compel parties to adhere to their commitment to arbitrate; (ii) court support for arbitration by curbing anti-arbitration injunctions to enable parties to submit their differences to arbitration; (iii) a wider recognition and acceptance of the doctrine of separability enabling the arbitral tribunal to determine the extent of its own jurisdiction;<sup>530</sup> and (iv) clarification of the duties of an arbitrator with regard to the obligation to “act fairly and impartially as between the parties”, giving each party a reasonable opportunity to put his case, and adopting procedures that avoid unnecessary delay and expense.

Kenya and other African jurisdictions that historically draw inspiration from English law and practice and which have not yet adopted the Model Law have options for modernization and harmonization of arbitration law. Apart from the freedom of each state to create its own arbitration law as it wishes there are now relatively modern

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<sup>529</sup> See the Foreword to *Russell on Arbitration*, 23<sup>rd</sup> ed (2007) 5

<sup>530</sup> *Premium Nafta Products Ltd & Others v Fili Shipping Co. Ltd & Others* (the *Fiona Trust* case) [2007] UKHL 40, [2007] 4 All ER 951.

options based either on the Model Law approach or that of the English Act<sup>531</sup> or a combination of the best of both legislative visions. The OHADA system of arbitration which is open to all African states is yet another option.

## 2.7 Conclusion

It can be seen that the Legal Framework of Arbitration in Kenya and the comparable jurisdictions of Nigeria and Zimbabwe is a massive terrain of activity embracing Customary Law, Common Law, Equity and Statutory arbitral traditions across Africa as exemplified by the jurisdictions discussed in this study. Further, that the drive towards modernization and harmonization of arbitration laws has extended beyond national boundaries to receive and assimilate the developments in arbitration introduced by the UNCITRAL Model Law and The Uniform Act on Arbitration within the framework of the OHADA (OHBLA) Treaty.

The relatively modern arbitration statutes in Kenya, Nigeria and Zimbabwe demonstrate firstly that arbitration law is not static. But the legislatures and drafters of arbitration laws in these jurisdictions have more to do to improve these laws and the rules of procedure that will not only facilitate the conduct of efficient arbitral proceedings but also promote the development of good practices in the arbitral traditions across Africa.

The discussion in the preceding and introductory chapters 1 and 2 is intended to set the legal foundation and contextual environment of arbitration practice in Kenya from which the chapter 3 problems arise and are discussed. It is not so much that these problems are unknown in other jurisdictions or unique to Kenya but that their frequent recurrence and negative impact on Kenyan arbitration practice is a particular concern for investigation by research.

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<sup>531</sup> For illuminating commentary on the English Act see the sources in n 519 above; Hunter (1997) 13(4) *Arbitration International* 345-360.

## CHAPTER THREE

### RECURRENT PROBLEMS IN ARBITRATION PRACTICE

*“It is one of the saving graces of the juridical mind that alongside the interminable circuitry of its methods, it has also discovered a short route to settling commercial disputes, the arbitration route. ...*

*It would be a futility of monstrous proportion if the arbitration process instead of ending litigation were to commence new litigation or perpetuate it. In that event we will have to say with Shakespeare who was so conscious of the ‘law’s delays’:*

*‘The end crowns all,  
And that old common arbitrator, Time,  
Will one day end it.’<sup>1</sup>*

In this chapter six recurrent problems in arbitration are examined. The reasons for their selection are stated in paragraph 1.2 of chapter one and need no repetition here. However their formulation as the research questions is repeated in this chapter, being the appropriate context for their investigation and discussion. They are:

- (i) The quest for genuine consent: how genuine is the consensual basis of arbitration?
- (ii) Frequent challenges to arbitrators and to the arbitral jurisdiction: how can these be curbed?
- (iii) The powers of the arbitral tribunal: are they adequate for the effective management and conduct of the arbitral proceedings and efficient disposal of disputes?
- (iv) Frequent adjournments, postponements and delay: how can these be minimized?
- (v) Constraints on the granting of interim measures by the arbitral tribunal: are they a help or hindrance to arbitration?
- (vi) Enforcement of the arbitral award: what improvements can be made to facilitate speedy enforcement and execution of arbitral awards?

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<sup>1</sup> Extract from the speech by Narayanon Shri KR President of India, at the inauguration of the International Council for Commercial Arbitration conference 2000 (2000) 17(5) *Journal of International Arbitration* 153-155.

These problems are encountered at various stages of the arbitral process, from challenges to the existence and validity of the arbitration agreement to enforcement of the award.<sup>2</sup> It is not suggested here that there are easy solutions. What is intended is an analysis and discussion towards recommended solutions, where possible.

### 3.1 The Consensual Basis of Arbitration: The Quest for Genuine Consent

This discussion investigates the genuineness of consent<sup>3</sup> as the basis of arbitration by first drawing a distinction between the “consent to arbitrate” and the “arbitration agreement”. Thereafter the requirement of consent and the impact of disputed consent are considered, and also in relation to clauses incorporated by reference. This is followed by the consideration of consent to arbitration in the context of multiple parties and multiple related contracts and the extent to which these circumstances are dealt with by national statutes and the UNCITRAL Model Law. Examples from other jurisdictions and a review of existing arbitral jurisprudence on these topics are brought into the discussion.

#### 3.1.1 Consent to Arbitrate and the Arbitration Agreement

A fundamental requirement for a valid arbitration agreement, apart from formal requirements, is consent.<sup>4</sup> Indeed the presence of consent is so readily presumed from the arbitration agreement that it can be an uphill task for an arbitral party who subsequently denies his consent to arbitrate. In the common-law tradition, consent in the sense of “assent” or more technically “consensus ad idem” is an essential element of a contract.<sup>5</sup> Therefore if a contract or agreement is held out to be validly concluded it is logical to infer from this that the parties consent to its provisions including the arbitration provision, if any. Yet a party’s consent to arbitrate and the arbitration agreement, if bound together in logic and construction, are not the same thing in their practical application and effect. The distinction between them assumes greater prominence when the consent to arbitrate, which by implication is an ingredient of the arbitration agreement, is hotly contested. This distinction between a component of the

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<sup>2</sup> See para 1.3 above regarding the research .

<sup>3</sup> See too Rau AS “Arbitral Jurisdiction and the Dimensions of ‘Consent’” (2008) 24 *Arbitration International* 199-264, particularly 200-201. See also Torgbor E “Tracking Down Consent and Dissent in Arbitration Law and Practice” (2009) 20(3) *Stellenbosch Law Review* 551-561.

<sup>4</sup> This is clear from any major work on arbitration law such as *Russell on Arbitration* 23rd ed 28-29 and Mustill MJ & Boyd SC *The Law and Practice of International Commercial Arbitration* 2<sup>nd</sup> ed (1989) 4, who comment that the arbitration law of England is dominated by the law of contract.

<sup>5</sup> Merkin R *Arbitration Law* (1991) para 3-17; *Clarke v Dunraven* (1897) AC 59 (HL); *Storer v Manchester City Council* [1974] 3 All ER 824; see also Treitel GH *Law of Contract* (2003); *Cheshire & Fifoot & Furmston’s Law of Contract* 14<sup>th</sup> ed (2001).

agreement and the agreement itself must not be blurred because the denial of consent to arbitrate (a component) is a different proposition from the denial of the arbitration agreement (the complete agreement). By way of example, the arbitration agreement commonly takes the form of a clause in a contract. Various situations can arise regarding the consent to arbitrate. These include where (i) the disputing party rejects the entire contract with the arbitration agreement, or (ii) accepts the contract but not the arbitration agreement, or (iii) accepts the contract and the arbitration agreement but still maintains he did not consent to arbitrate the particular dispute that has arisen,<sup>6</sup> or (iv) where consent as declared is said not to represent true consent.<sup>7</sup> In all these instances the nature, substance and direction of the investigation to ascertain the existence or otherwise of a common consent to arbitrate can be expected to vary as the issue raised by each instance of denial is different in spite of the physical existence or evidence of the arbitration clause or other written agreement.

The distinction between the “consent to arbitrate” and “the arbitration agreement” itself is also discernible from domestic arbitration statutes, such as the Kenyan statute, that say nothing or make no reference at all to the requirement of consent in arbitration but set out the formal requirements of the arbitration agreement. The recognition accorded by such legislation to the arbitration agreement but not specifically to the constituent arbitral consent would support the statement that arbitration is “contractual” rather than the generally accepted but more arguable proposition that arbitration is “consensual”.<sup>8</sup>

A clearly identifiable document signed by the parties,<sup>9</sup> if it is submitted, will normally cause little or no problem in deciding whether or not the consent to arbitration existed. But this is not invariably so because of the varieties and types of instruments that, in modern times, come under the rubric of contractual agreements.

The formal requirements imposed by legislation for an arbitration agreement (essentially “an agreement in writing”) may be used in practice by a court or arbitrator to decide that there was consent in a legal sense to sustain a valid arbitration agreement. In the main a legally binding

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<sup>6</sup> In this case he is basically contending that the dispute falls outside the scope of the arbitration clause.

<sup>7</sup> See the discussion of the principle of interpretation in good faith in Gaillard & Savage *International Commercial Arbitration* 257. It can be submitted further that the principles for the discovery of true consent differ from those for determining the existence and validity of an agreement.

<sup>8</sup> Commission on International Arbitration *Final Report on Multi-party Arbitrations* (the Delvolvé Report, Paris June 1994): “Arbitration has a contractual basis...”, quoted in Redfern & Hunter *International Commercial Arbitration* 169.

<sup>9</sup> As provided for by s 4(3)(a) of the Kenya Arbitration Act 1995 and Article 7(2) of the UNCITRAL Model Law (1985 version).

consent for purposes of an arbitration agreement is determined in accordance with the ordinary principles of contract law, which in domestic arbitration is normally the law of the place of arbitration. But consent inferred from or established through compliance with the formal requirements of an arbitration agreement (that is, “legal or technical consent”) is frequently contested in Kenyan arbitration practice by parties who have not consciously given their consent to arbitrate despite the existence of a valid arbitration agreement. It is submitted that in such instances “genuine” consent (in contrast to “legal or technical consent”) can be investigated factually from cogent evidence; that the application of the distinction between “consent to arbitrate” and the “arbitration agreement” could assist the investigation by setting out and narrowing down the direction of inquiry and the nature of the evidence required; and further, that legislation that stipulates and provides for express manifestation of consent could facilitate the process and the correct decision. Such legislation is recommended for Kenya.

Arbitration agreements typically assume one of two forms: either a clause in an underlying contract or a separate agreement.<sup>10</sup> The extent to which such instruments may or may not evince the parties’ common arbitral consent depends upon their content and clarity. But the elaboration of the forms of arbitration agreement and the requirements of writing<sup>11</sup> which, on the one hand, have expanded the scope of an arbitration agreement in writing have also, by the same token, extended the search for consent to other forms of communication between the parties such as ordinary letters, telexes, telegrams and other modern means of telecommunication.<sup>12</sup> These exchanges of transactional documents which are not necessarily signed by either party may still constitute and provide a record of an agreement; but from them the consent to arbitrate may nevertheless be illusory or wholly absent. That is an indication, if not the full measure, of the problem the arbitral tribunal has to contend with in practice where the documents exchanged provide a record of transactions and even demonstrate a contractual relationship but not necessarily a conscious assent to arbitrate a future dispute under an agreement in respect of which the consent to arbitrate is vigorously denied.<sup>13</sup> Besides, the expansion of arbitrable disputes in recent years<sup>14</sup> has broadened the range of disputes and consequently the scope of the investigation<sup>15</sup> when consent is contested.

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<sup>10</sup> Kenya Arbitration Act 1995 s 4(1); UNCITRAL Model Law Article 7(1).

<sup>11</sup> Kenya Arbitration Act s 4(2); UNCITRAL Model Law Article 7(2).

<sup>12</sup> Kenya Arbitration Act s 4(3)(b); UNCITRAL Model Law Article 7(2).

<sup>13</sup> Examples are provided under the topic “Incorporation by Reference” below at paragraph 3.1.6.

<sup>14</sup> “Arbitrable” is used here in its normal meaning as capable of being decided by arbitration, as opposed to a matter which is under the applicable law reserved for decision by the court. See further para 3.2.3 below.

<sup>15</sup> Compare the problem raised in the text to n 6 above.

The lack of genuine consent to arbitrate is frequently encountered in domestic arbitration and the over-enthusiastic arbitral tribunal exposes itself to jurisdictional challenges founded not only on the assumption of jurisdiction over matters beyond its competence but also for ignoring the absence of genuine consent as a fundamental requirement for arbitration.<sup>16</sup>

Despite the much vaunted consensual basis of arbitration neither the Model Law nor the Kenyan statute based on it are explicit<sup>17</sup> on the requirement of consent in arbitration. The omission, in a disputed case, contributes to the difficulty of establishing consent. The problems created by its actual or alleged absence necessitate the critical quest for consent without which there can be no binding agreement and so no valid arbitration or award.<sup>18</sup>

### 3.1.2 The Problem of Consent

For purposes of this study the question for consideration is whether, assuming its factual existence, the arbitration agreement in a contractual clause or separate document truly reflects or embodies the genuine consent of the parties. The question is of particular concern and relevance where the agreement was written before the dispute arose and by parties or their representatives who did not and could not have consciously applied their minds adequately to the kind of dispute that might arise or has arisen or to the scope of the arbitration agreement they concluded long ago.

Consider a sample arbitration clause in a contract that states:

“Provided that in case of any dispute or difference between the parties as to the construction of this contract or any matter or thing of whatsoever nature or the rights and liabilities of the parties herein, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or failing agreement (within 14 days after a request to concur in the appointment of an arbitrator has been duly served) a person appointed by the chairman of (a professional society or institute).”

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<sup>16</sup> This risk is particularly acute where the arbitrator proceeds with an arbitration when the respondent is in default. See further para 3.2.5 below regarding proceedings *ex parte*.

<sup>17</sup> A legally valid consent may be “implied” from Articles 34(2) and 36(1) of the UNCITRAL Model Law, both of which require a valid arbitration agreement without which the award may be set aside or denied enforcement.

<sup>18</sup> *Arab Republic of Egypt v Southern Pacific Properties Limited and Southern Pacific Properties (Middle East) Limited* (The Pyramids Case) 12 July 1984, Ct of Appeal, Paris.

This clause is plain enough. It does not and is not expected to set out the permutation of differences that can arise between contracting parties or the varieties of procedures available for the appointment of an arbitrator or for the conduct of the proceedings. The point is that such a clause in one brief paragraph tucked at or near the end of a lengthy contract of several substantive provisions describing the obligations and activities of the contracting parties raised no particular concerns for the parties at the time of signing the agreement. So why do parties deny consent under this clause when a dispute arises? Whether the denial of consent takes the form of a refusal to concur in the appointment of the arbitrator<sup>19</sup> or the withholding of consent to arbitrate the particular dispute that has arisen, such denial more often than not demonstrates the deficiency and inadequacy of the device of the arbitration clause in a contract – the form in common use in Kenya (and international) arbitrations. Furthermore, with no demonstrable intervening event that might have varied the terms of the contract in the period between its formation and the occurrence of the dispute it might be thought that the refusal to arbitrate at the time of the dispute stemmed from the lack of genuine consent from the very beginning, which includes the lack of a conscious choice of arbitration as the preferred method of settling future differences. Indeed parties that have signed a contract are deemed bound by their signatures; but an arbitration clause or agreement itself even under the New York Convention requires no signature<sup>20</sup> provided its existence in writing is evidenced by an exchange of documents that recognize, incorporate or confirm its existence. This extends the quest for consent to other documents. On the other hand the *sine qua non* for an agreement is that the parties be “*ad idem*” for their agreement to be valid and binding. The issue then is not about signature or form of agreement but whether genuine consent to arbitrate can be elicited from what constitutes the arbitration agreement. In other words an arbitration clause or agreement may meet the formal requirements although there is not true consent. That is what the tribunal or court has to decide when consent is disputed and it is then an issue quite distinct and distinguishable from the disputed existence of an arbitration agreement.

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<sup>19</sup> It is not suggested that every refusal by a respondent to participate in the appointment of an arbitrator amounts to a denial of consent to arbitrate. Instances where denial is used as a tactical ploy to delay the implementation of the arbitration agreement are distinguishable, as evidence in demonstration of a tactical ploy could be different from evidence that demonstrates the lack of genuine consent. As the arbitration clause in the text above indicates, effective arbitration clauses are usually written so that tactical delays by a respondent concerning the selection of an arbitrator cannot prevent the appointment of the tribunal.

<sup>20</sup> See the New York Convention Article II(2); *Encyclopaedia of Arbitration Law*: EAL Service Issue No 2 31 December 1985, para 3.1.16; see also *Excomm Ltd v Ahmed Abdul-Qawi: Bamaodah (The St. Raphael)* [1985] 1 Lloyd’s Rep 403 CA.

An eminent arbitrator in the common-law tradition describes the essence of the problem thus:

“By far the majority of arbitrations, both domestic and international, take place because of an arbitration clause in a standard-form contract which the parties did not bother to change, as opposed to a deliberate selection of arbitration because of its perceived advantages.”<sup>21</sup>

In Francophone Africa the problem is acknowledged in the context of OHADA where particular vigilance by parties is needed when drafting their arbitration clause, as

“[i]t is a truism that when a contract is negotiated, the parties deal first with all the commercial aspects of the transaction, and frequently pay only very cursory attention to the dispute resolution provisions. This often leads to unpleasant surprises when a dispute does arise, with the parties finding that the arbitration clause is inoperative, or that it has consequences that they had not anticipated.”<sup>22</sup>

In similar vein, Redfern and Hunter describe the arbitration clause as a last-minute or “midnight clause”:

“Insufficient thought is [therefore] given as to how disputes are to be resolved (possibly because parties are reluctant to contemplate falling into dispute) and an inappropriate and unwieldy compromise is often adopted.”<sup>23</sup>

If the majority of arbitrations are not based on a “deliberate selection of arbitration because of its perceived advantages” and contracting parties only give “very cursory attention to the dispute resolution provisions in their contract” at the time of concluding the contract then their consent to arbitration was at best assumed and at worst unfounded and so not genuine.<sup>24</sup> In other words there never was a true consensual basis for such arbitration when the dispute actually arose. Consequently both the integrity of the award and its enforcement may be jeopardized.

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<sup>21</sup> Mustill MJ “Contemporary Problems In International Commercial Arbitration: A Response” 1989 *International Business Lawyer* 161.

<sup>22</sup> See Martor B, Pilkington N, Sellers DS & Thouvenot *SBusiness Law in Africa: OHADA and the Harmonization Process* 2<sup>nd</sup> ed (2007) 260. Particular vigilance is needed in the context of OHADA as OHADA has two different sets of arbitration legislation: there is the OHADA Uniform Act on Arbitration, or alternatively institutional arbitration under the arbitration rules of the Common Court of Justice and Arbitration under the OHADA Treaty. See para 2.4.3 above.

<sup>23</sup> *International Commercial Arbitration* para 3-02.

<sup>24</sup> A decision whether an inadequate or mistaken consent is good enough to sustain a legally valid and enforceable arbitration agreement will often turn on the particular facts and circumstances.

It has been observed<sup>25</sup> that neither the Model Law nor the national statutes in Africa drawn from it specifically provide for or deal expressly with consent as an essential prerequisite or ingredient of the arbitration agreement; and that consequently investigation of consent is left to the arbitral tribunal or court when consent is disputed or the validity of the agreement or the jurisdiction of the tribunal is challenged on this basis. In the light of these considerations the consensual basis of arbitration may be more of an illusion than a reality.<sup>26</sup> If so the assumption that arbitration is consensual is a rebuttable truism. Perhaps it is sometimes nothing more than a pragmatic legal fiction, useful but tantalizing.

### 3.1.3 The Impact of Disputed Consent

But if arbitration is not in all instances truly consensual what is the significance and consequence of the failure of genuine consent for the ensuing process?<sup>27</sup>

The significance and consequence of disputed consent are difficult challenges in arbitration and have the potential to undermine important elements or aspects of the arbitration process such as:

- (i) the contractual basis of the arbitration;
- (ii) the exercise of the arbitral jurisdiction; and
- (iii) recognition and enforcement of the award.

It may be noted here that the problem and impact of disputed consent are compounded by the involvement of multiple parties,<sup>28</sup> multiple contracts and non-signatories in arbitral proceedings. But these are particular cases which, for neatness of presentation, are considered separately below.<sup>29</sup>

In relation to the first element, the lack of consent is germane to the contractual and legal bases of the arbitral process in that the absence of genuine consent not only impinges upon

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<sup>25</sup> See para 3.1.1 above.

<sup>26</sup> In field study discussions with practising arbitrators in Kenya and abroad for purposes of this study there was common cause that the consensual basis of arbitration is often difficult to establish. See also the views of Hosking referred to below in para.3.1.6 below regarding consent in multi-party disputes.

<sup>27</sup> On significance of consent see Redfern & Hunter *International Commercial Arbitration* 148 and 157; Mustill & Boyd *Commercial Arbitration* 43.

<sup>28</sup> See Redfern & Hunter *International Commercial Arbitration* 148; Mustill & Boyd *Commercial Arbitration* 132 and 141.

<sup>29</sup> See para 3.1.6 below.

but also detracts from the validity of the agreement upon which the contractual and legal legitimacy of the arbitration is founded.

The second element flows from the first in that the impact of the lack of genuine consent means that without a valid agreement the tribunal has no jurisdiction to embark upon the process leading to the making of an award. Therefore in law and practice the importance of consent is such that if one party in arbitration proceedings proves that he was not a party to the agreement embodying the arbitration clause then the tribunal cannot exercise jurisdiction over that party. The same consequence ensues if a party concedes to the contract but proves that the arbitral clause was defective because it lacked his consent. Therefore and because the arbitral jurisdiction derives from the parties' agreement it is in everyone's interest to ensure that the arbitration clause is at least based on what amounts to a legally valid consent.

Although, depending on the facts, the validity of the arbitration agreement and the jurisdiction of the arbitral tribunal can be two separate issues, the impact of the absence of consent with regard to both the arbitration agreement and the jurisdiction of the arbitral tribunal reinforces the principle that without genuine consent there is no valid agreement and without it there is no lawful arbitration.

If there is no lawful arbitration then there can be no valid award and that is the third aspect and consequence of the absence of genuine consent.

The three aspects or consequences under discussion are therefore interrelated as they all flow from disputed consent. The specific observation with regard to enforcement is that where consent was put in issue from the beginning but for some reason the consideration of it was postponed or merged with the merits of the dispute as sometimes happens in domestic arbitration, then if consent was subsequently adjudicated to be absent, such finding can nullify the arbitral proceedings. If an award has been made it may therefore be invalidated or set aside by the court.<sup>30</sup> The award may also be denied recognition and enforcement.<sup>31</sup>

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<sup>30</sup> See the UNCITRAL Model Law Article 34(2)(a)(i) and the equivalent s 35(2)(a)(ii) of the Kenyan Arbitration Act.

<sup>31</sup> See the UNCITRAL Model Law Article 36(1)(a)(i) and the equivalent s 37(1)(a)(ii) of the Kenyan Arbitration Act. Recognition and enforcement could be withheld on this basis under the provisions referred to even without the award having been set aside. (Refusal of recognition and enforcement on the basis that the award has been set aside is covered by the UNCITRAL Model Law Article 36(1)(a)(v) and the equivalent s 37(1)(a)(vi) of the Kenyan Act.)

This may be common knowledge. Nevertheless a shift in perception and the need for change in the response to disputed consent and the treatment of the consequences can expedite and facilitate arbitration. It starts with the question whether such retrogressive consequences are desirable for parties that have applied or put their energy and resources into a contract already running for several months and even years to be confronted, at the time of dispute, with the decision by an arbitral tribunal or a court that there never was true consent to arbitrate their dispute or that the long awaited award cannot be recognized or enforced. The thrust for change is that the parties in a disputed agreement that is already in operation can and must be assisted by the law and the arbitral tribunal to resolve their dispute instead of being told they have no enforceable arbitration agreement.

This approach is supported by fact, principle and the otherwise positive purposes served by arbitration. Firstly, the contractual relationship already subsisting and evidenced by performance or part-performance could be utilized to promote a solution rather than having the arbitration clause cast aside on apparent technicalities. Secondly, the need to resolve the parties' dispute has arisen from the existing contractual relationship and the purpose of arbitration must be to resolve that dispute and not stop with the mere recognition or declaration that their agreement is imperfect. Thirdly, the doctrines of acquiescence and waiver can be called in aid to elucidate and determine what the parties may be deemed to have acquiesced in or waived by their conduct, performance or part-performance of the impugned agreement. Finally the process of finding a solution must move forward and not backwards, to a conclusion with the assistance of the tribunal. This is in line with the fact that arbitration seeks a just result rather than technical perfection.

A separate issue from consent for purposes of creating a valid agreement is whether a party can subsequently withdraw its consent unilaterally once it has been given. Neither the Kenyan nor the Zimbabwean Arbitration Act is explicit on the revocability of the consent to arbitrate and in arbitration practice in general, consent once given is not expected to be revoked unilaterally. But revocation of the arbitration agreement by mutual consent or agreement is permissible and legislation may impose formalities, in the interest of legal certainty, for the cancellation of an arbitration agreement by mutual consent of the parties. An example of national legislation on the point is found in the Nigerian Arbitration and Conciliation Act which provides:

“Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or a Judge.”<sup>32</sup>

Obviously the mutual consent to terminate the arbitration agreement is distinguishable from the mutual consent to vary the terms of the agreement. The consensual nature of arbitration makes it permissible for the parties to vary the terms of their arbitration agreement at any stage by agreement. So for example, they can agree to change their previously agreed method of appointing arbitrators, the procedure, the venue or the applicable law in an international arbitration.<sup>33</sup>

On the need for caution as to the effect of consent once given, Asante stated more than a decade ago:

“The difficulties posed by the arbitral rules of various arbitration systems are aggravated in the African perception, by the somber realization that consent of the parties is not a prerequisite to the progression of the arbitral proceedings once the tribunal is properly seized of the case.<sup>34</sup> Unwary African parties have discovered, to their dismay, that after the initial provision in a treaty, agreement or legislation accepting the jurisdiction of a particular arbitral system, the entire process can be triggered into full operation up to a definitive award even in the absence of any explicit manifestation of the respondent’s consent to the various consequential steps in the process. Thus, neither delay, default or non-participation by the respondent or defendant will prevent most arbitration systems from appointing an arbitrator for the erring party, from constituting the full tribunal, from admitting the pleadings of the claimant or plaintiff, from hearing the case or from issuing the final award against the respondent. Furthermore by virtue of this involuntary process, such an award could be enforced against the respondent in a foreign country whether he contests the proceedings or not. An African party, in these

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<sup>32</sup> See the Nigerian Arbitration and Conciliation Act s 2. S 7 of the South African Law Commission’s Draft Bill for domestic arbitration provides: “An arbitration agreement is not capable of being terminated except by the consent of all the parties in writing, unless the arbitration agreement otherwise provides, and subject to the provisions of section 9.” This provision is more specific than s 3(1) of the existing South African Arbitration Act of 1965 in that the parties’ consent is required to be in writing. (The reference to s 9 is to the provision dealing with the staying of court proceedings where the dispute is subject to an arbitration agreement.) A party may still unilaterally waive its right to rely on the arbitration agreement by participating in the court proceedings without relying on the arbitration agreement. See the Commission’s report *Domestic Arbitration* (May 2001) para 3.42.

<sup>33</sup> See Orojo & Aromo *Arbitration and Conciliation in Nigeria* 40.

<sup>34</sup> Generally a party who participates by lodging a Statement of Defence without challenging jurisdiction is deemed to have waived the right to do so (see the Kenyan Arbitration Act s 5 and the Zimbabwean Arbitration Act First Schedule Article 4).

circumstances, feels victimized by the inexorable progression of an alien process culminating in an arbitrary imposition.”<sup>35</sup>

This feeling of victimization will be accentuated if the African party signed a lengthy contract containing an arbitration clause tucked in at the end, without a clear understanding at the time of the full implications of the clause. This is a graphic illustration of a situation where there is no genuine consent.

Although Asante’s message is clear enough it is questionable whether the references to “*unwary African*”, “*involuntary process*” and “*arbitrary imposition*” are accurate or appropriate in African arbitration practice today. First, there are many more specialist Africans in arbitration practice today since Asante’s time. African states are advised on arbitration issues by local and foreign specialists and experts to belie the phrase “*unwary African*”. Secondly, once the African party is given notice and is aware of the dispute the choice of participating or not in the arbitration does not render the process involuntary. Thirdly, it follows from the second observation that the award cannot be correctly described as an “*involuntary imposition*” where a party, African or non-African has chosen to ignore the arbitration notice or not to participate or co-operate in the proceedings. Asante’s concerns must therefore be placed in time and circumstances that, it is submitted, have considerably improved if not completely changed.

The African jurisdictions under consideration and their arbitration statutes do not explicitly provide for manifestation of consent in the arbitration agreement as a specific legal requirement.<sup>36</sup> It is submitted that this situation should be remedied by an appropriate amendment to the legislation,<sup>37</sup> as it will do no good to the arbitral process and its reputation as a preferred and effective method of settling disputes if arbitral tribunals are readily inclined to assume jurisdiction and proceed to make awards that can equally and readily be set aside or refused recognition and enforcement by the courts for ignoring one of the essentials of a valid agreement, namely the existence of genuine consent to arbitrate. The inconsistency of English judicial decisions in jurisdictional disputes has been noted,<sup>38</sup> and there is no reason to expect that African judges or arbitrators in the common-law traditions that have inherited and still

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<sup>35</sup> “The Perspectives of African Countries in International Commercial Arbitration” (1993) 6 *Leiden Journal of International Law* 331.

<sup>36</sup> See n 17 above.

<sup>37</sup> See the discussion of article 1677 of the Belgian Code Judiciaire below.

<sup>38</sup> See *Russell on Arbitration* 23<sup>rd</sup> ed para 2-045 and para 3.1.5 below.

follow English judicial precedents, albeit persuasively, will act any differently in such matters. Even in the well established European systems of arbitration, common-law and civil-law systems alike, there appears to be no uniformity in the application of the principles that govern this aspect of arbitration practice.<sup>39</sup>

It is therefore proposed that a modern arbitration statute should contain a specific provision requiring the manifestation of express consent to arbitrate. A good example of such provision is Article 1677 of the Belgian *Code Judiciaire* which states:

“Every arbitration agreement shall be the subject of a written document, signed by the parties, or any other document which binds the parties and in which they **have manifested their consent** to have recourse to arbitration”<sup>40</sup> (emphasis added).

Three observations can be made. First, unlike the position under the UNCITRAL Model Law,<sup>41</sup> Article 1677 of the Belgian Code explicitly regards the function of the writing requirement as being to establish the existence of consent, rather than to facilitate proof of the content of the arbitration agreement. Second, the explicit statutory requirement for manifestation of consent would help to concentrate the minds of the contracting parties on the need to ensure that their consent to arbitrate is demonstrated from the very beginning and so avoid the kind of disputes and delaying tactics that ensue in the absence of clear provisions in the law on the subject. Third, and in line with the distinction drawn above<sup>42</sup> between the consent to arbitrate and the arbitration agreement the express reference in the arbitration clause to consent is preferred to a clause such as “all disputes relating to this contract shall be referred to arbitration”, which in essence is directed to the choice of procedure for resolving the dispute by arbitration rather than the need for manifestation of express consent. Not only the arbitral parties but also arbitrators and judges could benefit from such legislation and thus be less disposed to subjective predilections for their preferred principles of interpretation

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<sup>39</sup> These principles are noted in the discussion of incorporation by reference below.

<sup>40</sup> The translation of article 1677 provided by Cepani (Belgian Centre for the Study and Practice of National and International Arbitration), available at [www.cepani.be/EN](http://www.cepani.be/EN) is similar: “An arbitration agreement shall be agreed by the parties in writing, or by other documents that are binding on the parties **and that reveal their intent** to resort to arbitration” (emphasis added). The relevant portion of the Dutch text reads “*waarin zij blijken hebben gegeven van hun wil om het geschil aan arbitrage te onderwerpen*”.

<sup>41</sup> See the discussion of Article 7(3), as amended in 2006, in para 2.4.4.5(ii) above.

<sup>42</sup> See para 3.1.1 above.

when consent is contested. This will also be of particular assistance to parties to ad hoc or one-off contracts.<sup>43</sup>

With regard to standard-form contracts the option offered by the UK Joint Contract Tribunal (JCT) Standard Arbitration Clause, which requires the parties to choose between litigation and arbitration at the time of the contract, is a positive step in the manifestation of consent to arbitrate or litigate and may usefully be emulated by the drafters of standard-form contracts in Kenya and elsewhere in Africa.<sup>44</sup>

Lastly on this aspect, unlike other preliminary issues relating to the questioned validity of the arbitral process that may perhaps best be postponed to or merged with consideration of the merits, the issue of disputed consent once raised deserves prompt determination on the principle that if consent is non-existent or has failed there can be no arbitration and time and expense can be saved.<sup>45</sup> Suitable legislative provisions will enable the arbitral tribunal to consider the application by hearing arguments on the issue and make a ruling on jurisdiction as a preliminary issue before, if need be, proceeding with consideration of other matters or taking any further step in the process. Evidence on disputed consent can normally be expected to differ from that on the merits of the main dispute.

### 3.1.4 Principles of Interpretation

It has been noted above that arbitration legislation usually imposes formal requirements for an arbitration agreement. Compliance with these provisions does not by itself determine the existence of consent to arbitrate. Because consent to an arbitration agreement lies in the parties' common intention to submit disputes to private adjudication, arbitrators often face the task of ruling on the existence of the parties' legally valid consent to the arbitration agreement.<sup>46</sup> In view of the formal requirements, determining whether a party consented will mostly involve considering and interpreting the documentation exchanged between the

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<sup>43</sup> An arbitration clause could commence "The parties hereby expressly consent that all disputes arising out of the contract shall be referred to arbitration ...". Where, as in the case of a company, the contract is signed by an agent, the inclusion of a warranty that the agent has authority to consent to the arbitration clause could also be considered.

<sup>44</sup> The danger still exists that the party will mechanically initial the deletion involved in the selection, without availing himself of the opportunity to make an informed choice.

<sup>45</sup> An exception will arise where a party disputes the existence of consent on the basis that his agent lacked authority to enter into both the main contract and the agreement in the arbitration clause.

<sup>46</sup> Gaillard & Savage *International Commercial Arbitration* para 471.

parties.<sup>47</sup> In that exercise they apply various principles of interpretation to establish the degree of certainty required for the parties' consent to be effective and the scope of that consent.<sup>48</sup>

The following principles have been proposed to facilitate the determination of consent acceptable to the law. Although made in the context of international arbitration in a civil-law jurisdiction, it is submitted that they are equally useful in a domestic arbitration in a common-law jurisdiction.

The first is the principle of interpretation in good faith, which means that a party's true intention should prevail over its declared intention where the two are not the same. It is a less technical way of saying one must look for the parties' common intention instead of the literal meaning of the words used.<sup>49</sup>

The second is the principle of effective interpretation, which is applied where an arbitration clause can be interpreted in two ways. The preferred interpretation is that which enables the clause to be effective rather than that which renders the clause ineffective, useless or nonsensical.<sup>50</sup>

The third is the principle of interpretation *contra proferentem*, which involves interpreting an ambiguity in the agreement against the party that drafted the disputed clause.<sup>51</sup>

Two principles not favoured in international arbitration practice are the principle of interpretation *in favorem validitatis* (or *in favorem jurisdictionis*) and the principle of strict interpretation. The former is extensive and the latter is restrictive and both are deemed not to express the parties' true intention. The rationale is that the existence and extent of true consent must be discovered by using the general principles of interpretation of the arbitration agreement that are neither unduly extensive nor restrictive.<sup>52</sup> Nevertheless, when it comes to establishing the scope of an arbitration clause, as opposed to the existence of consent, English courts favour a liberal interpretation of the wording used. One of the reasons is a presumption

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<sup>47</sup> Born G *International Commercial Arbitration: Commentary and Materials* 2<sup>nd</sup> ed (2001) 185 para 16.

<sup>48</sup> Gaillard & Savage *International Commercial Arbitration* para 472.

<sup>49</sup> Gaillard & Savage *International Commercial Arbitration* para 477.

<sup>50</sup> Gaillard & Savage *International Commercial Arbitration* para 478.

<sup>51</sup> Gaillard & Savage *International Commercial Arbitration* para 479. Although this principle is more likely to be used should there be a dispute as to the scope of the arbitration clause, it is conceivable that it could be applied to determine whether the parties intended to consent to arbitration.

<sup>52</sup> See Gaillard & Savage *International Commercial Arbitration* paras 440-481. See also Hanotiau B "Problems Raised by Complex Arbitrations" (2001) 18(3) *Journal of International Arbitration* 251-360.

in favour of one-stop adjudication and the consideration that if parties to a commercial agreement containing an arbitration clause wanted, for example, to exclude a dispute regarding the validity of the contract from arbitration, it would be easy enough to say so.<sup>53</sup> However this liberal approach does not apply to a dispute between the parties as to whether there was ever a contract at all, as this would bring in issue the question of whether the parties could have consented to arbitration.<sup>54</sup>

The discussion above indicates the approach to establishing consent in the context of an arbitration clause in a contract. However, more problematic cases are those involving arbitration clauses or agreements incorporated by reference to a document outside the contract. The question that then arises is whether the reference to that document is sufficient for the parties to be bound by the arbitration provision on the basis of their legally valid consent. This problem is discussed in the next section.

### 3.1.5 The Quest for Consent in Documents Incorporated by Reference

The terms of a contract will have to be established with reference to more than one document where terms are incorporated in a written contract by reference to another document. *Russell on Arbitration* explains that:

“Ascertaining which documents constitute the contractual documents and in what, if any, order of priority they should be read is a problem encountered in many commercial transactions, particularly those involving shipping and construction. This issue has to be determined by applying the principles of construction and attempting to infer the parties’ intentions by means of an objective assessment of the evidence.”<sup>55</sup>

The investigation of other documents may lead to the discovery of an arbitration clause and this commonly occurs when the document incorporated is a standard form of contract containing an arbitration clause.

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<sup>53</sup> See *Fiona Trust & Holding Corporation & Ors v Yuri Privalov & Ors* [2007] EWCA Civ 20 paras 17-19 approved on appeal as *Premium Nafta Products Ltd & Ors v. Fili Shipping Company Ltd & Ors* [2007] UKHL 40, paras 12-14 (per Lord Hoffmann) and paras 29-32 (per Lord Hope). As the case involved an international arbitration Lord Hope referred to the liberal interpretation of the scope of arbitration clauses adopted in Germany, the United States and Australia. See too the Zimbabwean decision *Bitumat Ltd v Multicom Ltd*, Zimbabwe High Court Judgment No HH144–2000 CLOUT Case No 370, (2001) XXVI *Yearbook Comm. Arb*, where it was stated that the court should not be astute in trying to reduce the ambit of the arbitration clause.

<sup>54</sup> See the *Fiona Trust* judgment para 21 and para 34 of the judgment on appeal.

<sup>55</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) para 2-044.

However, the purported incorporation may be ineffective in whole or in part where the standard-form wording is inappropriate for the contract into which the parties seek to incorporate the clause.<sup>56</sup> *Russell on Arbitration* points out that the drafters of the English Arbitration Act 1996 were asked to provide specific guidance on whether a general reference to a document should suffice to incorporate an arbitration clause contained in that document or whether a specific reference to the arbitration clause was required, but they preferred to leave this to the court.<sup>57</sup> The position in English law since 1996 is briefly referred to below.

On the question whether a general reference to an incorporated document with an arbitration clause is sufficient for the parties to be bound by the provision for arbitration, Gaillard and Savage provide the civil-law perspective by clarifying firstly that the principle of the autonomy of the arbitration agreement from the contract is not an obstacle to the validity of an arbitration agreement incorporated by reference as the principle is irrelevant to that issue.<sup>58</sup> Secondly, they consider outdated the view of some commentators<sup>59</sup> that the requirement of writing for an arbitration agreement entrenched in some national arbitration statutes is satisfied only where the parties have specifically referred to the arbitration agreement contained in the incorporated document.<sup>60</sup> In the view of Gaillard and Savage<sup>61</sup> arbitration agreements incorporated by reference must be analysed in terms of the existence of the parties' consent for their disputes to be resolved by arbitration; and the existence and extent of that consent should be interpreted using the general principles of interpretation of arbitration agreements, that is, neither extensively nor restrictively. They assert that the only case in which a French court has refused to recognize the existence of an arbitration clause incorporated by reference was when the factual circumstances left genuine doubt as to the existence of consent.<sup>62</sup>

It seems that the question of the validity of the arbitration agreement incorporated by reference stemmed from the application of the requirement of writing in Article II of the 1958

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<sup>56</sup> For example where parties to a sub-contract purport to incorporate the arbitration clause in a main contract by reference without sufficient regard to the effect of the change of parties: compare *Russell on Arbitration* para 2-044.

<sup>57</sup> See *Russell on Arbitration* para 2-044 and the Saville Report (1996) para 42.

<sup>58</sup> Gaillard & Savage *International Commercial Arbitration* para 492.

<sup>59</sup> Gaillard & Savage *International Commercial Arbitration* para 494 n 154 cite Van den Berg AJ *The New York Arbitration Convention of 1958* (1981) at 172; and Sanders P "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Awards" (1979) 13 *International Law* 269.

<sup>60</sup> See also Gaillard & Savage *International Commercial Arbitration* para 495.1.

<sup>61</sup> Gaillard & Savage *International Commercial Arbitration* para 496.

<sup>62</sup> Gaillard & Savage *International Commercial Arbitration* para 496 at 279.

New York Convention<sup>63</sup> as adopted by the national arbitration statutes based on that Convention. Gaillard and Savage argue that “the UNCITRAL Model Law underlines that it is outdated to construe the New York Convention as requiring a specific reference to the arbitration clause itself” and that, while requiring a document in writing, the Model Law “nevertheless allows an arbitration agreement incorporated by reference”.<sup>64</sup>

The UNCITRAL Model Law states in this regard:

“The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”<sup>65</sup>

This provision has been adopted in the arbitration legislation of Kenya, Nigeria and Zimbabwe with only one very minor amendment.<sup>66</sup> Gaillard and Savage rightly criticize the language of this provision as being somewhat obscure.<sup>67</sup> However, it was not intended by its drafters as requiring a specific reference to the arbitration clause, as long as there was the intention to incorporate the general conditions, including the arbitration clause, into the contract.<sup>68</sup>

The language of the Netherlands Code of Civil Procedure is perhaps more explicit in this regard. It provides:

“The arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions<sup>69</sup>

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<sup>63</sup> Gaillard & Savage *International Commercial Arbitration* para 494.

<sup>64</sup> Gaillard & Savage *International Commercial Arbitration* para 495.1 referring to the UNCITRAL Model Law (1985) Article 7(2).

<sup>65</sup> Article 7(2), as originally adopted in 1985. UNCITRAL clarified the wording slightly in the 2006 amendment of Article 7, option I, Article 7(6): “The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make the clause part of the contract.”

<sup>66</sup> See the Kenyan Arbitration Act of 1995 s 4(4), the Nigerian Arbitration and Conciliation Act 11 of 1988 s 1(2) and the Zimbabwean Arbitration Act of 1996, Schedule, Article 7(2). All three substitute “if” for “provided that” in the original.

<sup>67</sup> Gaillard & Savage *International Commercial Arbitration* para 495.1.

<sup>68</sup> See Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law* 264.

<sup>69</sup> The Dutch is “*algemene voorwaarden*”. “Standard conditions” therefore appears unnecessarily restrictive and the phrase appears to cover “general conditions”, whether standard or not.

for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.”<sup>70</sup>

This provision makes it clear that a specific reference to the arbitration clause in general conditions is not required, and, in circumstances where the written instrument emanates from one party, the emphasis is correctly placed on the need to establish acceptance of the instrument by the other.

Again, and from the European perspective, Hanotiau has noted that:

“such incorporation by reference seems to be generally admitted by statute or case law in Western European countries. The requirement that an arbitration clause be in writing, whether by effect of a local statute or by application of article II.2 of the New York Convention has been recently interpreted by most courts, including in Switzerland, in a more relaxed fashion. The issue has rather become whether the party against whom the clause is invoked was aware of the incorporation of the related conditions or documents containing the clause in the original agreement and had a real opportunity to know their contents. When deciding the issue, the courts take into consideration various elements, whether the contract is an isolated one or whether there was an ongoing relationship between the parties, and whether the clause accords or not with trade usages.”<sup>71</sup>

As noted above, the concept of incorporation by reference is firmly entrenched in the national arbitration statutes of Kenya and the other African jurisdictions via the UNCITRAL Model Law. Any interpretation of consent in relation to documents incorporated by reference into the party’s contract ought to be in conformity with the intention of such legislation; and where necessary and appropriate, should take into account the relevant trends in leading jurisdictions.

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<sup>70</sup> Netherlands Code of Civil Procedure, Article 1021, as translated in Gaillard & Savage *International Commercial Arbitration* para 495.1.

<sup>71</sup> Hanotiau B “Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties – Issues” (2001) 18(3) *Journal of International Arbitration* 268. Other commentators cited by Hanotiau are: Van Houtte V “Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience” (2000) 16 *Arbitration International* 1, 14; De Boisseson M & Clay T “Recent Developments in Arbitration in Civil Law Countries”, 1998 *International Arbitration Law Review* 150, 152. Other contributions on the topic are Di Pietro D “Incorporation of Arbitration Clauses by Reference,” (2004) 21(5) *Journal of International Arbitration* 439, 452; Van den Berg *The New York Arbitration Convention of 1958* 172; Kaplan N *New Development on Written Form, in Enforcing Arbitration Awards Under the New York Convention* (1998) 17; Landau T “The Written Form Requirement for Arbitration Agreement: When ‘Written’ Means ‘Oral’” (2003) 11 *ICCA Congress Series* 19.

Some caution is however necessary in applying English decisions. The motivation behind the equivalent English legislation has been mentioned in the text above.<sup>72</sup> As in the case of the Model Law it is necessary to determine whether the reference to the general conditions (including the arbitration provision) is such as to make the arbitration clause part of the contract.<sup>73</sup> The English courts struggled to find a consistent approach before 1996 but a more consistent approach has now emerged.<sup>74</sup> It appears that English law will in principle accept incorporation of standard terms by the use of general words, “particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well-known market”.<sup>75</sup> In so-called “two-contract cases”,<sup>76</sup> a specific reference to the arbitration clause in the other document is required, particularly as the other party may have no actual knowledge or ready means of knowledge of the relevant terms.<sup>77</sup> While the English approach in “two-contract” cases is out of line with the jurisdictions which accept a general reference in those cases as well, the underlying principle seems to be the same: the court or arbitrator ought to investigate whether the other party, in the absence of actual knowledge, had a reasonable opportunity to become aware of the arbitration provision.<sup>78</sup>

The subtleties of older English case law appear from the following two examples. In *Secretary of State For Foreign and Commonwealth Affairs v Percy Thomas Partnership and Kier International Ltd*<sup>79</sup> Judge Bowsher QC said “where the arbitration clause is one of a set of standard conditions written especially for the purpose of incorporation in contracts of a certain type, general words in a contract of that type incorporating those terms as a whole will usually bring the clause into that contract so as to make the arbitration clause applicable to

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<sup>72</sup> See n 57 above. Based on Article 7(2) of the UNCITRAL Model Law (1985), s 6(2) of the English Arbitration Act reads: “The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.” It has rightly been said that “this provision begs the question *when* is the reference such as to make the clause part of the agreement” *Russell on Arbitration* 23<sup>rd</sup> ed para 2-045). See also *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 2530 (Comm) para 77.

<sup>73</sup> See Article 7(6) of the Model Law (2006), quoted in n 65 above.

<sup>74</sup> See *Russell on Arbitration* para 2-045.

<sup>75</sup> *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd supra* para 65.

<sup>76</sup> Particularly where a bill of lading refers to a charterparty, and possibly in construction cases where a subcontract refers to a main contract and in reinsurance cases: see *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd supra* para 62 and *Russell on Arbitration* para 2-049.

<sup>77</sup> *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd supra* paras 65 and 81. A second reason given is that the terms of the arbitration clause may require adjustment to apply to the parties to a different contract.

<sup>78</sup> Compare however *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd supra* para 87, where the court stated that once the arbitration clause was held to have been incorporated by a general reference, the question as to whether the other party actually knew or was deemed to know of the arbitration clause became academic.

<sup>79</sup> (1998) 65 Con LR 11.

disputes under that contract.” But in *Stanstead Shipping Co Ltd v Shenzhen Nantian Oil Mills Co. Ltd*<sup>80</sup> Thomas J ruled that referential incorporation could not be presumed where there was uncertainty as to what was incorporated. The court upheld an arbitrator’s decision that he had no jurisdiction where the reverse side of a computer-generated bill of lading that usually set out general conditions of carriage, including an arbitration clause, was left blank.

It is submitted that as what matters is the true intention of the parties, there ought not to be any serious divergence in arbitration practice in the use and application of the concept of incorporation by reference as long as the intention to arbitrate is apparent or can be gleaned from the incorporated clause or document; and that it is not particularly helpful to adopt an approach that is neither strict nor extensive as propagated in some European jurisdictions.<sup>81</sup> In this writer’s view the arbitrator (or court) in a disputed consent case, must endeavour objectively to discover the true intention of the parties and their consent to arbitrate from the contract and incorporated documents and other admissible evidence.<sup>82</sup> This writer had adopted this approach and applied the concept of incorporation by reference in arbitral awards that have been upheld by the High Court of Kenya.<sup>83</sup>

### 3.1.6 The Problem of Consent in Multi-Party Disputes

It was noted above<sup>84</sup> that the problem of consent required separate consideration in arbitrations involving multiple parties and non-signatories to the arbitration agreement who may have a legal or beneficial interest in the outcome of the arbitration. Multi-party arbitrations may involve several parties to one contract or several contracts with different parties that have an interest or bearing on the matters in dispute. Two separate issues need to be distinguished. A simple example of the first is a multi-party dispute involving A, B and C, where there is an arbitration agreement between A and B. The issue could then be whether or

<sup>80</sup> Commercial Court, 21 August 2000 (unreported).

<sup>81</sup> Per Gaillard & Savage *International Commercial Arbitration* para 496. As Gaillard & Savage remark in para 495.1: “Ultimately, what matters is the parties’ true intentions. There is therefore no reason to take a hostile position towards arbitration clauses incorporated by reference.”

<sup>82</sup> In contrast, there are English decisions at the highest level in support of a liberal interpretation of dispute resolution mechanisms: see *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444; *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd’s Rep 205 (PC).

<sup>83</sup> *Telkom Kenya Ltd and Postal Corporation of Kenya v Kamconsult Ltd* Civil Suit Nos 262 & 207 of 2001(OS) consolidated; *Thara v Ministry of Health of Government of Kenya*, HCCC; 7 August 2001.

<sup>84</sup> See para 3.1.3 above.

not C could participate in the arbitration of the dispute. C's consent to participation, if any, would have to be established on a legally acceptable basis.<sup>85</sup>

The second issue concerns the consolidation of separate arbitration proceedings between A and B and B and C based on separate arbitration agreements, but with some of the issues in dispute in both arbitrations being the same. The main question here is the extent to which the court or tribunal can order consolidation by a power conferred by a statute<sup>86</sup> or rules, even where not all the parties have consented, in the interests of justice and procedural efficiency.<sup>87</sup> Fundamentally, the first issue raises the question "who is bound by the arbitration agreement?" The question is answered in *Halsbury's Laws of England* as follows:

"An arbitration agreement is binding on the parties thereto and on persons claiming through or under them. Such derivative parties include an assignee, a successor by operation of law, for example, a personal representative, a trustee in bankruptcy who adopts the contract containing the arbitration agreement, and a statutory transferee of rights against insurers. The derivative party is obliged and entitled to arbitrate any claim, and can take advantage of any claim already advanced in pending arbitration proceedings by the original party so as to defeat any time bar arising before assignment or transfer."<sup>88</sup>

Under the English Arbitration Act 1996,<sup>89</sup> a "party to an arbitration agreement" includes "any person claiming under or through a party to the agreement". In the Kenyan Arbitration Act a party means "a party to an arbitration agreement and includes a person claiming through or under a party".<sup>90</sup> The Nigerian Act contains a similar provision.<sup>91</sup> Describing the same phenomenon with particular reference to the need for consent, Hosking states:

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<sup>85</sup> In that exercise several principles and doctrines may be drawn upon such as assignment, subrogation, third party beneficiary, novation, incorporation by reference, agency, estoppel, assumption of obligation, succession, "group of companies" doctrine, "single economic transaction" doctrine, and general reliance on "equity". See Hosking JM "Non-Signatories and International Arbitration in the United States: The Quest for Consent" (2004) 20 *Arbitration International* 289, 291.

<sup>86</sup> Such as the New Zealand Arbitration Act, Second Schedule; see the South African Law Commission Report on Domestic Arbitration 43-45, read together with the discussion at 35-36.

<sup>87</sup> The South African Law Commission Report favours strict application of the principle of consent.

<sup>88</sup> *Halsbury's Laws of England*, 4<sup>th</sup> ed Re-Issue, Vol 2 para 610.

<sup>89</sup> S 82(2).

<sup>90</sup> S 3(1). This provision is an addition to the UNCITRAL Model Law.

<sup>91</sup> S 57(1) of the Nigerian Arbitration and Conciliation Act defines "party" as "a party to the arbitration agreement or to conciliation or any person claiming through or under him". Under s 1 of the South African Arbitration Act 1965 a party includes a successor in title or an assign of such party or a representative recognised by law of such party, successor or assign.

“For many years arbitration practitioners have grappled with the problem of what to do with a ‘non-party’ – or more particularly a ‘non-signatory’ – to the arbitration agreement that is nevertheless integral to the resolution of the dispute that has arisen. To take a simple example, what of the corporate affiliate that has been assigned certain rights and obligations under a subsequently disputed contract: can the affiliate assignee be compelled to arbitrate; can it commence arbitration itself and can it somehow intervene in an arbitration initiated between the original contracting parties? At the heart of these questions lies the widely accepted principle that arbitration is by its nature consensual. However, in the absence of an agreement containing an arbitration clause bearing the affiliate assignee’s signature, where does one look to find evidence of such consent to arbitration?”<sup>92</sup>

This writer respectfully shares Hosking’s view<sup>93</sup> that far from being merely theoretical these questions are in fact highly relevant to the contemporary practice of commercial arbitration. Disputes involving non-signatories are inevitable in the context of business transactions involving multiple agreements and the intermingling legal obligations of numerous interrelated corporate and other entities. Although the non-signatory problem has long been associated with bills of lading and construction sub-contract disputes, it is now also found in arbitrations concerning reinsurance agreements, internet-based software licences and investment treaties.<sup>94</sup> While these observations are made with particular reference to problems in international commercial arbitrations they can in some respects also be relevant to domestic arbitration.

In considering this subject one has in effect to examine the scope of the parties’ consent to ascertain and identify the parties who are bound by the consent to arbitrate. The actual parties to the arbitration agreement who have usually signed the arbitration agreement or the contract containing the agreement are an obvious first category of parties bound by their consent. Identifying such parties poses no special problems for the arbitral tribunal. The problems

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<sup>92</sup> Hosking (2004) 20 *Arbitration International* 189. See also generally Sentner J “Who is Bound by Arbitration Agreements?” (2005) 6(1) *Business Law International*; Townsend JM “Non-Signatories and Arbitration” (1998) 8(3) *Newsletter of Dispute Resolution Law and Practice*; Hanotiau B “Arbitration and Bank Guarantees” (1999) 16(2) *Journal of International Arbitration* 15; Spence SA “Organizing an Arbitration Involving an International Organization and Multiple Private Parties” (2004) 21(4) *Journal of International Arbitration* 309-328; Pryles M “Multi-Tiered Dispute Resolution Clauses” (2001) 18(2) *Journal of International Arbitration* 159-179.

The question posed by Hosking can usually be answered by the single word “nowhere”, in line with the premise that the affiliate assignee has not signed any agreement containing an arbitration clause upon which the consent to arbitrate can be founded.

<sup>93</sup> Hosking (2004) 20 *Arbitration International* 289.

<sup>94</sup> Hosking (2004) 20 *Arbitration International* 289.

relate to the less obvious category of entities such as non-signatories, third party beneficiaries and other affiliates. The subject has generated voluminous literature.<sup>95</sup>

Indeed in seeking solutions to these problems one may benefit from the substantive domestic law theories and concepts by which non-signatories are bound by the arbitration agreement such as the concepts of assignment, incorporation by reference, the third party beneficiary, agency, equitable estoppel and “the group of companies” doctrine.<sup>96</sup> Hosking cautions however that “an over-zealous approach to ‘extending’ the arbitration agreement to non-signatories may undermine the fundamental touchstone of arbitration – consent.”<sup>97</sup>

Two more complex categories of multi-party arbitrations can be mentioned.<sup>98</sup> The first concerns the situation where individuals, corporations or state agencies combine in a joint venture or consortium and contract with another party or parties and then, when a dispute arises, the members of the consortium each desire to appoint their own arbitrator.<sup>99</sup> Two ICC cases exemplify the problem.<sup>100</sup> In *Westland Helicopters Limited v The Arab Organization for Industrialization, the United Arab Emirates, Saudi Arabia, Qatar, the Arab Republic of Egypt and the Arab British Helicopter Company*,<sup>101</sup> the claimant had commenced an ICC arbitration against six defendants and the ICC Court appointed one arbitrator for all of the defendants as part of a three-member tribunal. The Egyptian government’s objection to the composition of the tribunal in a way that did not allow each party to appoint its own arbitrator, was rejected by a Swiss court in Geneva on the ground that the parties submitted themselves to the Rules of the ICC which had been correctly applied in accordance with the Court’s normal practice.

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<sup>95</sup> See eg Vidal D “Extension of Arbitration Agreements to Non-Signatory Parties within Groups of Companies” (2005) 16(2) *ICC International Court of Arbitration Bulletin* 63-76; “Extracts from ICC Awards Relating to the Extension of Arbitration Agreements to Non-Signatories” (2005) 16(2) *ICC International Court of Arbitration Bulletin* 77-103; “Multiple Parties” in Davidson F *Arbitration* (2000); Sandrock O “Arbitration Agreements and Groups of Companies” (1993) 27 *The International Lawyer* 941-961; Sandrock O “‘Intra’ and ‘Extra-Entity’ Agreements to Arbitrate and their Extension to Non-Signatories under German Law” (2002) 19(5) *Journal of International Arbitration* 423-441; Hanotiau B “Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues.” (2001) 18(3) *Journal of International Arbitration* 251-300.

<sup>96</sup> Hosking (2004) 20 *Arbitration International* 291.

<sup>97</sup> Hosking (2004) 20 *Arbitration International* 290.

<sup>98</sup> Redfern & Hunter *International Commercial Arbitration* para 3-74 – 3-77 at 168-170.

<sup>99</sup> French Cass Civ 7 Jan 1992 (*BKMI and Siemens v Dutco*), Clunet (1992) 712 *Revue de l'arbitrage* 470.

<sup>100</sup> These cases are discussed by Schwartz E “Multi-Party Arbitration and the ICC” (1993) 10(3) *Journal of International Arbitration* 5-19. The author is a former Secretary General of the ICC International Court of Arbitration, based in Paris, France.

<sup>101</sup> Cour de Justice, Geneva, 26 November 1982, affirmed by the Tribunal Fédéral Suisse, 16 May 1983.

By contrast, in the case of *Siemens AG and BKMI Industrienlagen GmbH v Dutco Construction Co*,<sup>102</sup> Dutco commenced arbitration in Paris, as one of three parties to a consortium agreement, against its consortium parties, BKMI and Siemens. The consortium agreement related to the construction of a cement plant in Oman. Pursuant to the ICC arbitration agreement that provided for a panel of three arbitrators, Dutco nominated an arbitrator while BKMI and Siemens made a joint nomination of an arbitrator “under protest” because they were not allowed separate nominations. Their subsequent application to the Paris Court of Appeal to set aside the award was rejected by that court. On further appeal the French Supreme Court overruled the ICC Court’s long-standing practice of requiring joint nominations of arbitrators by multiple defendants in ICC cases. In the view of the Supreme Court, unless the parties agree otherwise after the dispute has arisen, two or more defendant parties cannot be required to nominate an arbitrator jointly where the claimant has had the opportunity to nominate an arbitrator on its own.

The *Dutco* decision<sup>103</sup> led to changes in arbitration rules and institutional practice. For example the 1998 editions of the LCIA Rules and the ICC Rules<sup>104</sup> contain specific provisions for multi-party arbitrations permitting the institution to appoint the entire tribunal if the co-claimants or co-respondents, as the case may be, are unable to agree on a joint nomination. It is recognized that this is a helpful way out but not perfect, as in such instances, it is the institution and not the parties that has established the arbitral panel and there is some concern that recognition and enforcement of the award may be refused under the New York Convention because the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place.<sup>105</sup>

The second complex category of multi-party arbitrations is the situation where several contracts involve different parties who have an interest in the issues in dispute, as for example, a major construction project that involves an employer, the main contractor comprising a consortium of companies, several specialized suppliers and sub-contractors all

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<sup>102</sup> French Cass Civ. 7 Jan 1992, Clunet (1992) 712 *Revue de l'arbitrage* 470.

<sup>103</sup> For reactions to *Dutco* see Seppala J “Multi-party Arbitrations at Risk in France” *International Financial Review* (March, 1993) 33; Bond S “Equality is Required When Naming Arbitrators” March 1992 *World Arbitrations and Mediation Report* 70; Jalili M “French Setback to Multiparty Arbitration” February 1992 *Mealey’s International Arbitration Report* 20.

<sup>104</sup> See the LCIA Rules article 8 and the ICC Rules article 10.

<sup>105</sup> See Article V 1(d): “The composition of the arbitral authority ... was not in accordance with the agreement of the parties ...”. The appointment nevertheless takes place in terms of express provisions of Rules to which the parties agreed, if indeed there was consent to the Rules by all the parties.

of whose contracts contain differing arbitration clauses.<sup>106</sup> In the event of a dispute the main contractor may desire to join one or more sub-contractors giving rise to problems of consolidation, joinder of parties, confidentiality of documents and conflict of arbitration clauses. Redfern and Hunter<sup>107</sup> discuss a number of possible solutions to this problem. Firstly, in commodity disputes involving string contracts, it is possible to agree on a single arbitration between the seller and the last buyer, on the basis that the award will bind and be enforceable against all the other parties in the string. Secondly, short of consolidation, concurrent hearings of separate arbitrations are also possible, with the arbitral tribunal(s) giving separate awards in each arbitration.<sup>108</sup> Thirdly, national arbitration law at the seat may permit court ordered consolidation.<sup>109</sup> The fourth and most satisfactory way of resolving such disputes is through consolidation by consent, in line with the consensual nature of arbitration. Whereas it is possible to join additional parties or consolidate separate actions in domestic courts it is difficult and sometimes impossible to do so in arbitrations that stem from party consent and agreement. This was recognized by the Commission on International Arbitration's Final Report on Multi-party Arbitrations, which stated that:

“[t]he difficulties of multi-party arbitrations all result from a single cause. Arbitration has a contractual basis; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against its will.”<sup>110</sup>

A former Secretary General of the ICC Court of International Arbitration has remarked that:

“[n]o generally acceptable solution to the manifold issues arising in multi-party arbitrations has yet been found by either the ICC or any of the dozens of other scholars, lawyers, and arbitral institutes working on this issue.”<sup>111</sup>

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<sup>106</sup> See Redfern & Hunter *International Commercial Arbitration* 171, who cite *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Bechtel Corp* [1982] 2 Lloyd's Rep 425 as an example.

<sup>107</sup> Redfern & Hunter *International Commercial Arbitration* 172-175, paras 3-80 - 3-84. See also Davidson *Arbitration* para 12.06; Orojo & Ajomo *Arbitration and Conciliation in Nigeria* 63-64.

<sup>108</sup> See the London Maritime Arbitrators Association (LMMA) Terms (2006) para 14(b) for an example.

<sup>109</sup> See for example the Netherlands Arbitration Act article 1046.

<sup>110</sup> Paris, June 1994, (the Delvolvé Report), quoted in Redfern & Hunter *International Commercial Arbitration* 169.

<sup>111</sup> Bond S “Recent Developments in International Chamber of Commerce Arbitration” in Practising Law Institute (ed) *International Commercial Arbitration: Recent Developments* (1988) 55 at 89, quoted in Redfern & Hunter *International Commercial Arbitration* 172.

On the quest for consent from multi-parties and multiple contracts it is recognized that these are difficult cases for which no one claims to have found easy solutions. The three African arbitration statutes are silent on consolidation and neither the Model Law nor the UNCITRAL Arbitration Rules provide for consolidation of different arbitrations. But the problem is not completely insuperable. Consolidation by consent of the parties is possible by coordinated arbitration clauses in the relevant contracts providing in advance for an appropriate multi-party arbitration. Under the LCIA Rules a request for joinder is possible with the consent of the applicant and the party to be joined<sup>112</sup> and this is helpful insofar as it enables all parties to be heard by the same arbitral tribunal. In this writer's experience consolidation of arbitrations and joinder of additional parties is practicable and can be facilitated by a skilful tribunal and achieved with the consent of all parties in major disputes.<sup>113</sup>

The English Departmental Advisory Committee on Arbitration Law rejected a proposal that the draft Arbitration Act 1996 should empower the arbitral tribunal or court to order consolidation or concurrent hearings because in the view of this committee it would amount to a negation of the principle of party autonomy.<sup>114</sup> The Committee's preference that the problem be solved by the agreement of the parties is reflected in section 35 of the English Arbitration Act 1996. This section allows the parties to agree that the arbitral proceedings shall be consolidated with other arbitral proceedings or that concurrent hearings be held on such terms as may be agreed. However in the absence of such agreement the tribunal has no power to order consolidation of proceedings or concurrent hearings.<sup>115</sup>

Hong Kong adopted the UNCITRAL Model Law for international arbitration in 1990.<sup>116</sup> The Hong Kong Arbitration Ordinance contains a provision for court ordered consolidation of arbitration proceedings, which initially applied to domestic arbitration, but also to international arbitration on a contract-in basis.<sup>117</sup> The operation of the provision for court ordered consolidation was later extended to apply automatically to international arbitrations as well.<sup>118</sup> This provision is a derogation from the principle of party autonomy and the consensual foundation of arbitration in that the power exists even in the absence of consent by

<sup>112</sup> See the LCIA Rules (1998) article 22(1)(h).

<sup>113</sup> In an arbitration recently concluded by this writer, a third party company, claiming a financial interest in the outcome of the arbitration, sought and was granted leave to enter the proceedings with the consent of both claimant and respondent, who had not initially anticipated such intervention.

<sup>114</sup> See the Saville Report (February 1996) paras 178-180; Redfern & Hunter *International Commercial Arbitration* 174.

<sup>115</sup> S 35(1) and (2).

<sup>116</sup> The Arbitration (Amendment) (No 2) Ordinance 1989 of Hong Kong which came into force on 6 April 1990.

<sup>117</sup> S 6B, read with s 2M.

<sup>118</sup> S 2AD, added by Act 75 of 1996 s 6.

the parties,<sup>119</sup> even though in other jurisdictions<sup>120</sup> consent is the only basis for consolidation of arbitrations.

It is therefore possible, in the absence of any statutory prohibitions, for parties in common-law jurisdictions in Africa that readily accept persuasive authorities from England and the Commonwealth to agree to confer power on the arbitral tribunal in multiple claims to consolidate claims and to order joinder of parties in arbitration proceedings as appropriate. Provisions for multi-party arbitrations exist in the London Maritime Arbitrators Association Terms 2006,<sup>121</sup> the UK Joint Contract Tribunal (JCT) Standard Form Construction Contracts,<sup>122</sup> The Federation of Civil Engineers (FCE) Sale-Contractors,<sup>123</sup> and the Grain and Food Trade Association (GAFTA) Arbitration Rules.<sup>124</sup>

An American lawyer has observed that

“the United States has developed principles, relatively unknown or underdeveloped elsewhere, that permit third-party beneficiaries to take advantage of arbitration clauses in contracts they did not sign, or that, under some circumstances, bind parties to arbitration clauses in contracts to which they were not originally party.”<sup>125</sup>

It has been suggested that a consensual approach leading to a decision by a single arbitrator or the same tribunal is preferable to the coercive approach by legislation.<sup>126</sup> This writer does not share this view because the two approaches are not mutually exclusive. It is for the refusal of consent where consent is probable and should be forthcoming but could be unreasonably withheld that legislation should intervene to concentrate the minds of the parties from the very beginning on the nature of the obligations they are about to undertake by their contract. In this

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<sup>119</sup> S 6B(3).

<sup>120</sup> Such as England: see the discussion of s 35 of the English Arbitration Act of 1996 above. Compare also the New Zealand Arbitration Act of 1996, Second Schedule, clause 2 which gives wide powers to the arbitral tribunal to direct consolidation in the first instance. See also the SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* (July 1998) para 2.72, which supported the same approach as that of s 35 of the English Arbitration Act for international arbitrations in South Africa. For a discussion of the difficult problem of consolidation see Mustill MJ “Multipartite Arbitrations: An Agenda for Lawmakers” (1991) 7 *Arbitration International* 393-402 and Mustill MJ & Boyd SC *Law and Practice of International Commercial Arbitration* 141-148.

<sup>121</sup> Para 14(b).

<sup>122</sup> 1980 edition, clause 41, 2.1.

<sup>123</sup> September 1978 Revision, clause 18.

<sup>124</sup> Rule 125, Clause 5 regulating “string arbitrations”.

<sup>125</sup> Ball M “Just Do It - Drafting the Arbitration Clause in an International Agreement” (1993) 10(4) *Journal of International Arbitration* 29 36. Decisions cited by him include *Art Galleries of Illinois, Inc v Art World, Inc* No 89 C 8940 US Dist LEXIS 5449; *Lee v Grandcor Medical Sys* 702 F Supp 252, 255 (D Colo 1988).

<sup>126</sup> See the Saville Report (February 1996) paras 178-180; SA Law Commission Report (July 1998) para 2.72.

context the advantage of legislation is in enabling to be done that which otherwise cannot effectively be done without it. It is submitted that legislation should expressly provide for consolidation and joinder of parties to facilitate arbitration and the expeditious disposal of disputes.<sup>127</sup>

It must also be said that while arbitration must serve its legitimate purposes by delivering arbitral justice there is no real merit in attributing to arbitration functions it is unable to perform or objectives it cannot achieve for lack of powers. The court system has always been available for delivery of “court-room justice”<sup>128</sup> where other procedures cannot be depended upon to do any better. Arbitration has not come to supplant the courts but to supplement it and arbitration enthusiasts should bear in mind that it is when arbitration attempts to become “alternative litigation” that it confronts the obstacles that reveal its weaknesses and must then yield to the secular superiority of the court system.

Arbitration is valuable but its services are, in essence, additional to those provided by the judicial system; and it can best deliver those services if arbitration can develop through legislation and good practices its own efficient procedural rules.

### 3.1.7 Conclusion

It is evident from this discussion and analysis that the requirement and manifestation of consent are not theoretical but real and sometimes difficult issues in arbitration practice. The consensual basis of arbitration is in some specific instances illusory and arbitration is foisted on parties to a contract containing an arbitration clause that does not reflect genuine consent to arbitrate the particular dispute that has occurred, despite the existence of the arbitration clause or agreement. The concept of party autonomy is neither an abstraction nor cast in stone<sup>129</sup> and while it serves the useful purpose of enabling arbitral parties in the first instance

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<sup>127</sup> An example of a provision for court-ordered consolidation is found in the Netherlands Arbitration Act article 1046. An arbitral tribunal may also permit the joinder of a third party but the third party must accede by an agreement in writing between him and the parties to the arbitration agreement (article 1045(3)). The joinder is therefore consensual. Compare Diamond A “Multi-Party Arbitrations: A Plea for a Pragmatic Piecemeal Solution” (1991) 7 *Arbitration International* 403 407, who favours a less drastic infringement of the consensual basis of arbitration by means of a statutory provision for court-ordered joint hearings as opposed to formal consolidation.

<sup>128</sup> The writer’s own term to differentiate “arbitral justice.”

<sup>129</sup> Lord Mustill has remarked that “party autonomy is looking a little frayed round the edges.” See Mustill “Too Many Laws” paper delivered at LCIA conference, St. John’s College, Cambridge 1-3 April 2004. In his address to the International Arbitration Conference, Boston USA, September 1996 headed “A Commercial Way to Justice” Lord Mustill cautioned that “It is now high fashion to emphasise ‘party autonomy’. It is a catch-phrase-a buzz word ... but it is important also to realize that party autonomy is an uneasy bed fellow with another article

to nominate their preferred arbitrators there are occasions when this is difficult or impossible to achieve. In such instances third parties (such as the chairman of a designated arbitral institution) are authorized by pre-existing institutional rules to make the nominations and appointments. Therefore a balance must be struck between a doctrine that does not always work and a practically convenient approach that detracts from the doctrine but is otherwise useful in finding procedural solutions that can move the arbitral process forward.

In several instances this writer, as arbitrator, has encountered situations where, despite the existence of a formally valid arbitration agreement, an arbitral party states in an affidavit or gives acceptable testimony that he did not consciously consent to the arbitration. With that in mind, an attempt is made in this study to distinguish the consent to arbitrate that may be denied, from an otherwise valid arbitration agreement.

It is submitted that disagreements about consent to arbitrate will be lessened where there is clear manifestation of party consent to arbitrate in the document or documents that provide a record of the parties' agreement. It has been noted that this is a necessary consequence from the writing requirements of an arbitration agreement and the broadening of the documentary bases of that agreement to include a "reference in a contract to a document containing an arbitration clause ... and the reference is such as to make that clause part of the contract."<sup>130</sup> It is therefore not enough for the all-important consensual foundation of arbitration to be left to conjecture or assumption from an inadequate arbitration clause in a contract or a separate agreement that does not specifically or adequately disclose party consent in clear words. If arbitration is truly consensual and consent is a *sine qua non* for arbitration then it must not be left to inference but clear words that will put the requirement of consent beyond doubt. It is submitted that legislation that provides for the express manifestation of consent to arbitrate will assist arbitral parties, the tribunal and even the court in resolving the issue of disputed consent. The Belgium Code Judiciaire Article 1677 and its specific requirement of the manifestation of consent as an essential requirement is an example of a statutory provision in point.<sup>131</sup>

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of fashion, commercial pragmatism. How can we follow the commercial way to justice and still honour the right of the parties to choose their own way to justice?"

<sup>130</sup> UNCITRAL Model Law (1985 version) Article 7(1) and (2); Kenyan Arbitration Act s 4(1)-(4); Zimbabwe Arbitration Act First Schedule Article 7(1) and (2).

<sup>131</sup> See the discussion in para 3.1.3 above.

Further, the arbitral consent is not to be taken for granted merely because of the existence of a valid underlying contract. It is therefore recommended that arbitral parties and their advisers, when scrutinising both the underlying contract and the arbitration clause, pay closer and particular attention not just to the choice of arbitration as their preferred mode of resolving their differences but also to the forms of wording and modalities of the procedure that will best fulfill their expectations. They must also bear in mind the public policy considerations on arbitrability to avoid including in the arbitration clause or agreement what may not be arbitrable under the relevant and applicable domestic law. Nevertheless some writers<sup>132</sup> prefer the arbitration clause or agreement to be drafted as broadly as possible without specifying some categories of disputes as referable to arbitration and others to the national courts, because this is what the parties usually intend. In practice, most domestic arbitration clauses commonly adopt a form of words that refer to arbitration any and all disputes within the scope of the agreement.<sup>133</sup>

Accuracy of wording is important for two reasons. First it defines the scope of the arbitration clause or agreement so as to avoid disputes as to its ambit. Secondly it also defines the scope of the arbitral mandate and by keeping the tribunal within bounds the likelihood of challenges to the arbitral mandate is thereby reduced.

It is recognized that the absence of specific consent in multiparty arbitrations is a difficult problem. It makes sense therefore where multiple contracts and multiple parties can be envisaged at the stage of preparation of such contracts to provide expressly for multi-party consent to arbitration in advance of disputes. Despite judicial attempts especially in western countries<sup>134</sup> to extend the arbitration agreement to non-signatories the problem does not go away. This may well be due to the failure to balance arbitral expediency against the fundamental requirement of party consent to arbitration in line with well established principles of fairness and justice in arbitration practice. It is suggested that the reputation of arbitration can be enhanced where the sometimes difficult conflict between arbitral expediency and arbitral justice is more often than not resolved in favour of

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<sup>132</sup> Redfern & Hunter *International Commercial Arbitration* 153 para 3-38, with reference to the recommendations of the *Final Report of the Working Group on the ICC Standard Arbitration Clause*, Document 420/318, 21 October 1991.

<sup>133</sup> This wording will only be effective to the extent that the disputes are arbitrable and the parties are of course in principle free to exclude expressly certain types of dispute from the scope of their arbitration agreement, with the result that any such disputes must be referred to court.

<sup>134</sup> Especially in construction and consumer contracts. The latter particularly have generated instances of so-called contracts of "adhesion" of the "take it or leave it" variety. See Trantina TL "Due Process Protocols and Consumer Arbitration in the United States" Conference Paper at AAA and LCIA Joint Conference, Lincoln's Inn, London, 19 March 1999.

the latter. The point to stress is that difficulties and challenges arise incrementally when the agreement to arbitrate lacks demonstrable consent or is poorly drafted so that the intention to submit to arbitration is either unclear, non-existent or lost and with it, the jurisdiction upon which the arbitration process is founded.

Neither the Model Law nor the Kenyan or the counterpart African national statutes have fully grappled with and addressed problems such as the lack of arbitral power to consolidate different arbitrations on the same issues or to join additional parties with a legal or beneficial interest in the outcome of arbitrations founded on contracts in which they were neither signatories nor parties. Therefore, and as the lack of genuine consent is the source of these problems in domestic arbitrations, national arbitration legislation can confer the appropriate power for the arbitral tribunal, rather than the court, to consolidate disputes and to join multiple parties.

### **3.2 Frequent Challenges to Arbitrators and the Arbitral Jurisdiction**

The second problem selected for discussion is the frequency and spate of challenges to which the arbitral tribunal is subjected. Challenges to the arbitral jurisdiction arising from disputed consent to arbitration and to the existence and validity of the arbitration agreement and defective arbitration clauses were discussed in the preceding section of this chapter. Other frequent challenges to jurisdiction relate firstly to the qualifications of the arbitrator and secondly to the arbitrability of the subject matter in dispute. These two sources of jurisdictional challenges and the measures for their abatement will be discussed followed by a discussion of proceedings under protest and *ex parte* proceedings which are additional hurdles to the arbitral tribunal.

#### **3.2.1 Qualifications of the Arbitrator**

Disputes about the qualifications and qualities of the arbitrator commonly involve consideration of his suitability, impartiality and competence and raise the question who is a suitable, impartial and competent arbitrator?<sup>135</sup> Such challenges are to an extent inherent in the flexibility of the arbitral procedure itself and its malleability in the senses discussed under

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<sup>135</sup> See Onyema E “Empirically Determined Factors in Appointing Arbitrators in International Commercial Arbitrations” (2007) 73 *Arbitration* 199.

“arbitration in crisis”.<sup>136</sup> As variable and adaptable as the arbitral process is for dealing with varieties of disputes so is the diversity of disciplines from which an arbitrator can be appointed. To this can be added the doctrine of party autonomy by which the parties can literally appoint anyone as arbitrator.<sup>137</sup> Yet a too literal reliance on this doctrinal right leads to difficulties that in practice create more problems for all participants in the arbitration. Therefore, although it is true that parties are free to choose anyone to arbitrate their dispute, it is equally true that an imprudent choice of a person with defects of which the parties should have been aware can result in a challenge for the removal of that person. Conversely a prudent choice can avoid or reduce the risk of challenges that waste arbitral time and increase costs.

Lane sums up the position by saying:

“We must be astute in discerning who is qualified to arbitrate. The mere fact that a person has a legal degree does not qualify him to be an arbitrator or to appear in arbitrations. Arbitrators must be skilled in the practice of arbitration and, even where they have some knowledge, he [sic] should continue to increase his learning. It is inadequate for a party, for instance, who has passed the Higher Diploma in arbitration regulated by the Association to regard himself as being qualified to act as an arbitrator for the rest of his active career. It is a skill which has to be continuously honed.”<sup>138</sup>

### 3.2.1.1 Suitability

Good sense would necessitate taking proper advice on the choice of a suitable arbitrator. In an ideal situation if parties succeed in choosing a preferred arbitrator or tribunal they have in effect exercised their freedom of appointment and, win or lose, they are more likely to accept the award from their chosen arbitrator. In domestic arbitration however two other factors engender challenges. These are (i) the fact that the arbitration clause does not usually name an arbitrator in advance<sup>139</sup> and (ii) in default of agreement the appointment is, not uncommonly, made by a third party or an institutional representative whose appointee may not command

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<sup>136</sup> See para 1.2 above.

<sup>137</sup> As Redfern & Hunter *International Commercial Arbitration* 194 para 4-39 remark, the arbitrator should nevertheless have legal capacity.

<sup>138</sup> Lane PMM “Cost Effective Arbitration” (1997) 63 *Arbitration* 5 at 6. The author is an advocate and arbitrator based in Johannesburg.

<sup>139</sup> This is not always practical as in many instances it is the nature of the dispute when it arises that can determine the suitability of the arbitrator with the requisite expertise to deal with such dispute.

the confidence of one or both parties. The way is then open for challenges, whatever the arbitrator does.<sup>140</sup>

Nevertheless the law does not prescribe any minimum qualifications for an arbitrator. It is therefore left to the parties to choose a suitable as against an unsuitable arbitrator. That, of necessity and prudence, would require pertinent and relevant advice and guidance from appropriate sources such as the experts and professionals closely involved in the area of dispute, at best to reduce the risk of choosing an unsuitable arbitrator.<sup>141</sup> Beyond this, except in the case of the arbitrator's failure to disclose relevant information,<sup>142</sup> party autonomy prevails and their chosen arbitrator can assume jurisdiction.

### 3.2.1.2 Impartiality, Independence and the Duty to Disclose

Regarding impartiality the general proposition is that an arbitrator should be impartial although no definition of impartiality is offered by statutes or rules imposing this requirement. There are scholarly writings on impartiality<sup>143</sup> from which it is understood that impartiality is appropriate and expected in several contexts such as alleviating, mediating, resolving or refereeing disputes or competitions between other parties. In such contexts impartiality is often taken to be synonymous with neutrality<sup>144</sup> and it is a role requirement for those called upon to act in this way and not to champion the cause of one party over the other.<sup>145</sup>

“One feature of the many contexts in which impartiality is in play, then, is that the party required to be impartial occupies a particular role, that of mediator, arbitrator or referee. And these roles, of course, are only relevant because of a second feature of some contexts in which impartiality is expected, namely, that they are conflictual or competitive. Hence impartiality is appropriate where there exists a conflict of interests between two or more parties, with a third party being involved to either police the conflict or to resolve it. ... It is a mistake to

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<sup>140</sup> The LCIA and ICC regard the institution's power to appoint (including approval of party nominations) as a way of ensuring quality.

<sup>141</sup> See *Russell on Arbitration*, 23<sup>rd</sup> ed, 120-122. Institutional panels are of particular value in this regard.

<sup>142</sup> See para 3.2.1.2 below.

<sup>143</sup> Lucy W “The Possibility of Impartiality” (2005) 25(1) *Oxford Journal of Legal Studies* 3-31. See also Baron M “Impartiality and Friendship,” (1991) 101 *Ethics* 836; Bentham J “Rationale of Judicial Evidence” in *Works* (1843) vol VI 350.

<sup>144</sup> In international arbitration neutrality extends beyond impartiality and an international arbitrator must be neutral not only as between the countries of the parties and their political systems but also as between their legal systems and use of legal concepts. See Lalive P “On the Neutrality of the Arbitrator and of the Place of Arbitration” in *Essays on International Arbitration* 23 (1984). See also Redfern & Hunter *International Commercial Arbitration* 201 for distinction between impartiality and neutrality.

<sup>145</sup> Lucy (2005) 25(1) *Oxford Journal of Legal Studies* 3.

think that impartiality is nothing but a stance or attitude, albeit one embedded in certain roles. For it is often the case that in competitive or conflictual contexts impartiality extends beyond the attitude of the mediator, arbitrator or referee and the specification of her role: it is also incorporated in the very process by which mediator, arbitrator or referee makes determinations.”<sup>146</sup>

Bias or partiality is easy to impute but difficult to prove. Basically the situations and circumstances that may give rise to the perception and imputation of bias so as to justify the challenge and removal of an arbitrator vary so much that they defy listing. The Kenyan Arbitration Act and the UNCITRAL Model Law attempt to deal with the problem at least in part, not by providing a detailed list of all possible connections to the parties or the circumstances that might justify a challenge, but by providing two formulas. Section 13(1) and Article 12(1) of the Model Law impose a duty on a prospective arbitrator to disclose circumstances which are likely to affect his impartiality or independence. The duty is continuous from the time when the arbitrator is approached regarding his possible appointment until the final discharge of the arbitral mandate. Section 13(3) of the Act and Article 12(2) of the Model Law then set out the “only” grounds on which a challenge may be made, namely, firstly the existence of justifiable doubts as to the arbitrator’s impartiality or independence, or secondly if he does not possess the qualifications agreed by the parties. Moreover a party who has appointed an arbitrator or made the appointment jointly with another party may only challenge the appointment for reasons which were unknown to the party at the time of appointment. In addition, a party who by reasonable diligence could have become aware of a disqualifying circumstance but failed to do so is probably in no better position than a party who knew but did not disclose the disqualifying factor from the very beginning. Although the Act and Model Law are silent on this point, the IBA Guidelines on Conflicts of Interest in International Arbitration also impose a duty of disclosure of relevant information on arbitral parties including the duty to perform a “reasonable search of publicly available information”.<sup>147</sup>

Article 12 of the UNCITRAL Model Law , which is modeled on Articles 9 and 10 of the UNCITRAL Arbitration Rules, applies the same standard of impartiality and independence to all arbitrators, whether party-appointed, sole or third arbitrators. Some important differences between the Model Law provisions and the Rules are:

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<sup>146</sup> Lucy (2005) 25(1) *Oxford Journal of Legal Studies* 3.

<sup>147</sup> See General Standard 7(a), (b) and (c) in Redfern & Hunter *International Commercial Arbitration*, Appendix F, 559.

- (i) the disclosure under Article 12 is to the person that approaches the arbitrator concerning potential appointment – whether a party, an arbitral institution, an appointing authority or a court; and the timing of the disclosure is “when [the potential arbitrator] is approached” and the circumstances must be disclosed “without delay”;
- (ii) the word “only” in Article 12(2) indicates that the grounds of challenge listed thereunder are the exclusive mandatory grounds; and the word “only” is omitted in the Rules because arbitration rules, unlike a national arbitration law, cannot purport to list exclusive grounds of challenge;
- (iii) the lack of qualification as an additional ground of challenge is another difference between Article 12 and the UNCITRAL Rules.
- (iv) the final difference is that Article 12(2) extends the bar on challenging an arbitrator on grounds of which a party has knowledge both to arbitrators appointed by that party and to arbitrators in whose appointment he has participated.<sup>148</sup>

It may be added that the duty to disclose under the Model Law Article 12, though seemingly subjective is not entirely so. This is because whereas Article 12(1) enables the arbitrator himself to assess his impartiality and independence he may still be challenged under Article 12(2) where the “question is not just whether [the arbitrator] is really impartial, but whether a reasonable outsider might consider that there is a risk that he is not.”<sup>149</sup>

The position in England is distinguishable because the English Arbitration Act 1996 imposes no duty of disclosure before an arbitrator accepts an appointment; further, an arbitrator cannot be challenged under the English Act solely for lack of independence unless this gives rise to justifiable doubts as to his impartiality.<sup>150</sup> Independence is not the same concept as neutrality which is deemed broader, a distinction more discernible in international arbitration where the chairman of a tribunal must be neutral both in relation to the countries of the parties and their political systems as well as to their legal systems and concepts.<sup>151</sup>

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<sup>148</sup> Holtzman & Neuhaus *Guide to the UNCITRAL Model Law* 390.

<sup>149</sup> Mustill & Boyd *Commercial Arbitration* 252.

<sup>150</sup> S 24(1) (a); *Russell on Arbitration* 166; SA Law Commission *Arbitration: An International Arbitration Act for South Africa* (1998) 68 n 206. This is only one of several listed grounds under which an English court can remove an arbitrator, other grounds are listed under s 24(1)(b)-(d) inclusive. In all cases, substantial injustice to the applicant must also be shown.

<sup>151</sup> *Russell on Arbitration* 167.

These considerations in relation to Article 12 of the Model Law do have a significant bearing on the interpretation of the corresponding provisions of national statutes such as the Kenya Arbitration Act 1995,<sup>152</sup> the Zimbabwe Arbitration Act 1996<sup>153</sup> and the Nigerian Arbitration and Conciliation Act.<sup>154</sup> In this connection however, the slight differences in wording in the relevant provisions of the three statutes should be borne in mind as they can affect the interpretation of those provisions. An example of a difference in wording is provided by the phrase “only if” which appears in Article 12(2) of the Model Law limiting the grounds for a challenge,<sup>155</sup> but which is omitted from the equivalent section 8(3) of the Nigerian statute. The implication is that under the Nigerian statute the limitation on the grounds of challenge to the two in Article 12, referred to above, possibly does not apply.<sup>156</sup>

A further observation is that the terms “independence” and “impartiality” that appear in the African statutory provisions are adopted by the corresponding arbitration rules exemplified by Rule 4(1) of the Arbitration Rules of the Chartered Institute of Arbitrators (Kenya Branch), which requires that an arbitral tribunal conducting an arbitration “shall be and remain at all times wholly independent and impartial.”<sup>157</sup>

The concepts of independence and impartiality are imported, with slight differences, by various institutional rules used in international arbitration practice, a useful review of which has been done by the authors Redfern and Hunter.<sup>158</sup> The LCIA Rules require all members of the tribunal to remain impartial and not to act as advocates of the parties.<sup>159</sup> Under the ICC Rules an arbitrator must at all times be independent of the parties<sup>160</sup> and may be challenged for “alleged lack of independence or otherwise”<sup>161</sup> without reference to impartiality. The explanation offered is that particularly in the context of disclosure by arbitrators prior to

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<sup>152</sup> S 13(1), (2), (3) and (4).

<sup>153</sup> First Schedule Article 12.

<sup>154</sup> S 8(1), (2) and (3).

<sup>155</sup> It is also retained in the First Schedule Article 12(2) of the Zimbabwean Act and s 13(3) of the Kenyan Act.

<sup>156</sup> The English Arbitration Act 1996 s 24(1) states that the court on application may remove an arbitrator “on any of the following grounds ...”. Although the word “only” is not used, the list of grounds in s 24(1) was nevertheless intended by the drafters of the Act as exhaustive (see the Saville Report (1996) para 100).

<sup>157</sup> Articles 9 and 10 of the Nigerian Arbitration Rules (in the First Schedule to the statute) also require that arbitrators be impartial and independent.

<sup>158</sup> Redfern & Hunter *International Commercial Arbitration* 200-201.

<sup>159</sup> Article 5.2.

<sup>160</sup> Article 7.1.

<sup>161</sup> Article 11.1. The inclusion of the words “or otherwise” would nevertheless permit a challenge on the basis of an alleged lack of impartiality.

appointment,<sup>162</sup> “independence” is a more objective concept and a function of prior or existing relationships that are capable of verification and measurement, while impartiality is a state of mind that may not be susceptible to verification at the time of appointment.<sup>163</sup> In the words of Redfern and Hunter:<sup>164</sup>

“It is generally considered that ‘dependence’ is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be susceptible to an *objective* test, because it has nothing to do with an arbitrator’s (or prospective arbitrator’s) state of mind. ... By contrast the concept of ‘impartiality’ is considered to be connected with actual or apparent bias of an arbitrator – either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a *subjective* and more abstract concept than independence, in that it involves primarily a state of mind.”

While the ICC Court stayed with “independence” the LCIA preferred the test of impartiality and independence.<sup>165</sup> Redfern and Hunter assert that there is a move towards considering “independence” and “impartiality” as a “package” and to use them as parallel tools for assessing the potential for actual or apparent bias; and that while the terms are rarely used individually they are usually joined together as a term of art.<sup>166</sup>

It is said that the most important way of trying to ensure compliance with the requirements of impartiality and independence is disclosure.<sup>167</sup> A difficulty in this context is the subtle difference between an objective test (whether the facts disclosed would create doubt in the mind of a reasonable third party), and a subjective test (whether they might create doubt in the mind of the arbitral parties). The major institutions such as ICC and LCIA provide no guidelines on matters that must be disclosed.<sup>168</sup> The International Bar Association (IBA) therefore produced in 2004 the *IBA Guidelines on Conflicts of Interest*, which set out general standards regarding impartiality, independence and disclosure with explanatory notes for the

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<sup>162</sup> See article 7.2.

<sup>163</sup> Redfern & Hunter *International Commercial Arbitration* 200 n 69, recite this explanation offered in Derains Y & Schwartz E *A Guide to the New ICC Rules of Arbitration* (1998) 109 regarding the assessment of independence at the time of appointment in the context of article 7 of the ICC Rules.

<sup>164</sup> Redfern & Hunter *International Commercial Arbitration* 201.

<sup>165</sup> See the LCIA Rules (1998) article 5.2 and 5.3 regarding the duty of impartiality and independence and the arbitrator’s duty of disclosure, which applies to both concepts, and article 10.3, which allows a party to challenge an arbitrator on the basis of justifiable doubts regarding the arbitrator’s impartiality or independence. Compare Redfern & Hunter *International Commercial Arbitration* 201, who erroneously convey the impression that the LCIA Rules only require impartiality.

<sup>166</sup> Redfern & Hunter *International Commercial Arbitration* 201.

<sup>167</sup> Redfern & Hunter *International Commercial Arbitration* 204.

<sup>168</sup> Redfern & Hunter *International Commercial Arbitration* 205.

practical application of the general standards.<sup>169</sup> After much discussion in the Working Group which compiled the Guidelines, it decided that a subjective test should generally apply to disclosure but that an objective test should apply to disqualification of arbitrators.<sup>170</sup>

It seems that while arbitration institutions will be prone to use their own internal criteria for the confirmation or disqualification of nominated arbitrators when challenged they also have the IBA Guidelines at their disposal on areas of difficulty on this subject. The IBA has acknowledged that these Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties themselves.<sup>171</sup>

As challenges contribute to delay and expense the pertinent considerations at this stage are the measures for curbing challenges relating to the suitability or otherwise of an arbitrator in light of the discussion of the criteria of impartiality, independence and the duty of disclosure. On the international plane arbitration institutions such as the ICC Court,<sup>172</sup> the LCIA<sup>173</sup> and ICSID<sup>174</sup> provide the standard and example of ensuring that their appointees as arbitrators are not challenged for lack of independence by requiring disclosure of possible conflicts of interest prior to appointment. In addition, although parties may nominate arbitrators for appointment under the rules of both the ICC and the LCIA, the institution must first confirm the nomination for a valid appointment. It will only do so if there has been due compliance with the disclosure requirements.<sup>175</sup> Domestic arbitration institutions possessing some degree of control over their members and appointing authorities who are approached to appoint arbitrators may adopt similar standards. In any event the problem of challenges has to be confronted rationally but resolutely as some challenges may have merit while others may not.

Particularly where a domestic arbitration is being conducted under ad hoc rules which do not contain a challenge procedure, a unilateral challenge<sup>176</sup> will usually be raised by the party

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<sup>169</sup> See the *IBA Guidelines On Conflicts of Interest In International Arbitration* (2004). Part I deals with the General Standards. Part II deals with the Practical Application of the General Standards divided into four separate groups of circumstances being (i) the Non-Waivable Red List; (ii) the Waivable Red List; (iii) the Orange List and (d) the Green List. The text is contained in Redfern & Hunter *International Commercial Arbitration* Appendix F 552-564.

<sup>170</sup> See the Explanation to General Standard 3 para (a); Redfern & Hunter *International Commercial Arbitration* 556.

<sup>171</sup> See the *IBA Guidelines* "Introduction" para 6.

<sup>172</sup> ICC Rules article 7(2).

<sup>173</sup> LCIA Rules article 5.3.

<sup>174</sup> ICSID Rules of Procedure for Arbitration Proceedings rule 6(2).

<sup>175</sup> See the ICC Rules article 9.2 and the LCIA Rules articles 5.5 and 7.1.

<sup>176</sup> That is a challenge made by one party only, without the support of the other party to the arbitration.

concerned with the arbitrator.<sup>177</sup> Even where an arbitrator from long practice and experience can reasonably assess the chances of success or failure of the objection it seems that the better approach is for the arbitrator to be seen to have afforded the opportunity for himself and the arbitral parties to resolve the challenge fairly and expeditiously by correct procedure. Therefore however strong the temptation for the arbitrator to brush aside an objection, it is not a rational option.

If faced with a genuine conflict of interest an arbitrator can rely on his own integrity and standing to withdraw or resign. However, immediate withdrawal or resignation on the mere indication or notification of an objection is not warranted and may even be unfair to a party and wasteful of the resources that went into the initial nomination and appointment.

Two recent challenge situations involving this writer as arbitrator illustrate the perception of conflicts of interest, partiality and the duty of disclosure. In the first example, in a dispute between a contractor and an employer for non-payment of certificates, the arbitrator disclosed that the claimant's counsel once acted professionally for the arbitrator in a civil suit. Respondent's counsel said that he himself had no problem with the facts disclosed but that his client was uncomfortable with the arbitrator in the stated circumstances. Although there was no genuine conflict of interest, the respondent's perception of bias or partiality was strong enough to influence the arbitrator's withdrawal from the case. The decision to do so was guided by ICC practice that required the prospective arbitrator to take into account whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional or of any other kind and whether the nature of such relationship is such that disclosure is called for, that is, it is of such a nature as to call into question his independence in the eyes of the parties.<sup>178</sup> On the other hand Swiss commentators<sup>179</sup> have previously decried the need to disclose mere prior acquaintance

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<sup>177</sup> See for example the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules (1998). The Rules require an arbitrator to be at all times independent and impartial (rule 4(1)), and provide for the appointment of a replacement arbitrator, if an arbitrator appointed by the Chairman of the Branch withdraws after a challenge (rule 3(2)). The Rules do not however contain a challenge procedure, with the result that the challenge should be dealt with under the Kenya Arbitration Act ss 13 and 14. S 14(1) allows the parties to agree on their own challenge procedure, failing which the arbitrator must decide the challenge. Should the challenge in either case be unsuccessful, the challenging party may take the matter further under s 14(3).

<sup>178</sup> See the ICC "Arbitrator Statement of Acceptance, Availability and Independence" form, which a prospective arbitrator must complete and sign for his appointment to be considered by the ICC Secretariat. The form is available at [www.iccarbitration.org](http://www.iccarbitration.org).

<sup>179</sup> 1990(3) *Swiss Arbitration Association Bulletin* 226-234 and 1991(2) *Swiss Arbitration Association Bulletin* 85-89.

between an arbitrator and the lawyer for one of the parties and have suggested an amendment to the ICC Rules.<sup>180</sup>

In the second example the arbitrator was challenged with the complaint that his appointment was “unilateral” and “unprocedural” as the respondent did not participate in his appointment. Evidence that the respondent and its advocate were invited but ignored the invitation to participate in the nomination and appointment of the arbitrator put paid to the complaint as to the proposed method of appointment to which the respondent had not objected. Further, although the legal basis of the complaint was alleged lack of impartiality and independence,<sup>181</sup> no facts were presented in support of that legal ground. The objection was dismissed as counsel for the respondent categorically disavowed any imputation of partiality or lack of independence on the part of the arbitrator. A further relevant aspect of this case was that although the statutory time for objecting to the arbitrator’s appointment had long expired,<sup>182</sup> both counsels nevertheless consented to the hearing and determination of the belated objection. The opportunity for doing so was granted by the arbitrator leading to the dismissal of the challenge. The refusal to resign was supported by the general principle that an arbitrator may be trusted to resign in the face of a genuine conflict of interest and a prospective arbitrator should not accept an appointment if there is reason to believe that either party may genuinely feel that he is not independent or cannot be impartial. An arbitrator should resign if the objection is or appears to be well-founded whether or not the parties agree; but if the objection appears to be without merit the arbitrator should not resign, but permit the matter to be dealt with by the relevant challenge procedure, as demonstrated in the second example above. Timely resignation will save time and expense; but even though the use of the correct challenge procedure may cause some delay it does help to discourage unmeritorious and disruptive tactics.<sup>183</sup>

In a jurisdiction such as Kenya’s in which practitioners and professionals who grew up together from school, college and church know each other quite well and interact freely in localized communities, the problem regarding independence and conflicts of interest is that much harder to deal with and prescriptions from substantially larger foreign jurisdictions must

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<sup>180</sup> It has been mentioned above that ICC Rules require factors pertaining to independence to be disclosed but do not use the term “impartiality” which is deemed a state of mind and difficult to assess.

<sup>181</sup> See the Kenyan Arbitration Act s 13(3).

<sup>182</sup> In terms of s 14(2) the challenge must be made within 15 days of the party becoming aware of the circumstances on which the challenge is based.

<sup>183</sup> See Redfern & Hunter *International Commercial Arbitration* 208. They provide (207 n 90) an informative summary showing the rising and then declining trend of challenges in ICC arbitrations from the 1980s to 2003.

be taken with considerable caution or not taken at all. In an African jurisdiction where an arbitrator has interacted with the parties in wide ranging circumstances, in church and community activities, social clubs and the like, but is nevertheless chosen because of his integrity and the respect accorded him in the community, the foreign rules or guidelines on conflicts of interest may well break down or be wholly inappropriate. That said, this writer has found the IBA *Guidelines on Conflicts of Interest* beneficial.

Ultimately, the point to emphasize is that the appointment of an arbitrator who is suitably qualified to arbitrate the particular dispute can eliminate or reduce the risk of challenge on grounds of unsuitability.<sup>184</sup>

### 3.2.1.3 Competence

The arbitrator's "competence", giving the term its dictionary definition,<sup>185</sup> has two aspects. The first aspect is directed at his aptitude and involves consideration of his personal capacity, qualities and professional qualifications. The second aspect is concerned with his jurisdictional competence (*Kompetenz-Kompetenz*).

On the first aspect domestic arbitration agreements do not, in general, name in advance a particular individual as arbitrator. It is sufficient to specify the expected qualifications and or profession such as "a legal practitioner of no less than fifteen years experience in law practice", and a special qualification such as membership of a particular association, for example, "a member of the bar" or "Fellow of the Chartered Institute of Arbitrators". The arbitrator so appointed must therefore possess the qualification specified by the arbitration agreement as otherwise the appointment can be challenged and the appointee removed.<sup>186</sup>

Similarly, in the event of party disagreement, the arbitration agreement may specify an appointing authority to make the appointment, such as "the Chairman of the East African Law Society". The appointing authority is then under an obligation to follow the procedure agreed by the parties in order to complete the cycle of qualities and qualifications prescribed by the parties, otherwise the appointment may be set aside. In the English case of *Hadjisawas v*

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<sup>184</sup> The Kenyan Act s 13(3), following the Model Law, only permits challenges on the basis of justifiable doubts regarding impartiality and independence or if the arbitrator does not possess qualifications agreed to by the parties.

<sup>185</sup> See the *Shorter Oxford English Dictionary*, which defines "competence" *inter alia* as "sufficiency of qualification, capacity".

<sup>186</sup> See the Kenyan Arbitration Act s 13(3) and para 3.2.1.2 above.

*Zampelas*, the failure by an appointing authority to follow an agreed procedure for the composition of an arbitral tribunal led to a successful challenge of the sole arbitrator's award. The Chartered Institute of Arbitrators appointed the sole arbitrator without waiting for a 42 day period to elapse after the notice of arbitration, as prescribed by the arbitration agreement. The court stated:

“If the procedure is not followed or is curtailed the party against whom the arbitration clause is invoked would be deprived of his contractual right to have the opportunity to participate in the selection of the arbitrator ... and failure to follow the procedure invalidates the jurisdiction of the default appointing body to make a default appointment.”<sup>187</sup>

The fact that these simple and seemingly straightforward requirements are often the sources of protracted discord and avoidable delay at the start of the arbitral process clearly shows the scant attention the parties and their advisers give to an arbitration clause prior to the occurrence of the dispute.<sup>188</sup>

With regard to capacity it is probably accurate to state that under most modern jurisdictions an adult natural person of sane mind and in good health can be an arbitrator.<sup>189</sup> It follows from the parties' freedom of choice that they may consciously and specifically exclude or disqualify a particular character or profession from appointment, for example, a negative requirement that the arbitrator shall not be a clergyman or one residing in the same community as either of the parties.

The second aspect of the arbitrator's competence, and the more usual meaning of the term in arbitration literature,<sup>190</sup> relates to his jurisdiction. Challenges to jurisdictional competence would usually involve consideration of the jurisdiction exercisable by the arbitrator.<sup>191</sup> This

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<sup>187</sup> Commercial Court (unreported) 29 June 2000, per Judge Dean QC. See also Akseli O “Appointment of Arbitrators as Specified in the Agreement to Arbitrate” (2003) 20(3) *Journal of International Arbitration* 247-254.

<sup>188</sup> The writer recalls an arbitration involving Kenyan and Ugandan parties conducted in Kampala in which the named appointing authority was “the Chairman of the East African Architects Association”, a body that had ceased to exist and had been replaced by “the Uganda Architects Association”. The appointment was made by the Chairman of the Uganda Architects Association. The oversight, deliberate or inadvertent, led to protracted debate on the validity of the appointment and the arbitration was in the end conducted “under notice of protest” filed by the challenging party.

<sup>189</sup> Mustill & Boyd *Commercial Arbitration* 9-10. See also para 3.2.1.1 above.

<sup>190</sup> See Redfern & Hunter *International Commercial Arbitration* 248 para 5-30; *Russell on Arbitration* (23<sup>rd</sup> ed) 145 para 4-070.

<sup>191</sup> The distinction between “jurisdiction” and “powers” of the arbitral tribunal is clarified further below (see para 3.2.2 below). *Russell on Arbitration* (23<sup>rd</sup> ed) 145 para 4-070 points out the need to distinguish between the tribunal's powers and its jurisdiction (competence). Without jurisdiction it cannot determine the dispute at all. If

can be gleaned from the terms of the arbitration agreement which is the source of the arbitrator's jurisdiction. In consensual arbitration the competence (authority) of the arbitrator comes from that agreement. Various stated, this means the tribunal must stay within the terms of the reference, or must not exceed its mandate or must conform to its mission. Whether stated with reference to the arbitrator's competence, authority or mandate, the tribunal must not exceed its jurisdiction or it will face challenges to its jurisdiction, which may be a partial or total challenge.<sup>192</sup>

A partial challenge goes to only some but not all of the claims before the arbitrator and may be resolved by agreement. A total challenge assails the very foundation of the tribunal and is therefore more serious and requires a decision as to whether the tribunal is validly created. Total challenges arise more particularly from arbitration clauses contained in a contract in contradistinction to submission agreements. Instances of total challenges are where a party contends (i) that it is not bound by the clause because it is contained in a document assented to by only the opposing party; or (ii) that it was assented to by a different legal entity; or (iii) that the agreement was not in writing; or (iv) the dispute is outside the scope of the arbitration agreement; or (v) that the claim is time-barred; or (vi) that the arbitration clause is inoperative or incapable of performance; or (vi) that the dispute is not arbitrable under the applicable law.<sup>193</sup>

The fact that challenges under items (i) and (ii) involve disputed consent demonstrates to some extent the interaction between that subject and challenges to the jurisdictional competence of the arbitrator.

The affinity between the concepts of "power", "jurisdiction" and "competence" is demonstrated by the fact that the power of the tribunal to decide upon its own jurisdiction is also its power to decide on its own competence.<sup>194</sup> How does this power operate, and what is its significance? The UNCITRAL Model Law and its national derivatives such as section 17(1) of the Kenyan Arbitration Act give the tribunal power to determine its own

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it has jurisdiction, it must consider the extent of its powers in determining how to conduct the reference. Compare too the English Arbitration Act 1996 s 68(2)(b), in the context of the setting aside of the award for serious irregularities, which refers to "the tribunal exceeding its powers, otherwise than by exceeding its substantive jurisdiction", with the latter being dealt with under s 67.

<sup>192</sup> See Redfern & Hunter *International Commercial Arbitration* 248-249 paras 5.30-5.31.

<sup>193</sup> Redfern & Hunter *International Commercial Arbitration* 250 para 5.35.

<sup>194</sup> The French form is *Compétence de la Compétence*, or more briefly *compétence-compétence* (see Gaillard & Savage *International Commercial Arbitration* 396-397 for the difference between the original meaning of *Kompetenz-Kompetenz* and *compétence-compétence*.) For distinctions between power and jurisdiction see text to footnote 220 below.

jurisdiction,<sup>195</sup> but this power is neither exclusive nor final.<sup>196</sup> It has been noted that a total challenge to the arbitrator's jurisdiction is more fundamental and serious because it challenges the very validity of the existence of the tribunal. The tribunal that is challenged must exist, or have been formally appointed,<sup>197</sup> before the legitimacy of its existence can be impugned. Therefore the doctrine of competence/competence enables the arbitral tribunal that has been purportedly or ostensibly created, and whether validly or invalidly, to entertain the challenge of its jurisdiction and rule on it. In effect it is an inherent power that is also formally enacted in the Model Law.

### 3.2.2 Challenges to the Arbitral Jurisdiction: Illustrative Judicial Decisions

Jurisdictional challenges are wide ranging. In the context of the discussion so far, the following English illustrative decisions based on the 1996 Arbitration Act relate to disputed consent and jurisdictional competence. First it is observed that since the 1996 Act, English courts are recorded to have set aside numerous arbitral awards for want of jurisdiction *ratione personae*;<sup>198</sup> but secondly, that the courts have not been consistent in dealing with jurisdictional challenges.<sup>199</sup>

In *Hussman (Europe) Ltd v Al Ameen Development and Trade Co*<sup>200</sup> Hussman Europe Ltd ("Hussman") entered into a distributorship agreement in 1990 with Al Ameen Development & Trade, based in Saudi Arabia. The latter was a sole proprietorship that operated in the form of an "Establishment".<sup>201</sup> In early 1994 the Establishment formally transferred its business to a limited liability company, formed by its sole proprietor ("the company").<sup>202</sup> The

<sup>195</sup> Model Law Article 16(2) and (3). See too the UNCITRAL Rules Article 21(1) and (2).

<sup>196</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 479. The tribunal's decision on jurisdiction, depending on the circumstances, is subject to court review under Article 16(3) of the Model Law or Article 34(2) or Article 36(1)(a) and is therefore not final. A court may also have to establish aspects of the tribunal's jurisdiction when deciding whether or not to stay court proceedings so that a dispute can be referred to arbitration under Article 8. The tribunal's power is therefore not exclusive.

<sup>197</sup> The Model Law Article 16(2) states that a party is not precluded from challenging the jurisdiction of the tribunal by the fact that it participated in the appointment of the tribunal.

<sup>198</sup> Shackleton "Annual Review of English Judicial Decisions on Arbitration – 2000" (2001) 4(6) *International Arbitration Law Review* 178-201.

<sup>199</sup> In most significant respects the English Act reflects the Model Law provisions; but there are also significant differences in context between Article 16 of the Model Law and the English provisions such as s 31 ("Objection to substantive jurisdiction of the tribunal"), s 32 ("Determination of preliminary point of jurisdiction") and s 67 ("Challenging the award: substantive jurisdiction"). Note also that s 30 divides challenges to the tribunal's jurisdiction into three categories: (i) where there is a valid arbitration agreement; (ii) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

<sup>200</sup> [2000] 2 Lloyd's Rep 83; [2000] EWHC 210 (Comm).

<sup>201</sup> See para 3 of the judgment.

<sup>202</sup> Para 6.

distributorship agreement contained an arbitration clause. In early 1997 Hussman commenced arbitration proceedings against the Establishment. The company defended the arbitration proceedings and brought a counterclaim substantially in excess of the claim. Hussman's objection at the commencement of the arbitration hearing that the company was not a party to the distribution agreement and therefore to the arbitration clause was dismissed by the arbitral tribunal. The tribunal then made an award in favour of the company on its counterclaim.<sup>203</sup> Hussman therefore challenged the award in court on the basis that the tribunal lacked jurisdiction to make an award in favour of the company,<sup>204</sup> contending that it had contracted only with the Establishment and that the company was never a party to the contract. The court found that the governing Saudi law required Hussman's consent to the assignment of the Establishment's business to the company, and held that Hussmann had neither expressly nor impliedly consented.<sup>205</sup> It therefore allowed Hussman's jurisdictional challenge.<sup>206</sup>

Whether or not one agrees with the judge's factual findings in the particular case, the strict enforcement of the requirement of consent is in accord with the approach recommended above.<sup>207</sup>

In contrast, in *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd*,<sup>208</sup> the tribunal's substantive jurisdiction was challenged in court,<sup>209</sup> on the basis that the contract containing the arbitration clause was assigned to a successor company that was not a signatory to the original contract. The challenge failed because the court saw no reason why, as a matter of English law, succession to a contract should not also entail the transfer of the arbitration clause.<sup>210</sup>

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<sup>203</sup> See paras 7 and 11.

<sup>204</sup> See paras 1 and 14. The court pointed out that under the English Arbitration Act the tribunal was first entitled to rule on its own jurisdiction and that the tribunal had done so. When that finding is challenged it is then up to the court to decide under s 67 whether the tribunal had jurisdiction. For a detailed discussion of s 67 see *Russell on Arbitration* (23<sup>rd</sup> ed) 476-484.

<sup>205</sup> See paras 14 and 17. Although Hussmann mistakenly described the Establishment as a company in its notice of arbitration, it used the registration number of the Establishment, which differed from that of the company. The court accepted that Hussman was referring to the original party to the distribution agreement (see para 17(4)).

<sup>206</sup> The court also held that s 5(5) of the English Arbitration Act, in terms of which an arbitration agreement exists when its existence is alleged by one party and not denied by the other, had no application, as Hussman referred to an agreement with the Establishment, not with the company (para 20).

<sup>207</sup> See para 3.1 above.

<sup>208</sup> [2000] 2 Lloyd's Rep 550.

<sup>209</sup> Under the English Arbitration Act s 67.

<sup>210</sup> See too *Russell on Arbitration* (23<sup>rd</sup> ed) 99 para 3-018, where reliance is also placed on the definition of a party to an arbitration agreement in s 82(2) of the Act.

An award was set aside on jurisdictional grounds in *American Design Associates v Donald Install Associates*<sup>211</sup> by Judge Bowsher QC because although the standard form contained an arbitration clause and work was done, the court was satisfied that the parties' contractual negotiations were inconclusive. The court could find "nothing in any letters passing between the parties which I read as either express or implied agreement for arbitration in England".

English courts appear more liberal and less prone to formalism with regard to challenges to jurisdiction *ratione materiae*.<sup>212</sup> For example, in *Weldon Plant Ltd v Commissioner for the New Towns*,<sup>213</sup> Judge Humphrey Lloyd QC, in dealing with an application for the partial setting aside of an award<sup>214</sup> on the basis that the arbitrator had decided an issue not referred to arbitration, suggested that the principles in section 1 of the Arbitration Act<sup>215</sup> require the courts to read an award "supportively" in a manner "which is likely to uphold it rather than to destroy it". On the facts, the judge concluded that the award should be read so as to conclude that the arbitrator had not ruled on an issue outside the reference.<sup>216</sup>

However, in dealing with a jurisdictional challenge regarding the extent of the arbitral tribunal's substantive jurisdiction, that jurisdiction will first have to be established with reference to the arbitration agreement, the request for arbitration and the statements of claim and defence in order to determine the issues in dispute that were actually referred to the tribunal for decision. In the context of statutory adjudication,<sup>217</sup> the English courts have adopted a liberal approach to subject-matter jurisdiction that marks an important move away from formal textual analysis of reference documents. In *Fastrack Contractors Ltd v Morrison Construction* Judge Thornton QC stated:<sup>218</sup>

"A vital and necessary question to be answered when a jurisdictional challenge is mounted is what was actually referred? That involves a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force,

<sup>211</sup> Unreported, 9 November 2000, TCC.

<sup>212</sup> Shackleton (2001) 4(6) *Int ALR* 178-201.

<sup>213</sup> [2000] BLR 496 at 503; [2000] EWHC Technology 76, para 22.

<sup>214</sup> Under s 67(1) and (3) of the English Arbitration Act.

<sup>215</sup> S 1 states that Part I of the Act is based on the principles set out in s 1 and that Part I must be construed accordingly. See para 2.6 above for these principles.

<sup>216</sup> See paras 23 and 24 of the judgment.

<sup>217</sup> In terms of Housing Grants, Construction and Regeneration Act 1996 s108. The decision of the adjudicator is binding on the parties and may be enforced by the court, but after completion of the contract the adjudicator's decision can nevertheless be referred to arbitration or to court (depending on the parties' preference) for reconsideration.

<sup>218</sup> [2000] BLR 168 at 176-177; [2000] EWHC Technology 177, para 20.

must be construed against the underlying factual background from which it springs, which will be known to both parties.”

Although this statement concerned a challenge to the jurisdiction of an adjudicator, it is submitted that a similar approach should be adopted in the context of arbitration, particularly bearing in mind that arbitration is intended to be a less technical and formal process than litigation in the courts.

Before leaving this topic it must be mentioned that although the terms “powers” and “jurisdiction” are sometimes used interchangeably the concepts are distinct.<sup>219</sup> There is no comprehensive statement of the powers exercisable by the arbitrator beyond those expressly or impliedly conferred by the arbitration agreement. On the one hand, where the arbitrator has **power** to fulfill the arbitral mandate or mission he is deemed to be competent and in that context may only be challenged for exceeding the authority conferred by that power. However the term “powers” can be used, for example in legislation, to refer simultaneously both to the power to conduct the reference and to substantive jurisdiction.<sup>220</sup> On the other hand where the arbitrator lacks **jurisdiction** he lacks competence and cannot assume the authority to exercise the powers that enable him to arbitrate the dispute.<sup>221</sup> It is not surprising that the correlation between the interchangeable senses of the two concepts creates confusion because, simply put, the arbitration agreement which confers jurisdiction also entails and confers the power, authority and competence to act as arbitrator.

The difference between the concepts “excess of powers” and “excess of substantive jurisdiction” in terms of the English Arbitration Act is illustrated by the English case of *Lesotho Highlands Development Authority v Impregilo SpA*.<sup>222</sup> Briefly, in an ICC arbitration held in London involving a dispute arising from the contract awarded by the Lesotho Highlands Development Authority (“LHDA”) for the construction of the Katse Dam in Lesotho, the tribunal awarded the contractors an amount payable in European currencies and

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<sup>219</sup> These concepts are considered in greater detail in the context of the cases discussed in the text below. For the affinity between the concepts see the text to footnote 195 above.

<sup>220</sup> See the South African Arbitration Act 42 of 1965 s 33(1)(b) where one of the grounds on which an award may be set aside by the court is where the tribunal “has exceeded its powers”. Unlike the English Arbitration Act in which exceeding substantive jurisdiction (s 67) and exceeding other powers (s 68(2)(b)) are dealt with separately, by necessary implication s 33(1)(b) of the South African Act covers both situations.

<sup>221</sup> Compare the South African case of *Vidavsky v Body Corporate of Sunhill Villas* 2005 5 SA 200 (SCA). The arbitrator erroneously used his default powers in s 15(2) to proceed with the hearing in the absence of a party, when that party had not received proper notice of the hearing. The arbitrator clearly committed a gross procedural irregularity and arguably exceeded his powers, but he was not, as the court appears to decide (para 12), lacking in substantive jurisdiction as a result of the error. See also the text below on this case.

<sup>222</sup> [2005] UK HL 43.

not in Maloti, the Lesotho currency.<sup>223</sup> Because the Maloti, then linked to the South African Rand, had depreciated sharply against the European currencies the substantial award was challenged by LHDA in the English courts. Section 69 of the English Arbitration Act 1996 allows a limited right of appeal on points of law. Having chosen an ICC arbitration and so contracted out of a section 69 appeal,<sup>224</sup> LHDA first turned to section 67 which allows an award by the tribunal to be challenged for lack of substantive jurisdiction; but this approach was subsequently abandoned in the hearing before the Court of Appeal in preference for section 68(2)(b) and the challenge was then founded on a serious irregularity resulting in substantial injustice through “the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction ...)”. The statutory distinction between excess of substantive jurisdiction (section 67) and excess of powers (section 68) is at this stage poignant. The ultimate issue for determination was whether “an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power under section 68(2)(b) so as to give the court power to intervene, rather than an error of law, which can only be challenged under section 69 if the right of appeal has not been excluded.”<sup>225</sup>

It was therefore necessary to decide for purposes of section 68(2)(b) whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power which it did have.<sup>226</sup> On the currency point the court decided that there was no more than an erroneous exercise of the power available under section 48(4),<sup>227</sup> that is, the erroneous exercise of the power that actually existed. Therefore a mere error in law does not amount to an excess of power. It seems that “excess of substantive jurisdiction” applies to **what** the tribunal is authorized to decide, in contrast to “excess of powers” which perhaps refers to **how** the decision is made.<sup>228</sup> It is also said that:

“[i]f ... [the arbitrator] applies the correct remedy, but does so in an incorrect way – for example by miscalculating the damages which the submission empowers him to award – then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does

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<sup>223</sup> See paras 4 and 12 of the judgment.

<sup>224</sup> As a result of ICC Arbitration Rules article 28.6. See para 3 of the judgment.

<sup>225</sup> The issue as formulated by Lord Steyn, in para 3 of the judgment.

<sup>226</sup> See para 24 of the judgment.

<sup>227</sup> Under s 48(4) “the tribunal may order payment of a sum of money, in any currency”.

<sup>228</sup> Synthesized from conference papers in Amasike CJ (ed) *Arbitration & Alternative Dispute Resolution in Africa* (Arbitration and Alternative Dispute Resolution in Africa, Nigeria 2007) 50 60, citing Park WW “The Nature of Arbitral Authority: a Comment on Lesotho Highlands” (2005) 21 *Arbitration International* 483 486 n 17.

not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure.”<sup>229</sup>

While accepting that the statement of principle by the House of Lords in *Lesotho Highlands* that a mere error of law will not amount to excess of power was correct, as a matter of statutory construction one commentator, Main, contends that the apparent clarity which the principle offers is illusory and the distinction between “mere errors of law” and “excess of jurisdiction” is “conceptually weak and impossibly difficult to apply in practice in all but the simplest of cases”.<sup>230</sup> He argues that:

“[t]he difficulty with the concept is that every order made by a tribunal is premised on a judgment as to its lawful powers, and every act in excess of its powers is therefore necessarily premised on an error of law. Conversely, whenever a tribunal makes an order which it would not otherwise have made had it not committed an error of law, it necessarily acts in excess of its powers, because it has no original jurisdiction.”<sup>231</sup>

The validity of this comment is debatable for blurring the distinction between the arbitral tribunal exceeding its substantive jurisdiction and other instances of the tribunal exceeding its powers typically in procedural matters. It also ignores the differences in the remedies afforded by the applicable law in those two instances. For example, under section 39 of the Kenyan arbitration statute, an error of law arising in domestic arbitration can, by agreement of the parties, be a ground of appeal; whereas under section 35(1)(iv) an excess of jurisdiction in a matter not contemplated by or falling within the terms of the arbitral reference, may be a ground for setting aside the arbitral award.

To this writer the problem in *Lesotho Highlands* is that the respondent’s complaint about an error of law by the arbitral tribunal was, as a matter of law, appealable under section 69, the right to which was not available by the choice of an ICC arbitration. Challenging the award, not for the error of law but for the tribunal’s excess of power, was from the outset an exercise in futility. Section 67 dealing with lack of substantive jurisdiction was unavailable because the tribunal quite clearly had jurisdiction to determine the substance of the dispute on merits. Thereafter to equate an error of law with excess of power under section 68(2) (b) was a

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<sup>229</sup> Mustill & Boyd *Commercial Arbitration* 555 quoted by Lord Steyn in *Lesotho Highlands*, para 25.

<sup>230</sup> Main HA “Court Supervision of Awards and the Interpretation of the Arbitration Act 1996” (2005) 71 *Arbitration* 368 371. See also Main HA “Court Ordered Interim Relief: Developments in English Arbitration Law” (2005) 22(6) *Journal of International Arbitration* 505 506.

<sup>231</sup> Main (2005) 71 *Arbitration* 371.

spurious argument rightly rejected by the House of Lords. In hindsight, as the English Arbitration Act has defined categories of challenge under specific statutory provisions it is necessary for a complainant to place itself within the prescribed statutory categories of challenge or lose the fight. In the end the attempt to transpose a section 69 grievance to section 68 was for the court an exercise in statutory interpretation. The philological challenge of distinguishing between the seemingly interchangeable terms “excess of power” and “excess of jurisdiction” was a task the court did not embark upon. Perhaps the explanation, in part, was Lord Phillips’ observation that “the concept of an excess of power that is not an excess of jurisdiction is not an easy one”.<sup>232</sup>

Another illustration of problems in distinguishing between the substantive jurisdiction and procedural powers is in a South African judicial decision<sup>233</sup> in which the court concluded that the failure of the arbitrator to give proper notice of the hearing meant the arbitrator lacked jurisdiction to proceed with the hearing. On the facts the arbitrator quite clearly committed a gross procedural error which, in the light of the clarifications offered by the House of Lords in *Lesotho Highlands*, and Mustill and Boyd, as noted above, was not tantamount to acting outside his substantive jurisdiction.<sup>234</sup>

### 3.2.3 Arbitrability

Arbitrability is another source of challenges to the arbitral jurisdiction.<sup>235</sup> The courts apply the doctrine of arbitrability to determine whether the subject matter of a dispute which the parties have by agreement referred to arbitration is indeed capable of resolution outside the court system in the light of the relevant public policy considerations.<sup>236</sup> When the issue of arbitrability arises it involves a determination as to whether the tribunal or the court is the appropriate forum for resolving the subject matter of the dispute.<sup>237</sup> In Kenya the application

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<sup>232</sup> The *Lesotho Highlands* judgment para 51. On the various provisions of the English Arbitration Act dealing with the tribunal’s substantive jurisdiction, see Aeberli P “Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map” (2005) 21 *Arbitration International* 253-299.

<sup>233</sup> *Vidavsky v Body Corporate of Sunhill Villas* 2005 5 SA 200 (SCA).

<sup>234</sup> For another notable comment provoked by *Lesotho Highlands*, see Park (2005) 21 *Arbitration International* 483-491.

<sup>235</sup> See generally on arbitrability, Redfern & Hunter *International Commercial Arbitration* 138-145; Gaillard & Savage *International Commercial Arbitration* 312-359; Sanders P “The Domain of Arbitration” *Encyclopaedia of International and Comparative Law* vol XVI, ch 12; Hanotiau B *The Law Applicable to the issue of Arbitrability* (1998).

<sup>236</sup> Fortier LY “The Principle and Practice of Arbitrability: Do we have the Ability to Deal with the Consequences”: LCIA Colloquium, Cambridge, 3 April 2004.

<sup>237</sup> Arbitrability in this context is sometimes termed “objective arbitrability” to distinguish it from “subjective arbitrability”, which is concerned with the capacity of certain persons or entities (particularly state entities and

is commonly made under section 6 of the Act. The issue can arise (i) when a party tries to prevent the enforcement of the arbitration agreement in court on the basis that the dispute is not arbitrable;<sup>238</sup> (ii) on application to stay the arbitration when the opposing party claims the tribunal lacks authority to determine a non-arbitrable dispute; (iii) during arbitration proceedings when an objection is taken that the tribunal lacks substantive jurisdiction; and (iv) on an application to challenge the award or oppose its enforcement.<sup>239</sup> Arbitrability, which involves the question whether a particular dispute can be arbitrated as a matter of law is distinct from the question as to what dispute falls within the scope of an arbitration clause or agreement, which is a matter of interpretation of the clause or agreement.<sup>240</sup> In the light of this clarification it is apparent that a simple arbitration clause of the sort frequently encountered in domestic arbitration, such as:

“[a]ny differences or matters in dispute between the parties shall be referred to an arbitrator for determination ...”

can be misleading, as not every difference or matter in dispute is susceptible to determination by an arbitral tribunal in the relevant jurisdiction.

Different jurisdictions use different terminology and definitions to describe arbitrability. Asouzu states that most first generation arbitration laws<sup>241</sup> in Africa enumerate subject matters that cannot be arbitrated. He cites as an example the Ghana Arbitration Act of 1961 which provides that:

“an arbitration agreement may cover issues between parties which are capable of being the subject of civil action but that an award should not be made affecting the status of a person or thing or determining any interest in property except as between the parties themselves.”<sup>242</sup>

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local authorities) to submit disputes to arbitration (see Gaillard & Savage *International Commercial Arbitration* 312-313). Asouzu *International Commercial Arbitration and African States* 146 refers to “subject-matter arbitrability” rather than objective arbitrability.

<sup>238</sup> In response to an application under Article 8 of the Model Law for enforcement of an arbitration agreement by the court.

<sup>239</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 15 para 1-034; compare Mustill & Boyd *Commercial Arbitration* 149.

<sup>240</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 15 para 1-033. Some American judges use arbitrability to have a different meaning, namely whether the scope of the arbitration agreement is wide enough to cover the particular dispute. See Paulsson J “Arbitrability, still through a glass darkly” *ICC International Court of Arbitration Bulletin* (1999 Special Supplement) 95 n 2; compare Park WW “The arbitrability dicta in *First Options v Kaplan*” (1996) 12 *Arbitration International* 137 143-144.

<sup>241</sup> See para 2.4.2 above for the meaning of this term.

<sup>242</sup> See s 5(2) and Asouzu *International Commercial Arbitration and African States* 147.

It is submitted that definitions like this are too broad in their scope and so lacking in precision as to leave much interpretative work for the courts, which is not a desirable end in modern arbitration.

The English common law position on arbitrability is that

“[a]dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction.”<sup>243</sup>

Mustill and Boyd<sup>244</sup> state that in English law as a general principle “any dispute or claim concerning legal rights which can be subject of an enforceable award is capable of being settled by arbitration”. As an award dealing with a non-arbitrable subject matter is not enforceable, this statement of principle is not sufficiently definitive of what is arbitrable under the English common law.<sup>245</sup> The English Arbitration Act of 1996 simply preserves the common law on matters that are not capable of settlement by arbitration, without attempting to indicate what those matters are.<sup>246</sup> In this writer’s opinion the English common-law position on arbitrability as preserved by the 1996 Act lacks precision and in an African context would leave even wider the doors that are already open to judicial intervention and interpretation of arbitrability.<sup>247</sup>

The most important constraints on the arbitrator’s powers regarding the substantive issues that he may decide on are public policy considerations, the fact that his decision is binding only on the parties who appointed him and no one else, and that he cannot impose judicial remedies in the form of fines and penalties. Some expert views on the subject are instructive. Asouzu, after a wide-ranging discussion of the provisions on arbitrability in a range of third generation arbitration laws in Africa,<sup>248</sup> comes to the following conclusion:

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<sup>243</sup> Halsbury’s Laws of England 4<sup>th</sup> ed vol 2.

<sup>244</sup> Mustill & Boyd *Commercial Arbitration* 149.

<sup>245</sup> *Russell on Arbitration* 15 n 125 states that while the English courts have frequently considered the scope of particular arbitration clauses, the issue of arbitrability has received little attention from the English courts.

<sup>246</sup> See s 81(1)(a).

<sup>247</sup> For other commentaries in Commonwealth jurisdictions see Reddy V & Nagaraj V “Arbitrability: The Indian Perspective” (2002) 19(2) *Journal of International Arbitration* 117-149; Morrison J “Defining the Scope of Arbitrable Disputes in Australia: Towards a ‘Liberal’ Approach?” (2005) 22(6) *Journal of Internatinnall Arbitration* 569-572.

<sup>248</sup> Asouzu *International Commercial Arbitration and African States* 147-157. He also discusses in detail the proposals of the SA Law Commission on arbitrability.

“The trend in third generation arbitration law is to define arbitrable subject matter widely, except for those disputes which parties may not themselves settle, especially matters with public policy implications or relating to personal status, or those that are otherwise excluded as being against public policy or patently contrary to enactments of a fundamental nature.”<sup>249</sup>

The English commentators Brown and Marriott state:

“There is now a recognized trend in England and in developed jurisdictions elsewhere, to broaden the range of disputes which may be submitted to arbitration and to interpret the scope and meaning of arbitration clauses and agreements widely and favourably. There are indications that the powers given to arbitrators particularly with respect to interim orders including injunctive relief are being clarified and expressly provided for ... . This reflects the change manifest in England and elsewhere in the relationship between the courts and the arbitral process, to permit in the public interest the wider development of arbitration as a private and independent system of resolving disputes which otherwise would fall to be adjudicated in these courts. ... The courts are also increasingly prepared to see issues arbitrated which touch and concern vital public and political interests.”<sup>250</sup>

Part of the problem with arbitration and arbitrators is therefore not so much with the demonstrable shortcomings of the arbitral system such as the lack of punitive sanctions,<sup>251</sup> than with conventional fears that adjudication is traditionally the domain of judges. It is thus interesting and informative to read that:

“[j]udges and arbitrators work together as laborers in the same vineyard of justice. The procedural differences are less important than the substantive common purpose.”<sup>252</sup>

It is this writer’s view that a modern doctrine of arbitrability ought to promote predictability by prescribing in advance through legislation, as has been attempted in Zimbabwe,<sup>253</sup> what is **not** arbitrable and so reduce jurisdictional challenges founded on individualistic notions of arbitrability.

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<sup>249</sup> Asouzu *International Commercial Arbitration and African States* 158. Asouzu 158 notes that in Ghana customary law arbitration is being regulated by statute and made applicable to a wider range of disputes and he hopes that other African states might emulate this example. See also Redfern & Hunter *International Commercial Arbitration* 139 on the importance of public policy in the context of arbitrability. See further para 3.2.4 below regarding how arbitrability has been dealt with in some modern African arbitration statutes.

<sup>250</sup> Brown H & Marriott A *ADR Principles and Practice* (1999) 65.

<sup>251</sup> See the discussion in para 3.7 below.

<sup>252</sup> Haight “How Judges View Arbitration” (1988) 20 *The Arbitrator* 1.

<sup>253</sup> See para 3.2.4 below.

### 3.2.4 Reducing Challenges to Arbitrability: Diversity of Approach

It may be thought that with an arbitration clause or agreement which provides that “any or all differences between the parties shall be referred to arbitration”, the parties have consciously and comprehensively eliminated any possible doubt or disagreement about what may be arbitrated in giving effect to their arbitration agreement. Unfortunately this is not so because a clause of this scope is of necessity subject to public policy considerations and the limitation on arbitral jurisdiction prescribed by the relevant arbitration law.<sup>254</sup> Because national laws demarcate the province of arbitration it is left to each state to settle the boundaries of arbitrability. The right of each state to do so, taking into consideration their cultural, economic and political inclinations, introduces divergences in the interpretation and content of arbitrability and a lack of uniformity in state practice. Ball observes that:

“[t]he courts of different nations have different views, based on their own interpretations of national or international public policy, of whether particular classes of disputes are arbitrable. Under the influence of a strong Federal policy favouring arbitration, U.S. courts have found wide classes of disputes arbitrable, including disputes under the securities and antitrust laws, the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Age Discrimination in Employment Act (ADEA). Other nations take a less expansive view, or at any rate have a less well developed jurisprudence on the subject of arbitrability.”<sup>255</sup>

From an African perspective, the two main sources for modern arbitration legislation in Africa, the OHADA Uniform Act on Arbitration and the UNCITRAL Model law adopt different approaches to the issue of arbitrability. The OHADA Uniform Act on Arbitration 1999, which applies to an arbitration taking place in one of the member states,<sup>256</sup> provides:

“Any natural person or corporate body may [have] recourse to arbitration on rights of which he has free disposal. States and other territorial public bodies as well as public establishments may equally be parties to an arbitration without having the possibility to invoke their own law

<sup>254</sup> In the context of domestic arbitration, the relevant law will normally be the law of the seat, but in international commercial arbitration, the law which determines arbitrability will depend on the circumstances in which the issue of arbitrability arises. See Redfern & Hunter *International Commercial Arbitration* 138-139.

<sup>255</sup> Ball M “Just Do It – Drafting the Arbitration Clause in an International Agreement” (1993) 10(4) *Journal of International Arbitration* 29 36.

<sup>256</sup> See Articles 1 and 35. See para 2.4.3 above regarding OHADA arbitration.

to contest the arbitrability of the claim, their authority to sign arbitration agreements or the validity of the arbitration agreement.”<sup>257</sup>

The first sentence deals with objective arbitrability. The Uniform Act is not restricted to commercial matters and arbitration is possible on any matter that parties may freely dispose of. Matters relating to personal status will not be arbitrable as the intervention of public authorities is required on such matters.<sup>258</sup> The rest of the provision is concerned with subjective arbitrability. In short, subject matter arbitrability is widely defined under the OHADA Uniform Act.<sup>259</sup>

The UNCITRAL Model Law<sup>260</sup> prescribes that it shall not affect any other law of an adopting state by virtue of which certain disputes may not be submitted to arbitration or may only be submitted to arbitration in accordance with other law. The Model Law therefore yields to national laws on arbitrability by not making any dispute arbitrable which would not otherwise be capable of arbitration under the relevant national law. The Model Law in its original form is limited to international commercial arbitration. One reason for the adoption of the provision on arbitrability was to make it clear that the intended broad meaning of international commercial arbitration should not be taken as overriding restrictions on arbitrability in other laws.<sup>261</sup>

In effect, the drafters of the Model Law leave it to the legislature of a state adopting the Model Law to decide on whether or not it is necessary to incorporate an addition dealing specifically with arbitrability. Kenya and the counterpart jurisdictions have each adopted a different approach.

As stated above,<sup>262</sup> arbitration law in Kenya from the start of the colonial era until the introduction of the Arbitration Act of 1995 was based on English arbitration statutes and the English common law. But section 81 of the English Arbitration Act 1996, which preserves the

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<sup>257</sup> Article 2.

<sup>258</sup> See Martor et al *Business Law in Africa* 262.

<sup>259</sup> See Asouzu *International Commercial Arbitration and African States* 158.

<sup>260</sup> Article 1(5). See also Article 34(2)(b) which provides that an award may be set aside by the court at the seat if it deals with matters which are non-arbitrable or is contrary to public policy under the law of the seat. Similarly a court may refuse enforcement of an award on the same two grounds under Article 36(1)(b), but in terms of the law where enforcement is sought.

<sup>261</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 39.

<sup>262</sup> See para 2.4.1 above.

common-law position on arbitrability in England,<sup>263</sup> is not part of Kenyan law. The Kenyan position on arbitrability is reflected by section 3(1) of the 1995 Act which in relevant part defines an arbitration agreement to cover “all or certain disputes which have arisen or which may arise ... in respect of a defined legal relationship whether contractual or not.” There is no list of arbitrable and non-arbitrable subjects in the Act; but the above provision would extend arbitrability in Kenya to contracts, torts and disputes from any relationships deemed legal. Moreover the Act is not restricted to commercial arbitration.<sup>264</sup> There is also no equivalent to Article 1(5) of the Model Law by which the Model Law does not affect other laws of the adopting state restricting the arbitrability of specified disputes. The avenue to court on arbitrability is therefore wide open and the High Court can set aside an award if it finds that (i) the subject matter is not capable of settlement by arbitration under the law of Kenya or (ii) the award is in conflict with public policy.<sup>265</sup>

The question on the commonly encountered but complex topic of whether fraud is arbitrable has not been authoritatively tested or answered in Kenya. In an arbitration case which is still pending before the High Court of Kenya this writer as arbitrator ruled that an allegation of fraud raised in defence to a claim should be investigated by the tribunal together with the other arbitrable matters pleaded by the parties. The respondent objected by means of a court application which has not been strenuously pursued. The arbitration was being conducted under the Arbitration Rules of the Chartered Institute of Arbitrators (Kenya Branch), which confer jurisdiction on the tribunal to decide questions of bad faith, dishonesty or fraud arising in the dispute where the parties have submitted to arbitration under those rules.<sup>266</sup> The respondent/objector has not denied the application of those rules. It is also persuasive that issues of fraud, bribery and civil liability arising from such conduct are arbitrable under modern English law.<sup>267</sup>

The Nigerian position on arbitrability can be summarized as follows. Firstly, the Nigerian Arbitration and Conciliation Act, like the Kenyan Arbitration Act, does not list arbitrable and non-arbitrable matters. Nevertheless, the Nigerian Act, unlike the Kenyan Act, is restricted to

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<sup>263</sup> See para 3.2.3 n 246 above.

<sup>264</sup> As pointed out above (see para 2.4.4.5(i)), the retention of the expression of “commercial relationship” in s 3(2)(b) and 3(2)(c) appears to have been an oversight.

<sup>265</sup> S 35(2)(b).

<sup>266</sup> See Rule 16B(5).

<sup>267</sup> See *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40 paras 15 and 35; *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20 paras 16 and 23. Criminal liability for such acts is of course not arbitrable (see *Russell on Arbitration* (23<sup>rd</sup> ed) 16 para 1-035).

commercial disputes<sup>268</sup> and the statutory definitions of “arbitration” and “commercial” throw some light on arbitrability.<sup>269</sup> The definition of “commercial” in the Nigerian Act differs from that in the footnote to Article 1 of the Model Law<sup>270</sup> in that the words “whether contractual or not” are omitted.<sup>271</sup> Nigerian commentators have deduced from this that in the Nigerian statute, commercial relationships mean contractual relationships only, with the result that disputes from tortious relationships are apparently not arbitrable.<sup>272</sup>

Secondly, as case law assists the determination of arbitrability, the judicial doors on arbitrability in Nigeria are wide open.<sup>273</sup> A judicial list of non-arbitrable matters, that is, matters that cannot validly be the subject of an arbitration agreement, was prescribed in *Kano State Urban Development Board v Fanz Construction Co Ltd*.<sup>274</sup>

Thirdly, the Act does not affect any other law which provides that certain disputes are not arbitrable or may only be submitted to arbitration in terms of that other law.<sup>275</sup> For example, industrial disputes must be resolved by conciliation and arbitration as provided for in the Trade Disputes Act.<sup>276</sup>

Finally, public policy considerations may also enlarge the list of non-arbitrable matters.<sup>277</sup>

On the question whether fraud is arbitrable in Nigeria, Idornigie argues that where there is an arbitration agreement and the issue of fraud arises, the proper procedure is to seek leave of the court to revoke the arbitration agreement and the authority of the arbitrator.<sup>278</sup> This writer, as a matter of principle, does not share this view, where the fraud does not emanate from the

<sup>268</sup> See the long title to the Act.

<sup>269</sup> In s 57(1).

<sup>270</sup> That definition commences: “The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. ...”

<sup>271</sup> S 57(1) “commercial”.

<sup>272</sup> See Idornigie PO “The Principle of Arbitrability in Nigeria Revisited” (2004) 21(3) *Journal of International Arbitration* 279-281, citing Ezejiofor G *The Law of Arbitration in Nigeria* (1997) 179.

<sup>273</sup> Idornigie (2004) 21(3) *Journal of International Arbitration* 283-284.

<sup>274</sup> (1990) 4 NWLR (pt 142) 1. The non-arbitrable matters are an indictment for an offence of a public nature; disputes arising out of an illegal contract; disputes arising under agreements that are void as being by way of gaming or wagering; disputes leading to a change of status, such as a divorce petition; and any agreement purporting to give an arbitrator the right to give judgment *in rem*.

<sup>275</sup> S 35, which corresponds to Article 1(5) of the Model Law.

<sup>276</sup> Cap 432 of the Laws of Nigeria (1990). See Idornigie (2004) 21(3) *Journal of International Arbitration* 283; Asouzu *International Commercial Arbitration and African States* 168.

<sup>277</sup> See Idornigie (2004) 21(3) *Journal of International Arbitration* 283, citing the court’s power under the Arbitration and Conciliation Act s 48(b)(i) to set aside an award as being contrary to public policy.

<sup>278</sup> Idornigie (2004) 21(3) *Journal of International Arbitration* 284-287, citing *BJ Export & Chemical Processing Co v Kaduna Refining and Petrochemical Co*, Court of Appeal, Kaduna Division, October 2002 (unreported) in support of this argument.

arbitrator and the arbitrator is in a position to investigate and decide the issue as between the parties. Idornigie also disagrees with the view of the authors of *Russell on Arbitration*<sup>279</sup> that parties are free to submit all arbitrable issues, including those involving fraud, to the tribunal for determination. He argues that arbitrable issues cannot include disputes involving fraud, in view of the authors' own statement that criminal responsibility is not arbitrable,<sup>280</sup> because only judges and magistrates can punish criminals. Here Idornigie seems to blur the distinction between private-law or civil liability in tort and criminal liability.

Idornigie notes that the repealed English Arbitration Act of 1950 gave the court the power, in the case of an arbitration agreement to refer future disputes to arbitration, to order that the agreement should cease to have effect if the issue arose as to whether one of the parties had been guilty of fraud, so that this issue could be determined by the court.<sup>281</sup> He duly notes that there is no equivalent provision in the 1996 English Arbitration Act, but regards this omission as having no effect on the arbitrability of fraud.<sup>282</sup> However, it is submitted that as the framers of the 1996 Act were alive to the incidence of fraud in arbitral matters, but omitted the provision on fraud contained in the old Act from the 1996 Act, it may be inferred that Parliament was not minded to exclude issues regarding fraud from arbitration, a view shared by the English courts.<sup>283</sup>

Regarding Zimbabwe, the Zimbabwean Law Development Commission's Final Report contained the following recommendation regarding arbitrability:

“[I]n adopting the UNCITRAL Model Law as the law of Zimbabwe, it would not be confined to commercial arbitration as the Model law was, but would cover any subject that could lawfully be arbitrated upon. (For guidance and clarification, a list of matters that definitely could *not* be the subject of arbitration would be set out.)”<sup>284</sup>

The Zimbabwe Arbitration Act 1996 duly gave effect to these recommendations and admirably avoids doubt and uncertainty on arbitrability by first setting out what may be

<sup>279</sup> Citing *Russell on Arbitration* (21<sup>st</sup> ed) 17.

<sup>280</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 16 para 1-035 states: “An obvious area where disputes are not arbitrable is criminal responsibility.”

<sup>281</sup> S 24(2) and Idornigie (2004) 21(3) *Journal of International Arbitration* 284.

<sup>282</sup> Idornigie (2004) 21(3) *Journal of International Arbitration* 284.

<sup>283</sup> See the English cases referred to in n 267 above.

<sup>284</sup> See the Zimbabwe Law Development Commission *Final Report on Arbitration* (Report No 31, January 1994) 5-6; Asouzu *International Commercial Arbitration and African States* 149-150.

arbitrated under section 4(1).<sup>285</sup> What is not capable of determination by arbitration is set out under section 4(2) and these matters comprise the following:

- (i) an agreement that is contrary to public policy;<sup>286</sup>
- (ii) a dispute which, in terms of any law, may not be determined by arbitration;
- (iii) a criminal case;
- (iv) a matrimonial cause or a matter relating to status,<sup>287</sup> unless the High Court gives leave for it to be determined by arbitration;
- (v) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; and
- (vi) a matter concerning a consumer contract as defined in the Consumer Contracts Act unless the consumer has by separate agreement agreed thereto.<sup>288</sup>

Regarding the second exception, the Act makes it clear that the fact that an enactment confers jurisdiction on a court to determine a matter, must not, on that ground alone, be construed as preventing the matter from being determined by arbitration.<sup>289</sup>

It is submitted that these provisions will make it much easier to predict what is and what is not arbitrable in Zimbabwe. Subject to these exceptions, it seems that any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.<sup>290</sup> It is apparent from this analysis that domestic law defines the province of arbitration and each state determines matters that are arbitrable in accordance with its own public policy on such

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<sup>285</sup> S 4(1) reads: “Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.”

<sup>286</sup> It is suggested that the content of the agreement must be contrary to public policy. A dispute as to whether a contract containing an arbitration clause is voidable because of fraud or bribery should still be arbitrable. (See the English cases referred to in n 267 above. In *Soleimany v Soleimany* [1999] QB 785 (CA) 797 an agreement between highwaymen as to how they would split the proceeds of their planned illegal activities is given as an example of an agreement contrary to public policy. The court suggested that an arbitration clause in an agreement to split the proceeds of a joint venture to commit offences in Iran would be invalid for the same reason.

<sup>287</sup> Because of uncertainty as to the meaning of the term “status”, the SA Law Commission, after having consulted provisions in European national statutes on arbitrability, recommended that the term status be omitted. Instead the proposed Act should provide that any matter “which the parties are entitled to dispose of by agreement may be determined by arbitration”, unless the arbitration agreement is contrary to public policy, or another statute excludes arbitration. See SA Law Commission *Arbitration: An International Arbitration Act for South Africa* (July 1998) paras 2.42-2.44 and 2.50.

<sup>288</sup> This provision was necessary in that the Zimbabwe Act is not restricted to commercial arbitration.

<sup>289</sup> See s 4(3). The position is apparently the same in Nigeria: see Asouzu *International Commercial Arbitration and African States* 155; and the SA Law Commission recommended a similar provision for South Africa (see para 2.50 of its Report).

<sup>290</sup> Arbitration Act 1996 s 4(1).

matters. Therefore challenges to jurisdiction on grounds of arbitrability are inexorably linked to national concepts and interpretation of public policy.

Obviously then it is not that an arbitral tribunal is necessarily incapable of determining the matters excluded from its jurisdiction on the basis of subject matter arbitrability because of some inherent deficiency in the arbitrator or in the arbitral process, but that from public policy considerations those matters are deemed to be best dealt with by the public courts as arbitration is a private process between parties who should not privately arbitrate matters of a public nature.

Further it is the dearth of definition of public policy in national laws that keeps the doors of challenge open on what may or may not be arbitrable. The Kenyan arbitration statute or any national statute that excludes “an agreement that is contrary to public policy” from arbitration is on the face of it clear enough in what it says, but quite imprecise on what constitutes public policy. Kenya may emulate the Zimbabwean example by enumerating in the arbitration statute matters that are not arbitrable and the guiding principles on public policy enunciated in the noted Kenyan judicial decisions.

Moreover as public policy varies from state to state so will the boundaries of arbitrability differ. In international arbitration the interests of harmonizing the procedures governing international trade and commerce preponderate towards expanding the domain of what is arbitrable. National laws and courts therefore have a duty to balance the domestic importance of reserving matters of public interest to the courts against the general public interest of promoting trade and commerce and the settlement of disputes.<sup>291</sup>

### 3.2.5 Proceedings under Protest and *Ex Parte* Proceedings

Two other pertinent avenues of challenge that affect the course of proceedings and the authority of the tribunal are:

- (i) proceedings “under protest”, and
- (ii) *ex parte* proceedings.

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<sup>291</sup> *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* 473 US 614, (1985). The US Supreme Court, by a majority of five to three, decided that antitrust issues arising out of international commercial contracts were arbitrable under the Federal Arbitration Act.

### 3.2.5.1 Proceedings “Under Protest”

A party may be so opposed to any form of proceedings by arbitral tribunal or court that he may neither respond to arbitral notices nor court summons to participate in either process. But as sometimes happens he may do so “under protest”. Boycott of proceedings is ill-advised and may prove unrewarding as in practice the tribunal can proceed in the absence of the boycotting party to his likely detriment.<sup>292</sup> To the extent that the protest or boycott is a challenge to the arbitral tribunal and a threat to the process it must be dealt with swiftly and effectively in order not to derail, subvert or unduly delay the proceedings. Neither the UNCITRAL Model Law nor the Kenyan statute provides guidance for proceedings under protest.<sup>293</sup> Because of this, a party who files a notice of protest and refuses to participate in the proceedings is in no better position than the boycotter as the effect of such notice does not prevent the proceedings from continuing to the making of an award. An otherwise meritorious case may be lost by a party’s total abstention. The better approach, it seems, is to file the protest notice and cause the merits of the protest to be considered as expeditiously as possible and obtain an interim ruling that may, on persuasive grounds, be reviewed by the court.<sup>294</sup> It is submitted that a demonstrably perverse ruling or a deliberate or flagrant misapplication of law by the tribunal and the likelihood of serious or grave prejudice could constitute such grounds.

It seems that the opportunity for such protests is also arguably afforded in some circumstances by the provisions of Article 4 of the Model Law and the corresponding provisions of the national statutes. Article 4 provides for an implied waiver of the right to object. This may occur where a party, while aware that a non-mandatory provision of the Model Law or a requirement under the arbitration agreement has not been complied with, proceeds with the arbitration without objecting timeously to the non-compliance. The legislative history of Article 4 suggests that the waiver will be implied for (i) non-compliance with an arbitration agreement or non-mandatory provisions of the arbitration law or, (ii) in situations where the waiving party knew of the non-compliance, (iii) the failure to object within any time limit provided by the law or arbitration agreement and without undue delay and, (iv) only if,

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<sup>292</sup> See *Letco v Liberia* and the *Texaco, British Petroleum* and *Liamco* arbitrations referred to by Redfern & Hunter *International Commercial Arbitration* 259 and 103-104.

<sup>293</sup> It is arguable whether Article 4 of the Model Law (“Waiver of right to object”) and the corresponding provisions in the African statutes (such as s 5 of the Kenyan statute) indirectly raise the need for such protests.

<sup>294</sup> In an arbitration “under protest” conducted in Uganda by this writer, the protester failed to disclose grounds of protest and the tribunal proceeded with the arbitration to the making of an award that was upheld by the High Court of Uganda.

without the objection, a party proceeds with the arbitration.<sup>295</sup> It may be noted further that certain mandatory provisions such as Article 7 relating to the inference of a written arbitration agreement from exchange of statements of claim and defence, and Article 16(2) requiring pleas as to jurisdiction to be raised before the submissions of the defence statement, also create opportunity for waiver to be implied in the event of failure to object. However, to create a balance between the need to deal with issues of waiver, protests and challenges on the one hand and the corresponding need to proceed expeditiously with the arbitration, Article 25(c) provides that where a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may, unless the parties have agreed to the contrary, continue with the proceedings and make an award on the evidence presented. Therefore the default proceedings of Article 25 of the Model Law and the corresponding national statutory provisions should promote and facilitate the reduction of unmerited challenges and delaying tactics in appropriate circumstances.

To the pertinent question as to what other remedy does a party have, who is adversely affected by a partial negative jurisdictional finding by the arbitrator as a preliminary question, the Model Law<sup>296</sup> and the Kenyan statute<sup>297</sup> are *in pari materia* that a positive finding may be reviewed but silent on a negative finding as to jurisdiction. Article 16(3) of the Zimbabwe statute allows a party within 30 days of receiving notice of a ruling on a plea that the tribunal does not have jurisdiction<sup>298</sup> to request the High Court to decide the matter with no right of appeal thereafter. Section 12(4) of the Nigerian statute similarly allows the tribunal to rule on such pleas either as a preliminary question or in an award on the merits but, “such ruling shall be final and binding”. It seems therefore that under the Zimbabwean statute a negative ruling on jurisdiction is reviewable but not so under the Nigerian statute.

In this writer’s view, in a jurisdiction such as Kenya, a tribunal that rules that it has no jurisdiction becomes *functus officio* and the question of jurisdiction thereafter ceases to be solely an arbitral issue. An aggrieved claimant in such a situation would need legal advice on the particular facts and merits of his case and whether a judicial remedy might be available.

The legislative history of the Model Law Article 16(3) reveals the acknowledgement that the law does not provide for court review of a finding by the arbitral tribunal that it lacks

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<sup>295</sup> Holtzman & Neuhaus *Guide to the UNCITRAL Model Law* 196-200.

<sup>296</sup> Article 16(3).

<sup>297</sup> S 17(1)(5) and (6).

<sup>298</sup> Pursuant to Article 16(2)

jurisdiction; that Article 16(3) refers only to preliminary rulings that the tribunal possesses jurisdiction and Article 34 presupposes such a finding in the final award; that a direct review of the tribunal's finding that it lacked jurisdiction was not a matter governed by the Model Law but by the general law on arbitration or civil procedure; that while the tribunal's negative finding would not necessarily settle the question whether the substantive claim was to be decided by a court or by an arbitral tribunal, the UNCITRAL Commission's adopted view was that such a decision was final as to the arbitrator who made the ruling as arbitrators could not be compelled to continue the arbitration.<sup>299</sup> This writer shares these views.

Research on the meaning and purpose of "under protest" shows that the phrase has no distinct meaning and amounts to nothing unless explained by the proceedings and circumstances.<sup>300</sup> In court proceedings an appearance to a writ "under protest" is a situation where a party denies the obligation to appear at all because objection is taken to the jurisdiction of the court. A party who makes payment under protest thereby signifies his reservation of the right to taxation, notwithstanding the payment.<sup>301</sup> If this rationale is applied to arbitration practice it would mean reservation of the right to raise the objection to jurisdiction at a later stage. It would be prudent to do so earlier rather than later if the applicable law so permits.

### 3.2.5.2 "Ex Parte" Proceedings<sup>302</sup>

A proceeding "Under protest" is distinguishable from an "*ex parte proceeding*". A protesting party may still participate in the proceedings whereas in "*ex parte*" proceedings the defaulting party is absent and does not participate in the proceedings. The absence of a defaulting party can and does place the arbitral tribunal in a quandary in view of the principles of natural justice and of equal treatment of the parties that enjoin the tribunal to accord each party an opportunity to be heard and to present or defend its case. The UNCITRAL Model Law and national arbitration statutes are not explicit on *ex parte* proceedings although Article 25(b) and (c) in effect authorize such proceedings. Some useful guidance for domestic arbitrators is

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<sup>299</sup> Holzman & Neuhaus *Guide to the UNCITRAL Model Law* 486 – 487.

<sup>300</sup> Words and Phrases Legally Defined: *Re Massey* (1845) 8 Beav 458, 462 per Langdale MR.

<sup>301</sup> Greenberg D *Stroud's Judicial Dictionary* (2012).

<sup>302</sup> The term "*ex parte*" refers to proceedings conducted with one party present but in the absence of an opposing or boycotting party (see Redfern & Hunter *International Commercial Arbitration* 259 para 5-55). An "*ex parte* application", strictly speaking, is one in which notice was not in fact given to the other party. The wider meaning of the term given to it by Redfern & Hunter is in common use in Kenya. The narrower technical interpretation of the term would not cover the situation where a party had due notice but chose to boycott the proceedings.

available from the experience of international arbitrations.<sup>303</sup> An arbitrator's mission is to determine the dispute submitted to him. The tribunal has no authority to issue an award akin to a default judgment in a common-law state court where the award is based purely on the default.<sup>304</sup>

Therefore if an arbitral respondent fails to attend the hearing or to present his case the tribunal is nevertheless obliged to consider the merits and determine the substance of the dispute. How does the tribunal do so in the absence of a defaulting party? Hunter offers good counseling on the problem with which this writer is in respectful agreement:

“Once it becomes clear that a respondent does not propose to appear, the tribunal will normally direct that the claimant's submissions and the evidence are to be placed before it in written form. Then it will be justified in holding only a brief *ex parte* hearing to raise any questions.

The tribunal has no duty to act as advocate for any party who has elected not to appear, but it must examine the merits of the argument of law and fact and it should proceed on the basis that the claimant must prove his case to the satisfaction of the tribunal so that a reasoned determination of the issues can be made.”<sup>305</sup>

It is also important that the defaulting respondent receives notice of the *ex parte* hearing and that the respondent receives the written submissions of the claimant if these are provided in advance of the hearing.

An experienced national court in an African common law tradition may be expected to take the dimmest view of an arbitral tribunal that proceeds *ex parte* in the absence of strict compliance with the default provisions of the governing statute. For this reason and in anticipation of a likely appeal from an *ex parte* award it will be prudent for the tribunal to recite the full facts and circumstances that justified the *ex parte* proceedings. There must be the not unreasonable presumption that the party who has in effect boycotted the proceedings will more than likely challenge its outcome and resist the enforcement of the award.

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<sup>303</sup> For example, Bernini G ” Preventing Delay and Disruption in Arbitration” Working Group ICCA Congress Series No 5, (1990) 17.

<sup>304</sup> Compare the Kenya Arbitration Act s 26(d) and Zimbabwe's Arbitration Act First Schedule Article 25(d).

<sup>305</sup> Hunter M “The Procedural Powers of Arbitrators under the English 1996 Act,” (1997) 13 *Arbitration International* 345 359.

Reference has been made to UNCITRAL Model Law Article 25(b) and (c), which while allowing the defaulting party to show sufficient cause for failing to communicate a claim or defence statement, or appear or produce documentary evidence, make it clear that the tribunal may proceed and make an award on the available evidence. It seems however that the danger of review arises not so much from the reasons which a defaulting party may have had for the default, but through the arbitrator failing to follow the letter of the applicable rules on default, such as, giving proper notice of the proceedings or providing a respondent with a copy of the claimant's written submissions and so affording the opportunity to reply. These provisions and requirements of due process do not compel an arbitrator to bend over backwards to oblige a blatantly uncooperative party but to ensure equal treatment and a fair outcome as to avoid undeserving challenges.

### 3.2.6 Finality of Arbitral Decisions<sup>306</sup>

The arbitral tribunal's decision on the merits of a dispute is termed an award, which is distinguishable from a procedural ruling by the tribunal.<sup>307</sup> "Finality" means there is no right of appeal to the courts even where it appears that the tribunal's award might be incorrect on the merits.<sup>308</sup>

The question as to who should have the final say in arbitration, arbitrator or judge, is troublesome but determinable once it is appreciated that the issue is not about ability or capability of arbitrator or judge but about enhancing the capacity of the arbitral process and tribunal to achieve a final solution. This writer's view is that, subject to the noted essential qualifications and safeguards of public policy and the fact that the arbitrator is appointed by private parties and not the state, the arbitrator should finalise all matters in the dispute within the arbitral mandate; but as state courts cannot be ousted from public disputes or private disputes with public consequences there is, to that extent, and in relation to matters

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<sup>306</sup> On finality of awards arbitration legislation and judicial decisions differ from jurisdiction to jurisdiction. The Kenya Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* Civ App. No NAI 57 of 2006 upheld a right of appeal from the High Court to the Appellate Court in an arbitral matter because the Kenyan Arbitration Act 1995 does not expressly proscribe the right. In contrast see Dundas H "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal" in (2007) 73 *Arbitration* 1 in which the point is stressed that where the English Arbitration Act 1996 provides, as it does in 18 places, that the decision of a first instance judge shall be final, then "final" means "FINAL".

<sup>307</sup> The formalities for making an award do not apply to a procedural ruling and the status of an award differs from that of a procedural ruling.

<sup>308</sup> Jurisdictions differ in the statutory provisions governing appeal from an arbitrator's decision or award. There is, for example, no automatic right of appeal from an arbitral award in Nigeria or South Africa but there is a limited right of appeal by agreement of the parties on points of law in Kenya in arbitration law and practice.

specifically excluded from arbitrability, room for judicial intervention in arbitration; but that, such intervention ought to be exceptional, residual and minimal. While noting that an arbitral decision on jurisdiction may not be final in jurisdictions like Kenya and Zimbabwe, it is possible that the finality of such decisions in the Nigerian context may prove more preferable for users of arbitration who seek an end to disputation so that they can continue with their lives and businesses.

### 3.2.7 Conclusion

Arbitrators can deal effectively with challenges to the arbitral jurisdiction by maintaining a degree of firmness in the management of the arbitral process and the conduct of the proceedings. Every challenge has to be considered. Indeed a determination as to whether or not a challenge is merited cannot be made without due consideration of the basis of the challenge. Meritorious challenges should not, in general, be difficult to rule upon. Unmerited challenges require toughness to dispose of ably and swiftly. Thereafter there is nothing to fear if parties choose to have further recourse to court. National arbitration legislation recognizes the right of parties to refer questions of law<sup>309</sup> and appeals<sup>310</sup> to the court. The Model Law also recognizes and endorses the limited and or concurrent role of the courts.<sup>311</sup>

## 3.3 The Need for Effective Powers for the Arbitral Tribunal

### 3.3.1 Classification and Sources of the Arbitral Tribunal's Procedural Powers

An arbitrator requires substantial procedural powers, conferring a wide procedural discretion on the arbitrator, so that where the parties' agreement is silent, the arbitrator can use appropriate procedures to determine the dispute without unnecessary delay and expense, while still doing justice between the parties. Before starting to classify the arbitrator's powers and to identify their sources, it is first helpful to distinguish between the arbitrator's powers and the arbitrator's duties. "Duties" define the minimum which the arbitrator must do,<sup>312</sup> whereas "powers" define the maximum which he can require the parties to do.<sup>313</sup> As powers

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<sup>309</sup> Kenyan Arbitration Act 1995 s 39(a).

<sup>310</sup> Kenyan Arbitration Act 1995 39(b) and 39(2).

<sup>311</sup> See for example Articles 6, 9 and 16(3).

<sup>312</sup> Certain aspects of these duties are discussed in para 3.3.4 below.

<sup>313</sup> See Mustill & Boyd *Commercial Arbitration* 291. There may nevertheless be a degree of overlap between powers and duties *Russell on Arbitration* (23<sup>rd</sup> ed) para 4-066 mentions as an example that the arbitrator has both the power and the duty to make an award.

relate to what an arbitrator can or may do, they are discretionary. The extent of an arbitrator's powers therefore depends on the extent of his discretion.<sup>314</sup> A further important practical issue is whether effective sanctions are available if a party fails to comply with orders given by an arbitrator in the legitimate exercise of his procedural powers.

As to the possible extent of the arbitrator's discretion he has been described by the English judge Lord Diplock as a master of the procedure:

“By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular rules, the parties make the arbitrator a master of the procedure to be followed in the arbitration. Apart from a few statutory requirements ... he has a complete discretion to determine how the arbitration is to be conducted ... so long as the procedure he adopts does not offend the rules of natural justice.”<sup>315</sup>

It will however appear from the discussion below that this alluring reference to the arbitrator as “master of the procedure” should not be taken at face value. The arbitrator's powers are subject to statutory limitations, which in modern arbitration statutes are aimed at ensuring that the procedure followed by the arbitrator is fair.<sup>316</sup> It will also be shown that a provision in arbitration rules in use in Kenya<sup>317</sup> to the effect that the arbitral tribunal can exercise its powers in “its absolute and unfettered discretion” is not only exaggerated but is potentially misleading.<sup>318</sup>

Some works on arbitration classify the arbitrator's powers with reference to their source, distinguishing between powers conferred by the parties and powers conferred by operation of law.<sup>319</sup> Powers conferred by the parties may be conferred directly by an express provision to that effect in their arbitration agreement, or indirectly by choosing a set of arbitration rules,

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<sup>314</sup> See Mustill & Boyd *Commercial Arbitration* 292.

<sup>315</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1982] AC 909 at 985; see also *Carlisle Place Investments Ltd v Wimpey Construction (UK) Ltd* 15 BLR 109 QB 1980 at 116.

<sup>316</sup> See the UNCITRAL Model Law Articles 18 and 24 discussed in the text below.

<sup>317</sup> See The Arbitration Rules of the Chartered Institute of Arbitrators (Kenya Branch) (June 1998) rule 16A. Hereafter these rules are referred to as “the Kenya Branch Rules”.

<sup>318</sup> Compare the pre-1996 Arbitration Rules of the Chartered Institute of Arbitrators (1988 edition) in England Article 5.1: “In the absence of procedural rules agreed by the parties or contained herein, the Arbitrator shall have the widest discretion allowed by law to ensure the just, expeditious, economical and final determination of the dispute.” This rule makes the “widest” discretion enjoyed by the arbitrator subject to three express restrictions: those imposed by the parties, those imposed by the rules and those imposed by mandatory rules of law.

<sup>319</sup> See Redfern & Hunter *International Commercial Arbitration* paras 5-04 and 5-07. Compare *Russell on Arbitration* para 4-067 and para 4-068, who classify the second category as powers conferred by statute.

which confer procedural powers on the arbitrator.<sup>320</sup> Powers are more likely to be conferred directly where the arbitration agreement is drawn up after the dispute has arisen. The parties are then able to define the arbitrator's powers more precisely, having regard to the needs of the particular dispute, than is otherwise practical. In a typical arbitration clause in a contract, the powers will be conferred indirectly, with reference to a specified set of rules.<sup>321</sup>

Regarding the interaction between the arbitration agreement and the applicable arbitration law, the primary source of the arbitrator's powers is the arbitration agreement, which is subject to the restrictions imposed by the applicable law.<sup>322</sup> To the extent that the agreement is silent, the arbitrator's powers conferred directly or indirectly in that agreement will be supplemented by the powers conferred by the regulatory provisions of the applicable arbitration statute.<sup>323</sup>

Powers conferred by the arbitration agreement or by statute may be general or specific. A good example of a general power is that conferred by Article 19(2) of the UNCITRAL Model Law, whereby subject to the parties' agreement and the mandatory provisions of the Model Law,<sup>324</sup> the arbitral tribunal may "conduct the arbitration in such manner as it considers appropriate ...". General powers are conferred in general terms, whereas specific powers are to be exercised for specified purposes.<sup>325</sup> Even where the general power purports to confer a very wide discretion, this discretion is certainly not absolute or unfettered.<sup>326</sup> It is appropriate in discussing the powers of the arbitral tribunal not to ignore the related duties of the tribunal.<sup>327</sup> An important duty is imposed by Article 18 requiring the tribunal to treat the parties with equality and for each to be given a "full opportunity" to present its case. "Full opportunity" derives from Article 15 of the UNCITRAL Rules of 1976 and is understood to

<sup>320</sup> See Redfern & Hunter *International Commercial Arbitration* paras 5-05 and 5-06.

<sup>321</sup> For example, the clause recommended by UNCITRAL in the context of the UNCITRAL Arbitration Rules provides: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

<sup>322</sup> See Redfern & Hunter *International Commercial Arbitration* para 5-03 and the discussion of the mandatory provisions of the UNCITRAL Model Law below.

<sup>323</sup> Mustill & Boyd *Commercial Arbitration* 292 refer in this context to "implied" powers, because the English Arbitration Act of 1950 s 12(1), dealing with the arbitrator's powers to conduct the proceedings was prefaced by the words "Unless a contrary intention is expressed therein, every arbitration agreement shall ... be deemed to contain a provision ...". The statutory powers were therefore deemed to be included in the arbitration agreement, unless excluded or restricted by the parties.

<sup>324</sup> Particularly Articles 18 and 24(2) and (3). See further n 341 below.

<sup>325</sup> A good example is provided by s 41(3) of the English Arbitration Act of 1996, concerning the arbitral tribunal's power to dismiss a claim for want of prosecution, where the extent of the tribunal's discretion is carefully circumscribed. The similar power in the Kenyan Arbitration Act of 1995 s 26(d), while still clearly specifying the purpose of the power, is less specific regarding the restrictions on the tribunal's discretion.

<sup>326</sup> See the discussion below.

<sup>327</sup> A more detailed discussion of the arbitrator's duties in this context appears in para 3.3.4 below.

be subject to the requirement of reasonableness.<sup>328</sup> Another procedural duty is imposed by Article 24(2) of the Model Law, which requires the tribunal to give the parties sufficient advance notice of any hearing.

As will appear from the discussion below,<sup>329</sup> modern arbitration statutes typically confer a general power, supplemented by a few specific powers.<sup>330</sup> Arbitration Rules will usually also confer a general power, supplemented by more detailed specific powers than those found in legislation.<sup>331</sup> Problems will occur in a situation where there is no general power, either in the arbitration agreement or in the law, and the question arises whether or not the arbitrator has a particular power.<sup>332</sup> Where there is only provision for specific powers and the particular power is not listed, it will be difficult to imply such a power in the absence of a general provision. As a result an arbitrator, under South African law, has no power to order security for costs, unless this power is conferred by the arbitration agreement. Prior to s 38(3) of the Arbitration Act of 1996, the position was the same in England, notwithstanding the general power, in section 12(1) of the 1950 Act.<sup>333</sup>

The distinction between private and public powers is also pertinent to arbitration law and practice. An arbitrator exercises private powers<sup>334</sup> in consonance with the private nature of consensual arbitration. To the extent that the arbitration agreement is silent, some of the arbitrator's powers are conferred by the relevant national arbitration statute, which is a public

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<sup>328</sup> Article 18 is described as “a key element of the ‘Magna Carta of Arbitral Procedure’”; see the SA Law Commission’s Report *Arbitration: An International Arbitration Act for South Africa* (July 1998) para 2.192 and Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 550-551.

<sup>329</sup> See para 3.3.2.

<sup>330</sup> In the UNCITRAL Model Law the specific procedural powers are contained in Articles 22, 23(2), 24(1), 25, 26 and 27. The English Arbitration Act of 1996 confers a general power in s 34(1), with examples of what it encompasses in s 34(2). Specific powers are contained, for example, in s 37, 38 and 41.

<sup>331</sup> See, for example, the LCIA Arbitration Rules (1998) which have a general power in article 14.2 and specific powers in article 22, the Kenya Branch Rules, rules 16A-16D and the Arbitration Rules of the Chartered Institute of Arbitrators Articles 6.1 and 7. See further the discussion in para 3.3.3 below.

<sup>332</sup> See s 14(1) of the South African Arbitration Act of 1965 which contains a fairly lengthy list of specific powers, but no general power. Even the English Arbitration Act of 1950 s 12(1) contained a general power by requiring the parties to “do all other things which during the proceedings ... the arbitrator ... may require”.

<sup>333</sup> See Mustill & Boyd *Commercial Arbitration* 335-336.

<sup>334</sup> It was held in the South African case of *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) paras 24-25 that arbitration did not fall within the purview of “administrative action” but arose from the exercise of private (rather than public) powers; and that the hallmark of arbitration was that it was an adjudication flowing from the parties’ consent to the arbitration agreement. The parties defined the powers of the arbitrator and were equally free to modify or withdraw that power at any time by way of further agreement. Furthermore, an arbitration was seen as a form of private adjudication, with the result that the function of the arbitrator was not administrative but judicial in nature and decisions made in the exercise of judicial functions did not amount to administrative action. See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 4 SA 7 (CC) para 198.

instrument. Even so, whether drawn from a statute or an arbitration agreement, the powers of an arbitrator in a consensual arbitration remain private.

Although both have an adjudicative function, the powers of an arbitrator in a consensual arbitration differ from those of a judge. The powers of an arbitrator are conferred directly or indirectly by the parties' agreement, whereas the powers of a judge are conferred by the state.<sup>335</sup> Judges have formidable coercive powers which they may use to ensure compliance with their orders. Parties cannot confer on an arbitrator the same coercive powers over persons and property as are conferred by the state on judges.<sup>336</sup> Moreover, the arbitrator's powers are limited to the parties to the agreement and the arbitrator cannot order a non-party to attend a hearing to give evidence or to produce documents. Arbitration legislation may alleviate this problem in the context of the arbitrator's procedural powers either by conferring a power directly on an arbitrator which he would not otherwise have,<sup>337</sup> or indirectly, by providing court support for the arbitration process.<sup>338</sup> The court may, for example, assist with the production of evidence in the arbitration proceedings.<sup>339</sup>

It is perhaps appropriate at this stage to mention that improvements in legislation and arbitration rules can assist considerably in expanding and clarifying the arbitrator's powers, thereby facilitating the arbitral process and so curbing unmerited interruptions and tactical delays. The provisions of the Model Law Article 19(1) and 19(2) and the equivalent provisions of the Kenyan and the compatible African national statutes<sup>340</sup> provide the necessary foundation. Article 19(1) stresses the principle of party autonomy: subject to the mandatory provisions of the Model Law<sup>341</sup> the parties are free to agree on the procedure to be

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<sup>335</sup> See Mustill & Boyd *Commercial Arbitration* 292; Redfern & Hunter *International Commercial Arbitration* 235-236.

<sup>336</sup> Redfern & Hunter *International Commercial Arbitration* 236; Mustill & Boyd *Commercial Arbitration* 292.

<sup>337</sup> See, for example, the English Arbitration Act s 38(5) regarding the power to administer oaths to witnesses and Redfern & Hunter *International Commercial Arbitration* 236. The existence of wide statutory procedural powers (as in Article 19(2) of the Model Law, referred to above) also makes it less likely that the issue of gaps in an arbitrator's procedural powers will cause serious difficulties during arbitration proceedings.

<sup>338</sup> See Redfern & Hunter *International Commercial Arbitration* 236.

<sup>339</sup> See the UNCITRAL Model Law Article 27 and the English Arbitration Act of 1996 s 43. Another example is found in the English Arbitration Act s 42, which empowers the court to order compliance with a peremptory order made by the arbitrator. Non-compliance with the court order would expose the party concerned to the penalties available for contempt of court. The court's powers of support in the context of interim measures and the enforcement of the arbitral award in the absence of voluntary compliance are discussed in paras 3.5 and 3.6 below.

<sup>340</sup> The Kenyan Arbitration Act s 20, the Zimbabwean Arbitration Act First Schedule Article 19 and the Nigerian Arbitration and Conciliation Act s 15. See also para 2.4.4.5(vii) above.

<sup>341</sup> The mandatory provisions are Articles 18, 23(1), 24(1) (2<sup>nd</sup> sentence) (2) and (3), 27, 30(2), 31(1), (3) and (4), 32 and 33(1)(a), (2), (4) and (5): see Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 583. In the context of the arbitrator's procedural powers, the mandatory provisions are Articles 18 (equal treatment of

followed by the arbitral tribunal in conducting the proceedings. In the absence of such agreement, and subject to the same mandatory provisions, Article 19(2) gives the arbitral tribunal the general power to conduct the proceedings in such manner as it considers appropriate. This general power includes the power to decide on the admissibility, relevance and weight of any evidence (unless the parties have agreed otherwise).<sup>342</sup>

The inference is that on all procedural points or matters on which the parties agree, their agreement will be given effect under Article 19(1) as long as it does not conflict with a mandatory provision. On other matters, the arbitrators have the discretion under Article 19(2) to conduct the arbitration as they consider appropriate. As there appears however to be no limitation on when the parties could agree on a procedural point, it can be inferred that the freedom of the parties to agree on the procedure is a continuing one.<sup>343</sup> Further, the “power conferred upon the arbitral tribunal” in Article 19(2)<sup>344</sup> is to be understood to be non-mandatory and as referring to the power conferred by the Model Law itself in the first sentence of paragraph 2 and not the power conferred by the parties’ agreement under paragraph 1.<sup>345</sup> This again emphasizes that the tribunal’s statutory powers are subject to the parties’ agreement.

As under some legal systems the admissibility, relevance, materiality and weight of evidence are matters of substantive law<sup>346</sup> it may be thought that Article 19 might conflict with Article 28 which allows the parties, or in default, the arbitral tribunal, to choose the substantive law to govern the dispute. It is said however that, as a matter of interpretation, the specific provision in Article 19(2) is not affected by Article 28 and the former should prevail over the general provision in Article 28.<sup>347</sup> Further, as a matter of policy it is deemed desirable for arbitration to avoid the application of technical rules of evidence where possible.<sup>348</sup>

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parties), 23(1) (exchange of statements of claim and defence) and 24(1) (2<sup>nd</sup> sentence), (2) and (3) (hearings and written proceedings).

<sup>342</sup> See further para 3.3.3.2 below.

<sup>343</sup> A proposal for the procedural agreement to be reached before the first or sole arbitrator is appointed was rejected by the UNCITRAL Working Group; see Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 565-566.

<sup>344</sup> See the text to n 342 above.

<sup>345</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 566.

<sup>346</sup> Even in South Africa which has a common-law basis for its law of evidence, the so-called parol evidence rule is actually a rule of substantive law. See Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3<sup>rd</sup> ed (2009) para 4.6.1 at 38).

<sup>347</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 567.

<sup>348</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 567. Technical rules of evidence would exclude those which impact on a party’s right to a fair hearing. Compare the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) Article 9(2), which provides guidance on how a discretionary power like that contained in Article 19(2) of the Model Law should be exercised. Evidence should be excluded,

As this discussion is concerned with the procedural powers of the arbitral tribunal, the distinction between procedural powers<sup>349</sup> and the specific powers conferred by the Model Law under Article 17 and the national statutes relating to the grant of interim measures and the power of the tribunal to rule on its own jurisdiction under Article 16 must be borne in mind.<sup>350</sup>

The alluring statement by Lord Diplock in *Bremer Vulkan*, quoted above,<sup>351</sup> must not be taken at face value. Firstly, because the mere omission by the parties, whether deliberate or inadvertent, to specify in their arbitration agreement any particular rules does not thereby translate into conferment of arbitral powers an arbitrator does not otherwise have and cannot assume, such as the power to grant security for costs.<sup>352</sup> This is because the powers of an arbitrator from an arbitration agreement are conferred by the parties expressly or impliedly but not by their default. Secondly, an arbitral discretion can hardly be deemed “complete” in the sense of enabling an arbitrator to conduct the proceedings at will where, in practice, such discretion is circumscribed by statutory requirements, however few these may be in older legislation, and the hallowed precepts of natural justice intended to ensure due process.<sup>353</sup> Indeed the passage is imbued with the lofty resonance in which many English judicial dicta are etched; but stripped to its basic elements it can be no authority, especially outside pre-1996 England, for an arbitrator to assume powers not conferred by the parties or the law or to exercise a non-existent unfettered or absolute discretion.

An example of the modern position is provided by the 1998 LCIA Arbitration Rules. While these rules confer on the tribunal “the widest discretion” allowed by law to decide on the conduct of the proceedings,<sup>354</sup> that power is subject not only to statutory limitations,<sup>355</sup> but

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for example, where it is subject to legal professional privilege or on the basis of compelling considerations of fairness (Article 9(2)(b) and (g)).

<sup>349</sup> Besides Article 19, see also Articles 22, 23(2), 24(1), 25, 26 and 27.

<sup>350</sup> The arbitrator’s power to rule on his own jurisdiction is discussed in para 3.2 above and the power to grant interim measures is discussed in para 3.5 below. An order for interim measures regarding security for costs is arguably both conservatory and procedural. The classification of these powers and the distinctions between them are sometimes blurred by the drafters of legislation or dealt with in the same section as in s 38 of the 1996 English Arbitration Act. S 41(6) of that Act gives the tribunal a sanction against a claimant’s failure to comply with a peremptory order for security for costs, by making an award dismissing the claim, thereby affecting the claimant’s substantive rights. In the context of this study, the distinctions are less significant as the focus of the dissertation is ultimately on the adequacy or otherwise of the totality of the powers exercisable by the arbitral tribunal to conduct the arbitration effectively, so as to deliver an enforceable award.

<sup>351</sup> See the text to n 315 above.

<sup>352</sup> See n 333 above regarding the arbitrator’s power to award security for costs in older legislation.

<sup>353</sup> See Mustill & Boyd *Commercial Arbitration* 288 and 290 regarding these principles.

<sup>354</sup> See article 14.2.

also to the agreement of the parties, and the general duties of the arbitral tribunal in the rules regarding due process and the avoidance of unnecessary delay and expense.<sup>356</sup> A further deliberate fetter is the requirement that the tribunal must give the parties a reasonable opportunity to state their views on the matter, before exercising its specific procedural powers.<sup>357</sup>

In the light of the discussion above perhaps Lord Diplock's dictum can be reformulated as follows:

“By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular rules, or where the parties fail to agree on the procedure for conducting the arbitration, the arbitral tribunal may conduct the arbitration in such manner it considers appropriate in the circumstances, subject to the provisions of the relevant arbitration law and the rules of natural justice.”

The problem of the adequacy or otherwise of arbitral powers manifests itself in various ways. For example, the powers may be inadequately defined in legislation and rules resulting in uncertainty in their application. The same may be said of the corrective measure of providing wide discretionary powers without guidance as to their exercise.<sup>358</sup> Practitioners may have also encountered occasions in practice when an arbitrator yields to the temptation to conduct the arbitration like “privatized litigation” by dealing with procedural issues in the same way as a judge. Another variation occurs when a timid arbitrator compounds the problem regarding the adequacy of the arbitrator's procedural powers by yielding ground too readily to lawyers who would control and dominate the proceedings. The danger of the arbitrator exercising procedural powers in an arbitrary way resulting in procedural unfairness and the inevitable challenge of the award must moreover be distinguished from the assumption of powers by the arbitrator that he may not have.<sup>359</sup>

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<sup>355</sup> In a Model Law jurisdiction, those restrictions are contained in Articles 18 and 24. The LCIA Rules are intended for use in an international commercial arbitration in any jurisdiction, with London as the default option (see article 16(1)).

<sup>356</sup> The general duties, based on those in the English Arbitration Act, s 33, are contained in article 14.1.

<sup>357</sup> See the introduction to article 22.1.

<sup>358</sup> See Park WW “Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion” (2003) 19 *Arbitration International* 279 281-282 and see further para 3.3.3 below at n 413.

<sup>359</sup> Compare Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 para 24 regarding s 68(2)(b) of the English Arbitration Act of 1996: “This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have.”

Opinions may differ among practitioners on whether or not the powers available to an arbitral tribunal are indeed adequate for conducting the arbitration effectively from beginning to end.<sup>360</sup> This discussion is therefore aimed at the investigation of the extent of the procedural powers of the arbitrator and the effectiveness of those powers for performing the arbitral function. Adequate powers of necessity include the ability to impose effective sanctions in the event of non-compliance by a party with the arbitrator's procedural directions.

Despite the notion that by virtue of the arbitration agreement an arbitrator may possess wider powers than a judge, the spate of enforceable sanctions available to a judge but not to an arbitrator, tend to diminish arbitral authority with a discernable impact on the effectiveness of the arbitral function.<sup>361</sup> If this premise is accepted, then perhaps the arbitrator's problem through the perceived diminution of his authority may well be the consequence of inadequate coercive sanctions rather than the absence of functional powers.<sup>362</sup>

In the following paragraphs the powers conferred on the arbitrator by statute and institutional rules will be discussed in greater detail, including powers relating to expedited proceedings and the reception of evidence. The adequacy of the arbitrator's powers will then be assessed against the background of his duties. This will be followed by a proposal for the provision of enhanced coercive sanctions.

### 3.3.2 Powers Conferred by Law

It has been stated that arbitral powers can also be drawn from law or operation of law. In this way national statutes supplement the powers of the arbitral tribunal which the national courts are obliged to recognize and enforce. Statutory arbitral powers are in Kenya, Nigeria and Zimbabwe granted by the legislatures of those countries. In all significant respects the powers granted to the arbitral tribunal by these legislatures are akin to those set out in the UNCITRAL Model Law. The Model Law, while defining and restricting the extent of court intervention in arbitration,<sup>363</sup> reinforces the authority of the arbitral tribunal by granting it power, in the absence of agreement by the parties, to conduct the arbitration in such manner

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<sup>360</sup> Compare Jarvin S "The Sources and Limits of the Arbitrator's Powers" in *Contemporary Problems in International Arbitration* (1986) 50.

<sup>361</sup> Compare Redfern & Hunter *International Commercial Arbitration* para 5-07, who state that the parties cannot confer on the arbitral tribunal the coercive powers that the state can confer on a national court.

<sup>362</sup> When the writer discussed this problem with Lord Mustill (London, June 2006) he expressed the confident view that arbitrators, under improved legislation, now have all the powers they probably need to do the work if only they would use them fully and effectively.

<sup>363</sup> Article 5.

as it considers appropriate including the power to determine the admissibility, relevance, materiality and weight of any evidence.<sup>364</sup> The Model Law additionally confers powers on the tribunal, in default of agreement by the parties, to determine the place of arbitration and meetings for hearing witnesses, experts and parties, or for inspection of goods, property or documents<sup>365</sup> and the language of the arbitration.<sup>366</sup> These provisions, with slight modification of wording, are replicated in the national arbitration laws of Kenya, Nigeria and Zimbabwe.<sup>367</sup>

Although South Africa has not yet adopted the Model Law the powers exercisable by an arbitration tribunal granted by the Arbitration Act of 1965 under section 14(1) are illustrative.<sup>368</sup> These are specific powers and are exercisable subject to their exclusion or modification by the parties. Some of these powers are exercised only on application of a party, for example, the power to order discovery of documents or delivery of pleadings.<sup>369</sup> Other powers may be exercised on the tribunal's own initiative, for example the power to determine the time and place of hearings, and subject to any legal objection, examine the parties and witnesses and require them to produce documents or things within their possession or power, or to inspect any goods or property involved in the reference<sup>370</sup> One particular power, to receive evidence on affidavit, may only be exercised with the consent of the parties or an order of court.<sup>371</sup> The main problem caused by the absence of a general statutory power as omitted in the South African Act is that it is then very difficult to apply the *Bremer Vulkan* principle that deemed the arbitrator master of procedure with "complete discretion" to determine how the arbitration is to be conducted. This is because a gap in the list of procedural powers, such as the power to call an expert witness, could mean that the tribunal has no such power.

What may be stated here is that the powers granted by the parties to the tribunal are not equivalent to the powers of the court. Arbitrators are not judges and do not possess the coercive powers available to a court. But by granting powers to both tribunal and court the law enables the court to use its coercive powers to assist the tribunal. The court does this either by its power to order arbitral parties to comply with the orders of the tribunal on pain of

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<sup>364</sup> Article 19 (2).

<sup>365</sup> Articles 20 (1) and (2).

<sup>366</sup> Article 22.

<sup>367</sup> Kenyan Arbitration Act s 17-23; Nigerian Arbitration and Conciliation Act s 12-23; and Zimbabwean Arbitration Act First Schedule Articles 16-20 and 22.

<sup>368</sup> S 14 (1)(a)(i) – (iv).

<sup>369</sup> S 14 (1)(a).

<sup>370</sup> S 14 (1)(b).

<sup>371</sup> S 14 (1)(b)(v).

otherwise being in contempt of court, or by direct orders of court intended to facilitate the tribunal's proceedings as, for example, by orders of seizure of evidence or injunctions.<sup>372</sup>

In concession to the view that in a jurisdiction with a modern and highly developed arbitration statute such as England, an arbitrator draws on a wide range of powers sufficient for conducting the arbitration effectively, the approach of the English Arbitration Act as to the procedural powers of the arbitrator is instructive.<sup>373</sup> To be borne in mind is the fact that the extent of arbitral powers is not only indicated by the general and special powers under discussion but also by the restrictions on judicial intervention, appeals and the limitation on the circumstances of challenging the arbitrator. The general principles under section 1 of the English Act are therefore pertinent for bringing to mind that the object of arbitration is the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; that parties are free to agree how their disputes are to be resolved subject only to such safeguards as are necessary in the public interest; and that a court should not intervene in matters governed by the Act except as provided by Part 1 of the Act.<sup>374</sup> In this connection the restrictions imposed by section 24 of the Act on the removal of an arbitrator are beneficial to the tribunal and the parties and can be perceived to contribute to the statutory measures for safeguarding the arbitral process and enhancing both the powers and efficacy of the tribunal.<sup>375</sup> Arbitrators cannot therefore be challenged frivolously or removed at the will of merely reluctant parties; and an arbitrator with the agreed qualification can be expected to conduct the proceedings with confidence. Section 29 can be seen to boost the confidence of the arbitrator by granting an immunity from liability for anything done or omitted in the discharge of arbitral duties in the absence of bad faith.

The facilitative provisions of sections 33 (general duty of the tribunal) and 34 (on procedural and evidential matters) have been noted and again these can be seen to strengthen the tribunal's hand on the matters covered by these provisions. The procedural powers under section 34(2) (e) to (h) inclusive are new and ground-breaking in their reach. The arbitrator can now decide whether any and what questions can be put to a party, whether the strict rules

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<sup>372</sup> The English Arbitration Act 1996: sections 43 and 44 illustrate the use of court powers to assist the tribunal. This type of court support to compel compliance can be distinguished, because an order for production of evidence against a party is distinct from an injunction for the preservation of evidence which is clearly an interim measure of protection.

<sup>373</sup> See generally Hunter M "The Procedural Powers of Arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345-373.

<sup>374</sup> S 1 (a), (b) and (c).

<sup>375</sup> See s 24 (1)(a)-(d) for these grounds.

of evidence or any other rules should apply, whether to take the initiative in ascertaining facts and the law, and whether to receive oral or written evidence and submissions.

The significance of these innovations is that it was not in the tradition of common-law lawyers to use inquisitorial procedures. English arbitrators have until now been more prone to use adversarial methods. These new provisions enable arbitrators to use inquisitorial methods in arbitration without doubting their power to do so.<sup>376</sup> This makes particular sense where, as is often the case, an arbitrator is appointed for his requisite skills. Again, subject to contrary agreement by the parties, section 37(1) permits the tribunal to appoint its own experts or legal advisers where appropriate; but this the tribunal must do with due regard to the overriding duty under section 33 to adopt procedures suitable to the circumstances of the case and to avoid unnecessary delay and expense.

The general powers under section 38 with regard to ordering security for costs, giving directions regarding the property in dispute, inspection, taking samples, the preservation of evidence and examination of witnesses on oath or affirmation<sup>377</sup> may be said to complement the provisions of section 34 which, as noted, deals with procedural and evidential matters which the tribunal must decide. To some extent (except as regards security for costs) these powers correspond with those of the court under section 44, the scheme of the Act being so far as possible, to enable the tribunal to act rather than require the parties to resort to court with the attendant costs, expense and inconvenience entailed.<sup>378</sup> The power to make a provisional award under section 39 is also new and distinct from an interim award. It is a power given by the parties enabling the tribunal to make orders for any relief which could be granted in the final award on a provisional or temporary basis. The point therefore is that such orders are subject to adjustment on the final adjudication and are brought into account in the final award.<sup>379</sup>

Another enhancement provision is section 41 conferring and defining powers exercisable by the tribunal in case of a party's default including significantly the dismissal of the claim for inordinate and inexcusable delay by the claimant and continuation of the proceedings in the absence of a defaulting party. Section 41(5) to (7), that set out sanctions for enforcing the tribunal's peremptory orders, are novel. The peremptory order enables the tribunal which, for

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<sup>376</sup> Harris B, Planterose R & Tecks J *English Arbitration Act 1996 – a Commentary* 2<sup>nd</sup> ed (1999) 178.

<sup>377</sup> S 38(1), (2), (3), (4), (5) and (6).

<sup>378</sup> Harris, Planterose & Tecks *English Arbitration Act 1996* 191.

<sup>379</sup> S 39(3); *Russell on Arbitration* 221-222.

example, has ordered the production of witness statements by a specified date, to make a further peremptory order for compliance, in default of which the defaulting party may be barred from calling the intended witness. It is helpful to the tribunal that the peremptory orders, sanctions and consequences envisaged under section 41 are backed by enforcement powers granted to the court under section 42, together with the additional court powers granted by section 43 for securing the attendance of witnesses as well as the court powers conferred by section 44 to be exercised in support of arbitral proceedings. Because control of the arbitral proceedings reverts to the tribunal such intervention by the court is deemed supportive rather than an interference.

The tribunal is empowered to determine recoverable costs of the arbitration fees and expenses, if the parties do not agree.<sup>380</sup> After all, the tribunal has become familiar with the course of the proceedings and is best placed to settle any debate as to claims for costs and expenses. Determination by the tribunal may be more expeditious and fair to the parties. It is submitted that section 64 (on the tribunal's power to fix its own reasonable fees and expenses, subject to court control) and the tribunal's power to limit recoverable costs under section 65 are beneficial to the arbitral parties.

Therefore commentators who believe that an arbitral tribunal with its seat in England now has sufficient powers under English law may be quite justified, because of the elaborate provisions and schemes of the English Arbitration Act in areas where the UNCITRAL Model Law and other comparable national statutes are silent on controversial matters.

It is perhaps worth mentioning that the regulatory procedural powers conferred on the arbitrator by the Model Law and national statutes influenced by it, apply, unless otherwise agreed by the parties. Because of the emphasis on the need for manifestation of consent in this dissertation it is appropriate to draw attention to section 5(1) of the English Act 1996 and the provision that Part 1 of the Act applies "only where the arbitration agreement is in writing", and any other agreement between the parties as to any matter is effective "only if in writing". This should reduce any arguments on whether the parties, subsequent to their original arbitration agreement, have by a further agreement curtailed (or extended) the arbitrator's powers. It is also pertinent that the same approach, based on section 5(1) of the English Act,

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<sup>380</sup> S 63.

was recommended in the South African Law Commission's Report on Domestic Arbitration.<sup>381</sup>

### 3.3.3 Powers Conferred by Institutional Rules

Arbitration rules purport to set standards for arbitration practice. As a general observation most national arbitration statutes, such as the Kenyan statute, contain mainly general propositions such as a provision empowering the arbitral tribunal, if the parties fail to agree a procedure, to conduct the arbitration in a manner it considers appropriate<sup>382</sup> or enjoining the arbitral tribunal to treat each party with equality.<sup>383</sup> Conversely, the Model Law<sup>384</sup> and national statutes do not, and are not expected to, set out detailed rules of procedure that condescend to the minutiae of arbitration procedure. Yet the detailed rules, such as those that set time frames for various procedural activities including the exchange of statements of claim and defence, with or without supporting documents, written submissions, and which provide for the conduct of the arbitration on a documents-only basis or with oral hearings, are deemed critical to the arbitral process. Such details are more often found in the rules provided by the arbitration institutions.

Institutional rules governing arbitration are not the same although they aim at providing a comprehensive and cohesive framework within which to manage the arbitral process.

For domestic arbitration<sup>385</sup> the rules conferring arbitral powers and discretion provided by the Chartered Institute of Arbitrators, based in England, (hereafter "CI Arb") that have set standards and guidelines for its national branches in Kenya, Zimbabwe and Nigeria are of relative importance. But because even such rules need supplementation by other more detailed rules there will be references to the rules of the LCIA, the IBA and UNCITRAL, as appropriate, because of their wide acceptance and relevance to this study. Before discussing the arbitral powers provided by institutional rules, it is perhaps also appropriate to refer in

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<sup>381</sup> *Domestic Arbitration* 132 n 14 and s 6(1) of the Draft Bill.

<sup>382</sup> See the UNCITRAL Model Law Article 19 and the corresponding provisions of the selected national statutes.

<sup>383</sup> See the UNCITRAL Model Law Article 18.

<sup>384</sup> Although Model Law Articles 23 and 24 deal with statements of claim and defence and hearings respectively, the Model Law is drawn up in relatively broad terms and does not lay down detailed procedural rules on the actual conduct of the arbitration. See Redfern & Hunter *International Commercial Arbitration* 82.

<sup>385</sup> For international arbitration the best known rules are probably those of UNCITRAL, the ICC, LCIA, ICSID, the AAA (American Arbitration Association) and the Arbitration Institute of the Stockholm Chamber of Commerce. The IBA Rules, as their full title suggests, are restricted to the taking of evidence in international commercial arbitration.

passing to the criteria for evaluating institutions<sup>386</sup> and their rules. These include consideration of the institution's structure, its procedure for selecting arbitrators, the degree to which the institution supervises arbitrators, if at all, and the scale of administrative charges, the arbitrators' fees and requirements for advance payment of deposits.<sup>387</sup> The suggested criteria for evaluating arbitral rules include whether the rules provide for the tribunal to grant interim measures, well-defined standards and procedures for dealing with challenges to arbitrators, a procedure for defining the dispute, obtaining access to evidence and for conducting the hearing.<sup>388</sup>

While it is true that an arbitrator has powers and a measure of discretion to conduct the proceedings subject to the governing law and rules of natural justice, the rules agreed by the parties may also confer extensive discretion on the arbitral tribunal. The "widest discretion" allowed by law to arbitrators under the 1988 Arbitration Rules of the Chartered Institute of Arbitrators (England) and the 1985 Rules of the LCIA have been noted<sup>389</sup> in relation to the *Bremer Vulkan* principle. The later versions of the rules of both institutions now reflect and are more in line with the provisions of the 1996 English Arbitration Act. The 2000 CI Arb Arbitration Rules were drafted to incorporate the provisions of the Arbitration Act 1996<sup>390</sup> and to take cognizance of the new Civil Procedure Rules which became effective on 26 April 1999.<sup>391</sup> Concerning arbitration procedure, in place of the "widest discretion", article 6.1 of the 2000 CI Arb Rules gives the arbitrator power to decide all procedural and evidential matters (including but not limited to the matters referred to in section 34(2) of the Arbitration Act) subject to the right of the parties to agree any matter.<sup>392</sup>

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<sup>386</sup> The authors Bernstein, Tackaberry & Marriott *Handbook of Arbitration Practice* 25 point out that an integral part of supporting party autonomy is the recognition of the role and importance of arbitral institutions. In England the 1996 Act gives full recognition and effect to the agreement of the parties to arbitrate according to institutional rules and subject to institutional supervision. The authors identify three potentially problematic matters to which institutions ought to give attention in their rules. These are rules designed to give effect to s 39 (the tribunal's power to make provisional awards, which can be conferred by agreement (s 39(4)), s 47 (the power to make awards on different issues), and s 35 (provision for consolidation of arbitration proceedings by prior agreement in appropriate cases).

<sup>387</sup> Redfern & Hunter *International Commercial Arbitration* 51-52.

<sup>388</sup> For international arbitration one may look out for rules that contain adequate curbs on dilatory tactics, a requirement for arbitrators to furnish reasons for their award unless the parties agree otherwise and a provision for consolidation of arbitration proceedings for multi-party disputes. See also Redfern & Hunter *International Commercial Arbitration* 51.

<sup>389</sup> Chartered Institute of Arbitrators Rules article 6.1, LCIA Rules article 5.2.

<sup>390</sup> See Chartered Institute of Arbitrators Rules article 1.1.

<sup>391</sup> Bunni N "The Chartered Institute of Arbitrators" (2000) *XXV Yearbook Comm Arb*.561

<sup>392</sup> After the appointment of the tribunal any subsequent agreement of the parties to amend the rules is subject to the agreement of the tribunal (article 1.2).

Regarding powers of the arbitrator, article 7.1 of the 2000 CI Arb Arbitration Rules incorporates all the powers given to an arbitrator by the Act including those contained in section 35 (dealing with consolidation of proceedings and concurrent hearings) and section 39 (dealing with provisional orders) but specifically in those two cases, subject to the limitations imposed by article 7.

Under the 1998 LCIA Rules<sup>393</sup> the freedom of the parties to agree on the conduct of their arbitral proceedings must be consistent with the arbitral tribunal's general duties to act fairly and impartially and to adopt the procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense.<sup>394</sup> Further, unless otherwise agreed by the parties under Article 14.1 the arbitral tribunal is given "the widest discretion" to discharge its duties allowed under such law(s) or rules of law as the tribunal may determine to be applicable.<sup>395</sup> The additional powers granted by the Rules under article 22.1(a) to (h) inclusive are extensive. These empower the tribunal, on party application or "of its own motion", but in both cases after first giving the parties a reasonable opportunity to state their views, to allow an amendment of pleadings, extend or abbreviate time-limits, conduct inquiries including identifying issues and ascertaining relevant facts and law(s) or rules of law applicable to the arbitration. The tribunal may also order a party to allow the inspection of any thing relating to the subject matter of the arbitration, order a party to produce any documents deemed relevant, and decide whether to apply the strict rules of evidence or any other rules as to the admissibility, relevance or weight of any material tendered by a party or an expert. Of interest also is the tribunal's power to order the correction of any contract between the parties or the arbitration agreement itself, subject to specified limitations and to allow joinder of third parties with their consent and then to make a single final award or separate awards.

Under Rule 16 of the Kenya Branch Rules<sup>396</sup> the parties confer on the arbitral tribunal the jurisdiction and powers set out in the Rules to be exercised by it "in its absolute and unfettered discretion if it judges it to be expedient for the purpose of ensuring the just, expeditious, economical and final determination of the dispute." This of course will be subject to the mandatory provisions of the 1995 Arbitration Act.

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<sup>393</sup> The LCIA was founded in 1892 and claims to be probably the longest-established of all the major international arbitration institutions: see the preamble to the current Arbitration Rules, which took effect on 1 January 1998.

<sup>394</sup> Per article 14 which is clearly reminiscent of the wording of s 33 of the English Act.

<sup>395</sup> Article 14.2.

<sup>396</sup> The June 1998 edition.

Rule 16B sets out under thirteen paragraphs various matters upon which the tribunal has the power and jurisdiction to grant orders on matters such as the determination of the existence, validity and extent of the arbitration agreement<sup>397</sup> and its own jurisdiction,<sup>398</sup> the rectification of the arbitration agreement,<sup>399</sup> and questions of law, bad faith, dishonesty and fraud arising in the dispute.<sup>400</sup> The tribunal may also order any party to furnish details of its case, in fact or in law, grant an injunctive relief and measures for conservation of property. It may also grant interim awards and simple interest on sums awarded and order specific performance of a contract.<sup>401</sup>

Further discretionary powers and jurisdiction are set out in twelve paragraphs under Rule 16C. The significant powers include the powers to allow other parties to be joined in the arbitration with their express consent,<sup>402</sup> to rely on the arbitrator's own expert knowledge and experience in the field,<sup>403</sup> to direct the parties to submit for inspection and to exchange written witness statements and to direct which such witnesses must give oral testimony.<sup>404</sup> The tribunal may also make interim orders for security for any party's own costs and to secure all or part of any amount in dispute.<sup>405</sup> Rule 16C (10) reinforces the arbitral power to conduct the arbitration in whatever manner the tribunal considers appropriate provided the parties are treated with equality and each party is heard and given the opportunity to present its case. The arbitrator is given power to award compound interest in an appropriate case if compound interest is claimed.<sup>406</sup>

The important observation is that these institutional rules of procedure have expanded the powers and authority of the arbitral tribunal and thereby filled some of the troublesome gaps in the statutory provisions governing arbitration practice with particular reference to the arbitrator's powers.

It has to be mentioned that even amongst arbitration enthusiasts and adherents there is some reaction against unfettered arbitral discretion. While acknowledging that arbitrators can conduct proceedings under institutional rules in almost any manner they deem best they must

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<sup>397</sup> Rule 16B (1).

<sup>398</sup> Rule 16B (4).

<sup>399</sup> Rule 16B (2).

<sup>400</sup> Rule 16B (5).

<sup>401</sup> Rule 16B (9) and (12).

<sup>402</sup> Rule 16C (1).

<sup>403</sup> Rule 16C (3).

<sup>404</sup> Rule 16C (4).

<sup>405</sup> Rule 16C (9).

<sup>406</sup> Rule 16C (11). The interest must be claimed as special damages.

nevertheless respect the arbitral mission and play according to the rules of natural justice or “due process” (as known in some jurisdictions) by which is meant freedom from bias and affording each side equal opportunity to be heard and to present their respective cases. If the absence of rigid procedural rules is deemed an advantage to the tribunal it is by no means apparent that arbitrators invent new rules of procedure as they go along preferring instead to follow well-beaten procedural tracks akin to court procedure. In this connection, Park cautions that:

“the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration’s malleability often comes at an unjustifiable cost. Therefore arbitral institutions should give serious consideration to adopting provisions with more precise procedural protocols to serve as default settings for the way arbitrations should actually be conducted. These directives would explicitly address questions such as documentary discovery, privilege, witness statements, order of memorials, allocation of hearing time, burden of proof and the extent of oral testimony.”<sup>407</sup>

In view of Park’s comment, which relates essentially to international practice, it is necessary to state that there are significant differences between the various sets of rules on the detail in which powers are specified. For example, in the international context, the LCIA Rules (such as article 22) are considerably more detailed and specific than the ICC and UNCITRAL rules. Even so it is recognized as already noted, that even these rules will need to be supplemented by more detailed provisions from time to time.<sup>408</sup> Notwithstanding the increasing popularity of the UNCITRAL Arbitration Rules they do not arguably deal with contentious points of detail regarding the procedure for reception of evidence, both oral and written.

The problems regarding presentation of evidence were addressed by the International Bar Association by formulating in 1983 the Supplementary Rules Governing the Presentation and Reception of Evidence, which were replaced in 1999 by the IBA Rules on Taking Evidence in International Commercial Arbitration.<sup>409</sup>

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<sup>407</sup> Park (2003) 19 *Arbitration International* 283. Another skeptic of arbitral discretion identified by Park is Uff J “Predictability in International Arbitration” *International Commercial Arbitration: Practical Perspectives* (2001) 151.

<sup>408</sup> Redfern & Hunter *International Commercial Arbitration*, 83 paras 2 – 13; The UNCITRAL Arbitration Rules may be supplemented with the IBA Rules for an ad hoc arbitration.

<sup>409</sup> These Rules were adopted by the IBA Council on 1 June 1999.

The object of adducing and presenting evidence is to assist the arbitral tribunal to determine disputed issues of fact and disputed expert opinion. The methods of presenting evidence involve (i) the production of documents, (ii) the testimony of witnesses of fact (iii) the testimony of expert witnesses and (iv) the inspection of things comprised in the subject-matter in dispute.<sup>410</sup> The detailed IBA Rules<sup>411</sup> on Taking Evidence in International Commercial Arbitration embrace these categories of evidence and demonstrate the use and application of procedural powers of the arbitral tribunal to these varieties of evidence. It is submitted that these rules can apply to both domestic and international arbitrations. It is apparent in examining these rules that the arbitral authority devolves from the interplay of the principle of party autonomy and the discretionary powers granted by the rules.

In summary Article 3 of the IBA Rules deals with documentary evidence and Article 4 relates to witnesses of fact. Party-appointed experts and tribunal-appointed experts are regulated by Articles 5 and 6 respectively while Article 7 deals with on site inspection. The evidentiary hearing, and the admissibility and assessment of evidence are dealt with by Articles 8 and 9 respectively.

Article 3 first gives the arbitral tribunal the power to require, within the time ordered by the tribunal, submission to the tribunal by the parties of all documents available to and relied on by a party. A party that requires additional relevant documents, which it does not have but which it believes to be in the possession or under the control of its opponent, may, within the time ordered by the tribunal, file a Request to Produce, with the prescribed contents. Within the time ordered by the tribunal, the party to whom a Request to Produce is addressed must produce to the tribunal and other parties all documents requested to which no objection is taken.<sup>412</sup> Where an objection is raised, it must be raised in writing with the tribunal and can be based on any of the reasons set out in Article 9(2).<sup>413</sup> Additionally, and in exceptional circumstances, if the propriety of an objection can only be determined by a review of the document, the tribunal has power to decline to review the document itself and, after consultation with the parties, to appoint an independent expert to perform this function.<sup>414</sup>

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<sup>410</sup> Redfern & Hunter *International Commercial Arbitration* 296.

<sup>411</sup> The IBA Rules are generally recognised as reflecting internationally established best practice across common law and continental systems: see *Legal Business Arbitration Report on Witness Conferencing* (2006) 64. Another invaluable source of guidance on practical points of detail is provided by the UNCITRAL Notes on Organizing Arbitral Proceedings (1996). See Ceccon R “UNCITRAL Notes on Organising Arbitral Proceedings and the Conduct of Evidence” (1997) 14(2) *Journal of International Arbitration* 67-79.

<sup>412</sup> Article 3(1)-(4).

<sup>413</sup> Article 3(6) and 9(2): see footnote 416 below for the reasons set out under Article 9(2).

<sup>414</sup> Article 3 (7).

Quite clearly therefore Article 3 is concerned with the disclosure of documents within carefully prescribed and restricted requests. It provides useful guidance to an arbitrator in a common-law system on how to deal with controversial issues regarding discovery of documents in a cost-effective manner. However as an arbitral tribunal ordinarily lacks power to order the production of documents in the possession of a third party and Article 3 does not and cannot confer such power, the assistance of the court would still be necessary for subpoenas to compel the attendance of a third party at arbitral proceedings to produce documents.

The creation of an international standard on the admissibility of evidence is reflected in the provisions of Article 9 which grants the arbitral tribunal the procedural power to determine the admissibility, relevance, materiality and weight of evidence.<sup>415</sup> Further, at the request of a party or on its own motion the arbitral tribunal may exclude from the evidence or production any documents, statement, oral testimony or inspection on any of the grounds specified in Article 9(2).<sup>416</sup>

The arbitral tribunal also has power to order each party within a specified time to submit to the tribunal and other parties a written statement (“witness statement”) by each witness whose testimony is relied upon; and the witness statement must conform to the prescriptions as to the form and content of the statement.<sup>417</sup> Article 4 is in effect a codification of the existing practice for parties to submit written statements of the witnesses on whose evidence they intend to rely; and the common-law practice whereby lawyers interview witnesses and assist with the preparation of their evidence is endorsed by the provisions of Article 4(3) that do not make it improper for a party, its officers, employees, legal advisers or other representatives to interview that party’s witnesses or potential witnesses.

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<sup>415</sup> Article 9(1), which besides conferring the power, is also phrased as a duty: “The Arbitral Tribunal shall determine ...”. Compare Article 19(2) of the Model Law, second sentence, which is couched as a power, as opposed to a duty.

<sup>416</sup> Article 9(2) provides: “The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance or materiality; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the document that has been reasonably shown to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; (g) considerations of fairness or equality of the parties that the Arbitral Tribunal determines to be compelling.

<sup>417</sup> Article 4(4) and (5).

Article 5 contains the tribunal's discretionary power to order any party-appointed expert who has submitted an expert report on the same or related issues to meet, confer and attempt to agree on any differences of opinion. They must thereafter appear to testify at the evidentiary hearing unless excused by the parties with the approval of the tribunal. The sanction against the expert who fails to appear without a valid reason is the tribunal's power to disregard the expert's report. Article 5 enables the tribunal to evaluate the conflicting evidence from expert reports and provides a useful summary of what the party-appointed expert's report must contain. The interplay of party autonomy and the exercise of the arbitral discretion is evident in Article 6 under which the tribunal may, after consultation with the parties, appoint one or more independent experts to report on specific issues designated by the tribunal. Site inspection can be done at the request of a party or on the tribunal's own motion. The tribunal may inspect or require inspection by a tribunal-appointed expert of any site, property, machinery or any other goods or process or documents the tribunal deems appropriate; and the tribunal has power, in consultation with the parties to determine the timing and arrangements for the inspection.<sup>418</sup>

The tribunal, at all times has "complete control" over the evidentiary hearing and may limit or exclude any question addressed to a witness or exclude the attendance of a witness on any of the grounds specified in Article 9(2).<sup>419</sup>

These standard-setting rules, which are not law, have the attractiveness of combining aspects of both civil and common law practices in arbitration and can serve as guidelines for practitioners in both jurisdictions for extending or delimiting the powers of the arbitral tribunal.

It can be summarized in conclusion that although arbitration rules do set standards, arbitrators have the discretion and the parties have the freedom by agreement to exclude rules intended to promote best practices in arbitration. Consequently the co-operation of arbitrators, parties and their advisers is needed for the attainment of benefits of expeditious and cost-effective arbitration.

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<sup>418</sup> Article 7.

<sup>419</sup> Article 8(1). The grounds in Article 9(2) are quoted in n 416 above.

### 3.3.3.1 Expedited procedure

The reference to the benefits of expeditious and cost-effective arbitration links up with the thrust of this dissertation, which is for the removal or minimization of avoidable inefficiencies by the effective use of the procedural powers conferred by the law and rules governing arbitration. The factors that contribute to arbitral inefficiency include: the ingrained tendency of arbitration practitioners and users to emulate litigation, with its own shortcomings and imperfections; the failure of arbitral pleadings to define sufficiently the real issues in dispute; a document discovery process with a potential to submerge the proceedings under a mass of sometimes quite irrelevant documents; the misuse of the opportunity for oral presentation of evidence, particularly cross-examination, and legal argument; and the arbitrator's reluctance to intervene and take charge for fear the intervention might be misconstrued and provide a ground for setting aside the eventual award

In general, arbitration practice in Kenya emulates litigation too closely with the attendant delays and disadvantages.

More traditional adversarial arbitration proceedings might usefully be substituted by the use of an expedited procedure,<sup>420</sup> with the potential of saving time and costs without diminishing the quality and justice of the final result. The use of witness statements in arbitration in preference to oral evidence in chief is gradually taking root in Kenya. In essence an expedited procedure would require the arbitrator to start with the suggestion that the disputed issues be accurately defined through the exchange of written statements of case by claimant and respondent as opposed to court-style pleadings. These statements of case will be accompanied by copies of all relevant documents thereby eliminating the need for full discovery as known and used in litigation practice. Any additional discovery will be at the discretion of the arbitrator and restricted to a specified class of documents or a particular issue. Issues can be heard and determined separately as appropriate and evidence in chief of factual witnesses can be by affidavit. Parties may submit their main arguments in writing. The purpose is not to abolish the traditional adversarial process as such but to adapt its non-essential features and the three main adaptations are:

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<sup>420</sup> see Uff J "Cost-Effective Arbitration" (1993) 59 *Arbitration* 31; Thesen D & Smith D "Preliminary Matters in Arbitration Practice (1987) 53 *Arbitration* 16 and 20; and Harris B "Arbitration: a Normal Incident of Commercial Life – But for How Long?" (1992) 58 *Arbitration* 153.

- the use of case management at the preliminary meeting to make the procedure quicker and more cost-effective;
- the reduction of the duration of oral hearing; and
- the division of the hearing of evidence and argument into logical phases so that these are not heard at a single sitting.

### 3.3.3.2 Powers regarding Evidence

This discussion can also usefully be extended to consideration of the applicability of the ordinary rules of evidence to arbitration. In this connection the traditional rule that an arbitrator is required, as a matter of law, to apply the ordinary rules of evidence, based as it was on “somewhat ancient authorities”,<sup>421</sup> appears difficult to reconcile with more modern English authorities which emphasise the arbitrator as the master of his own procedure. It seemed that the traditional rule, based on the recognition of arbitration as a dispute resolution procedure that had departed its roots in contract law and had become part of the administration of justice, has lost much of its practical significance. This perhaps was due principally to the readiness of the courts to imply an agreement to exclude strict compliance with the rules of evidence and their reluctance to interfere where the rules are not complied with unless there has been a breach of the rules of natural justice. A suggested “reformulation” of the old rule is that “unless the arbitration agreement provides otherwise, whether expressly or by implication, an arbitrator is not as a matter of law obliged to comply with the formal rules of evidence, as long as the procedure he follows complies with the rules of natural justice by being fair to both parties” Being the exact reversal of the so called traditional rule the suggested reformulation results more in the rejection of the old rule than in its reformulation.

In some jurisdictions such as Kenya and Uganda, the Evidence Act of either country does not apply to arbitration.<sup>422</sup> Nevertheless, as the arbitrator’s power granted by the Arbitration Act to conduct the arbitration in the manner it considers appropriate in the absence of party agreement includes the power to determine the admissibility, relevance, materiality and weight of any evidence,<sup>423</sup> some guidance in dealing with evidence and any objections to admissibility is necessary. Three reasons may be suggested for regarding evidence as

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<sup>421</sup> Hunter JMH “Arbitration Procedure in England: Past, Present and Future” (1985) 1 *Arbitration International* 82 101.

<sup>422</sup> Evidence Act (Kenya) s 2.

<sup>423</sup> Kenyan Arbitration Act s 20(3).

inadmissible. These are: irrelevance, public policy and the adjudicator's inability to assess the weight of evidence properly. The arbitrator is advised to bear these reasons in mind when dealing with questions of admissibility whether on his own initiative or when raised by a party. Where the problem is irrelevance or public policy, it is suggested that the arbitrator should be prepared to exclude the evidence, either in response to an objection, or on his own initiative. This applies particularly where the public policy in favour of exclusion is state privilege or because the evidence relates to the content of "without prejudice" negotiations.

With regard to hearsay evidence where the problem is more logically weight rather than admissibility, the arbitrator may well admit the evidence and consider the weight carefully. Dealing with objections to admissibility will require the arbitrator to afford the parties the opportunity to present their grounds for and against the objection for due consideration. In this writer's experience written grounds and submissions are particularly helpful for identifying the bone of contention more precisely.

It is recommended for Kenya that the provisions of section 20(3) regarding relevance, materiality, admissibility and weight need further elaboration to guide the arbitrator more fully and effectively including determining whether an argument or submission on any of these issues has been adequately addressed.

### 3.3.4 Substantive Powers

Problems can occur in practice when disputes arise between the parties during an arbitration regarding the extent of the arbitrator's powers to grant substantive relief. For example, in a contractual dispute, does the arbitrator have the power to order the rectification of the contract where this relief is requested by one party and the arbitrator's power to order rectification is denied by the other party? If the arbitrator rules, as a preliminary question, that he has this power, a respondent bent on delay will be able, prior to an award, to challenge this finding in court as a matter concerned with the arbitrator's jurisdiction.<sup>424</sup>

As in the case of the arbitrator's procedural powers,<sup>425</sup> powers to grant substantive relief can be conferred by the parties in their agreement, either directly, or indirectly through their choice of institutional rules. Substantive powers can also be conferred by law. Where the

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<sup>424</sup> See the Model Law Article 16(3) and para 3.2.2 above.

<sup>425</sup> See para 3.3.1 above.

agreement, including the chosen rules and the applicable arbitration statute are silent, the question then is from where does the arbitrator derive the power unless it can be said to be implied by law?

The UNCITRAL Model Law deals only with the arbitrator's power to determine the substantive law applicable to the merits of the dispute.<sup>426</sup> The English Arbitration Act of 1950<sup>427</sup> gave the arbitrator the same power as the High Court to order specific performance of any contract, other than one relating to land or an interest in land, unless the parties agreed otherwise.<sup>428</sup> The English Arbitration Act of 1996, true to the principle of party autonomy, gives the parties the freedom to agree on the powers exercisable by the tribunal as regards remedies.<sup>429</sup> Unless the parties agree otherwise, the tribunal may grant declaratory relief, may order the payment of a sum of money in any currency, and the tribunal has the same power as the court to order injunctive relief,<sup>430</sup> to order specific performance of a contract (other than one relating to land)<sup>431</sup> and to order the rectification, setting aside or cancellation of a deed or other document.<sup>432</sup>

None of the three jurisdictions, Kenya, Nigeria and Zimbabwe, when adopting the Model Law, thought it necessary to supplement it, so as to deal with the tribunal's powers relating to remedies, except on the issues of interest and costs.<sup>433</sup> The drafters of the Model Law possibly considered the issue of remedies as a substantive issue which had no place in a law which, in civil-law countries, would normally form part of a the code on civil procedure. It is therefore significant that Mauritius,<sup>434</sup> when adopting the Model Law for international arbitration only, incorporated a provision regarding the arbitral tribunal's powers to grant remedies which closely follows the equivalent provision of the English Arbitration Act of

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<sup>426</sup> See Article 28.

<sup>427</sup> See s 15, which has its origin in an amendment made by s 7 of the Arbitration Act of 1934, inserting para (j) in the 1<sup>st</sup> schedule to the Arbitration Act of 1889. The current South African Arbitration Act 42 of 1965 contains a similar provision in s 27, without the restriction regarding land or interests in land.

<sup>428</sup> See further Mustill & Boyd *Commercial Arbitration* 389.

<sup>429</sup> See s 48(1).

<sup>430</sup> See the Saville Report (1996) para 234. S 48(5)(a) refers to ordering "a party to do or refrain from doing anything".

<sup>431</sup> The Saville Committee retained this restriction to avoid changing the existing law. See the Saville report (1996) para 234.

<sup>432</sup> See s 48(2)-(5).

<sup>433</sup> The Zimbabwe Arbitration Act of 1996 First Schedule Article 31(5) and (6) gives the tribunal the powers to award costs and interest. The Kenyan Act of 1995 s 32(6) gives the tribunal the power to award costs but is silent on the award of interest.

<sup>434</sup> Mauritius was a French colony before acquired by Britain and the separate Mauritian arbitration law for domestic arbitration is based on modern French law. See further the *Travaux Préparatoires*, drafted by the State Law Office, for the Mauritius International Arbitration Act 38 of 2008 para 7, regarding the decision to retain a separate statute for domestic arbitration.

1996.<sup>435</sup> The South African Law Commission, although influenced by the English Act in its proposals for a new Arbitration Act for domestic arbitration, apparently considered it unnecessary to expand the provisions on remedies, and merely retained the existing provision on specific performance.<sup>436</sup>

It is submitted that particularly those African jurisdictions which adopt the Model Law for domestic arbitration should supplement it to deal comprehensively with the arbitrator's powers to grant substantive remedies, along the lines of the provision in the English Arbitration Act. Such a provision promotes certainty and can thus prevent unnecessary delay and jurisdictional challenges. The need for clarification was obviously felt by the drafters of the Kenya Branch Rules of the Chartered Institute. These Rules deal reasonably comprehensively with the remedies which an arbitrator has the power to grant. The Rules empower the arbitrator to rectify a contract on the application of a party, to decide questions of bad faith, dishonesty or fraud arising in the dispute, to order specific performance and to award interest.<sup>437</sup> As these rules do not seem to deal specifically with declaratory relief it is recommended that the omission ought to be considered and provided for the Kenyan Chartered Institute of Arbitrators. This again underlies the need for parties to a domestic arbitration to include a reference to appropriate rules in their arbitration agreement as a means of ensuring the requisite degree of certainty as to the extent of the arbitrator's powers.

### 3.3.5 Duties of an Arbitrator

Apart from the general and specific powers exercised by an arbitral tribunal in the conduct of proceedings there are also specific duties, in the performance of which the exercise of arbitral powers can be inferred from the parties' agreement or the governing law.

Because of this the interaction between the powers and duties of an arbitrator deserves comment. In the context of arbitration, duties denote rules the arbitrator must follow, in contradistinction to arbitral powers that are discretionary; and whereas duties define the minimum the arbitrator must do, powers define the maximum he can compel the parties to do.<sup>438</sup> In brief such duties include:

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<sup>435</sup> See the Mauritius International Arbitration Act 38 of 2008 s 33, which however omits the exception regarding contracts of land in relation to the power to order specific performance.

<sup>436</sup> See the Commission's Draft Bill for domestic arbitration, s 47.

<sup>437</sup> See the Kenya Branch Rules rule 16B (2), (5), (12) and (13), and 16C (11) on compound interest.

<sup>438</sup> See Mustill & Boyd *Commercial Arbitration* 291.

## (i) The Duty to Take Care

Arbitral parties expect the arbitrator to perform his tasks with due care. Because they pay for his services as arbitrator the relationship can be deemed contractual. The arbitrator's inherent duty to exercise due care and diligence is assumed; but whether he is also under a legal duty to exercise care may depend on the terms of his appointment. It is submitted that a legal duty may not be assumed in absence of clear provisions in the contract of appointment. Neither the Model Law<sup>439</sup> nor the national statutes contain any provisions on the liabilities of arbitrators; and because arbitrators perform a judicial or quasi-judicial function it is quite appropriate, as a matter of public policy, to accord arbitrators immunity from suit<sup>440</sup> though they may be removed for breaches of duty.

## (ii) The Duty to Proceed Diligently and the Duty to Act Impartially

These two duties relate to due process and are recognized by law. There is clearly a duty on the arbitrator to act diligently in the provisions of Article 14(1) of the Model Law and, by extension, in the corresponding provisions of the national statutes based on it. The Article in relevant part provides that an arbitrator who (i) becomes *de jure* or *de facto* unable to act or (ii) for other reasons fails to act without undue delay may have his mandate terminated. These are ostensibly therefore two alternative grounds on which the mandate could be lost. The termination of the mandate does not occur automatically but through either the arbitrator's withdrawal from office or the agreement of the parties. If a controversy remains as to the presence of the grounds referred to in article 14, it will have to be resolved by the court, or a designated authority.<sup>441</sup> The first ground, *de jure* and *de facto* inability to act, is derived from Article 13(2) of the UNCITRAL Arbitration Rules of 1976. It is doubted whether *de jure* inability to act is wide enough to include apparent bias,<sup>442</sup> and as apparent bias is perceived logically to give rise to "justifiable doubts as to the arbitrator's impartiality or independence" it is suggested that it is thereby a ground on which the arbitrator may be challenged under Article 13 (read with Article 12(2)) rather than an instance of *de jure* inability to act. The practical importance of this point, if any, is rather subtle, but unlike Article 13(3), Article 14

<sup>439</sup> The Model Law avoided the topic for being highly controversial;

<sup>440</sup> Redfern and Hunter *International Commercial Arbitration* 254-256. The English Arbitration Act 1996, s 29 accords immunity from liability to an arbitrator for anything done or omitted in the discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

<sup>441</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 438 who infer three grounds of termination of the mandate and three methods of doing so. Contrast the SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* 70 which infers two alternative grounds.

<sup>442</sup> SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* 70.

gives the arbitral tribunal no discretion to continue with the arbitration while an application for the termination of an arbitrator's mandate is under consideration by the court.<sup>443</sup>

The phrase “without undue delay” in the second ground for termination expresses the time element inherent in the words “failure to act”; but otherwise it is not intended that the efficiency with which the arbitral proceedings are conducted should be a factor, in order not to subject the substantive work of the tribunal to a review.<sup>444</sup> On the meaning of “fails to act” the guidance provided by the UNCITRAL Secretariat<sup>445</sup> is that in judging whether an arbitrator failed to act the following considerations or questions may be relevant: which action was expected, or required by the arbitration agreement and what was the specific procedural requirement? If an arbitrator has done nothing in this regard, then is the delay inordinate and unacceptable in the circumstances? If he has done something then did his conduct fall below a reasonable standard expected?

English law, for example, requires the tribunal (i) to act fairly and impartially as between the parties and to give each party a *reasonable opportunity* to put his case and deal with that of his opponent and (ii) to adopt procedures suitable to the circumstances of the particular case to avoid unnecessary delay and expense.<sup>446</sup> The duty to treat the parties with equality and to give each a *full opportunity* to present his case is enacted by Article 18 of the Model Law as replicated in the corresponding national statutes of Kenya (section 19), Nigeria (section 14) and Zimbabwe (First Schedule Article 18). Nothing significant seems to turn on the difference of wording with reference to “reasonable opportunity” under the English Act and “full opportunity” under the Model Law regarding the duty of impartiality as in practice the two terms could be given the same or similar interpretation.<sup>447</sup>

### 3.3.6 The Adequacy of an Arbitrator's Procedural Powers

The logical question from the discussion so far is whether the procedural powers conferred by parties, the law and the rules are adequate for the performance of the arbitral function?

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<sup>443</sup> SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* 70.

<sup>444</sup> SA Law Commission's Report *Arbitration: an International Arbitration Act for South Africa* 70.

<sup>445</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 439.

<sup>446</sup> Arbitration Act 1996, s 33.

<sup>447</sup> The ICC Rules (1998), Article 15.2 adopt the “reasonable” opportunity approach; see Harris, Planterose & Tecks *English Arbitration Act 1996 – a Commentary* 174-175. Interestingly Holtzmann and Neuhaus *Guide to the UNCITRAL Model Law* 557 suggest that the terms “treated with equality” and “full opportunity” in the Model Law Article 18 should be interpreted “reasonably” in regulating the procedural aspects of the arbitration. The UNCITRAL Secretariat's Explanatory Note gave no guidelines on the interpretation of those terms.

As noted above there are differences of opinion among practitioners regarding the adequacy or otherwise of the arbitrator's powers.<sup>448</sup> On the one hand it is necessary for the proper discharge of the arbitral mandate for an arbitrator to have full powers to perform his tasks.<sup>449</sup> The justification is that it is quite inconsistent with the performance of those tasks for an arbitrator, chosen for his expertise in the field of dispute, to be hampered by inadequate powers to do so. Not uncommonly, an arbitrator may be apprehensive about the extent of his procedural powers because of frequent challenges to his authority and occasional intimidation by the very parties who conferred his mandate or by persons acting on their behalf in the proceedings. From such concerns it might be thought that arbitrators should be seised with full procedural powers to conduct the arbitration with confidence, efficiency and expedition.

On the other hand it is felt by others that the power of the arbitral tribunal conferred by the parties themselves within the limits of the applicable law and the additional powers conferred by the operation of law are, in practice, sufficient for the tribunal to perform its tasks fully and effectively.<sup>450</sup>

To this writer the question whether or not arbitrators have sufficient procedural powers does not commend a uniform or straightforward response and depends largely on the powers granted by arbitration regimes in different jurisdictions. It is apparent from the discussion above that English arbitrators have substantially more express procedural powers than those in Model Law jurisdictions.<sup>451</sup> An explanation given for not giving arbitrators more powers is that even judges with state power in their armoury and formidable coercive powers do not enjoy unlimited powers and their decisions are commonly appealable.<sup>452</sup> Other explanations

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<sup>448</sup> See para 3.3.1 n 360 above.

<sup>449</sup> Herrmann G "The Role of the Courts under the UNCITRAL Model Law Script" in *Contemporary Problems in International Arbitration* 166.

<sup>450</sup> Redfern & Hunter *International Commercial Arbitration* 234-257; Mustill & Boyd *Commercial Arbitration* 279. The view of Lord Mustill that the arbitral powers are adequate and that it is for arbitrators to utilize fully those powers has been noted earlier in this study. See too Hunter M "The Procedural Powers of Arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345-360.

<sup>451</sup> See paras 3.3.1 and 3.3.2 above. Because arbitral procedural powers are more explicitly set out under ss 34, 38 and 41 of the 1996 English Act, there is less need to rely on a general power such as in the Model Law Article 19(2). Additionally s 41 on the tribunal's powers on a party's default contains a substantially wider battery of sanctions aimed at a wider range of situations than the Model Law Article 25. See also the Saville Report (1996) paras 206-211 on s 41 and *Russell on Arbitration* (23<sup>rd</sup> Edition) paras 5-181 – 5-185. *Russell on Arbitration* para 7-198 states that in most cases the tribunal's own powers under s 41 to enforce its orders will suffice. The section is commented on in paragraphs 3.3.4 and 3.6.9 of this dissertation.

<sup>452</sup> Asouzu *International Commercial Arbitration and African States* 170-171; Reisman MW *Systems of Control in International Adjudication and Arbitration: Breakdown and Repairs* (1992); Park WW "National Legal Systems and Private Dispute Resolution" (1988) 82 *American Journal of International Law* 616; Park WW "Private Adjudicators and the Public Interest" (1986) 12 *Brooklyn Journal of International Law* 629; Asouzu AA

are based on the dictates of public policy and public interest and the obligation of states to ensure conformity with international standards of due process and the rule of law. As public policy and public interest differ from state to state and the province of public policy is not uniformly defined, this is an explanation that is not readily attractive as it raises more questions than answers. A further reason for limiting the powers of arbitrators is the need to control wrongful conduct or the excesses of the arbitral tribunal.<sup>453</sup> Although a court cannot under the UNCITRAL Model Law review an arbitrator's procedural rulings prior to the award, it could in an extreme case, on the application of a party, intervene to remove the arbitrator. In Kenya, procedural rulings are challenged in court and, not infrequently, as a ploy or delaying tactic by an unco-operative party and it is one of the concerns that prompted this research. Arbitrators, it can be argued, must be subject to the requirements of due process for the sake of the integrity of the arbitral process.<sup>454</sup>

However, arbitrators whose procedural orders or directives on time limits, for example, have been ignored or whose orders for production of documents are not complied with, might think differently about the adequacy of their powers. The same could be said about arbitrators who might have encountered unwarranted and offensive behaviour from participants in arbitral proceedings and have felt powerless to do anything about it, or have suffered intimidation from lawyers, who can get away with it because of the lack of coercive arbitral powers.

A firm and fair stance by the tribunal might be suggested as a means of dealing with difficult and awkward participants before the tribunal. It is submitted however that such an approach does not really go far enough to meet the gravamen of offensive and contemptible conduct from the perpetrators. Moreover, a "fair and firm stance" is a subjective concept and, not being a standardized practice, its application can be expected to vary from arbitrator to arbitrator. Even if it is accepted that the powers conferred by the parties, the law and institutional rules may be sufficient for an arbitrator, in normal circumstances, to direct the course of the arbitral proceedings, it is nevertheless submitted that additional statutory powers are still necessary in the armoury of the arbitral tribunal. These should take the form of coercive sanctions to compel compliance with arbitral orders, directives and rulings as well as punitive damages against aggravated misconduct and malicious conduct. The availability of such power and sanctions can deter bad behavior, prevent unwarranted disruptions and

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"A Threat to Arbitral Integrity" (1995) 12(4) *Journal of International Arbitration* 145; Asouzu AA "Arbitration and Judicial Powers in Nigeria" (2001) 18(6) *Journal of International Arbitration* 617-640.

<sup>453</sup> See para 3.3.2 above.

<sup>454</sup> Asouzu (1995) 12(4) *Journal of International Arbitration* 145.

flippant disobedience to arbitral orders by those inclined to see arbitrators as lesser mortals than judges. Their availability will also protect and safeguard the integrity of the process, and ultimately the award. It is to be noted that in South Africa any person who willfully insults an arbitrator or umpire or willfully misbehaves during arbitral proceedings is guilty of an offence and is liable on conviction to a fine not exceeding R100 or to imprisonment for a period not exceeding three months (Arbitration Act 42 of 1965 s 22(1)). The adequacy or otherwise of such penalty is food for thought for those who seek a new domestic arbitration law for South Africa. In its report *Domestic Arbitration* (2001), the SA Law Commission recommended that the penalty should be linked to section 30(4) of the Supreme Court Act 59 of 1959.<sup>455</sup> A foundation for punitive damages<sup>456</sup> and an arbitral Code of Sanctions<sup>457</sup> is proposed below. It is recommended that national and international committees could be constituted under the auspices of institutions such as the Chartered Institute of Arbitrators and the IBA to investigate the need for punitive damages and arbitral sanctions, and to formulate proposals for a Code of Sanctions and Damages.

### 3.3.7 Exemplary and Punitive Damages<sup>458</sup>

Exemplary and punitive damages are a substantive remedy and therefore distinct from procedural remedies or sanctions. In the context of this study however it is deemed appropriate to deal with the topic here because underlying the recommendation for a Code of Sanctions to facilitate arbitration, there is also the need to deter persistent or malicious and objectionable conduct by a party in arbitration by the award of punitive damages, also known as exemplary damages.<sup>459</sup> Punitive damages are available in private actions in common-law countries but, generally, it seems, not in civil-law countries.<sup>460</sup> This makes it a controversial topic, especially in the international arena. Punitive damages are sums awarded over and above any compensatory or nominal damages for aggravated misconduct of the defendant and the most generally acknowledged justification for it is to deter and punish willful or malicious

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<sup>455</sup> See s 41(1) of the Draft Bill.

<sup>456</sup> See paragraph 3.3.7 below.

<sup>457</sup> See paragraph 3.5.7 and 3.6.7 below.

<sup>458</sup> For a major contribution on punitive damages see Gotanda JY *Punitive Damages in Private International Law* (2005) ch 4. See too on exemplary damages *Russell on Arbitration* 6-103-6-106.

<sup>459</sup> Redfern & Hunter *International Commercial Arbitration* 357. On the award of punitive damages in arbitration see (2003) 3(2) *International Arbitration News* 5.

<sup>460</sup> The prohibition on punitive damages in private actions in countries like France, Germany and Switzerland reflects the strict separation of “damages” in civil law and “punishment” in criminal law. The repealed Swedish Arbitration Act of 1929 para 15 expressly prohibited an arbitrator from awarding penalties and fines. However, Norway, a civilian jurisdiction, appears to allow punitive damages (II *International Encyclopedia*, ch 10 84).

conduct and repetition.<sup>461</sup> The objection to punitive damages is that they unfairly constitute a windfall to the plaintiff, subject the defendant to double jeopardy and may far exceed the maximum criminal penalty for the same conduct.

The award of punitive damages is rooted in English common law,<sup>462</sup> which restricted punitive damages to suits involving (i) oppressive action by government servants; (ii) conduct calculated to make profit in excess of the compensation available to the plaintiff; and (iii) cases in which punitive damages are expressly authorized by statute. It seems that in the Republic of Ireland, punitive damages extend to oppressive conduct by both government servants and private individuals.<sup>463</sup>

Punitive damages are commonly awarded in the United States, although differing views have emerged as to whether or not an arbitrator has the authority to award punitive damages. One view is that arbitrators have no power to award punitive damages.<sup>464</sup> This is based on the rationale that such award is an exemplary remedy that can only be granted by judicial authority. A second view is that an arbitrator cannot grant such relief unless expressly provided by the arbitration agreement.<sup>465</sup>

The arguments in favour of arbitrators granting punitive damages as a sanction for a party's procedural misconduct are as follows. Firstly, in the specific instances that the issue arises in arbitration the arbitrator is perfectly capable of determining whether a particular conduct is unacceptable and the amount that can deter or punish such misconduct. Secondly, denying this punitive power to arbitrators diminishes the arbitrator's authority and undermines the value and efficacy of the arbitral process as a dispute resolution procedure. Thirdly, the resultant procedural inefficiencies frustrate the public policies and purposes served by punitive damages. Finally, arbitrators must have the flexibility to determine appropriate remedies. The governing law in the United States on the issue is the Federal Arbitration Act which applies to actions involving interstate commerce<sup>466</sup> and to international arbitrations.<sup>467</sup>

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<sup>461</sup> This writer has awarded substantial damages for wilful breach of contract in an arbitral decision that was upheld by the Kenya Court of Appeal in *Kobil Petroleum v Kenya Shell Ltd* Civ App. No NAI 57 of 2006. See also Dobbs DB *Handbook on the Law of Remedies* (1973) 204.

<sup>462</sup> *Wilkes v Wood* 98 Eng. Rep 489 (CP 1763); *Rooks v Barnard* [1964] AC 1129 (HL).

<sup>463</sup> *Conway v Irish Nat'l Teachers Org* [1991] ILRM 497 (SC).

<sup>464</sup> The "Garrity Rule" from *Garrity v Lyle Stuart Inc* 353 NE 2d 793 (NY 1976).

<sup>465</sup> *Baltimore Regional Joint Bd, Amalgamated Clothing Workers v Webster Clothes* 596 F2d 95 98 (4<sup>th</sup> Cir 1989).

<sup>466</sup> Chapter 1 9 USC para 1 (1994).

<sup>467</sup> Chapter 2 9 USC para 202.

In his extensive research on punitive damages from which this writer has greatly benefited, Gotanda<sup>468</sup> observed that jurisdictions that prohibit the award of punitive damages in arbitration do so because of their perception that such damages are an extraordinary sanction that may be awarded only by a state authority (i.e. a court) and are thus subject to judicial review; while those that allow arbitrators to award punitive damages view the award as an important deterrent. This writer supports the award of punitive damages in arbitration in line with his advocacy of a Code of Arbitral Sanctions that will include punitive damages. But because such an award is not readily available in the common-law jurisdictions and it is controversial in actions for breach of contract, it will be prudent for an arbitrator first to ascertain whether or not there exists an arbitration agreement or clause that includes or excludes punitive damages from the issues in the arbitration.

A clause permitting punitive damages should be enforced unless it violates an applicable mandatory rule of law. This approach would firstly recognize both the doctrine of party autonomy and its limitations. Secondly, if no such clause exists, an arbitrator should determine whether the parties intended to give the arbitrator the authority to award punitive damages bearing in mind the obligation to render an enforceable award. Thirdly, it ought to be apparent on the face of the award that such relief is separate and distinct from the award of other damages. Fourthly, where the arbitrator has such a power, it may be prudent first to ask the parties or their representatives for their views on the matter before exercising the power.<sup>469</sup> Finally, the arbitrator would still have a duty to give reasons for the decision.

In conclusion on this topic, this writer submits that the fact that an award of damages may be penal in nature should not, in and of itself, be a ground for not permitting the award or for refusing to enforce it where the circumstances justify such an award.

Despite the age-old resistance of English law to the award of exemplary or punitive damages by arbitrators in actions for breach of contract, it may well be that the door is not closed on the subject. Perhaps the prospect of change, in this respect, is held out by the provisions of section 48 of the Arbitration Act 1996 to the effect that

“[t]he parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.”

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<sup>468</sup> Gotanda *Punitive Damages in Private International Law* ch 4.

<sup>469</sup> In this respect, the power is analogous to the arbitrator's power to award costs.

The Act provides that unless the parties otherwise agree, the arbitral tribunal may grant injunctive relief as a substantive remedy.<sup>470</sup> Therefore, the possibility of the arbitrator applying the substantive remedy of damages as a sanction for a party's flagrant procedural misconduct is not as radical as it may first appear.

### 3.3.8 Conclusion

As the use of arbitration gathers greater momentum nationally and internationally and the arbitral procedure achieves wider acceptance worldwide, the chances are that the problematic areas of practice, on which the provisions of the Model Law and national statutes derived from it are inadequate or silent, will receive greater attention. This will hopefully lead to the enhancement of arbitral powers in jurisdictions that value arbitration.

Arbitration law has come a long way from when it was thought that an arbitrator had greater latitude than the court to do complete justice between the parties resulting in the need for strict judicial control of arbitral powers.<sup>471</sup> Today the English Arbitration Act, which gives even wider latitude to arbitrators, is praised for restating and improving the law that has moved further away from judicial restrictions and for its recognition and blend of the principles of party autonomy, the autonomy of the arbitral tribunal and the immunity of arbitrators.<sup>472</sup>

Party freedom, and in default of its exercise, the freedom of the arbitrator to determine the rules of procedure, as entrenched by the Model Law and some national arbitration statutes, are, indubitably, significant statutory enhancements to arbitration. But perhaps the arbitrator's real power lies, together with the law or the rules of arbitration, in the authority the arbitrator possesses as the person who will make the ultimate decision on the parties' dispute.

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<sup>470</sup> See the Saville Report (1996) para 234 and *Russell on Arbitration* 6-107 regarding s 48(5)(a).

<sup>471</sup> *Knox v Symmonds* (1791) 1 Ves Jun369, 30 ER 390; *Zarnikow v Ruth Schmidt & Co* [1922] 2 KB 478 at 484-485 and at 488: "There must be no Alsatia in England where the King's writ does not run".

<sup>472</sup> Hong-Lin Yu "Five Years On: A Review of the English Arbitration Act 1996" (2002) 19(3) *Journal of International Arbitration* 209-225; Reid A "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?" (2004) 21(3) *Journal of International Arbitration* 227-238. Okekeifere AI "Appointment and Challenge of Arbitrators under the UNCITRAL Model Law Part 2" (2000) 3(1) *International Arbitration Law Review* 13, 16 states: "The Model Law grants an arbitrator a wider latitude to act with impunity", but "the failure of the Model Law to include avoidable delay or lack of commitment to the case as grounds for dismissal of the arbitrator has been criticised as a serious lacuna."

### 3.4 Taking Charge of the Arbitration and Minimizing the Frequency of Adjournments, Postponements and Delay

#### 3.4.1. Adjournments and Postponements

Adjournments and postponements are common features of domestic arbitration practice. The problem, in the context of this study, is their frequency and the noticeable perception or misconception that the flexibility and informality of arbitration make an adjournment or postponement easier to get away with than in litigation.<sup>473</sup> The topic is chosen for consideration in order to investigate the underlying causes and the means of controlling the frequency of unwarranted interruptions in arbitral proceedings and consequently minimizing the delay occasioned by the incidence of adjournments.

A further and more ambitious justification is the dearth of written material on the subject despite the daily encounters with requests for adjournments and postponements and their frequency. It is conceivable that, as a procedural matter, adjournments are deemed to be within the procedural discretion of an arbitrator as “master of procedure”<sup>474</sup> to be dealt with as the arbitral tribunal considers appropriate. Perhaps this also explains the almost total absence of guidelines on dealing with applications for adjournments despite their disruptive propensity and the potential for protracting arbitral proceedings and hearings.

The terms “adjournment” and “postponement” tend to be used synonymously and interchangeably in relation to legal proceedings. This is not surprising because “to adjourn” can mean to bring to an end or postpone a meeting, session or proceeding,<sup>475</sup> and “to postpone” can likewise mean to put off a session or meeting to a later time.<sup>476</sup> Further, an adjourned meeting is in the ordinary sense a mere continuation of the original meeting with no need for a fresh notice of it to be given.<sup>477</sup> The hearing of a case can be adjourned at the discretion of a judge.<sup>478</sup> It is probably safe to say that the context and object of an

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<sup>473</sup> In this writer’s experience most legal practitioners in arbitration tend to look at arbitration as an informal affair and conducted without wig and gown in an atmosphere more relaxed and less rigorous than the courtroom.

<sup>474</sup> Bernstein et al *Handbook of Arbitration Practice* para 2-302. Such thinking might appeal to those who are won over by the idea of an arbitrator as master of procedure. Arbitrators who do not share this view might feel the need for stricter guidelines on adjournments and postponements.

<sup>475</sup> Bryan AG *Black’s Law Dictionary* 8<sup>th</sup> ed (1999).

<sup>476</sup> *Black’s Law Dictionary*, 8<sup>th</sup> edition. See also *Chambers Concise 20<sup>th</sup> Century Dictionary* for the ordinary meaning of these words.

<sup>477</sup> See Burke J *Jowitt’s Dictionary of English Law*, 2<sup>nd</sup> edition, citing *Scadding v Lorrant* (1851) 3 HLC 418.

<sup>478</sup> *Jowitt’s Dictionary*; Rules of Supreme Court, Order 35 rule 3 (England).

adjournment or postponement will determine the sense and meaning to be accorded to each term.<sup>479</sup>

The purely technical or subtle differences in meaning attributed to or suggested by the two terms, if any, are of little or no significance in this study as the consequences of either approach or process are more or less similar. The concern here is the frequency of interruptions to arbitral proceedings occasioned by an unwarranted adjournment or postponement which delay the arbitral process. For this reason, in what follows the terms “adjournment” and “postponement” will be used interchangeably in connection with arbitral proceedings and hearings or together as appropriate for the sake of emphasis. It is also intended to examine the causes of adjournments and postponements and the management of time as a technique for curbing avoidable delay.

As noted, an adjournment or postponement puts off an arbitral meeting or proceeding to another day thereby delaying the progress of the proceedings and the day of reckoning and consequently the delivery of the award. Yet because such an interruption may in some instances be justified an arbitrator cannot ignore a request for postponement and in any event he cannot determine the reasonableness or otherwise of the request until he allows time and opportunity to hear and consider the reasons offered for putting off or interrupting the proceedings. The reference to time is appropriate. This is because as time, to an extent, is of the essence in the conduct of arbitrations, time-management is a relevant consideration with regard to how much of it can be allocated to the entire arbitral proceedings and the intervening interruptions that occasion delay. Be that as it may, it is submitted that excusable delays can and ought to be minimized while inexcusable delays including tactical ploys are discouraged, deterred and even penalized.

Before commenting further on time-management and delays it is appropriate to identify the causes of adjournment and postponements. These are usually found in the requests for adjournments and postponements and the grounds upon which such requests are based. Not

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<sup>479</sup> For example, in relation to public enquiries under the English Election Commissioners Act 1852, enquiries cannot be held without meetings and when the power of holding meetings is given, “adjourn” has the popular sense of “deferring or postponing” an inquiry to a future day: see *Stroud’s Judicial Dictionary of Words and Phrases*, 6<sup>th</sup> edition volume 1, citing Mellor J in *Fitzgerald’s Case*, LR5QB1 at 10. The term “postpone” also takes differing meaning in relation to differing subject-matter, such as the sale of interests in real estate, investments and tenancies. The similarity of meaning in “adjourn” and “postpone” is also reflected in legal terminology like “adjourn *sine die*” (i.e. ending a session without setting a time to reconvene; and “postpone indefinitely” meaning disposing of a motion without a decision on merits and preventing its further consideration during the same session: *Black’s Law Dictionary*.

surprisingly the request for adjournments is often at the instance of the respondent and the numerous and varied grounds offered include family bereavement or the sudden illness of a relative, or the call of public duty necessitating the presence of a participant elsewhere than at the place of arbitration. In Kenya, the need to attend the funeral of an “uncle” (curiously, more so than the funeral of any other relative) would top the list of commonest excuses given for seeking an adjournment. Uncles abound in African folk-life and they may not be necessarily blood-relatives. Again, with reference to Kenya, if a state advocate is involved in arbitration he or she is likely to be booked for other professional duties at the same time as the arbitration proceedings. Frequently in Kenya, the precedence accorded to state courts over arbitral tribunals is used as a ground of adjournment to enable counsel to appear in court either to take a judgment or ruling or to make an urgent application in a criminal case.<sup>480</sup>

Other common grounds are the need to amend pleadings; the unavailability of a prospective witness who has allegedly traveled; or that an expert witness requires more time to complete a report required by the tribunal.<sup>481</sup> The point is that more often than not the application is nothing more than a delaying tactic or strategy to buy more time and the arbitrator may be apprehensive about the prospect of court intervention and more delay if the application is denied. In the simplest and obvious instances an arbitrator will correctly grant an adjournment without more on appropriate conditions. In suspicious cases he is placed in a dilemma where the application is unexpected and unprovoked by any immediate antecedent event. Either way some delay will occur with possible prejudicial consequence for the innocent party. It is also suggested that the arbitrator’s dilemmas and hesitations with suspect applications and his fear of court intervention may be due more to his own timidity than to the inherent weakness in the arbitral procedure.

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<sup>480</sup> When an alleged short and unexpected notice for counsel to appear in court is proffered as the reason for a postponement it is troublesome for the arbitral tribunal bearing in mind that the arbitral hearing date might have been fixed by consent several weeks or months earlier. The monetary value of the arbitral dispute may far outweigh the value of the litigation, and the reception of the evidence of a busy expert or an overseas witness may have to be postponed for the convenience of the absenting counsel.

<sup>481</sup> Ghikas G “A Principled Approach to Adjourning the Decision to Enforce under the Model Law and the New York Convention” (2006) 22(1) *Arbitration International* 53 57 draws the analogy of court adjournments by stating: “Courts often are asked to grant adjournments or postponements of domestic legal proceedings. One party or the other may ask for more time to prepare, or it may be that insufficient time for the hearing has been reserved, or there may be other practical or logistical reasons to justify an adjournment.” He suggests with regard to the adjournment of enforcement proceedings under Article 36(2) of the Model Law and the New York Convention (Article VI) that “regardless of their customary approach to granting adjournments in domestic matters, in enforcement proceedings courts must scrutinise the grounds for seeking adjournments with great care to ensure that they are not being asked to exercise their discretion in a manner that circumvents the Convention or the Model Law.” Ghikas is a Canadian QC and barrister.

Where the arbitrator entertains doubts as to the bona fides of the application he is faced with two conflicting considerations, first, to give due consideration to the application and second, to give due consideration to the delay to be occasioned by the application. How does an arbitrator proceed? The mischief engendered by the application is delay. The stage at which the application is made is a significant factor. In a genuine case, applicant counsel will offer an acceptable explanation and or some proof of the cause of adjournment enabling the arbitrator to grant the adjournment readily, with or without an award of the wasted costs, as appropriate. Indeed the offer of wasted costs also makes it easier for the application to be granted even if grudgingly; but because even wasted costs do not fully cure the prejudice caused by delay<sup>482</sup> the application may be granted only where the arbitrator is persuaded by the reasons offered. The arbitrator's duty to ensure fairness and justice between the parties in this regard is as important as the accompanying need for expeditious disposal of the dispute.<sup>483</sup>

It is submitted that an arbitrator ought not to be intimidated by suspicious stratagems particularly because a court will be less likely to upset an arbitrator's rational decision to allow or disallow an adjournment following the due hearing and consideration of the grounds and merits of the application and without any serious procedural irregularity or breach of any rule of natural justice by the arbitrator.

The national arbitration statutes of Kenya, Nigeria and Zimbabwe do not provide guidelines for dealing with requests for adjournments or for stemming their frequency. This is no cause for despair or for an arbitrator to succumb to disdainful treatment of the proceedings by one of the parties. Parties present themselves differently to the tribunal. The Model Law recognizes the differences in parties and indeed arbitrators by requiring the tribunal to treat the parties with equality and to accord each party a full opportunity for presenting his case.<sup>484</sup> The hearing and determination of applications may well facilitate the proceedings. Some parties lose interest soon after the initiation or commencement of proceedings and become inactive or dilatory; others become aggressive, uncooperative or deliberate defaulters, who fail or refuse to comply with arbitral orders and directives. The conduct and performance of parties and

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<sup>482</sup>Monetary compensation is what an adjudicator may deem sufficient for a particular kind of prejudice or injury; but it is never a full or complete atonement or remedy for an unquantifiable prejudice or injury suffered. For a tactful applicant the offer of wasted costs may be a cheaper price to pay for the benefit of an advantageous postponement.

<sup>483</sup> See Du Plessis PW "Procedural Rules: the Supreme Court and the Rules for the Conduct of Arbitrations" (1987) 5(6) *The Professional Builder* 22 for the criteria for evaluating arbitral procedures.

<sup>484</sup> Article 18.

their advisers from the very beginning to the time of the application may shed light on how to treat them and the degree of consideration and firmness necessary to deal with adjournments at their behest. The prudent arbitrator will be guided by such factors and the reasons proffered for the adjournment in determining the request within the terms of the arbitration agreement, the permissible rules of practice and the governing law. On the other hand an arbitrator can be firm in rejecting a frivolous request or one unsupported by rational explanation or excuse, without pampering to exaggerated notions of fair play or turning the otherwise helpful rules of practice into absolute articles of faith.

It may be added that an application for an adjournment or postponement calls for a procedural ruling which is distinguishable from an interim award. The former deals with the procedure to be followed by the tribunal and parties towards the determination of their dispute. The latter, an interim award, determines an issue or matter in dispute while postponing other issues to be determined in the final award. The essence of the distinction is that a court may interfere with a procedural ruling by an arbitrator during the arbitration only in exceptional circumstances. Therefore an arbitrator on the right track, so to speak, need not fear court interference with his ruling on a request for an adjournment or postponement. In *Tuesday Industries (Pty) Ltd v Condor Industries (Pty)* 1978 4 SA 379 (T) 383F-384E a South African court declined to interfere with an arbitrator's refusal to grant a postponement.

The widening of the range of available procedural powers as done, for example, by the English Arbitration Act 1996,<sup>485</sup> would enable an arbitrator to deal confidently with requests for adjournments to enable parties to gather more evidence or produce particular documents, or prepare additional witnesses for the hearing. This is because under the new powers given by the English Act the tribunal can, after identifying the issues in the dispute, refuse adjournments based on the grounds noted above by opting to determine some issues without receiving any evidence or determine other issues on documents only without a hearing, or hold a hearing confined to the determination of specific issues only. Such an approach is very likely to save time and expense and an arbitrator who exercises the variety of options offered by law can hardly be expected to incur the wrath of a court for refusing an unnecessary adjournment.

The same considerations would apply to the refusal of a request for an adjournment that hinges on an alleged need for full discovery of documents. On the same or similar principles

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<sup>485</sup> S 34(2)(g).

to those enacted by the English Arbitration Act and the need to perform the duties listed under section 33 of the Act, a degree of robustness will be necessary for an arbitrator to deny requests for full discovery. This ought to be encouraged not only to curtail the circumstances in which discovery may be sought but also in the interests of saving time and expense.

It was noted earlier that the scant literature on the subject of adjournments and postponements may in part be explained by the fact that procedural rulings on applications for adjournments and postponements are conceivably within the procedural discretion of the arbitral tribunal, without more, to deal with such incidents as appropriate. This would naturally require an arbitrator to take charge of the arbitral process from the very beginning with regard to the allocation of time for the parties to do all things necessary for the effective conduct of the arbitration. Adjournments are therefore not confined to actual proceedings or hearings but also to preliminary and other arbitral meetings before the hearing. It is therefore not uncommon for major arbitral meetings to be adjourned, or for several short adjournments to occur so that in appropriate circumstances members of the tribunal can confer in private or for party representatives to engage in private discussions.<sup>486</sup> The opportunity so afforded by legitimate adjournments which enable the parties, with the guidance of the tribunal, to agree on the basic framework and organization of the proceedings can save time and costs for all concerned. The legitimacy of “comfort-breaks”<sup>487</sup> during actual proceedings is recognized by the authors Redfern and Hunter as necessary for elderly arbitrators “who (unlike the parties and their representatives) cannot slip out for a few minutes while the hearing is in progress!” It boils down to a flexible approach by the tribunal that is capable of being adapted to the circumstances of a particular case or a particular hearing. The authors therefore recommend an occasional half-day or even full day adjournment to afford sufficient time for lawyers to prepare their cases and speeches in the course of the proceedings. A tribunal should take charge of the proceedings<sup>488</sup> and proceed firmly but fairly in the expectation that the parties will respond accordingly in making the best use of the time allotted for presentation of their cases.

A conscientious arbitrator would frown upon the waste of arbitration time whether generally or through tactical requests for adjournments and postponements and the ensuing delay in the

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<sup>486</sup> Redfern & Hunter *International Commercial Arbitration* 279.

<sup>487</sup> Redfern & Hunter *International Commercial Arbitration* 223.

<sup>488</sup> Although the authors are primarily concerned with international commercial arbitration, their views are also pertinent to domestic arbitration. “The Arbitral Tribunal shall be in full charge of the hearings” per ICC Arbitration Rules article 21.3.

conduct of the proceedings and the delivery of the award. Comparing the incidence of wasted time in litigation and arbitration it has been said that

“[u]ntil recent years, if the matters in dispute in a civil action had been referred to arbitration rather than to the courts, the probability was that the procedure would have been the same, the waste of time the same, and the waste of costs even greater (in that the arbitrator’s time would have been paid by the parties whereas the judge’s time was in large part paid by the state). An arbitrator should be free of all this.”<sup>489</sup>

And further that

“[i]n a large proportion of arbitrations he (an arbitrator) is himself an expert in the field in which the dispute arises. In consequence he can read the documents with greater understanding than most lay judges, because he does not have to be led like a child through 500 or 5,000 pages of documents, having elementary trade or technical expressions explained.”<sup>490</sup>

The changes made by the English Arbitration Act 1996 enabling an English arbitrator to take charge and control of all aspects of arbitration proceedings including adjournments can be immediately appreciated in the light of these comments. This is because, in the words of the authors quoted above,

“[t]he Act enables the arbitrator to be bold and innovative in deciding new procedures and not merely to continue to use the traditional procedures modeled on litigation. The idea that litigation or arbitration, even of complex technical disputes, needs to take weeks or months of hearings is being seriously questioned. ... The Woolf proposals for case management have as an objective the reduction of the time spent in hearings with a view to saving both time and money.”<sup>491</sup>

The authors conclude their observations on time-saving techniques, which are relevant in both litigation and arbitration, with the statement that

“[t]here are many procedural devices for expedition and in the absence of agreement of the parties, arbitrators must opt for the most expeditious and economic procedural solution. That

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<sup>489</sup> Bernstein et al *Handbook of Arbitration Practice* 106.

<sup>490</sup> Bernstein et al *Handbook of Arbitration Practice* 106.

<sup>491</sup> Bernstein et al *Handbook of Arbitration Practice* 106.

should be the objective in programming the arbitration and in particular in deciding the timing, length and purpose of hearings.”<sup>492</sup>

Another commentator observes, with regard to how time can be wasted, that

“[t]ime is a particularly precious commodity in international arbitral proceedings ... that it is a curiosity of the legal process, and particularly so in its arbitral manifestation, that work tends to expand to exceed available time. This is what the timely arbitrator must prevent. ... The purpose of hearings is to help the tribunal resolve the dispute. Counsel are to be given a reasonable opportunity to put in their evidence, and to persuade the arbitrators; but it is for the tribunal, not counsel to determine what is reasonable. Another frequent cause of wasted time is the failure to achieve an understanding on the part of all participants as to what will happen in the course of hearings. ... In most cases, this kind of misadventure is easy to avoid. What the presiding arbitrator needs to do is to consult with counsel in order to understand their desiderata and expectations, and to explain those of the arbitral tribunal. This is how a clear schedule may be established. It provides the discipline within which the advocates are called upon to exercise their talents.”<sup>493</sup>

One cannot but be impressed by the persuasive force and effect of these salutary remarks by the distinguished authors quoted above. Surely there is some foundation for arbitrators in the African jurisdictions that have drawn from the Model Law provisions of Articles 18 and 19 as well as English arbitration culture to move in the same or similar direction as English arbitrators. This may have the desirable result of curtailing wasted time otherwise occasioned by conservative and excessively cautionary methods of dealing with applications for adjournments and postponements.

### 3.4.2 Delay

Delay is so closely tied up with adjournments and postponements because it is a direct consequence of those arbitral processes. Moreover the effect of adjournments, postponements and delay are the same – the prolongation of proceedings, increased costs and expenses and postponement of the delivery of the award. Therefore having exemplified some of the

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<sup>492</sup> Bernstein et al *Handbook of Arbitration Practice* 106.

<sup>493</sup> Paulsson J “The Timely Arbitrator: Reflections on the Böckstiegel Method” (2006) 22 *Arbitration International* 19-20. This article is written with reference to the arbitration of *Tradex Hellas SA v Republic of Albania* award rendered on 29 April 1999, (1999) 14 *ICSID Review – Foreign Investment Law Journal* 161. Paulsson suggests that this arbitration provides an interesting illustration of the Böckstiegel approach to the avoidance of time-wasting in arbitration practice

commonest causes and excuses for adjournments and postponements it would be appropriate also to discuss the incidence of delay with particular reference to adjournments and postponements, drawing upon the experiences of other jurisdictions in combating inexcusable delay.

The reasons for delay vary due to the different sources from which delays emanate, such as, the arbitral parties, the arbitrators themselves and the intervention of the courts, whether warranted or not. It seems that since adjournments and postponements are primarily at the instance of the arbitral parties and to a lesser extent at the instance of the arbitral tribunal, it is on those particular sources that this discussion should focus. Thereafter the discussion will extend briefly to expedition<sup>494</sup> and sound management of time in arbitration as the corollary of delay.

### 3.4.3 Delay by a Party

Delay by parties is the commonest form and originating source of prolongation of proceedings.

The apprehension of limitations of time may prompt a claimant to initiate arbitration proceedings quickly by, for instance, nominating an arbitrator or inviting the respondent to concur in the appointment of an arbitrator, after which nothing happens. Signals of time-wasting and delay begin to surface even at this early stage. The claimant may not have the financial resources to go further than this; or he may have real difficulties in providing his counsel with the necessary information for preparing the points of claim or supporting evidence from prospective witnesses or having access to essential documents to be relied on in advancing the claim. The respondent may have a multiplicity of reasons for slowing down the arbitral process, including principally the not unreal expectation that the claimant may run out of steam financially or be so frustrated by his own slow progress or some obfuscation by the respondent that he gives up altogether. Either way the arbitral tribunal cannot move until the initial hurdles are overcome and the tribunal is empanelled and takes charge of the process. A different source of delay may then set in by the tribunal's inability to act. The

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<sup>494</sup> Bernstein et al *Handbook of Arbitration Practice* 113-114, in their section "On Expedition and How to Achieve it", identify four possible situations: (i) where both parties want speed, (ii) where both parties want delay, (iii) where the claimant wants delay and the respondent wants speed, and (iv) where the claimant wants speed and the respondent wants delay. This study is primarily concerned with the last-mentioned category because it is mainly here that the problem considered in this discussion lies.

assistance that may be required from the court to break the impasse may in turn be held up by the court's delay in finding and fixing the time to entertain the request for assistance. That is why the incidence of delay by parties, arbitrators and the court system is in each case susceptible to separate categorization and consideration. What is emphasized here in this connection is that arbitrators must have enforceable powers to keep the arbitration on course with neither party having the opportunity to delay matters or refuse their cooperation.

Some particular instances in which a claimant who has initiated arbitral proceedings may subsequently desire to slow down and delay the process have been identified.<sup>495</sup> The claimant may want to delay an arbitration upon realizing subsequently after starting the arbitral process that his claim does not have the value he had anticipated. In another instance, the claimant may be discouraged from pursuing the claim after being confronted with a counter-claim with ostensibly better chances of success. In a third instance the claimant may want delay on realizing that he has more to gain from the mere existence of the claim than from its early resolution.<sup>496</sup>

The strategies adopted by the respondent to delay arbitration and enforcement of awards can be divided into pre-award and post-award categories.<sup>497</sup> The former included the respondent's refusal to reply to the claimant's communications inviting the nomination of arbitrators, refusal to accept the claimant's nominees, causing delay by invoking the mechanism, if available under the arbitration agreement, of resorting to a third party (such as an institutional head) to appoint the arbitrator. Again where the arbitration clause permits each party to appoint its own arbitrator, the respondent may simply refuse to do so or delay doing so. Resort to court for the appointment of an arbitrator can be the deliberate choice of the respondent to take advantage of the several months it might take from the start to the completion of that process. In cases where the respondent is a non-resident the claimant might be put through the cumbersome and protracted process of serving the respondent abroad with the necessary application. The use of any ploy or a combination of them can delay the arbitration by several months.

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<sup>495</sup> Harris C "Abuse of the Arbitration Process – Delaying Tactics and Disruptions" (1992) 9(2) *Journal of International Arbitration* 87-88.

<sup>496</sup> Bernstein et al *Handbook of Arbitration Practice* 114. The authors give as an example of this unusual situation that of a company in financial straits which is depending on its bank for financial facilities to keep going while the bank has over-optimistic expectations from the claim.

<sup>497</sup> Harris (1992) 9(2) *Journal of International Arbitration* 88.

Even after the tribunal is empanelled the respondent's clever choice of a busy arbitrator and busy lawyers may also slow down the arbitration process. The fixing of time-tables several months ahead for each of the arbitral processes with a "liberty to apply" provision for any eventualities may add to the respondent's store of delaying tactics.

Change of lawyers mid-stream, failure to pay lawyers leading to their withdrawal and the need for their replacement to ensure fair representation and equal treatment are additional ploys available to the respondent. Other procedural irritants inflicted on the claimant might take the form of converting at an advanced stage a hitherto informal exchange of submissions towards an amicable settlement into a full-blown formal arbitration, notwithstanding several months of preceding and lengthy negotiations. Late applications for production of additional evidence necessitated by the course of events during the hearing, applications for discovery of documents, security for costs, and references of questions of law to court where permitted by the relevant law are manoeuvres available to a respondent bent on delay before the award.<sup>498</sup>

Post-award strategies for delay would include challenges to the validity of the award. The alleged grounds for doing so may be that the tribunal has admitted a mistake that must be corrected, or that fresh evidence has been unearthed subsequent to the award, or for "misconduct" in the form of some technical error in the conduct or procedure of the arbitration. An appeal from an award, where permitted by law, can be a source of delay in enforcing the award. The respondent's resistance to enforcement of the award by refusing to pay up and so necessitating resort to court enlarges the scope for delay.<sup>499</sup>

As English procedures are influential in arbitration law and practice in Kenya and some African jurisdictions, an elaboration of English trends and approaches to delay is appropriate. It was long recognized that although a claimant might be inactive after initiating the proceedings, a respondent who desired the termination of the proceedings was unable under the English Common Law to have the claim dismissed. This was because neither the tribunal nor the court had the power to dismiss a claim for want of prosecution.<sup>500</sup> The absence of the power of a tribunal or court to dismiss an arbitral claim for (i) lack of diligent prosecution; or (ii) an implied repudiatory breach of contract by an indolent claimant; or (iii) frustration of the agreement to arbitrate because a satisfactory trial of the dispute was no longer possible; or (iv)

<sup>498</sup> Harris (1992) 9(2) *Journal of International Arbitration* 88-91.

<sup>499</sup> Harris (1992) 9(2) *Journal of International Arbitration* 91-94.

<sup>500</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v South India shipping Corp (the Bremer Vulkan)* [1981] 1 All ER 289; *Food Corporation of India v Antclizo Shipping Corporation (The Antclizo)*, [1988] 2 All ER 513.

lapse of the right to arbitrate for not being exercised within a reasonable time; or (v) the abandonment of the intention to arbitrate by both parties – was therefore a product of judicial precedent of the English Common Law.<sup>501</sup>

Since “*Bremer Vulkan*” in 1981 respondents have sought the dismissal of an arbitration on ground of excessive delay by the claimant. But it was not until the changes introduced by section 102 of the Courts and Legal Services Act 1990 that the dismissal of an arbitration for want of prosecution or for inordinate and inexcusable delay in pursuing an arbitral claim became possible or at any rate was put on the same footing as similar proceedings in court. It seemed nevertheless that the position in English arbitration law started changing before the 1990 Courts and Legal Services Act and the 1996 Arbitration Act because the Arbitration Act 1979<sup>502</sup> did grant arbitrators whose directions had not been followed, powers to apply to the court for an order authorizing them to continue with the arbitration.<sup>503</sup>

The old common law position is therefore no longer tenable or maintainable in the light of the progressive changes in English law by the Arbitration Act 1966.<sup>504</sup> For jurisdictions like Kenya that follow trends in English law the provisions of section 41 are instructive.<sup>505</sup> Under section 41(1) the parties can agree on the arbitral tribunal’s powers in case of default by a party to do something necessary for the proper and expeditious conduct of the arbitration. Under section 41(2) “unless otherwise agreed by the parties”, the provisions of section 41(3) would apply, so that,

“if the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay –  
gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or  
has caused, or is likely to cause, serious prejudice to the respondent  
the tribunal may make an award dismissing the claim.”

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<sup>501</sup> *The Bremer Vulkan* above; *Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 All ER 34; *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha* [1984] 2 Lloyds Rep 489; *The Antclizo* above.

<sup>502</sup> See the Arbitration Act 1979 s 5.

<sup>503</sup> It was recognised however that this power was ineffective as it rested upon the arbitrators having first made an order which had been disobeyed.

<sup>504</sup> See the Arbitration Act 1996 ss 41, 42 and 48(3).

<sup>505</sup> Under s 41(6) if the claimant fails to comply with a preemptory order of the tribunal to provide security for costs, his claim may be dismissed.

What must be noted is that subsection (3) operates subject to contrary agreement in accordance with sub-section (2). Therefore it is possible for the parties to agree in writing to exclude this power from the tribunal. There may also be no need for the respondent to make an application to the tribunal for striking out as, it seems, the arbitrators may do so of their own volition. The significant point here is that the arbitrator can prevent the arbitration from becoming dormant by issuing the required warnings to the claimant.<sup>506</sup>

The dilatory respondent who may delay in concurring in the appointment of an arbitrator, or in filing Points of Defence or producing documents will now be caught by the provisions of sections 41(4), (5) and (7) of the 1996 Act. It will suffice to set out the provisions of section 41(4) which are prefixed by the words “if without showing sufficient cause” and then goes on to provide

“a party,

- (a) fails to attend or be represented at an oral hearing of which due notice was given, or
- (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.”

The point to observe here is that the above provisions are in the nature of peremptory orders and that the making of such orders by arbitrators is subject to the arbitration agreement or other agreements by the parties. In effect therefore the power may be excluded by written agreement of the parties. But assuming it is not excluded, if the peremptory order is not complied with, arbitrators then have enforcement powers under section 41(7), including drawing an adverse inference from the act of non-compliance, proceeding to an award on the materials before the tribunal, and making orders as to the costs of the arbitration incurred through the non-compliance. Where necessary, section 42 of the Act empowers the court to order compliance with the arbitrator’s peremptory orders.

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<sup>506</sup> Guidelines in striking out cases for want of prosecution by the court and tribunal are propositions of law and not discretion: see *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB229; *Birkett v James* [1978] AC 297; *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897; *Roebuck v Mungovin* [1994] 1 All ER 568. Arbitrators must therefore take those judicial guidelines into account in determining whether they have jurisdiction to exercise the discretion to strike out or not. There is also judicial authority for the general assumption that a striking-out within the limitation period should not lightly or readily be ordered in both judicial and arbitration cases. See *James Lazenby & Co. v McNicholas Construction Co Ltd* [1995] 2 Lloyd’s Rep 30. The logic is that a plaintiff or claimant whose suit or claim is struck out before the expiry of the limitation period is always able to start a fresh action until the action is dismissed for want of prosecution or determined on the merits.

Article 25 of the Model Law deals with the types of default specified under the article, including failure to communicate a statement of claim<sup>507</sup> or defence<sup>508</sup> or to appear at a hearing or produce documentary evidence. In such instances the tribunal may continue the proceedings and make the award on the evidence before it.<sup>509</sup> As with the position under English law the parties may by agreement exclude the default provisions; if not excluded, the party against whom the article is invoked has an opportunity to show sufficient cause to negate its operation.

The scheme of the default provisions of Article 25 does not fully unfold without reference to the provisions of Article 23 governing the time agreed by the parties or determined by the tribunal for delivery of pleadings, submission of documents or other evidence to be relied on in the proceedings, amendments and supplements to claims and defences.<sup>510</sup> The fact that the framers of this law had the incidence of delay in their contemplation is manifested by the discretion conferred upon the tribunal to disallow an amendment during the course of the proceedings if it considers it inappropriate to allow such amendment having regard to the delay in making it.<sup>511</sup>

There are significant differences in the default provisions of the national statutes of Kenya, Nigeria, Zimbabwe and England. Under section 26 of the Kenyan Arbitration Act 1995, Article 25 of the First Schedule of the Zimbabwean Act 1996 and section 41 of the English Act 1996 there is an additional provision empowering the tribunal to make an award dismissing the claim for failure of prosecution.<sup>512</sup> The Model Law and the Nigerian statute do not provide for dismissal of the claim but for the termination of the proceedings or its continuation to an award.<sup>513</sup> In spite of the absence of the specific statutory power of dismissal one Nigerian jurist has submitted that, “though hewn from the rock of English law, Nigerian law rejected the old English common law approach even before the making of the UNCITRAL Model Law in 1985, and that if a claimant was indolent and did not pursue the claim, it could be dismissed.”<sup>514</sup> He states additionally that

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<sup>507</sup> Under Article 25(a) the tribunal is empowered to terminate the proceedings.

<sup>508</sup> Under Article 25(b) the tribunal must continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations.

<sup>509</sup> Article 25(c).

<sup>510</sup> Article 23(1).

<sup>511</sup> Article 23(2).

<sup>512</sup> Section 26 (d) Kenya; article 25 (d) Zimbabwe; section 41 (3) England

<sup>513</sup> Model Law Article 25 (a), (b) and (c); Nigerian statute section 21 (a), (b) and (c)

<sup>514</sup> Okekeifere AI “The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration” (1997) 14(1) *Journal of International Arbitration* 125-139. He cites as authority in support of his submission *Commissioner of Lands v Edo-Osagie and Others*, (1974) 9 NSCC 562.

“[i]n countries like Nigeria where this provision [Model Law Article 25] has been enacted the problem of deliberate delay is substantially removed.”

Three recurrent causes of delay by a party in a Kenyan context deserve brief comment.

(i) Failure to appear or participate in the proceedings as a cause of delay

A party's failure or refusal to appear or participate in the arbitration, when it occurs, is troublesome for an arbitral tribunal. This is because a good arbitrator, like a good judge, would prefer to do justice between the parties rather than be compelled into *ex parte* proceedings with their attendant shortcomings and hazards. Steering a correct middle course, in the absence of a party who has deliberately refused to recognize the arbitrator, is a skilful exercise requiring judicious circumspection.

It is submitted that the duty of an arbitrator, who is faced with the prospect of *ex parte* proceedings, is to give due notice to the defaulting party and to proceed with the arbitration. Caution, not timidity, would require the arbitrator to give notice of any steps intended to be taken in the ensuing proceedings and so to afford the defaulter an opportunity to react to the notice. Where the reason for the defaulter's refusal to participate is a challenge to the arbitrator's jurisdiction, the arbitrator can give an opportunity for the issue of jurisdiction to be tried and determined. In this writer's view, failure by the defaulter to appear to deal with or to respond in some appropriate way to the arbitrator's notice of hearing that issue is more likely to put the defaulter, rather than the arbitrator, at risk of damnation by the court.

In the absence of Model Law or national law guidelines on the subject, the provisions of the English Arbitration Act sections 41(4), (5) and (7), discussed above, can be emulated in developing Kenyan legislation on the subject. It is submitted section 41(4) will enable the tribunal to continue the proceedings in the absence of a party after due notice and make an award. Alternatively, under section 41(5) a peremptory order stating an intention to proceed *ex parte* unless there is compliance with an arbitral order within a specified period would, if disobeyed by the defaulting party, enable the tribunal, under section 41(7) to make an award on the basis of such materials available to it. It is then not open to a defaulting party to a peremptory order, to complain thereafter that the arbitrator failed to give due notice of the proceedings or that they were conducted in his absence.

## (ii) Lack of a Genuine Defence

Delay may also be caused by a party, who has no genuine defence to an arbitral claim, filing a pre-emptive action in court arising from the same cause or facts to delay or frustrate the arbitration. Here the Model Law provides a mandatory stay of court proceedings by the court before which the action is brought, thus referring the parties to arbitration unless the court finds the arbitration agreement null and void, inoperative or incapable of being performed.<sup>515</sup> Delay is also eliminated or minimized by the power of the tribunal to commence or continue with the proceedings, including the making of an award, while the issue is pending before the court. As noted earlier, in Kenya it is rare for an arbitrator to exercise the power to continue the proceedings while an aspect of the dispute is before the court, as the tendency is for the court to stay the arbitration pending its decision. This power is abused by parties who take advantage of the slowness of litigation to frustrate their opponents. The abuse can be eliminated by an amendment to the Kenyan statute and the imposition of strict time-limits for the court's decision, substantial costs and even punitive damages against a party found guilty of such abuse.

A party may also adopt the delaying tactic of making repeated applications to the arbitral tribunal. Practical common sense would suggest that a party does so at the risk of running-up wasted costs and, for fear of court interventions, a timid arbitrator may be inclined to keep on entertaining and hearing repeated applications by a party who has the resources for making such unmeritorious applications. The Model Law and UNCITRAL rules have no provisions for barring a party from presenting many applications. Here the arbitrator has his integrity, firmness and credibility on his side to stem the tide of spurious applications by remembering that he is chosen for his reputation and experience and the ability to do justice between the disputes.

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<sup>515</sup> Article 8 (1).

## (iii) Resort to Court as a Delaying Tactic

Court intervention is a source of delay in arbitration.<sup>516</sup> Whether warranted or not applications to court on preliminary rulings of the tribunal, the case stated procedure in jurisdictions that provide for that procedure or for referral of points of law to the court and appeals—all of these processes can be abused or deployed as delaying strategies by the reluctant party.<sup>517</sup> Harris, appearing to have it both ways, by first suggesting delaying strategies to the respondent, at the same time offers the claimant the remedy of instituting legal proceedings for summary judgment based on the award and seeking the conversion of the award into a judgment for enforcement in the normal way.<sup>518</sup> Bernstein *et al*<sup>519</sup> suggest that in most cases the practical sanction against delay or default is the reluctance of a party who seriously intends to pursue a claim or defence to incur the displeasure of the arbitrator. Therefore a party should obtain clear directions for progressing the arbitration and, in default of compliance by the other party, should promptly apply to the arbitrator for assistance towards speedy compliance.

Article 5 of the Model Law and the national statutes that replicate its provisions assist arbitration by limiting court intervention to matters in which the power of intervention is specifically conferred by the Model Law. The case stated procedure received no mention in the Model Law and Kenyan arbitration legislation permits appeals under very restricted circumstances with the consent of the parties;<sup>520</sup> and the reference of matters of law to the court is governed by the parties' agreement as prescribed by the domestic statute.<sup>521</sup> Article 5 is arguably useful for curbing the delays that might be prompted by unwarranted applications for adjournments. Its effectiveness ultimately depends on the willingness of the courts to limit and not to expand judicial intervention.

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<sup>516</sup> Delay in the adversarial system is said to be due largely to the nature of the judge's role: see Landsman S (ed) *Readings on Adversarial Justice: The American Approach to Adjudication* 1988 25. See also Redfern & Hunter *International Commercial Arbitration* 288 para 6-46 on "Avoiding delay and disruption", where the authors state that arbitration relies on speed and cost-effectiveness for its survival. They add that it is therefore important that the procedure adopted by the tribunal should be fair and that a balance be struck between speed and fairness, so no absolute time-limits can be prescribed. Furthermore, the parties have their own role to play, keeping in mind the issue of delay.

<sup>517</sup> As recognised and listed in Harris (1992) 9(2) *Journal of International Arbitration* 92-93.

<sup>518</sup> Harris (1992) 9(2) *Journal of International Arbitration* 93.

<sup>519</sup> Bernstein *et al Handbook of Arbitration Practice* 115.

<sup>520</sup> S 39(b) of the Kenya Arbitration Act 1995 is limited to domestic arbitration and, unlike for example ss 45 and 69 of the English Act 1996, which are contract-out provisions, is a contract-in provision.

<sup>521</sup> Kenya Arbitration Act 1995 39(a).

Apart from unwarranted applications delay may also be caused, as noted earlier, by unwarranted challenges to the award itself.<sup>522</sup> In so far as judicial intervention is not outlawed, resort to court remains the right of arbitral parties as long as it is not abused. Sometimes the parties unintentionally delay the proceedings by their incomplete agreement leaving it to be interpreted by the tribunal or the court through preliminary hearings that might have been avoided. Arbitral parties in a Kenyan arbitration must be duty-bound by legislation to do what is necessary for the proper and expeditious conduct of the proceedings, as specifically done in England by the provisions of section 40 of the Arbitration Act 1996.

#### 3.4.4 Delay by the Arbitrators

Parties are not the only source of delay. Arbitrators may wittingly or unwittingly contribute to delay. This may arise through inefficient case management and by prescribing unrealistic time-frames for activities to be done by the parties resulting in avoidable applications for extensions of time. Thus it has been said that

“[f]inding the right balance between giving a party the time that he requests for preparing his case, and the date that he requests for presenting it, without imposing on the proceedings a delay unacceptable to the other party, requires judgment.”<sup>523</sup>

Good judgment in arbitration practice with regard to case management and prudent allocation of time for things to be done can only come through consultation between all concerned – arbitrators, lawyers and other participants involved in the arbitration. In acknowledgment of the need for arbitrators to consult counsel and the consequences of failing to achieve a *modus operandi et vivendi* for the arbitration one commentator observes that

“one comes up against another curiosity which seems inherent in the nature of lawyers, namely that our ignorance of what is about to happen does not seem to inhibit our holding strong opinions on the subject. And thus one finds time and again, that each side has made different assumptions about the unfolding of events, and prepared itself in consequence, while the tribunal has a third idea and therefore promptly frustrates both sets of litigants. The sadly

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<sup>522</sup> See also para 3.2.2 above on the abatement of challenges.

<sup>523</sup> Bernstein et al *Handbook of Arbitration Practice* 113. Because fixing dates well in advance may raise difficulties, the authors suggest that it is sensible, when fixing dates in circumstances where the arbitrator suspects the time estimates are “seat of the pants” estimates, to invite the parties to summarise what they expect the issues to be. At least this will give the arbitrator a draft agenda against which to test any application for a new (and therefore probably longer and later) date.

frequent result is a muddled discussion at the outset of the hearings (time wasted already!), whereupon some half-thought-out *modus vivendi* is worked out – and those who care about expeditiousness are left to hope, nervously, that the thing will somehow be concluded on time, and that at least some of their preparation will turn out to have served a purpose.”<sup>524</sup>

An arbitrator who has in fact accepted appointment but fails to communicate the fact to the parties or his co-arbitrators can also cause delay as does an arbitrator who fails to act with dispatch and without undue delay. The busy arbitrator is another source of avoidable delay. In his “Respondent’s Guide” to the possibilities of delay Harris, tongue-in-cheek or, perhaps more accurately, mischievously, recommends to a respondent seeking delay to “appoint an arbitrator known to be extremely busy, accompanying this appointment by the choice of busy solicitors, counsel, expert witnesses and the like.”<sup>525</sup> This is possible, but one wonders whether a reputable arbitrator, worthy of that description and deserving such recognition, would knowingly act along with such a respondent deliberately to delay an arbitration. It is easy to suggest that a busy arbitrator would decline an appointment but for the understandable human condescension to being sought out and flattered by the appointment and hoping to be available to arbitrate the dispute. There is also the possibility of the appointer’s legitimate preference and insistence on a particular arbitrator, however busy, for his known skills and expertise and of that arbitrator feeling obliged to accept the appointment in order not to disappoint a perhaps valuable appointer.

The Model Law has no prescription for the length of time taken for making awards; but although the Kenyan Arbitration Act, for example, does not prescribe time-limits for making an award it is not unusual for parties to agree a time frame for adoption in an appropriate arbitral directive prescribing a specified period within which to produce the award. Domestic rules of practice can fill the gap by stipulating times for communicating acceptance of appointment and for making an award. Indeed, domestic arbitration institutions and associations tend to do so to expedite arbitration. The South African Arbitration Act 1965 s 23 prescribes four months from the date of entering the reference for an arbitrator to make an award, unless the parties otherwise agree or such time is extended by the parties or the court. Rule 36.4 of the Standard Procedure Rules of the Association of Arbitrators (Southern Africa) 6<sup>th</sup> edition, 2009, requires delivery of the award “as soon as practicable but in any event within 20 days after the conclusion of the hearing, or the submission of the last document to

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<sup>524</sup> Paulsson (2006) 22 *Arbitration International* 20.

<sup>525</sup> Harris (1992) 9(2) *Journal of International Arbitration* 89.

the Arbitrator”, if no hearing is required. The parties can nevertheless extend the time at the request of the arbitrator. This rule is partly necessitated by the above-mentioned provision of s 23, in order to avoid problems created by the section. The Centre for Arbitration and Dispute Resolution (CADER) of Uganda prescribes 60 days from appointment of the arbitrator to the delivery of the award.<sup>526</sup> As noted earlier the English Arbitration Act 1996 is explicit on the duty of the arbitral tribunal to act fairly and impartially as between parties and to adopt suitable procedures to avoid unnecessary delay and expense.<sup>527</sup> The exercise of this discretionary power is part of the statutory scheme for expediting arbitration but obviously cannot be a license for an arbitrator to indulge himself in exceeding his powers. The duty to avoid unnecessary delay and expense is also tempered by the duty to act fairly and impartially.

On the need for arbitrators to take charge of the proceedings and be firm about unwarranted adjournments, postponements and the ensuing delay the words of Lord Roskill to arbitrators come to mind:

“Rule 1 is – keep control of the proceedings and don’t let cases drift. Remember you are the masters of your own procedure, then never try to fit every case into the same procedural strait-jacket because some won’t fit. Be flexible, as flexible as you can in trying to meet the wishes of the parties, but above all be firm, politely firm, especially about delay. Why is it that some arbitrators seem frightened to grasp the nettle and take control of the cases and show that delay will not be tolerated. We all, I think, have some inbuilt fear of doing an injustice if we refuse to accept an excuse for seeking further time for pleading or discovery or a request, attractively if unjustifiably advanced, for an adjournment of the hearing. A judge may feel inclined to take the risk because there is always the Court of Appeal to direct him if he has gone too far in a particular direction. But in matters like this an arbitrator has for all practical purposes both the first and last word and I often think he fears that if he is firm someone may thereafter accuse him in the courts of ‘misconduct’, that dreadful word. I can understand the fear though I sincerely believe it to be unjustified. It has, I think, an historical basis and stems from the days when the courts were hostile to arbitrators, but I do not believe that any court would presume to criticize an arbitrator who was firm in dealing with disobedience to his orders, so long as he acted fairly.”<sup>528</sup>

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<sup>526</sup> See CADER Rules.

<sup>527</sup> S 33(1).

<sup>528</sup> The Third Alexander Lecture, 8 March 1977 published in (1977) *Arbitration* 4, and quoted in Bernstein et al *Handbook of Arbitration Practice* 93.

So there it all was and is - the challenge to arbitrators, fashioned in exuberant, exalted and hortatory rhetoric, and it may be added, to be firm, fair and “timely arbitrators”.<sup>529</sup>

### 3.4.5 Conclusion

It is apparent from this discussion that adjournments are a regular feature of arbitrations. This means some adjournments and resultant delays will be inevitable and unavoidable. An arbitrator will be obliged to grant such adjournments to facilitate the proceedings. It is also apparent that many adjournments resulting in considerable delay of the proceedings and the delivery of the award can be avoided if the arbitrator enters upon the reference, takes fullest control of the procedures and utilizes the mix of powers granted by the arbitration agreement, the practice rules and governing law. The apprehension of court intervention and the setting aside of an award should not deter an arbitrator from applying himself properly to the task and from rejecting frivolous or spurious applications and challenges intended by crafty parties and their advisers to frustrate an opponent or to postpone or unduly protract the proceedings. An arbitrator has to bear in mind the conceptual foundation of arbitration and the principle that in electing to submit their dispute not to a court of law presided over by a judge the parties are not looking for perfection in legal erudition but to an arbitrator who can resolve the dispute efficiently and effectively.

It can be concluded that the UNCITRAL Model Law and the complementary UNCITRAL Arbitration Rules, and the domestic statutes inspired by the Model Law have gone some length to provide a working framework for effective arbitration. It is therefore left to arbitrators to utilize the provisions of law and the terms of the reference to fulfill the arbitral mandate by engaging their best endeavours to curb unnecessary adjournments and delays that render arbitration unduly expensive. Justice is unfairly delayed and denied by the defaulting party who flagrantly and freely obtains extensions of time, one after the other, because an arbitrator is afraid to reject an unmerited request for adjournment or to deter an avoidable delay. The tribunal must not hesitate to demonstrate its displeasure with unreasonable requests. The recommendation of this writer is that adjournments delays and prolongation of arbitration can be more effectively controlled and curbed by specific improvements in the

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<sup>529</sup> In Paulsson’s phrase. See Paulsson J “The Timely Arbitrator: Reflections on the Böckstiegel Method” (2006) 22 *Arbitration International* 19.

African statutes taking advantage of the lessons learned from other jurisdictions such as the English Arbitration Act 1996.<sup>530</sup>

### **3.5 Interim Measures of Protection: Nature, Purpose, Powers and Constraints**

#### 3.5.1 Introduction

In considering interim measures of protection it is appropriate first to explain the terminology on the subject. This is necessitated by the diversity of arbitration phraseology incorporating the word “interim” and the differing senses and meaning they assume in different jurisdictions. Thereafter the discussion will proceed with the consideration of the nature and purpose of interim measures, the powers available to an arbitral tribunal and court for granting them and the constraints on such powers. This topic is selected for discussion because of its recurrence in arbitration practice in Kenya, the controversies associated with interim measures and the disinclination of arbitrators to grant interim orders, if they can be avoided, before the final award. Perhaps the diversity of terminology and meaning contributes to the problem with interim measures.

#### 3.5.2 Terminology, Nature and Purpose of Interim Measures

The word interim literally means “meantime”.<sup>531</sup> In common usage it means “temporary”. Some national statutes recognize a distinction between an “interim” and “final” award and define an arbitral award to include an interim arbitral award.<sup>532</sup> Others, such as the Zimbabwe Arbitration Act 1996 First Schedule Articles 17(2) (a) and 31(7), confer an arbitral power to grant an “interim order” and an “interim, interlocutory or partial award”.

The Model Law, prior to its amendment in 2006, some national statutes based on it and the UNCITRAL Arbitration Rules use the term “interim measures of protection” without

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<sup>530</sup> See for example the Mauritius International Arbitration Act 38 of 2008, s 24, which expands the duties and powers of the tribunal contained in Articles 18 and 19 of the Model Law, by incorporating additions from ss 33 and 34 of the English Arbitration Act 1996.

<sup>531</sup> *Chambers Concise 20<sup>th</sup> Century Dictionary* wherein appears the explanation that in Reformation history the term “interim” referred to certain edicts of the German emperor regulating religions and ecclesiastical matters, until they could be decided by a general council.

<sup>532</sup> Kenya Arbitration Act 1995 s 3(1) “arbitral award”.

definition.<sup>533</sup> The ICC Arbitration Rules refer to “interim or conservatory measures”.<sup>534</sup> They are also known as “interim relief” or “provisional or conservatory measures”<sup>535</sup>

It has been said from the perspective of English procedural law that

“the phrase ‘interim measures’ covers a number of possibilities... (and)... most commonly it is understood as referring to orders such as the *Mareva* injunction and an *Anton Piller* order.<sup>536</sup> But interim measures might also include orders for the detention of property, or an order for the sale of property, or an order requiring the respondent to do or refrain from doing a particular act”.<sup>537</sup>

Such orders are seen as having in common the characteristic of requiring the respective positions of the parties to be preserved pending the resolution of their dispute. This is deemed necessary to prevent the ends of justice being frustrated by an intervening event that would render a fair determination of the dispute impossible.<sup>538</sup> But by whatever name they are called “interim measures” and “interim relief” are convenient abbreviations and arise from the requirement of a party for immediate and temporary protection of rights or property pending a decision on the merits by the arbitral tribunal. In other words they are holding orders while a decision on the merits is awaited.<sup>539</sup>

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<sup>533</sup> Model Law Articles 9 and 17; UNCITRAL Arbitration Rules, Article 26. Article 17(1) of the Model Law, as amended in 2006, refers to an “interim measure”, which is comprehensively defined in the new Article 17(2).

<sup>534</sup> ICC Arbitration Rules article 23.

<sup>535</sup> Redfern & Hunter *International Commercial Arbitration* 345-358; Gaillard & Savage *International Commercial Arbitration* 709-734; Wagoner DE “Interim relief in international arbitration” (1996) 62 *Arbitration* 131-136.

<sup>536</sup> These are explained below. See further Gee *S Mareva Injunctions and Anton Pillar Relief* 3<sup>rd</sup> ed (1995).

<sup>537</sup> Johnson A “Interim Measures of Protection Under the Arbitration Act 1996” (1997) *International Arbitration Law Review* 9.

<sup>538</sup> Johnson A (1997) *International Arbitration Law Review* 9.

<sup>539</sup> Wagoner DE, ‘Interim Relief in International Arbitration’ (1996) 62 *Arbitration* 131. Trittmann R “When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders?” (2003) 20(3) *Journal of International Arbitration* 255-265 distinguishes, from a German perspective, between: (i) a final award, which contains the final decision on the matter in dispute which cannot be appealed; (ii) a partial award, which is a final decision by the arbitral tribunal at its discretion on a question that can be dealt with independently of other issues in the dispute either because of its nature or because it concerns an identifiable and quantifiable part of the claim that can be separated from the rest of the dispute; (iii) an interim award, which relates to a particular matter or aspect of the proceedings which is binding but not enforceable under German law; and (iv) a procedural order dealing exclusively with matters regarding the conduct of the proceedings and cannot cover any issues of fact or law. Examples of the last-mentioned category include orders fixing dates for hearings, submissions and disclosure of documents.

In view of the interchangeable but also differing senses of the terms “interim award”, “partial award”, “preliminary award”, “interlocutory” and “provisional award” Redfern & Hunter *International Commercial Arbitration* 353-354 n17 and n 18 recommend, for avoidance of confusion, that any decision that is not finally determinative of the issues with which it deals should not be called an award. S 39 of the English Arbitration Act 1996 grants arbitral power to make provisional awards. Compare the UNCITRAL Rules Article 32(1) regarding the power to make interim, interlocutory or partial awards.

Gaillard and Savage explain additionally that although “interim” or “provisional measures” and “protective or conservatory measures” are used interchangeably the former terms refer to the nature of the decision and the latter to the purpose of the decision.<sup>540</sup> The authors also classify and distinguish between (i) interim measures intended to prevent irreparable harm, (ii) those designed to preserve evidence and (iii) those that facilitate the enforcement of the award.<sup>541</sup>

Orders for interim relief by a tribunal may also be distinguished from procedural rulings by the tribunal. In the Model Law the former are dealt with by Article 17 and the latter by Articles 18-27 under the heading “Conduct of Arbitral Proceedings”. An order for preservation of evidence is clearly an order for interim relief whereas an order for production of evidence at the hearing is more in the nature of a procedural ruling. The distinction is significant in that under Article 17 of the Model Law the tribunal may, at the request of a party, grant an interim measure of protection and appropriate security in connection with such measure whereas under Article 27 the tribunal or party, with the approval of the tribunal, may request the assistance of the court in taking (i.e. producing) evidence. In contrast, under Article 9 a party may request an interim measure of protection from the court without the need for approval by the tribunal.

After thorough deliberation, UNCITRAL adopted the following definition of “interim measure” in 2006:

“2. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”<sup>542</sup>

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<sup>540</sup> Gaillard & Savage *International Commercial Arbitration* 709.

<sup>541</sup> Gaillard & Savage *International Commercial Arbitration* 709.

<sup>542</sup> See the UNCITRAL Model Law (2006) Article 17(2).

Sub-paragraph (c) is arguably wide enough to cover security for costs. Paragraph (b), which is not explicitly included in the categorisation of Gaillard and Savage referred to above, although it is arguably included in their first category, refers not only to anti-suit injunctions in support of arbitration but also to other injunctions against the large variety of actions that exist and have been used in practice to obstruct the arbitral process.<sup>543</sup> Given the difficulties experienced in practice with defining the term, it is recommended that Model Law jurisdictions in Africa such as Kenya should supplement their arbitration legislation to include this definition of interim measure.

### 3.5.3 The Power to Grant Interim Measures

#### 3.5.3.1 Applications to the Arbitral Tribunal

The ability of the arbitral tribunal to grant an interim measure depends upon, and is circumscribed by, the powers given to it by the arbitration agreement, the applicable law and arbitration rules chosen by the parties. The exercise of such powers also presupposes that the tribunal has been duly constituted and is thereby in a position to act. This statement is important in relation to interim measures as in some instances the need for an interim protection order may arise before an arbitral tribunal is established which can entertain the application. This discussion is therefore premised on the existence of a valid arbitration agreement and a competent arbitral tribunal that is able to receive and determine the application for an interim measure. Regarding the powers of the arbitral tribunal relating to interim measures, the starting point is the Model Law and the derivative national statutes, such as the Kenyan arbitration statute. As these statutes are based on the original 1985 version, the discussion focuses, at least initially, on this version.

Article 17 of the Model Law (1985) provides:

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

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<sup>543</sup> See UNCITRAL’s Report on its 39<sup>th</sup> Session (June 2006) (UN doc A/61/17) para 94.

There are limitations on the tribunal's power to grant interim measures under this provision. The granting of interim relief is premised on the application of a party. This means the provision does not envisage the grant of a measure on the tribunal's own motion.<sup>544</sup> Secondly, the order granted is directed only to a party to the arbitration agreement and will therefore exclude non-parties.<sup>545</sup> Thirdly, the phrase "in respect of the subject-matter of the dispute" implies that the order will affect only a particular subject-matter. The phrase is not defined but it has been suggested that the interim measures covered by Article 17 would include the preservation, custody or sale of goods which are the subject-matter of the dispute as well as measures designed provisionally to determine and stabilize the relationship of the parties in a long-term contract. It could also include an order for the maintenance of machines or works or the continuation of a certain phase of construction if necessary to prevent irreparable harm. Additionally the measure could conceivably also serve the purpose of securing evidence which would otherwise be unavailable at the date of hearing.<sup>546</sup>

A further point on the limitations of Article 17 of the Model Law is that, consistent with party autonomy, it may be excluded altogether by agreement of the parties as evident from the preceding phrase "unless otherwise agreed by the parties". Where Article 17 has not been excluded, the tribunal still needs to consider whether it can impose any effective sanctions to back its interim orders.

It follows that the national arbitration statutes, such as that of Nigeria,<sup>547</sup> which replicate the Model Law provision without more will likewise be subject to similar constraints unless varied by agreement of the parties or their chosen arbitration rules. In this connection the modifications and refinements<sup>548</sup> introduced by the Kenyan and Zimbabwean arbitration statutes to Article 17 of the Model Law are of considerable importance.

Section 18(1) of the Kenyan Arbitration Act 1995 adopts the wording of Model Law Article 17. But section 18(2) and (3) are additional provisions, which read as follows:

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<sup>544</sup> The Arbitration Rules chosen by the parties may alter this position by permitting the tribunal to grant relief on its own motion: see Chartered Institute of Arbitrators Arbitration Rules (2000) rule 7.9.

<sup>545</sup> This follows from the consensual and contractual bases of arbitration. Attempts to bring non-parties into arbitration are controversial: see the Saville Report (1996) para 214.

<sup>546</sup> Compare UN Doc A/CN.9/264, 43 para 2.

<sup>547</sup> Nigerian Arbitration and Conciliation Act s 13.

<sup>548</sup> Kenyan Arbitration Act s 18(1); Zimbabwe Arbitration Act First Schedule Article 17.

“18(2): The arbitral tribunal or a party with the approval of the arbitral tribunal may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1);

18(3): If a request is made under subsection (2) the High Court shall have, for the purpose of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) *as it would have in civil proceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.*” (My italics.)

While the provisions of section 18(3) including the italicized parts might have been intended to boost arbitration practice in Kenya, some complication is introduced by the fact that in assisting the tribunal with requests on interim measures, the High Court exercises the same power that it has in ordinary civil proceedings, which are more extensive than those conferred on the tribunal in Article 17 (section 18(1)). In Kenya this includes the power to stay the arbitral proceedings pending consideration of the request for assistance which invariably involves delay. In consequence a situation is thereby created that runs counter to the power of the tribunal to continue the arbitral proceedings while the request for assistance is pending before the court

The Zimbabwe Arbitration Act introduces elaborations under Article 17(2) enabling the arbitral tribunal to grant an interdict or other interim order,<sup>549</sup> and to order the parties to deposit the fees and costs of the arbitration. Under Article 17(3) the tribunal itself or a party with the tribunal’s approval may request executory assistance from the High Court. For this purpose, under Article 17(4), the Court has the same powers as in civil proceedings.

The inclusion of these additional provisions in the arbitration laws of Kenya and Zimbabwe has three consequences. First it keeps open the door from tribunal to court on interim measures; second, it enables the court to assist with the execution of arbitral interim measures; third, it brings arbitral orders on interim measures in line with those of the court in civil proceedings.

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<sup>549</sup> Compare the arbitral tribunal’s power under Article 31(7) of the First Schedule of the Zimbabwean Act to make an interim, interlocutory or partial award.

It has been noted that the purview of Article 17 of the Model Law is however narrower than that of Article 9 also dealing with interim measures by the court. But it is because Article 17 (1985 version) neither grants the tribunal the power to enforce its orders nor provides for the judicial enforcement of such orders, that the Kenyan and Zimbabwean statutes have expressly included the additional provisions noted above to enable such orders to be recognized for enforcement.<sup>550</sup>

Additionally, in Kenya, the problem of recognition and enforcement of interim orders and awards encountered in other jurisdictions, does not really arise in domestic arbitration as the definition of an arbitral award includes an interim arbitral award enabling both types of awards to be recognized for enforcement. The SA Law Commission in its report *Arbitration an International Arbitration Act for South Africa* paras 2.183-2.186, discusses this problem and makes a recommendation for the inclusion of Article 17(3) in the First Schedule of the Draft Bill to provide for the enforcement of an interim order as if it were an award. The Report clarifies however that the effect of Article 17(3) is not to turn an interim order by a tribunal into an award but merely to enable it to be recognised and enforced in South Africa as if it were an award, subject to the defences available under Article 36. This approach must be contrasted with that of UNCITRAL in the 2006 amendments, Articles 17 H and 17 I, referred to below.

Partly because of the influence of the Model Law but also because of the problems experienced<sup>551</sup> with interim measures in practice, the English Arbitration Act 1996 introduced important changes to the law on the subject. It is probably accurate therefore to state that once the parties have agreed to resolve their dispute by arbitration, the English Act adopts a general approach requiring them to look first to the arbitrators, and then to the court when the arbitrators have no power to act or are unable to act effectively.<sup>552</sup> Therefore on interim measures section 38(1) of the Act allows the parties the freedom to agree on the powers exercisable by the tribunal for the conduct of the proceedings. Here also, as with parties under national arbitral statutes that allow them the freedom to choose arbitration rules, the parties' choice of the procedural rules would enable them to confer power on the tribunal to make any

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<sup>550</sup> The enforcement of an interim order as an award is controversial especially in international arbitration, as the New York Convention governing the recognition and enforcement of foreign awards recognises as awards only decisions that determine finally one of the issues in dispute. See Kojovic T "Court Enforcement of Arbitral Decisions on Provisional Relief" (2001) 18(5) *Journal of International Arbitration* 511-532.

<sup>551</sup> The *Ken-Ren* case is an example (see n 589 below).

<sup>552</sup> Arbitration Act 1996 ss 1(c) and 44(5).

interim measures it deems necessary in respect of the subject-matter of the dispute.<sup>553</sup> In the absence of party agreement, the default powers of the tribunal to grant interim measures under sections 38(4) and (6) assist the tribunal to make appropriate orders over a wide variety of matters including the inspection, preservation and custody or detention of property. The wide discretion enjoyed by the tribunal is constrained by (i) the fact that the tribunal can only act after it has been constituted; (ii) the tribunal's orders apply only to the parties in arbitration; therefore an order intended to extend to third parties will still necessitate recourse to court; and (iii) under section 39 of the Act the power to make provisional awards is exercisable by the tribunal only by agreement of the parties. Section 39 therefore does not confer default powers and the power will not exist in the absence of specific agreement by the parties.

As mentioned above,<sup>554</sup> UNCITRAL's 2006 amendments to the Model Law contained a detailed definition of "interim measures. The amendments also stipulate requirements which must be met before the tribunal grants such measures and provide court assistance for their enforcement. Article 1 A specifies conditions that the applicant must meet before interim measures can be granted. One of these is the reasonable possibility that the party requesting interim measures will succeed on the merits of the claim.<sup>555</sup> This provision was considered as a necessary safeguard for the granting of interim measures.<sup>556</sup> The tribunal may also require the party requesting an interim order to provide appropriate security.<sup>557</sup>

An interim measure granted by the tribunal is binding,<sup>558</sup> and unless the tribunal otherwise directs, is enforceable upon application to a competent court, irrespective of the country in which it was issued.<sup>559</sup> The court may refuse to enforce the interim measures on limited grounds only, which broadly correspond to the grounds on which enforcement of an award may be refused, with some additional "tailor-made refinements". The court when deciding whether or not to enforce the interim measure must not undertake a review of its substance.<sup>560</sup> In practice, it seems that a party will normally comply voluntarily with a tribunal's order for

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<sup>553</sup> See for example the UNCITRAL Arbitration Rules article 26 and the LCIA Rules article 25.

<sup>554</sup> See para 3.5.2 above.

<sup>555</sup> See Article 17A(1)(b). In terms of Article 17 A(2), this condition only applies to a request for the preservation of evidence to the extent that the arbitral tribunal considers it appropriate.

<sup>556</sup> See UNCITRAL's Report on its 39<sup>th</sup> Session, June 2006, (UN doc A/61/17) para 101.

<sup>557</sup> See the Model Law Article 17 E(1). The applicant can also incur statutory liability for costs and damages in certain circumstances (see Article 17 G).

<sup>558</sup> Unless modified, suspended or terminated by the tribunal under Article 17 D.

<sup>559</sup> See the Model Law Article 17 H (1). The court may require the applicant to provide security, after first taking into account any determination by the tribunal in this regard (see the Model Law Article 17 H(3)).

<sup>560</sup> See the Model Law Article 17 I (1) and (2).

interim measures out of respect for the arbitrators' authority and a desire not to antagonize them.<sup>561</sup>

Kenya and other African jurisdictions which have already adopted or which are considering adopting the Model Law would be well advised to incorporate the provisions on interim measures from the 2006 amendments, including the provisions on court-assisted enforcement into their arbitration legislation.

### 3.5.3.2 Security for Costs

A specific issue which arises in the context of Article 17 is the possibility of an arbitral tribunal ordering security for costs. This matter is dealt with specifically in some institutional rules.<sup>562</sup> These rules restrict the tribunal, on the application of a party, to making an order against "any claiming or counterclaiming party" to provide security for the applicant's costs. The reason for this limitation is that a claimant or counterclaimant, in instituting the claim, must assume the risk that its opponent may not be able to pay a costs award. The purpose of security for costs is to protect a respondent against incurring heavy costs in successfully defending a claim brought by an impecunious claimant. Article 17 (1985 version), as noted above, confers on the tribunal power to order a party to provide appropriate security in connection with interim measures ordered by the tribunal, but this is obviously not the same as an order for security for costs as an interim measure.

The need for provision of security for costs may arise at the commencement or during the arbitration and it is always a difficult issue even in litigation. In arbitration the order for security for costs may be necessary to ensure that the losing claimant when ordered to pay the costs of the successful respondent will be able to do so from secured or guaranteed funds. It also enables the winning party to recover at least a portion of his costs in cases where costs prove to be irrecoverable through the losing claimant's insolvency. It is recognized that in some jurisdictions the tribunal does not have the power to order security for costs<sup>563</sup> and further that when the power exists an arbitrator may not have the stomach for it, so to speak,

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<sup>561</sup> See UNCITRAL's Report on its 39<sup>th</sup> Session, June 2006 (UN doc A/61/17) para 114.

<sup>562</sup> See the LCIA Rules 25.2; Association of Arbitrators (Southern Africa) Rules for the Conduct of Arbitrations (6<sup>th</sup> edition 2009) rule 23.

<sup>563</sup> For example, South Africa, unless the power is conferred on the arbitral tribunal in the arbitration agreement or the applicable rules.

because of its adverse and financially prejudicial impact on the claimant so early in the proceedings.

*Coppée Levalin NV v Ken Ren Chemicals and Fertilisers Ltd*<sup>564</sup> was a good illustration of the difficult problem posed by security for costs. The House of Lords was divided on the issue and by a majority of three to two decided in favour of the award of security for costs. The minority were acutely aware that the impecunious claimant had had to pay the full deposit to the ICC in an ICC arbitration, in circumstances where the respondents had refused to pay the portion of the deposit to the ICC payable by the respondents under the rules. The practice is for a court or tribunal ordering a claimant to provide security to stay the claim until security is provided, which could effectively deny the claimant a remedy. The English Arbitration Act does not now allow the court to award security for costs in arbitration, leaving it to the tribunal to do so (ss 38 and 44).<sup>565</sup> The same approach was recommended by the SA Law Commission.<sup>566</sup>

The power to order security is rarely invoked in domestic arbitrations, not only because of its adverse financial impact, but also because of the potential effect of restricting access to justice especially to a claimant with a triable claim who may not be financially able to comply with the order, resulting in the claim being stayed indefinitely.

No specific guidance is given by the legislatures that have empowered arbitral tribunals to order security for costs. In England, it seems that where a power could just as properly be exercised by a tribunal rather than the court, provision is made for this in order to reduce the expense and inconvenience of resorting to court during arbitrations.<sup>567</sup> To that end section 38(3) of the English Arbitration Act confers the power to order security for costs on the arbitral tribunal, unless the power is excluded in the arbitration agreement; and the Chartered Institute of Arbitrators has published guidelines for arbitrators on exercising this power.<sup>568</sup> It would be prudent before ordering security for costs for the tribunal to consider its likely effect so as not to restrict unduly the right of access to justice. The South African Law Commission Report notes the concern in England that the discretionary power to order security for costs

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<sup>564</sup> [1995] 1 AC 38.

<sup>565</sup> See also Remond C “Security for Costs in International Arbitration” (1994) 110 *Law Quarterly Review* 501-506.

<sup>566</sup> SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* paras 2.187-2189.

<sup>567</sup> The 1996 Saville Report para 189. See also para 190 on the complete removal of court’s power to order security for costs.

<sup>568</sup> Chartered Institute of Arbitrators guidelines in (1997) 63 *Arbitration* 166-167; see also (1998) 64 *Arbitration* 84-85 for the guidelines on the exercise of the powers under s 38(4) for preservation of evidence.

may be regarded by arbitrators as a “delightful new instrument, a wonderful new toy”. It may take some time before the position as to how the power is exercised is stabilized.<sup>569</sup>

### 3.5.3.3 Applications to Court for Interim Measures

An arbitrator is entitled to think that once he is appointed and has accepted the appointment and entered upon the reference his power to manage the preliminary stages as well as the conduct of proceedings should not involve the national court at all until his task is completed. Indeed in most cases this is what happens and the arbitration is undertaken and completed without the intervention of the court. The question that arises in the context of this discussion is: why should the domestic court be involved and intervene in a dispute the parties have assigned to an arbitral tribunal and do not those instances concerning interim measures (under Model Law Articles 9 and 17) when the court may intervene, constitute interference in the arbitration proceedings? Alternatively if the court intervenes because the tribunal ostensibly has no powers to grant interim orders of preservation or protection, should not the tribunal itself assume those powers necessitated by the terms of reference? Now it begs the question to say that the courts intervene because in those instances the tribunal has no power to act, because the argument here is that the tribunal should be given powers it lacks to do what it must do to discharge the arbitral mandate without “involvement”, “intervention” or “interference” by the court, whichever terminology is used to describe the court’s role in such situations. It is submitted therefore that the lack of arbitral power is not a genuine answer as, in some instances, it provides an unnecessary and undesirable opportunity for court intervention. The test surely must be whether an arbitrator can take action that is likely to be effective. The self-evident answer is that, having been appointed, the arbitrator does have the power to act and his orders have to be effective to justify the legal support for arbitration.<sup>570</sup>

It is also unconvincing to say that the tribunal cannot grant interim orders or measures of protection because its orders affect or apply only to parties in the reference. This is clearly an erroneous argument because legitimately it is a party in the arbitration who is seeking the interim order against the other party in the reference, over both of whom the tribunal has authority to grant appropriate orders. To that extent the provision in Article 17 of the Model

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<sup>569</sup> SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* para 2.189.

<sup>570</sup> See too para 2.4.4.5(iv)-(vii) above on the interplay between the powers of the court and those of the tribunal and also SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* paras 2.140-2.158 for their proposed additions to Article 9 of the Model Law.

Law (1985) that the tribunal may “order any party to take such interim measure of protection ...” must be understood as confined to an arbitral party and to exclude non-parties.

Regarding the possible need to approach the court for an interim assistance “before commencement of arbitration” it is necessary to investigate what this expression means. “Commencement of arbitration” is sometimes incorrectly understood in a sense synonymous with the origination of arbitral pleadings or even the actual hearing itself. The technical meaning ascribed to the term “commencement of arbitration” by the Model Law and the national laws drawn from it is that arbitration proceedings commence on the date agreed by the parties or on the date on which the request for arbitration is received by the respondent.<sup>571</sup> This awkward provision enables the parties to pre-determine or vary the commencement date from when the respondent received the request for arbitration. For purposes of this clarification, if the date of receipt of the request is taken as the commencement date of arbitral proceedings then there would be no tribunal in existence to act before the receipt of the request. This must be so because the tribunal only comes into existence and can only act after and not before it is created. In these circumstances there would logically be no arbitral party either to apply for interim measures of protection before the legal commencement date of arbitral proceedings. In other words the date of origination of pleadings or actual hearing must not be confused with the date chosen by the parties as the commencement date or that on which the request for arbitration was received. In this latter connection it must also be pointed out that the critical date is not the date on the notice of arbitration but the date of receipt of the notice by the respondent. These errors are common in the practice of arbitration in Kenya.

Viewed in this light it is apparent that the only rational basis for court assistance is before the creation of the tribunal, for the reason that a tribunal cannot issue interim measures until it has itself been established.<sup>572</sup> That, it is submitted, is a logical constraint on a tribunal that has not come into existence and therefore can exercise no powers at all, including powers pertaining to interim measures.

An application to court for interim measures before commencement of arbitral proceedings is recognized by Article 9 of the Model Law which allows a party to request “before or during

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<sup>571</sup> See the Model Law Article 21; and the Kenyan Arbitration Act 1995 s 21 and s 42 (3).

<sup>572</sup> In ICC arbitrations interim measures are not grantable by the tribunal until the file opened by the Secretariat on the arbitration has been transmitted to the tribunal: see the ICC Rules article 23(1) and Redfern & Hunter *International Commercial Arbitration* 334 n 25.

arbitral proceedings from a court an interim measure of protection”. The separation of Article 9 from Article 17,<sup>573</sup> two ostensibly connected provisions on the same subject-matter is perhaps explainable by the observation that Article 9 deals with the grant of interim relief by the court in relation to the arbitration agreement, with which Chapter II of the Model Law is concerned, while Article 17, involving the grant of relief by the tribunal, is located under Chapter IV which is concerned with the jurisdiction of the arbitral tribunal.<sup>574</sup> A more critical observation is that the purpose of Article 9 is not readily discernible without reference to its legislative history.<sup>575</sup> From this emerges the explanation that Article 9 combines two distinct statements. The first is that a request for a protective measure from a court is not inconsistent with the arbitration agreement. Therefore a party does not waive the right to arbitration by requesting a protective measure from the court. This explanation is given more poignancy by the commentary on the purpose of Article 9, namely that it is intended

“to give express recognition to the principle that a request to court for interim measures of protection which may be available under a given legal system and the granting of such measures by the court are not incompatible with an agreement to settle the dispute by arbitration.”<sup>576</sup>

It is therefore a declaratory statement to correct the otherwise possibly rational perception that an arbitration agreement by its nature and purpose excludes the court’s jurisdiction to grant interim measures regarding the arbitration.<sup>577</sup> Arbitration rules, such as the ICC Rules,<sup>578</sup> explicitly confirm that the application to court for interim measures is not incompatible with the arbitration agreement.

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<sup>573</sup> As appears from the text below, Article 9 is under Chapter II of the Model Law and Article 17 is under Chapter IV of the 1985 version.

<sup>574</sup> In terms of the 2006 amendments, the revised Article 17 became the first in a separate chapter, Chapter IV A, with the heading “Interim measures and preliminary orders”.

<sup>575</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 332.

<sup>576</sup> SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* para 2.141 citing UN Doc A/40/17 para 96.

<sup>577</sup> Indeed the US case of *McCreary Tire & Rubber Co. v Seat SpA*, 501 F 2d 1032 (3<sup>rd</sup> Cir 1974) 1038 illustrated a judicial decision in favour of incompatibility which it appears is no longer followed in the US. See Redfern & Hunter *International Commercial Arbitration* 336 citing *Carolina Power & Light Co. v Uranex* 451 F. Supp 1044, 1051 (ND Cal 1977). In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 (HL) at 688e, Lord Mustill commented incisively with reference to the *McCleary* case: “I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it”. Lord Mustill’s view corresponds with that underlying Article 9.

<sup>578</sup> Article 23(2), second sentence.

Another pertinent observation on the first statement of Article 9 is that, when read together with Article 1(2), Article 9 acquires an extraterritorial dimension and applies to a request to a court for an interim measure, even if the seat of the arbitration is in another state.<sup>579</sup>

The second statement (or half statement) in Article 9 is that the existence of an arbitration agreement does not bar a national court from granting an interim measure of protection in support of the arbitration. But this is in any event a matter for national law and requires no further elaboration other than that it is a statement more specifically directed to the courts of a Model Law state. The additional clarification of Article 9 is that it is not limited to any particular kind of interim measure, being applicable to a wider variety of measures, such as for the conservation of the subject-matter of the dispute, the preservation of evidence, the protection of trade secrets, measures for the seizure of assets and any measures involving third parties.<sup>580</sup> It is for this reason, as already noted under Chapter 2 above, that Article 9 is considered to be broader in scope than the original Article 17 of the 1985 version, which apparently confines the tribunal to ordering interim measures of protection “in respect of the subject matter of the dispute”.<sup>581</sup>

As pointed out above, Article 9 must also be read with Article 5 prescribing the extent of court intervention and Article 27 which deals with court assistance to the arbitral tribunal in taking evidence.<sup>582</sup>

It seems however that the right conferred by the same Article 9 for resort to court also “during arbitral proceedings” for a protection order, introduces concurrent jurisdictions<sup>583</sup> for tribunal and court with respect to interim measures. It is submitted that such concurrent jurisdiction

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<sup>579</sup> Article 1(2) creates certain exceptions to the general principle that the Model Law only applies if the place or seat of the arbitration is in that state, one of these exceptions being Article 9. However, the court to which the application is made would either have to be in a state which has adopted the Model Law, or at least be one prepared to order a measure in support of an arbitration being held elsewhere in the particular circumstances.

<sup>580</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 333.

<sup>581</sup> See para 3.5.2 above regarding the extended definition of “interim measures” in Article 17(2) of the 2006 version of the Model Law.

<sup>582</sup> For an informative elaboration on Articles 9 and 17 see SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* paras 2.140-2.158 and 2.183-2.189, particularly the recommendation to spell out court powers on interim measures on the models of New Zealand and Scotland.

<sup>583</sup> Gaillard & Savage *International Commercial Arbitration* 715 identify three consequences of concurrent jurisdiction as follows:

- i. the parties are entitled to apply to the courts, despite the existence of an arbitration agreement, to obtain provisional or protective measures;
- ii. the application to the courts is not a waiver of the arbitration agreement on the merits of the dispute; and
- iii. the tribunal has jurisdiction to grant the provisional or protective measures.

It is not apparent that these are “consequences” rather than the authors’ own interpretation and explanation of concurrent jurisdiction.

opens an avenue for court intervention which perhaps fosters the perception of incompatibility with the parties' choice of arbitration as their preferred mode for dispute resolution. One forceful argument against such perception is that the need for urgency justifies the concurrent jurisdiction of state courts both legally and practically especially before a tribunal is established, just as it justifies their residual jurisdiction at a later stage.<sup>584</sup>

To summarise this part of the discussion it can be said that Articles 9 and 17 and their derivatives in Kenya, Nigeria and Zimbabwe demonstrate two important principles of modern arbitration practice. The first is that when the occasion arises it is permissible and may be essential to the effective conduct of the arbitration for a party to resort to court to obtain an interim measure. The second is that, wherever practicable, the power to grant an interim measure should be exercisable by the arbitral tribunal rather than the court,<sup>585</sup> bearing in mind that as there are differences in national arbitration law and practice, a measure of controversy would surround the application of those principles in some jurisdictions.

National arbitration statutes that have amplified Article 9 to enable the court to act more decisively on interim relief include those of Kenya, Zimbabwe and England. The grant of interim measures of protection under Article 9(1) of Zimbabwean version of the Model Law is subject to additional provisions under Article 9(2) by which the High Court to which the request is made may grant

- “(a) an order for the preservation, interim custody or sale of goods which are subject-matter of the dispute, or
- (b) an order securing the amount in dispute or the costs of the arbitral proceedings,<sup>586</sup> or
- (c) an interdict or other interim order, or
- (d) any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.”

As resort to court is less and less warranted in modern arbitration practice, it may be appreciated that such amplification could reduce judicial intervention. There is no equivalent amplification in the Kenyan arbitration statute. Besides defining the extent of court's powers

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<sup>584</sup> Delvolvé J-L “Interim Measures and International Arbitration” (2003) 8(2) *LCIA News* 4 .

<sup>585</sup> See for example the LCIA Arbitration Rules article 25(3), which proceeds from the premise that where an interim measure is available from the tribunal, a party should only approach the court for that measure after the formation of the tribunal “in exceptional circumstances”.

<sup>586</sup> Compare the power of the arbitral tribunal (not the court) to grant an interdict or other interim order under Article 17(2) and to apportion the costs and expenses of an arbitration, including legal and other expenses of the parties and tribunal, in an award under Article 31(5)(a).

under Article 9(2), Article 9(3) in the Zimbabwean statute imposes general restrictions on the court's power to grant interim relief: either the tribunal must not yet have been appointed, or the tribunal must lack the power to grant the particular relief, or the urgency of the matter must make it inappropriate to approach the tribunal. The court is furthermore prevented from granting an order or interdict where a competent arbitral tribunal has already determined the application. The corresponding restriction in the Kenyan Act is mild in comparison. Section 7(2) of the Kenyan statute<sup>587</sup> requires the Kenyan court, when considering an application to the court for an injunction or other interim order, to treat as conclusive any ruling or finding of fact upon which an arbitral tribunal has already ruled.

There is little arbitration law and practice that has not received the attention of the English courts and the subject of interim measures is no exception. It has been noted that once the parties have chosen to resolve their dispute by arbitration, the English Arbitration Act 1996 requires them to look first to the arbitrators and only to resort to the court when the arbitrators cannot act or are unable to act effectively.<sup>588</sup> Moreover, regarding interim measures, section 38(1) of the Act allows the parties the freedom to agree on the powers exercisable by the arbitral tribunal for the conduct of the proceedings.

When the English court intervenes on interim measures its powers are prescribed by section 44 of the Act. The court's powers in this section apply unless the parties otherwise agree. Most importantly, the court's powers in relation to arbitration proceedings are restricted to the matters listed in section 44(2), and regarding these matters only, the court has the same powers as it has in relation to court proceedings.<sup>589</sup> The English provisions as well as those of Zimbabwe in specifying the court's powers, differ from the 2006 amendments to the Model Law. Article 17 J of the Model Law (2006) provides that the court "shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of [the enacting] State, as it has in relation to proceedings in courts." The court is nevertheless obliged when exercising the powers to consider "the specific features of international arbitration". It is submitted that the approach in Zimbabwe and England, in first specifying the powers of the court in relation to arbitration, and then further seeking to prescribe the circumstances in which a party may approach the

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<sup>587</sup> The Kenyan Arbitration Act s 7(1) enacts Article 9 of the Model Law and s 7(2) is an addition to the Model Law.

<sup>588</sup> Arbitration Act 1996 s 1(c) and s 44(5).

<sup>589</sup> These powers include the preservation of evidence, the making of certain orders regarding property which is the subject of the proceedings, the granting of an interim injunction and the appointment of a receiver. The power to order security for costs is conspicuously absent from the list.

court as opposed to the tribunal, is preferable to the approach in Article 17 J for jurisdictions in Africa using or adopting the Model Law.<sup>590</sup>

It is in the operation of section 44 of the English Arbitration Act and the restriction on the court's powers therein that the mechanism of the Act for achieving a balance between the arbitral process and the powers of the court emerges. But the limitations imposed by section 44(4) of the English Arbitration Act involving the requirement of notice to the other party does not apply in urgent applications. In such instances English practice has evolved the *Mareva* injunction<sup>591</sup> and *Anton Piller* orders<sup>592</sup> in response to urgent *ex parte* applications (that is without service of notice on the respondent) for court assistance for the preservation of the subject matter of a dispute pending the award. Because section 44 is a non-mandatory provision the parties may agree to exclude it. The interesting question that arises, where the arbitral parties incorporate a *Scott v Avery* clause<sup>593</sup> in their arbitration agreement is, whether they have thereby precluded recourse to court for interim relief? It is submitted that a clause making arbitration award a condition precedent to legal proceedings should not be construed to oust recourse to court for interim relief in appropriate circumstances because the *Scott v Avery* clause operates to prevent the court from exercising jurisdiction over the substance of the dispute and not to bar the court from assisting the tribunal where the interest of justice demands.

Other restrictions within section 44 are that, if the matter is not one of urgency, the court may only act if the tribunal cannot grant an interim measure;<sup>594</sup> and it may only act on the application of a party after notice to the other party and the tribunal and the application is made with either the permission of the tribunal or the agreement in writing of the other party.<sup>595</sup>

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<sup>590</sup>The relevant provisions of the Zimbabwean Arbitration Act First Schedule Article 9(2) and (3) have been discussed above. The circumstances in which the English court may be approached to exercise one of its specified powers are circumscribed by s 44(3)-(5) of the Arbitration Act 1996. The Mauritian International Arbitration Act 38 of 2008 follows the principle of Article 17 J and defines the scope of the measures which may be ordered in general terms as those which can be granted in court proceedings (s 23(1)), but nevertheless imposes prerequisites before the powers may be exercised (s 23(3)-(6)), based on those in the English Act.

<sup>591</sup> An anti-dissipation order directed to the defendant to stop him dealing with or diminishing the value of his assets pending judgement or award. See Gee S *Mareva Injunctions and Anton Piller Relief* and *Supreme Court Practice* (1997) vol 1 525-539.

<sup>592</sup> *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch. 55. It is a search and seizure order requiring the applicant to be given access to search the defendant's premises for incriminating documents and other relevant material likely to be destroyed by the defendant before or during the hearing. See Johnson (1997) *International Arbitration Law Review* 14-15.

<sup>593</sup> See Mustill & Boyd *Commercial Arbitration* 161; Johnson A (1997) *Int'l ArbLR* 11.

<sup>594</sup> S 44(5).

<sup>595</sup> S 44(4). See further on s 44 *Russell on Arbitration* 23<sup>rd</sup> edition 428-439.

Section 44 has extraterritorial aspects through the definition of the scope of application of the Act, which provides in section 2(3) that the powers conferred on the English court by section 44 are exercisable even if the seat of the arbitration is outside England and Wales or where no seat has been designated or determined. The court may nevertheless refuse to order interim measures if the fact of the seat being outside, or the likelihood of it being outside England makes it, in the court's opinion, inappropriate to order such measures. So it smacks of having it both ways through statutory ambivalence, reminiscent of common-law conundrums.

The issue arose in the *Channel Tunnel* case<sup>596</sup> on the question whether the English court had power to grant an interim injunction in support of the foreign arbitral proceedings. The court acknowledged the existence of power to order an injunction, but on the facts, refused an injunction because the type of injunction sought would have pre-empted the decision of the arbitrators sitting in Brussels. Therefore section 2(3) of the Act has to an extent dealt with the limitations on the grant of injunctive relief encountered in the *Channel Tunnel* case. It seems the House of Lords in that case shied away from affronting a neighbouring European power in whose territorial jurisdiction the seat of arbitration was located. Whether the august judicial House would have hesitated in granting an injunction affecting British interests in a distant oil or mineral rich country deemed a rogue state or politically incorrect state must be left to conjecture. If the court had a discretion in the matter then Lord Mustill offers an indication on how the discretion was exercised in the following words:

“There is always a tension when the court is asked to order by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other, the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail.”<sup>597</sup>

To conclude on the extraterritorial aspect of interim relief it may be observed that enforceability of interim orders across borders is a major concern in international arbitration. The reason for this difficulty appears to be that their extensive use was probably not foreseen

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<sup>596</sup> *Channel Tunnel Group Ltd v Balfour Beatty Ltd* [1993] 1 Lloyd's Rep 291 (HL). The House of Lords considered that it had the inherent power to grant an injunction but thought it inappropriate to do so.

<sup>597</sup> [1993] 1 Lloyd's Rep 310.

by the drafters of the New York Convention on the recognition and enforcement of foreign arbitral awards. The Convention was designed for final awards and under it the recognition and enforcement of an award may be refused where the award has not yet become binding on the parties.<sup>598</sup> The Convention did not address interim “awards” which could be varied in a subsequent final award. In Model Law jurisdictions which have adopted the 2006 amendments, this problem is now addressed by the provisions of Articles 17 H and 17 I referred to above. These Articles provide for court enforcement of interim measures ordered by arbitral tribunals, even if the seat of the arbitration is in another jurisdiction, subject to limited “tailor-made” defences.<sup>599</sup>

#### 3.5.4 Ex Parte Proceedings and Applications for Interim Measures

Applications for interim measures tend to be made in urgent circumstances by one party, often without notice to the other party, and therefore assume the characteristics of “*ex parte*” proceedings. For this reason what has been said on *ex parte* proceedings above is relevant here, without the need for repetition.<sup>600</sup>

With reference to applications for interim measures of protection, the practice differs from country to country and the complexity of the issue is demonstrated by the protracted duration of the discussions by the UNCITRAL Working Group on arbitration topics regarding interim measures, particularly in the context of *ex parte* applications to the tribunal.<sup>601</sup> In Kenya despite the power conferred by section 7(1) of the Arbitration Act for the grant of interim relief and Rule 16 B(9) of the Kenya Branch Rules for the making of interim awards, including injunctive relief and conservation measures, arbitrators rarely avail themselves of these powers. This writer recalls granting a conservation order in respect of the subject-matter of an arbitration from which the respondent immediately sought a review in the High Court. Thereafter it seems that the constraints of time, expense and inconvenience that ensued, combined to discourage both parties from proceeding with either the review or the arbitration. The arbitrator is not without recourse however as section 26(d) of the Kenyan Arbitration

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<sup>598</sup> See Article V(1)(e).

<sup>599</sup> See para 3.5.3.1 above.

<sup>600</sup> See para 3.2.5 above for comments on “*ex parte* proceedings” as distinguished from “proceedings under protest” and Redfern & Hunter *International Commercial Arbitration* 259 para 5-55 and 323-325 paras 6-119-121.

<sup>601</sup> See UNCITRAL’s 2006 Report (UN doc A/61/17) para 87, from which it appears that the first draft was under discussion by the Working Group in March 2000.

statute offers the tribunal the option where the claimant fails to prosecute his claim, to make an award dismissing the claim.

An example of the grant of interim relief in the form of an injunction under section 7 of the Arbitration Act of Kenya<sup>602</sup> was the case of *Pan Africa Builders & Contractors Ltd v National Social Security Fund Board of Trustees*.<sup>603</sup> The injunction was intended to restrain the respondent from paying a third party M/s Centurion Engineers & Builders Ltd the sum of KShs. 30,315,600 because the payment related to a contract between the applicant and respondent containing an arbitration clause. In reliance on section 10 of the Arbitration Act the court held that there was a dispute that could not be dealt with summarily; that section 6 of the Act was mandatory which, read together with section 10, justified a reference to arbitration.<sup>604</sup> In granting the injunction the judge stated:

“I find and hold that as to who is entitled to the sum of Kshs.30,315,600 or Kshs.8,090,619 and whether or not it ought to be paid or how much should be paid, this should form the subject-matter of the reference to arbitration and ought to be ruled on by an arbitral tribunal appointed under the relevant clause.”

As the arbitral tribunal had not been established it could not have granted interim relief, which might have been possible under section 18 of the Kenyan Arbitration Act on interim measures, which is the equivalent of Article 17 of the Model Law.

One of the most controversial aspects regarding the drafting by UNCITRAL of revised provisions on interim measures was the question whether or not an arbitral tribunal should be able to grant interim measures *ex parte*.<sup>605</sup> Current arbitration rules and statutes do not usually grant *ex parte* authority to arbitrators.<sup>606</sup> The provisions on the subject in the 2006 amendments to the Model Law represent a compromise.<sup>607</sup> *Ex parte* orders in this context are styled in the 2006 amendments as “preliminary orders”. The arbitral tribunal has a contract-

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<sup>602</sup> S 7 is the Kenya equivalent of Model Law Article 9.

<sup>603</sup> Civil Case No 32 of 2002.

<sup>604</sup> S 6 of the Act deals with stay of legal proceedings and corresponds to Article 8 of the Model Law. S 10 deals with the extent of court intervention and is the equivalent of Article 5 of the Model Law.

<sup>605</sup> “*Ex parte*” in this context is used in the sense of an application without notice to the other party. Compare the discussion in para 3.2.5 above.

<sup>606</sup> See the LCIA Rules article 25 read with article 19(2) and the ICC Rules article 23 read with article 21(1).

<sup>607</sup> See UNCITRAL’s Report on its 39<sup>th</sup> Session, June 2006, (UN doc A/61/17) para 88. In terms of this compromise, the provisions on preliminary orders apply unless otherwise agreed by the parties and the “preliminary orders” have the nature of procedural orders and not of awards. Further, there is no court assistance for the enforcement of such orders.

out power to grant a preliminary order, if prior disclosure to the party against whom it is directed risks frustrating the purpose of the measure.<sup>608</sup> Immediately after deciding on a request for a preliminary order the tribunal must disclose the prescribed information, including the contents of any oral communication, to all parties.<sup>609</sup> At the same time the tribunal must give an opportunity to the party against whom a preliminary order is directed to present its case at the earliest practicable time.<sup>610</sup> The preliminary order is binding on the parties but is not subject to court enforcement and expires after 20 days, unless converted into an interim measure after the affected party has had an opportunity to present its case.<sup>611</sup> The tribunal must normally require the party applying for a preliminary order to give security.<sup>612</sup>

One commentator has suggested that UNCITRAL Model Law jurisdictions in Africa should omit these provisions on preliminary orders, when giving effect to the 2006 amendments in their arbitration legislation, as being too controversial, bearing in mind that a party requiring interim measures *ex parte*, can always approach the relevant court.<sup>613</sup> However, in line with the general approach in this chapter of the dissertation of advocating strong and wide powers for arbitrators in the interests of effective arbitration,<sup>614</sup> it is submitted and recommended that the provisions on preliminary orders should be adopted, along with the other provisions of the 2006 amendments on the granting of interim measures by the tribunal.

### 3.5.5 Arbitration Rules on Interim Measures

It was stated above<sup>615</sup> that apart from legislation on interim measures, the arbitration rules chosen by the parties also regulate interim measures. More specifically the procedural rules chosen by the parties may indicate what powers the arbitral tribunal may exercise in respect of interim measures. The UNCITRAL Arbitration Rules governing interim measures of protection provide:

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<sup>608</sup> See the Model Law Article 17 B(1) and (2).

<sup>609</sup> See the Model Law Article 17 C(1).

<sup>610</sup> See the Model Law Article 17 C(2).

<sup>611</sup> See the Model Law Article 17 C(4) and (5).

<sup>612</sup> See the Model Law Article 17 E(2). See also Article 17 F(2) regarding the duty of disclosure imposed on the applicant.

<sup>613</sup> The provisions were also intentionally omitted from the Mauritian International Arbitration Act 38 of 2008 ss 21 and 22, while generally adopting the other 2006 amendments on the granting of interim measures by the tribunal.

<sup>614</sup> See para 3.3 above on the arbitrator's powers as well as para 3.7 below on the need for a Code of Sanctions.

<sup>615</sup> In para 3.5.3(1).

“At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.”<sup>616</sup>

This Article also allows such interim measure to be established as an interim award to facilitate enforcement and the tribunal is empowered to require security for costs of such measure.<sup>617</sup> In line with Article 9 of the Model Law, a request to court for interim measures under Article 26 of the UNCITRAL Arbitration Rules is not deemed to be incompatible with the agreement to arbitrate, or a waiver of that agreement.<sup>618</sup> The Rules of the Chartered Institute of Arbitrators<sup>619</sup> confer power on the arbitral tribunal to grant relief on a provisional basis on the matters itemized under Article 7.8 and, in particular, to grant a provisional order for “any relief claimed in the arbitration”, a very wide discretionary power in respect of interim relief.<sup>620</sup> The LCIA Rules grant power “to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject-matter of the arbitration”.<sup>621</sup>

For African examples, the Kenya Branch Rules<sup>622</sup> allow the tribunal to “make one or more interim awards including injunctive relief and measures for conservation of property.”<sup>623</sup>

In Nigeria the arbitration statute requires arbitral proceedings conducted under it to be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule of the Act.<sup>624</sup> Article 26 of the Rules governs the granting of interim measures relating to the subject-matter of the dispute.<sup>625</sup> Significantly Article 26(3) provides:

“[A] request for interim measures ... to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”

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<sup>616</sup> UNCITRAL Arbitration Rules Article 26(1).

<sup>617</sup> UNCITRAL Arbitration Rules Article 26(2).

<sup>618</sup> UNCITRAL Arbitration Rules Article 26(3).

<sup>619</sup> Arbitration Rules (2000 edition), for use in England, Wales and Northern Ireland, Article 7.8.

<sup>620</sup> Article 7.8(c).

<sup>621</sup> Article 25.1(b); see also the ICC Rules (1998) article 23 on interim or conservatory measures.

<sup>622</sup> These 1988 Rules are based on the English Chartered Institute Rules of 1988 updated by the 2000 edition, having regard to the differences between the English and Kenyan Arbitration Acts.

<sup>623</sup> Rule 16B (9) deals with interim relief. Compare Article 7.8-7.11 on provisional relief in the updated English Rules (2000).

<sup>624</sup> Arbitration and Conciliation Act s 15(1). These arbitration rules are virtually identical to the UNCITRAL Arbitration Rules.

<sup>625</sup> These include measures for conservation of goods, deposits with third persons and the sale of perishable goods.

For international commercial arbitrations the parties have the option to adopt these Rules or the UNCITRAL Arbitration Rules or any other international arbitration rules of their choice. In that connection the UNCITRAL Rules,<sup>626</sup> the LCIA Rules<sup>627</sup> and the ICC Rules<sup>628</sup> all make clear that an agreement to arbitrate under these rules is not inconsistent with an application to Court for interim relief, subject to the limitations imposed by those rules.

### 3.5.6 Control of Arbitration: Tribunal or Court

The distribution and balance of power between the arbitral tribunal and court in the context of interim measures are matters of major importance in arbitration practice. While a measure of judicial control of arbitration seems inevitable, the achievement of the correct balance is elusive. Two polarized positions have been identified:

“On the one side if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court system should play no part at all, save perhaps to enforce awards in the same way as they enforce any other rights and obligations to which the parties have agreed. To do otherwise is unwarrantably to interfere with the parties’ right to conduct their affairs as they choose.

The other extreme position reaches a different conclusion. Arbitration has this in common with the court system; both are a form of dispute resolution which depends on the decision of a third party. Justice dictates that certain rules should apply to dispute resolution of this kind. Since the state is in over-all charge of justice, and since justice is an integral part of any civilized democratic society, the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as public tribunals.”<sup>629</sup>

It is recognized therefore that, as in all relationships, the correct approach should be to strike the appropriate balance between the duty of the courts to supervise arbitrations and the rights of parties to seek court assistance in times of need.<sup>630</sup> It seems that a measure of judicial control of arbitration is unavoidable. Moreover, as noted above, Articles 9 and 17, when read

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<sup>626</sup> Article 26(3).

<sup>627</sup> Article 25.3.

<sup>628</sup> Article 23.2.

<sup>629</sup> Saville M (Lord Saville) “The Denning Lecture 1995: Arbitration and the Courts” (1995) 61 *Arbitration* 157, quoted by Redfern and Hunter *International Commercial Arbitration* 349-350. See also para 1.4 above.

<sup>630</sup> Redfern & Hunter *International Commercial Arbitration* 350.

together, envision a degree of overlapping jurisdiction.<sup>631</sup> It has further been noted in the context of interim measures that what an arbitral tribunal may order depends on the national law and the arbitration agreement. In this connection it is apparent from the jurisdictions based on the Model Law (1985 version) that the scope of the arbitral tribunal's authority in such cases is limited to the subject-matter of the dispute. But the existence of concurrent jurisdiction raises the critical question as to who should more properly grant the interim relief: tribunal or court?

It is submitted that a court should not readily or lightly assume the jurisdiction to grant interim measures which should more properly be sought from the arbitral tribunal, when established and once it can be deemed to have control of the arbitration. Again the tribunal can more expeditiously entertain the application and deal with it on the merits from facts that are either already available or that can be swiftly made available to the tribunal, compared to a court where such application may encounter considerable delay before the hearing.<sup>632</sup> In this connection an arbitrator's reluctance to entertain an application for interim measure for fear of intrusiveness or an accusation of taking sides or pre-judging the result, would be due more to his lack of confidence than to a serious concern for a just result.<sup>633</sup> After all inferior courts also risk the same accusations yet they proceed to grant interim orders as and when they are approached for assistance.

It is therefore submitted that those statutes<sup>634</sup> which impose prerequisites before a party can approach the court instead of the tribunal for an interim measure are preferable to the approach in the 2006 version of the Model Law, which appears to provide no such prerequisites.<sup>635</sup>

### 3.5.7 Conclusion

In conclusion this discussion can be summarized on the core points as follows:

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<sup>631</sup> Article 9 declares that it is not incompatible with an arbitration agreement for a court to grant interim measures at the request of a party during arbitral proceedings, while Article 17 empowers the tribunal to grant interim measures relating to the subject-matter of the dispute. See para 3.5.3 above.

<sup>632</sup> Wagoner (1996) 62 *Arbitration* 131-132; Johnson (1997) 1 *International Arbitration Law Review* 9.

<sup>633</sup> See the UNCITRAL Model Law (2006) Article 17 A (1)(b), in terms of which an applicant for interim measures must normally satisfy the tribunal that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. This provision demonstrates that it is not considered improper or unfair that the tribunal should form a provisional view on the merits for this purpose.

<sup>634</sup> See the English Arbitration Act s 44(3)-(6) and the Zimbabwean Arbitration Act First Schedule Article 9(3).

<sup>635</sup> A positive feature of the 2006 amendments is nevertheless the formulation of factors that the tribunal must take into account when considering an application for interim measures.

- i. Modern arbitration practice that embraces the Model Law recognizes that in some circumstances it may be necessary and compatible with arbitration for arbitral parties to seek court assistance in the context of interim measures in situations when an arbitral tribunal cannot act or cannot act effectively.
- ii. However, whenever possible, the parties should seek interim relief from the arbitral tribunal; and the parties themselves play a crucial role in empowering the arbitral tribunal through a mix of laws and rules that enable them to do so.
- iii. Modern arbitration legislation can and does assist the arbitral process through default powers and discretion conferred on the tribunal under such legislation. The English Arbitration Act 1996 is exemplary in this regard.
- iv. Courts will also benefit from clear and elaborate provisions on the extent of judicial intervention in which regard the Model Law, even under the 2006 amendments, has not gone far enough. The scope of the court's powers to grant interim measures could be defined more restrictively and the circumstances in which a party may approach the court rather than the tribunal could be spelt out.
- v. Courts in jurisdictions like Kenya and others that have embraced the Model Law should not feel threatened by the expansion of the scope of the tribunal's powers regarding interim measures, as this is intended to ensure effective arbitration.
- vi. Finally, in all cases where parties seek court assistance because an arbitral tribunal cannot act or act effectively, the courts should give fullest support in ways that facilitate the enforcement of the arbitration agreement and the eventual award.

### **3.6 The Problem of Enforcement and Execution of the Arbitral Award**

#### **3.6.1 Introduction**

When an arbitrator has made and delivered a final award he is *functus officio*.<sup>636</sup> His duty is done and his obligations are discharged. In the relatively few but still significant number of cases where the award is unacceptable to the losing party the successful party needs further assistance for securing compliance with the award. It is in that particular connection that the term “enforcement” assumes significance and is considered in this part of the dissertation.

This topic is included in this study because the value and effectiveness of arbitration as an attractive means of resolving commercial disputes in a domestic context can be measured by

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<sup>636</sup> Mustill & Boyd *Commercial Arbitration* 404-405; *Russell on Arbitration* (23<sup>rd</sup> edition) 334-335 para 6-166.

the successful implementation of the arbitral award. The problem is that whereas arbitration law governs the making, delivery,<sup>637</sup> recognition and enforcement<sup>638</sup> of the arbitral award, its actual execution as the final act in the arbitration process is either not mentioned or not specifically regulated by arbitration statutes.<sup>639</sup> This problem is known to arbitration practitioners who are also aware that the expectation of a binding and enforceable award is a principal goal of arbitration and that an arbitration agreement and award without an effective system of enforcement are practically useless. The issue for consideration here therefore is whether arbitration law and practice have actually put in place an adequate mechanism for the implementation of the award, or whether more must be done to clarify and strengthen the procedures for the effective enforcement and execution of the arbitral award.

Because of the role of the national court in the implementation of the arbitral award, this discussion will first examine the adequacy of the law governing the recognition and enforcement of awards and their implementation through the court system. The analysis will include the distinction in arbitration practice between (i) the enforcement of a final award (that is, an award on the merits); and (ii) the enforcement of arbitral orders and “awards” regarding interim and provisional measures. The discussion will extend to the enforcement of foreign awards under the New York Convention for two reasons. Firstly, Articles III and IV of that Convention may impact on domestic arbitration law, particularly in a monistic system.<sup>640</sup> Secondly, the losing party in a domestic arbitration may have assets outside the jurisdiction, necessitating enforcement proceedings in the place where those assets are situated.

The discussion on the actual execution of domestic awards as opposed to a court order for enforcement is exemplified by Kenyan practice, the shortcomings of which provoked the

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<sup>637</sup> It is clear from Article 31(4) of the Model Law that the making of the award and its delivery are two separate acts.

<sup>638</sup> See para 3.6.2 below for the distinction between recognition and enforcement.

<sup>639</sup> Compare Article 36(2) of the Model Law, which provides for the possibility that a court from which enforcement is sought, may require appropriate security from the party opposing enforcement as a condition for adjourning the enforcement proceedings so that an application for setting aside can be dealt with. Outside of applications for interim measures under Article 9, this appears to be the only provision in the Model Law where the court is directly concerned with the ability of a party to comply with an order for enforcement of an award.

<sup>640</sup> Article III states: “Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Article IV requires the party applying for recognition and enforcement to supply (i) the duly authenticated original award or a duly certified copy and (ii) the original agreement or a duly certified copy, and a translation of these documents into the official language of the country in which the award is relied on. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

writer's interest and in this problem. The topic is not covered by arbitration law. Its inclusion here may therefore be controversial insofar as award execution involves legislation other than arbitration law and so ostensibly outside the study field. In context, award enforcement and execution through the administrative system of the domestic courts is the same in the three African jurisdictions as evidenced by the provisions of statutes such as, for Kenya: The Civil Procedure Act and Rules of Court and the Licensing of Auctioneers Act; for Nigeria: The Sheriffs and Civil Process Act (Chapter 407) and the Civil Procedure Rules 2004 of the High Court of Lagos State; and for Zimbabwe: The High Court Act Chapter 7:06. In effect the procedure is for the enforcement of an arbitral award in the same manner as a judgement or court decree. Yet the fact that existing arbitration law does not cover award execution should not preclude a discussion of an expeditious method of award execution in Kenya. The point of departure therefore is the innovative proposition that arbitration law should cover the whole field including the execution of the arbitral award, and the originality of this proposition as well as its controversy can be seen as relevant challenges for research and new law. Kenyan practice adequately exemplifies the problem and its investigation concludes with a proposed simplified enforcement and execution procedure for Kenya.

The enforcement of an award against a defiant opponent can be a harrowing experience for the successful party. Yet opposition to the enforcement and execution of a favourable award is not unique to arbitration as successful litigants also encounter practical problems of enforcement and execution of judgments. The difference is that for the successful litigant, the processes of the court trial, delivery of the judgment, the issuance of a decree for enforcement and levy of execution are played out in one continuum under the panoply of state authority. For the successful arbitral party there is what seems like the end of one often lengthy process with the arbitral tribunal leading to a favourable award, only to have to start again with another in a different venue in court. This brings the prospect of additional costs and the possibility of losing the benefits of the favourable award through a successful challenge. In the words of a commentator from the common-law tradition:

“If an agreement or award which is not voluntarily carried out cannot be coercively enforced against a recalcitrant party, then a rationale for arbitration is eroded and confidence in the arbitral process would be shaken. ... Thus, in recognising and enforcing arbitral agreements or awards, courts assist parties in realising their legitimate expectations and thereby supporting the arbitral process, as well as reinforcing its efficacy and integrity. The court's duty has as an implication the assurance that the arbitral proceeding was conducted, or that a resultant award

was procured, in a manner compatible with procedural fairness or otherwise not in conflict with other public policy considerations. In those respects, the court may also be carrying out international arbitral obligations.”<sup>641</sup>

From the civil-law tradition another commentator observes:

“Enforcement ... ‘constitutes, for the arbitral award and for arbitration as a whole, the *moment of truth* or ... ‘the acid test’.’ Should the award be enforced, the arbitrator’s efforts are thereby honored, and arbitration as an institution strengthened. Should the award be vacated or enforcement denied, the result casts a dark shadow over the proceeding. To date, the record of award enforcement has been a good one. No doubt, this is in large part due to the seriousness and commitment with which arbitrators and arbitral institutions undertake their respective tasks. ... Nonetheless, the risk of non-enforcement remains looming like a ‘sword of Damocles’ over the entire system, and the costs of non-enforcement, even when rare, are enormous for the parties, the arbitrators, the institutions, the States and the system as a whole.”<sup>642</sup>

In sum, the ability to enforce the carrying out of an award, in the absence of voluntary compliance, is therefore crucial because in the end this determines whether or not the entire arbitration exercise has been worth the resources put into it. If a party who has received a valid and binding award cannot enforce it effectively and expeditiously against a party with the means but not the will to comply, then arbitration does not merit recognition as an effective means of resolving disputes. It should also be noted that the focus of the discussion is on problems relating to the enforcement of an award, rather than on the procedure and grounds for setting an award aside, which is only referred to in order to provide the necessary background for the discussion.

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<sup>641</sup> Asouzu AA “The adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards” [1999] *Journal of Business Law* 185.

<sup>642</sup> Horvath G “The Duty of the Tribunal to Render an Enforceable Award” (2001) 18(2) *Journal of International Arbitration* 135, quoting with approval Lalive P “Enforcing Awards” in *International Arbitration, 60 years of ICC Arbitration* (ICC 1984) 317 321.

### 3.6.2 Requirements of a Valid Final Award<sup>643</sup> and Grounds for Setting Aside

It has been said that perhaps the arbitrator's most important duty is to render an enforceable award.<sup>644</sup> It would seem to follow logically that the arbitrator should therefore ensure that the award satisfies the applicable formal and substantive requirements for a valid award. As appears from the discussion below, the UNCITRAL Model Law, although specifying the formal requirements for a valid award, is less specific than several other modern arbitration statutes as to the consequences of non-compliance.

The Model Law under Article 22(1) requires that the award must be made in the language used in the arbitration proceedings. The parties are free to agree on the language of the proceedings and in default of agreement the language is determined by the tribunal. This Model Law requirement is replicated in the arbitration statutes of the three jurisdictions under review, such as the Kenyan Arbitration Act s 23. Article 22(1) envisages that the proceedings could be conducted in more than one language. In a multi-lingual African jurisdiction, it is conceivable that the parties would agree that the proceedings should be conducted in more than one language but that the award should be made in English, to facilitate court enforcement, if necessary. The Model Law requires the award to be in writing and signed by the arbitrator or arbitrators. Where the tribunal comprises more than one arbitrator, the signatures of the majority are sufficient, provided that the reason for any omitted signature is stated.<sup>645</sup> The award must state the reasons upon which the award is based, unless the parties agree otherwise or the award records a settlement on agreed terms.<sup>646</sup> The date and place of arbitration must also be stated<sup>647</sup> and signed copies of the award are to be delivered to the parties.<sup>648</sup>

Other requirements deemed substantive by commentators require the arbitrator to convey his decision in a language that is clear, explicit and without ambiguity, and to ensure that the award is certain, final, lawful and capable of enforcement.<sup>649</sup> An important legal consequence

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<sup>643</sup> See the explanation of "final award" in para 3.2.6 above. The term "final award" is used without explanation in the Model Law Article 32(1); "final arbitral award" is used in s 33(1) of the Kenyan statute also without explanation; see also the Zimbabwe statute First Schedule Article 32(1) and s 27(1) of the Nigerian statute.

<sup>644</sup> See Horvath (2001) 18(2) *Journal of International Arbitration* 135.

<sup>645</sup> Article 31(1).

<sup>646</sup> Article 30 deals with the tribunal's power to make an award on agreed terms. The formal requirements of Article 31 apply and the award must state that it is an award on agreed terms.

<sup>647</sup> This refers to the place of the arbitration as determined in accordance with Article 20, rather than the place at which the award was actually signed. See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 838-839.

<sup>648</sup> See Article 31(3) and (4).

<sup>649</sup> Mustill & Boyd *Commercial Arbitration* 384-388; *Russell on Arbitration* (23rd ed) 301 para 6-072.

of a valid final award is that in terms of the parties' arbitration agreement, it brings an end to their dispute.

Regarding the legal requirements for a valid award, an arbitrator should also bear in mind the grounds on which an award can be set aside by the court, as non-compliance with the requirements underlying those grounds would mean that the award would be at the risk of being set aside by the court.<sup>650</sup>

Developing and drafting the standards against which courts of a Model Law jurisdiction are to judge the arbitral award, which is the final product of the arbitral proceedings, presented unusually sensitive and difficult problems to the drafters of the Model Law.<sup>651</sup> This is possibly illustrated by the fact that the *travaux préparatoires* of the relevant provision, Article 34, are longer than those of any other Article of the Model Law, other than Article 1.<sup>652</sup> From the outset, the drafters of the Model Law dealt with the problem in two ways. Firstly, they prescribed limited grounds for setting aside the award under Article 34. Secondly, although various national laws at the time provided "a great variety" of methods to assail an arbitral award, the Model Law prescribes a single exclusive method of doing so (other than resisting enforcement), that is, by judicial process involving an application to the court for the setting aside of the award.<sup>653</sup> The court may set aside the award only if the applicant proves the incapacity of a party to conclude the arbitration agreement, or the invalidity of the arbitration agreement, or the absence of notice of an arbitrator's appointment or of the proceedings or inability to present its case or that the award deals with extraneous matters.<sup>654</sup> The award may also be set aside if the court finds the subject-matter not arbitrable under its own law or that the award is in conflict with public policy of that state.<sup>655</sup> The national statutes of Kenya, Nigeria and Zimbabwe, in the main, replicate the provisions of Article 34.<sup>656</sup>

The drafters of the Model Law decided not to define the term "award" either for purposes of Article 34 or for purposes of other provisions of the Model Law, because considerable difficulty was encountered in "finding an acceptable general definition that would have the

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<sup>650</sup> Compare the argument in *Russell on Arbitration* 301 para 6-072.

<sup>651</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 911.

<sup>652</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 911. Article 1 deals with the scope of the Model Law's application.

<sup>653</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 911-912 and Article 34(1): "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

<sup>654</sup> Article 34(2)(a).

<sup>655</sup> Article 34(2)(b).

<sup>656</sup> See the text below.

effect of properly regulating court control of arbitral decisions”.<sup>657</sup> However, an award in Article 34 by implication includes a partial award.<sup>658</sup>

The statutory provisions on recourse to court to set aside an award in Kenya appear under section 35 of Part VI of the 1995 Arbitration Act. Apart from the specific reference to the High Court as the judicial authority to which an application for setting aside an arbitral award can be made, the provisions of section 35 of the Kenyan statute are *in pari materia*<sup>659</sup> with those of Model Law, Article 34. As the Kenyan statute is monistic, the same provisions will govern the application to the High Court to set aside a domestic and international award under the same grounds prescribed by Model Law, Article 34. Article 34 in the First Schedule to the Zimbabwe statute, on grounds for setting aside, is in similar terms to the Model Law. For avoidance of doubt however there is an additional declaration under Article 34(5) to the effect that an award would be in conflict with the public policy of Zimbabwe if it was “induced or effected (sic) by fraud or corruption”, or a breach of natural justice occurred in making the award. The position in Nigeria is different. Section 48 of the Nigerian statute, containing provisions similar to the Model Law Article 34 for setting aside an award, is part of the “Additional Provisions Relating To International Commercial Arbitration and Conciliation” under Part III of the statute. However for domestic arbitrations three grounds for setting aside an award are provided: (i) where the award contains decisions on matters beyond the scope of the submission;<sup>660</sup> or (ii) the arbitrator has misconducted himself or the proceedings or (iii) where “the arbitral proceedings, or the award, has been improperly procured” (sic).<sup>661</sup>

### 3.6.3 Recognition and Enforcement under the Model Law and Grounds for Refusal

The Model Law does not define the terms “recognition” and “enforcement”. However it appears from the legislative history of Article 35 of the Model Law that the drafters drew a distinction between “recognition” and “enforcement” because the wording of Article 35(1)

<sup>657</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 153-154. There was broad agreement that an award included any decision in which a matter of substance was finally determined, but problems were encountered with the situation where a tribunal described a decision on a procedural matter as an award.

<sup>658</sup> In the sense of an award that finally determines one or more, but not all, of the substantive matters in dispute. This is implicit in Article 32, which refers to a “final award” as one of the ways in which arbitral proceedings are terminated. The possibility of awards, other than a final award, is clearly contemplated.

<sup>659</sup> Except for an obvious error in the provisions of s 35(3) which must have been intended to be read together with s 34 and not with s 36 in order to be in line with the Model Law Article 34(3).

<sup>660</sup> S 29(2).

<sup>661</sup> S 30(1)). The last two grounds are reminiscent of s 23(2) of the English Arbitration Act of 1950, although the latter provision refers only to the award (not the proceedings) being improperly procured as a ground for setting aside.

suggests that recognition may occur independently of enforcement and therefore it is only for enforcement purposes that a written application to court must be made.<sup>662</sup> The explanation of the Working Group was that “recognition was an abstract legal effect which could obtain automatically without necessarily being requested by a party.”<sup>663</sup> Nevertheless it has been suggested that paragraph 2 of Article 35 does prescribe a procedure for requesting recognition by the provision that a party relying on an award “shall supply” the award and the arbitration agreement.<sup>664</sup> It is also observed that the distinction between recognition and enforcement is one of the changes between the New York Convention and the Model Law without being in conflict with each other.<sup>665</sup>

The tenor and content of Chapter VIII of the Model Law on recognition and enforcement of awards reflects the significant policy decision of applying the same rules in this context to arbitral awards whether made in the country of enforcement or abroad, and to follow as far as possible, the provisions of the New York Convention towards the uniform treatment of all awards, both as regards the grounds for active challenge under Article 34 and resistance to enforcement under Article 36. Secondly the new line of demarcation is therefore between “international” and “non-international” awards and not between “foreign” and “domestic”<sup>666</sup> awards; and the new distinction is based on substantive grounds rather than territorial borders.<sup>667</sup> In consequence the recognition and enforcement of “international” awards, whether “foreign” or “domestic” is governed by the same provisions. Thirdly by modeling recognition and enforcement on the equivalent provisions of the 1958 New York Convention the UNCITRAL Model Law can be said to supplement, rather than conflict with, the relevant provisions of the Convention.

Article 35(1) of the Model Law prescribes the procedural requirements of recognition and enforcement by providing that an arbitral award, irrespective of the country in which it was

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<sup>662</sup> See Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 1011. The intended distinction appears clearly if one compares the wording of Article 35(1) and (2) with that of the equivalent provisions of the New York Convention, namely Articles III and IV(I).

<sup>663</sup> Fifth Working Group Report. A/CN.9/246, para 146; Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 1011.

<sup>664</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 1011.

<sup>665</sup> Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 1011.

<sup>666</sup> There is the complicating fact that awards issued in international commercial arbitrations that take place in the enforcing or recognising state are domestic awards. Further, with the exception of investment disputes arbitrated by ICSID under the Washington Convention an international commercial arbitration is conducted under a national arbitration law of the seat of arbitration.

<sup>667</sup> The significant observation is that the place of arbitration is now of limited importance as it is often chosen for the parties’ convenience, as the dispute may have little or no connection with the state where the arbitration took place.

made, shall be recognized as binding and enforceable subject to the provisions of Article 35(2) and 36 which prescribe the grounds for refusal of recognition and enforcement. The application<sup>668</sup> for enforcement is made in writing to “the competent court”, together with an authenticated original award or duly certified copy, the original arbitration agreement or a duly certified copy, and a duly certified translation of the agreement and award if not written in the official language of the State where enforcement is sought.<sup>669</sup> What may also be noted from the perspective of international arbitration practice is that reciprocity is not included as a condition for recognition and enforcement, no doubt, because of the limited importance of the place of arbitration in international cases and the desire to do away with territorial restrictions. There is also the fact that reciprocity is a more logical requirement in a national statute that is giving effect to a Convention.

But, given the acclaimed success of the New York Convention on the recognition and enforcement of foreign arbitral awards, was a re-enactment of its core provisions in the Model Law necessary? The legislative history reveals a division of opinion on the inclusion of the provisions on recognition and enforcement of arbitral awards in the Model Law.<sup>670</sup> The most important argument in favour of inclusion was the need for a single set of provisions for both foreign and domestic awards and for the Model Law to de-emphasize the importance of the place of arbitration in international commercial arbitration.<sup>671</sup> This was perceived as a means of harmonizing arbitration law globally and enhancing the vitality of international commercial arbitration.<sup>672</sup> It was also acknowledged that the Model Law would be incomplete without provisions to govern awards not governed by the New York Convention or other multilateral or bilateral treaties. For domestic awards the justification was the need for a single unified treatment of arbitral awards as a means of facilitating international commercial arbitration world wide. In addition to this is the observation that the conditions specified under paragraph 2 of Article 35 are intended to set maximum standards. Therefore it was not seen to be contrary to the harmonizing impact of the Model Law for a state to set less onerous conditions.

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<sup>668</sup> Compare the provisions of s 53 of the proposed South African Bill for Domestic Arbitration: Any party may apply for the award to be made an order of court.

<sup>669</sup> Article 35(2). Article 35(2) was amended in 2006 to abolish the requirement to furnish the original or an authenticated copy of the arbitration agreement. This amendment is to be welcomed as it removes a formal barrier to enforcement, when the applicant does not have the original arbitration agreement.

<sup>670</sup> The arguments for and against inclusion are found in the five Working Group Reports, the Sixth and Seventh Secretariat Notes, the Summary Record A/CN.9/SR320 paras 30-57 and the Commission's Report A/40/17 paras 308-310. See also Holtzmann & Neuhaus *Guide to the UNCITRAL Model Law* 1006-1007.

<sup>671</sup> Seventh Secretariat Note, A/CN.9/264 Art 35; para 3.

<sup>672</sup> Seventh Secretariat Note, A/CN.9/264 Art 35; para 3.

Article 35 is replicated by the statutes of the three African jurisdictions for both domestic and international arbitrations and the adequacy or otherwise of these provisions for the enforcement of arbitral awards will be considered below. It is appropriate at this stage to turn to the grounds for refusing recognition and enforcement under the Model Law.

It is because enforcement of the award can be declined by the court at this stage that the role of the court and its relationship with the arbitral tribunal is under constant scrutiny in arbitration law and practice to ensure that an award is not lightly remitted or set aside or its enforcement improperly or incorrectly denied. The legal grounds for rejecting an award are therefore in this respect of particular importance.

The Model Law grounds for refusing recognition and enforcement are set out under Article 36. The opponent of the award must prove that (i) an arbitral party was under some incapacity, or the arbitration agreement is not valid; or (ii) no proper notice of the arbitrator's appointment or of the proceedings was given or the opponent was unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of submission; or (iv) the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement or, where the agreement is silent, the law of the situs; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court at the seat. Additionally enforcement will be refused if the court finds that the subject-matter of the dispute is not arbitrable under its own law or enforcement would contradict public policy of the state.

It is to be observed that the grounds for refusing recognition and enforcement under Article 36 are identical to those under Article V of the New York Convention, with the significant difference that under the Model Law these grounds are relevant not merely with regard to foreign awards but to all awards in international commercial arbitrations irrespective of the country in which the award was made.

It seems therefore that Article 36 which prescribes the grounds for a court to refuse recognition or enforcement of an arbitral award is intended to correlate with Article 35. Article 35 provides a procedure to be followed by a party seeking the recognition and enforcement of the award. Article 36, on the other hand, prescribes for the other party and the court what must be proved for recognition and enforcement to be denied.

As noted above, both Articles 35 and 36 are modeled on the New York Convention, although unlike the Convention Article 36 extends not only to foreign awards, that is, arbitral awards made outside the state in which recognition or enforcement is sought, but also to domestic awards, that is, those made in international commercial arbitrations that take place in the enforcing or recognizing state. The unified treatment of domestic and foreign awards seems to have been the deliberate policy choice by UNCITRAL. Another kind of unity is that Article 34 is in almost every respect a reflection of Article 36.

The important question relating to the interpretation of Article 36, that is, whether minor and non-material defects in arbitral procedure should result in the refusal of recognition or enforcement brings into consideration the issue of waiver of procedural errors. Arbitration practice seems to accept waiver of errors in arbitral procedure, and in some circumstances, even jurisdictional defects by the failure of a party to object timeously. In such an instance it can be reasonably inferred that such a waiver would extend to proceedings for the recognition and enforcement as well. More specifically, and with regard to waivers of procedural errors under Article 4 it seems that the UNCITRAL Commission was agreed that such waivers were not limited to arbitral proceedings only but also extended to subsequent court proceedings in the context of Articles 34 and 36.<sup>673</sup>

The analytical commentary draws a distinction between Articles 34(2)(a)(iv) and 36(1)(a)(iv) as an exception to the general policy of harmony between the two Articles.<sup>674</sup> The explanation is that the need to synchronise the Model Law with the New York Convention on the recognition and enforcement of awards was necessary to create a unified system worldwide for that purpose. But the alignment between Articles 34 and 36 also served the different purpose of diminishing the importance of the place of arbitration in international commercial arbitrations as between domestic and foreign arbitrations.<sup>675</sup>

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<sup>673</sup> See the Commission's Report A/40/17 para 57.

<sup>674</sup> *Article 34(2)(a)(iv)* states that the award may be set aside by the court only if, "(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision *of this law* from which the parties cannot derogate, or, failing such agreement, *was not in accordance with this law*". Article 36(1)(a)(iv): recognition or enforcement may be refused on proof that "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, *was not in accordance with the law of the country where the arbitration took place;*"

<sup>675</sup> Seventh Secretariat Note A/CN.9.264 Article 34 para 11 and Sixth Secretariat Note (Government Comments) A/CN.9/263 Article 36 para 8.

### 3.6.4 Court Recognition and Enforcement of Arbitral Awards in the Three African Jurisdictions Compared to English Law.

Under the provisions of the Kenyan statute, the duty of a party applying for enforcement to furnish the original award and arbitration agreement or duly certified copies, is apparently subject to the discretion of the court to dispense with strict compliance with these requirements.<sup>676</sup> The English language is substituted for the “official language” of the Model Law provision.

For Nigeria, the recognition and enforcement provisions for domestic awards appear under section 31<sup>677</sup> and for international commercial arbitration, under section 51, but in the latter case the enforcement of the award is subject to both the provisions of sections 51 and 52 of the statute.<sup>678</sup>

On Recognition and Enforcement the Zimbabwe statute replicates the Model Law Article 35 except the substitution of the “English language” for the “official language” under Article 35(2).<sup>679</sup>

Refusal of recognition and enforcement of awards in Zimbabwe is governed by Article 36 of the First Schedule to the Act in terms similar to Article 36 of the Model Law and section 37 of the Kenyan statute, plus an additional Article 36(3) to the effect that an award will be contrary to the public policy of Zimbabwe for fraud, corruption or breach of the rules of natural justice. The equivalent provisions for the refusal of a Nigerian award are elaborated under section 52 for international commercial awards. For domestic awards section 32 merely allows any of the parties to request the court to refuse recognition or enforcement of the award<sup>680</sup> but specifies no grounds for requesting the refusal.

It has been mentioned above that the requirement for a party in Kenya, that is relying on an arbitral award or applying for its enforcement, to follow the procedure outlined under section

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<sup>676</sup> See s 36(2) “Unless the High Court otherwise orders”; but note the comment below regarding the opportunity thereby afforded to the court to impose additional conditions.

<sup>677</sup> Under s 31(3) an award may, with the leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

<sup>678</sup> S 51(1). It seems that the reference to s 32 in the provision is a typographical error. It should refer to s 52 instead of s 32.

<sup>679</sup> See the Zimbabwean Arbitration Act First Schedule Article 35.

<sup>680</sup> See Asouzu (1999) *Journal of British Law* 185 regarding the implications of the adoption of the UNCITRAL Model Law on the recognition and enforcement of arbitral awards in Nigeria; also Idornigie (2002) 19(5) *Journal of International Arbitration* 443-459.

36(2) regarding the production of authenticated original copies of the award and the arbitration agreement in the English language, is subject to the discretion of the High Court to order otherwise. This affords an opportunity for the court to impose conditions or procedures more or less stringent than those of the Model Law. It may be argued that this provision allows the court a desirable flexibility to take into consideration local peculiarities in considering whether or not to grant recognition and enforcement of the arbitral award. On the other hand, it is a provision that militates against predictability. For this reason it is submitted that an application for recognition or enforcement that fulfills the specified basic requirements of section 36(2) as to authentication of the award and arbitration agreement and subsection (3) as to translation into the English language, should not be refused or lightly refused.

### 3.6.5 Enforcement and Execution of the Final Arbitral Award

#### 3.6.5.1 Enforcement

The route to enforcement of an arbitral award in Kenya is provided by section 36(1)<sup>681</sup> of the Kenyan Arbitration Act which states merely that an arbitral award shall be recognized as binding and “shall be enforced” upon an application in writing to the High Court. The manner of enforcement is not stated. Rule 9 of the Arbitration Rules 1997 made under the Kenyan statute requires the application to be made by summons in chambers but again, gives no indication of the manner of enforcement. In Kenya when judgment is granted in terms of an arbitral award the award is understood to have merged with the judgment, and the ensuing decree is therefore a decree of the court, not of the arbitral tribunal. Any challenge or proceedings in connection with such judgment or decree is therefore a challenge or proceedings against the judgment or decree and not the arbitral award.<sup>682</sup> It is recommended therefore that a further clarification of the Kenyan statute and Rule 9 is desirable as to the status of an arbitral award that is taken to court for enforcement as a judgment or decree of court and on the manner of its enforcement.

Recognising the need for the extension of arbitration law, a senior Kenyan practitioner<sup>683</sup> expresses the view that the award enforcement and execution system should respect and give greater force and effect to the phrase “binding, enforceable and final” in an arbitration clause;

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<sup>681</sup> The equivalent of the Model Law Article 35(1).

<sup>682</sup> This is drawn from the writer’s experience in arbitration matters while a judge of the High Court of Kenya.

<sup>683</sup> Justice Aaron Ringera, former Senior Lecturer at the University of Nairobi, former Solicitor General of Kenya and Judge of Appeal, now a practicing arbitrator.

that parties having chosen arbitration to resolve their dispute must abide by the finality clause; and that the Kenyan Court Registrar should be empowered by legislation to summarily dismiss challenges to an award containing such a clause and decree its execution forthwith. In his words “the buck should stop with the Registrar”. Absent a finality clause the Registrar should nevertheless scrutinize unmerited challenges strictly and award punitive costs.

The enforcement<sup>684</sup> of a domestic award<sup>685</sup> in Nigeria is possible through a summary procedure, on application to the court with notice to the other party.<sup>686</sup> Leave is normally granted unless the respondent requests that recognition and enforcement be refused.<sup>687</sup> Nigerian arbitration law provides a partial statutory explanation on the manner of enforcement by stating:

“An award may, by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect.”<sup>688</sup>

If the application for enforcement is granted, the award is enforced as if it were a judgment of the court.

The phrase “in the same manner as a judgement or order to the same effect” came under consideration in *Ras Pal Gazi Construction Co. Ltd v Federal Capital Development Authority*.<sup>689</sup> At the end of the arbitration the arbitrator forwarded his award to the court that made the referral order to arbitration.<sup>690</sup> The defendant’s application to set aside the award failed in the High Court which went on to make the award a judgment of the court. The

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<sup>684</sup> S 31(3) of the Arbitration and Conciliation Act.

<sup>685</sup> The enforcement of awards in an international arbitration, irrespective of the country where the award is made is dealt with by the Arbitration and Conciliation Act ss 51 and 52, based on the Model Law Articles 35 and 36. The enforcement of New York Convention awards is regulated by s 54 of the Arbitration and Conciliation Act. See Idornigie PO “The Relationship between Arbitral and Court Proceedings in Nigeria (2002) 19(5) *Journal of International Arbitration* 443 456-457. See also Asouzu *International Commercial Arbitration in African States* 204-205 regarding problems with the wording of s 54.

<sup>686</sup> See the Arbitration and Conciliation Act s 31; Idornigie (2002) 19(5) *Journal of International Arbitration* 454-455. See further on the relationship between the court and the arbitral tribunal in Nigeria Duru *Fundamentals of Arbitration Law and Practice in Nigeria*; Okekeifere A “The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria” (1999) *International Arbitration Law Review*; Okekeifere A “International Commercial Arbitration and the UNCITRAL Model Law under Written Federal Constitutions” (1999) 16(2) *Journal of International Arbitration* 49-71; Asouzu AA “Arbitration and Judicial Powers in Nigeria” (2001) 18(6) *Journal of International Arbitration* 617 – 640.

<sup>687</sup> See s 32 and Idornigie (2002) 19(5) *Journal of International Arbitration* 454. Idornigie 452-453 points out that s 32, unlike s 52 concerning the recognition of international awards, does not set out the grounds on which enforcement can be refused by the court.

<sup>688</sup> S 31(3) of the Arbitration and Conciliation Act.

<sup>689</sup> (2001) 10 NWLR (Part 722) 559.

<sup>690</sup> See the Arbitration and Conciliation Act s 4(1), which corresponds to Article 8(1) of the Model Law.

defendant again lost the subsequent appeals in both the Court of Appeal and Supreme Court. The Supreme Court held that

“a valid award on a voluntary reference operates between the parties as a final and conclusive judgement upon all matters referred. This is because arbitration as an alternative mode of dispute resolution has for years been given legal backing. Thus an arbitrator’s award under the provisions of section 4(2) of ACA<sup>691</sup> is as binding between the parties, and when filed in court should for all purposes have the force and effect of a judgement.”

However the Supreme Court criticized the High Court for converting the arbitral award into its own judgment, adding that “the role of the High Court in an arbitral award is mainly to enforce when the award is not challenged.” In other words, the arbitral award in Nigeria always remains an award of the arbitral tribunal and is enforced in the same manner as a judgment but without turning it into a judgment of the court. Therefore it is the manner of enforcement that is akin to a judgment, not the award itself. The manner of enforcement was not considered or explained by the Supreme Court. It seems to this writer that upon the arbitral award becoming a decree of court bearing the registrar’s signature and imprimatur as happens in Kenya the decree is thereby an order of court and so something more than an arbitral award and its execution as an instrument of court is therefore appropriate.

The provisions on the enforcement of arbitral awards in the Zimbabwean statute are silent on the manner of enforcement and so require no further comment beyond the discussion of the equivalent provisions of the Model Law above.<sup>692</sup>

In this writer’s submission, and for avoidance of doubt, it will be very helpful for award holders, in say Kenya, for the actual manner in which an award is enforced and executed through the court system to be set out in either the relevant law or in rules on the subject.<sup>693</sup>

Because of the similarity of English arbitration practice and that of Kenya, the developments in English arbitration law and practice on the enforcement of arbitral awards are relevant to this study. Enforcement of awards is dealt with by section 66 of the English Arbitration Act

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<sup>691</sup> S 4(2) of Arbitration and Conciliation Act, following Article 8(2) of the Model Law, permits the arbitrator to commence with the arbitration and make an award while the court proceedings are pending.

<sup>692</sup> The Zimbabwe Arbitration Act of 1996 1<sup>st</sup> Sch Article 35, following the Model Law, provides for the award to be enforced pursuant to an application in writing to the High Court, subject to the provisions of Articles 35 and 36, which are concerned with the conditions for granting enforcement and grounds on which enforcement may be refused. See further para 3.6.3 above.

<sup>693</sup> See the proposals in para 3.6.6 below.

1996. In essence section 66 provides for three alternative options for enforcing an award, although the second is actually a variant of the first.<sup>694</sup> First, with the leave of the court, the award may be enforced in the same manner as a judgment or order to that effect.<sup>695</sup> Secondly, in the alternative, where leave is given, “judgment may be entered in terms of the award”.<sup>696</sup> The choice between these two options may well be determined by the need for enforcement in another jurisdiction. In some it will facilitate the process to have an award, whereas in others it may be preferable to have an English court judgment.<sup>697</sup> The third procedure is for the enforcement of an award by “an action on the award”.<sup>698</sup> The enforcement of an award by way of an action may be considered where the first procedure is not available. For example, the first procedure is only available where there is an “arbitration agreement” within the meaning of the Arbitration Act of 1996.<sup>699</sup>

The procedure most used in practice is the first procedure and what is particularly important from a Kenyan or an African perspective, is the fact that there are special rules of court to enable leave of court for enforcement to be obtained expeditiously.<sup>700</sup> The application for leave is usually made without notice to the other party,<sup>701</sup> by an arbitration claim form supported by a written witness statement and either the originals or copies of the award and arbitration agreement. Permission to enforce the award is usually given,<sup>702</sup> but leave will not be given where the person against whom enforcement is sought, shows that the tribunal lacked substantive jurisdiction.<sup>703</sup> Even where jurisdiction is not in issue the court has a discretion not to grant leave for enforcement summarily.

The drafters of the English Arbitration Act decided against including a list of cases (even if it were not a closed list) as to when leave to enforce should be refused, preferring to leave this

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<sup>694</sup> Compare *Russell on Arbitration* (23<sup>rd</sup> ed) 450 para 8-002.

<sup>695</sup> S 66(1).

<sup>696</sup> S 66(2).

<sup>697</sup> See *Russell on Arbitration* (23<sup>rd</sup> edition) 453 par 8-008.

<sup>698</sup> See s 66(4), which also refers to the enforcement of awards pursuant to certain Conventions. In England an enforcement of an award under the New York Convention is provided for by ss 101-103 of the Arbitration Act of 1996.

<sup>699</sup> See *Russell on Arbitration* (23<sup>rd</sup> ed) 455 para 8-014.

<sup>700</sup> The original rules made when the Arbitration Act took effect have been replaced by the Civil Procedure Rules Part 62, Arbitration Claims (“CPR Pt 62”; see *Russell on Arbitration* (23<sup>rd</sup> edition) 530 para 8-181), which are contained in Appendix 1 of *Russell on Arbitration* 621-645. The Appendix includes the relevant Practice Directive and Claim Form. See *Russell on Arbitration* (23<sup>rd</sup> ed) 542-544 paras 8-219-8-224 for a brief discussion of the procedure.

<sup>701</sup> See *Russell on Arbitration* (23<sup>rd</sup> ed) 451 para 8-003 and CPR Pt 62.18.

<sup>702</sup> See *Russell on Arbitration* (23<sup>rd</sup> ed) 452 para 8-004.

<sup>703</sup> S 66 (3).

to the court's discretion.<sup>704</sup> Leave is only refused in exceptional cases. Where leave is given, it is usually given on "terms that the award may be enforced in the same manner as a judgment or order of court to the same effect".<sup>705</sup> It will also be possible to obtain an injunction freezing the assets of the party against whom enforcement is sought.<sup>706</sup> The claimant must serve the order for leave for enforcement on the defendant. Unless the order is served out of the jurisdiction, when a longer time will be stipulated, the defendant has 14 days from the date of service to apply for the order to be set aside. The award may not be enforced before the expiry of this period or until any application by the defendant within that period has been finally disposed of.<sup>707</sup> The grounds for challenging the order are certainly no wider than those on which an award may generally be challenged under the 1996 Act.<sup>708</sup> When granting leave to enforce, a court may stay enforcement for a limited period pending an application to challenge the award. In granting a stay, the court will take into account the chances of success of the challenge and may require the applicant for a stay to make a payment into court as security.<sup>709</sup>

In summary, the English Act, supplemented by the Civil Procedure Rules Part 62, provides a clear, expeditious and effective procedure for the enforcement of awards, with safeguards to prevent an unsuccessful challenge being abused so that enforcement will subsequently become impossible. The special summary procedure for the enforcement of arbitral awards, without notice to the other party, ensures that enforcement will not be delayed because of the unavailability of a court date or a judge to hear the application for enforcement. This is in sharp contrast to the position regarding the enforcement of awards in Kenya, discussed above. The English Arbitration Act as well as English text books<sup>710</sup> on arbitration assume the availability of an effective execution process for the enforcement of civil judgments generally and do not deal with the execution of awards once leave to enforce has been obtained. Again, it will appear from the discussion below<sup>711</sup> that the successful party in Kenya who has

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<sup>704</sup> See the Saville Committee's *Supplementary Report on the Arbitration Act of 1996* (January 1997) paras 32-34 (published in *Russell on Arbitration* (23<sup>rd</sup> ed) 720). Examples given by *Russell* 452 para 8-005 include when the award is so defective in form so as to be incapable of enforcement or where enforcement would be contrary to public policy.

<sup>705</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 452 para 8-005, citing s 66(1).

<sup>706</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 453 para 8-006.

<sup>707</sup> Civil Procedure Rules (CPR) Pt 62 18(7)-(9).

<sup>708</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 454 para 8-010. The grounds for challenging an award are contained in ss 67-69 of the Arbitration Act of 1996.

<sup>709</sup> *Russell on Arbitration* (23<sup>rd</sup> ed) 453 par 8-009.

<sup>710</sup> The discussion on enforcement of awards in *Russell on Arbitration*, ch 8, is focused on the special features for the enforcement of an award under s 66 and CPR Pt 62. The authors clearly see no need to discuss execution in a book on arbitration.

<sup>711</sup> See para 3.6.5.2 below.

managed to obtain a court order for enforcement of an award after a protracted and difficult process, is then confronted with further substantial difficulties in trying to have the order for enforcement executed.

The South African Law Commission's proposed Bill for domestic arbitration for South Africa provides that any party may apply to court after notice to the other party for the award to be made an order of court. Unless one of the specified grounds for refusing enforcement applies, the award must be made an order of court before being enforced "in the same manner as any judgment or order to the same effect".<sup>712</sup> "Court" in this context includes a magistrate's court with jurisdiction.<sup>713</sup> It is desirable that this definition of "court" is adopted for this purpose by Kenya to enable customary law arbitration awards in particular to be enforced, by a magistrate's court as well as by the High Court.<sup>714</sup> It is also noteworthy that the Law Commission also recommended the need to create an expedited enforcement procedure for arbitral awards by means of appropriate court rules.<sup>715</sup>

### 3.6.5.2 Execution

The reasons for including a discussion of this topic have been set out above.<sup>716</sup> In addition, it emerged from this writer's interviews with arbitration practitioners and members of the legal profession and court officials in Kenya that, not only is the manner of enforcing an arbitral award as a judgment somewhat obscure and capricious but even the procedure for enforcing a court judgment is not common knowledge.<sup>717</sup> From the perspective of a successful award and decree-holder,<sup>718</sup> the effectiveness or otherwise of enforcement and execution procedures is of importance as it impacts on the choice of arbitration as a preferred, competent and complete mode of dispute resolution.

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<sup>712</sup> See SA Law Commission *Report on Domestic Arbitration* (May 2001) Annexure B s 53.

<sup>713</sup> S 53(6).

<sup>714</sup> By virtue of a provision like the Nigerian Arbitration and Conciliation Act of 1988 s 31(3).

<sup>715</sup> See SA Law Commission *Report on Domestic Arbitration* para 3.259.

<sup>716</sup> See para 3.6.1 above.

<sup>717</sup> For this reason the writer is particularly grateful to Mr Joseph Getauke of the High Court Registry and Mrs Maureen Odera of the Milimani Commercial Court Registry for the insights they gave the writer on this topic. The Milimani Commercial Court serves as the commercial section of the High Court in Nairobi.

<sup>718</sup> In Kenya, decree-holder means "any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order" (Civil Procedure Act, Cap 21, s 2). A decree is a formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any matters in controversy in a suit and may be either preliminary or final. For purposes of appeal a decree includes a judgment (Civil Procedure Act s 2).

The ultimate objective of arbitration is compliance with the award, if necessary, with the assistance of the court. The successful execution of an award can therefore be considered the heart of the matter. Yet arbitration law, as observable from the laws discussed in this study, does not deal with the execution of awards, which is part of the ordinary law of civil procedure. Because an arbitrator cannot compel the parties to comply with his award the need for enforcement and execution arises in the absence of voluntary compliance. As the arbitrator becomes *functus officio* on the publication of the award the problem of execution is more for the successful party than for the arbitrator. The law applying to the execution of awards should clearly define the procedure for execution. The procedure must effectively deliver the fruits of the award. However, in Kenya, which is the main focus for consideration of this topic, the law regarding the applicable procedure is both unclear and unsatisfactory, leaving successful arbitral parties wondering what to do next with the award.

What is clear is that the execution of an award in Kenya is through a process of the domestic court. But as will become apparent, there may be several obstacles on the way. Assuming however the absence of any technical hitches a summary procedure can be used. Commonly this requires the successful party to file the award in court with a request or an application for judgment to be entered according to the award.<sup>719</sup>

Although the court may not be expected to turn this process into a full-blown inquiry or hearing it can lead to exactly that due to the lack of precise guidelines and a misapprehension of the court's powers, enabling the uncooperative opponent of the award to deploy delaying tactics at this stage to prevent the process moving forward to a conclusion.<sup>720</sup> In the event that the application proceeds smoothly with no recourse to the merits of the arbitral dispute, then the court, by making the award a judgment or order of court, thereby adopts the decision of the arbitrator for execution as a court decree.

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<sup>719</sup> The phrase to “enter judgement according to the award” appearing in Order XLV Rule 17 of the Civil Procedure Rules under the Civil Procedure Act is distinguishable from the enforcement of an award “in the same manner as a judgment or order to the same effect” under s 31(3) of the Nigerian Arbitration and Conciliation Act of 1988. Under the Kenyan regime the award so entered merges with the judgment whereas under the Nigerian regime the award remains an award of the arbitral tribunal throughout but is enforced in the same manner as a judgment (see comments on the *Ras Pal Gazi Construction* case in para 3.6.5.1 above).

<sup>720</sup> See para 3.6.6 below. Similar problems occur in South Africa, where a respondent resists an application to have an award made an order of court under s 31 of the Arbitration Act of 1965, in circumstances where it should have brought an application to set aside the award under s 33. The problem is aggravated by the fact that s 31 does not identify grounds on which the court may withhold enforcement. In *Vidavsky v Body Corporate of Sunhill Villas* 2005 5 SA 200 (SCA) the court regarded the award invalid on the basis that the arbitrator had exceeded his jurisdiction. On the facts, although the arbitrator had jurisdiction to decide the dispute, he omitted to give the respondent proper notice of a hearing, thereby committing a gross procedural irregularity. There was therefore a valid award, until set aside by the court.

Whether an arbitral award is made pursuant to a referral order of court<sup>721</sup> or under the Arbitration Act of 1995 (the two principal but distinct arbitration regimes in Kenya), there is one primary route to its enforcement and execution.<sup>722</sup> For an award obtained under a court referral order or under the Arbitration Act, the Civil Procedure Rules<sup>723</sup> provide in relevant part that

“[t]he Court shall on request enter judgement according to the award;”<sup>724</sup>

and

“Upon the judgement so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.”<sup>725</sup>

The first observation is that this provision is concerned only with the conversion or merger of an arbitral award into a judgment and decree of court, with nothing said about its enforcement in the same manner as a judgment or decree. Secondly an award made pursuant to a referral order of court may be set aside under the Civil Procedure Rules<sup>726</sup> for corruption or misconduct of the arbitrator or umpire or on the ground that either party has fraudulently concealed any matter which ought to have been disclosed, or has willfully misled or deceived the arbitrator or umpire.<sup>727</sup> It is immediately clear that these Civil Procedure Rules<sup>728</sup> are not compatible with, and could not have been intended to be consistent with, the grounds for setting aside an award under the Arbitration Act<sup>729</sup> that came into force in 1995 long after the 1985 revision of the Civil Procedure Act. The risk of confusion in attempting, as sometimes happens, to fill the gaps<sup>730</sup> in the Arbitration Act and Rules by the application of the Civil

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<sup>721</sup> Order XLV of the Civil Procedure Rules pursuant to the Civil Procedure Act Cap 21 in effect sets up a separate arbitration system which is set in motion by a court referral order. The arbitration is conducted outside the Arbitration Act of 1995. (Although the arbitration may have taken place pursuant to a court referral order under Order XLV, an application for the enforcement of the resultant award is done on a new court file.) In practice, according to files at the Deputy Registrar’s office, parties applying for enforcement of awards made pursuant to a referral order occasionally do so under s 36 of the Arbitration Act of 1995. See n761 below.

<sup>722</sup> Other awards emanate from proceedings before the Business Premises Tribunal and the Rent Restriction Tribunal.

<sup>723</sup> Rule 17(1) and (2) of order XLV of the Civil Procedure Rules pursuant to the Civil Procedure Act, Cap 21.

<sup>724</sup> Rule 17(1).

<sup>725</sup> Rule 17(2).

<sup>726</sup> See rules 15(1)(a) and (b) of Order XLV.

<sup>727</sup> Compare the differing grounds under s 35 Arbitration Act 1995 for setting aside an arbitral award, which makes no explicit reference to “misconduct”.

<sup>728</sup> Rules 15(1) and 17(1) and (2).

<sup>729</sup> See the Arbitration Act s 35. The rules are also not compatible with the contract-in right of appeal to the courts on a question of law in s 39, which is available in a domestic arbitration.

<sup>730</sup> Rule 11 of the Arbitration Rules of 1997 made under the Arbitration Act of 1995 allows the Civil Procedure Rules to be applied where appropriate to all court proceedings under the Arbitration Rules.

Procedure Act and Rules is that the execution of awards made under the Arbitration Act may be thwarted by the application of the Civil Procedure Rules that were made for litigation practice, but not specifically for awards under the Arbitration Act. Rule 11 of the Arbitration Rules of 1997, which allows the considerable lacuna in the Arbitration Rules to be filled by the Civil Procedure Rules, needs to be revisited and amended to remove the incongruity.

In the absence of any special or distinct rules governing the execution of arbitral awards made under the Arbitration Act, the general rules of execution of court decrees apply to such awards once they transmute to court decrees. The route to the High Court is provided by the Arbitration Act,<sup>731</sup> which allows the arbitral award to be recognized as binding and an application in writing to be made to the High Court for its enforcement. It has been noted that the application must be accompanied by the authenticated original arbitral award or a certified copy and the original arbitration agreement or a certified copy.<sup>732</sup> Thereafter the Arbitration Act, like the Model Law on which it is based, is silent on the procedure for the conversion of the award into a judgment and decree.

In the words of the Deputy Registrar of the Milimani Commercial Court, Nairobi,<sup>733</sup> the “award becomes sucked into the ordinary Civil Procedure Rules.” Order XX thereof deals with Judgments and Decrees and Order XXI deals with Execution of Decrees and Orders. The Civil Procedure Act itself contains general provisions on execution of decrees.<sup>734</sup> More specifically a “Procedure in Execution” is prescribed by section 38 of the Act, which empowers the High Court, on the application of the decree holder, to order execution of the decree by various methods. The methods specified are (i) by delivery of any property specifically decreed; (ii) by attachment and sale, or by sale without attachment of any property; (iii) by attachment of debts; (iv) by arrest and detention in prison of any person; (v) by appointing a receiver; or (vi) in such other manner as the nature of the relief granted may require.

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<sup>731</sup> See the Arbitration Act of 1995 s 36.

<sup>732</sup> See para 3.6.4 above on s 36. If the award or agreement is not in English, s 36(3) requires a duly certified translation.

<sup>733</sup> The Milimani Commercial Court serves as the commercial section of the High Court, and is located at Upper Hill, Milimani, Nairobi.

<sup>734</sup> See ss 28-57 of Part III of the Act.

The procedure to commence the execution of an arbitral award which has merged with a judgment order or decree is set out in rule 6 of Order XXI of the Civil Procedure Rules.<sup>735</sup> The holder of a decree who desires to execute it must apply to the court which passed the decree or its proper officer, on the prescribed form.<sup>736</sup>

Describing the entire process for the enforcement and execution of an arbitral award as cumbersome, the Deputy Registrar observed that it typically started with the service of a Notice of Filing the Award, a Chamber Summons (that is the application) with a supporting Affidavit for the Arbitral Award to be *adopted* by the High Court as a Judgment and for its enforcement as a Decree.<sup>737</sup> The term “adopted” is emphasized, being the official term used by the court officials to describe the process.

A Hearing Notice is then issued by the Court and an Affidavit of Service is subsequently filed. All being well, an Order for the adoption of the arbitral award with leave for its enforcement as a decree is granted by the court. A formal Decree is then issued. In addition a practice, without a clear legal basis, seems to have evolved whereby in an arbitration involving the government, a “Certificate of the Order Against the Government” is also issued by the court.<sup>738</sup>

Various concerns come to mind. Because there is no particular distinction between the execution of an arbitral award made under a court referral order and an award made under the Arbitration Act 1995 and there are no special rules governing the execution of decrees from an arbitral award made under the Act, the provisions of Order XXI Rule 17 concerning the merger of an award with a judgment tend to be applied, also to arbitral awards made under the Arbitration Act.<sup>739</sup> The attendant risk of so doing is that the court executing the decree may grant itself the liberty conferred by section 34 of the Civil Procedure Act to raise and determine any questions relating to the execution, discharge or satisfaction of the decree even

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<sup>735</sup> Order XXI, made pursuant to the Civil Procedure Act, is headed “Execution of Decrees and Orders” and sets out the detailed rules of practice under some ninety-one paragraphs, including rule 6.

<sup>736</sup> See rule 6. The application must be made in accordance with Form 5 of Appendix D. Rule 7 requires the application to be in writing, signed by the applicant or his advocate or a person acquainted with the facts of the case. The application must also contain the mode in which the assistance of the court is required in terms corresponding to the methods listed (i) to (vi) as set out in the text above from s 38 of the Civil Procedure Act.

<sup>737</sup> The Notice of Filing the Award is not covered by any rule; but the Chamber Summons is pursuant to s 36(1) of the Arbitration Act 1995 and Rule 9 of the Arbitration Rules 1997.

<sup>738</sup> See *Shiv Construction Co Ltd v Ministry of Health*, Misc Appl No 1150 of 2006.

<sup>739</sup> In *Kihoro v Kihoro* Misc. Appl No 885 of 2005, the application was made under both s 36 of the Act and Order XLV Rules 17 & 19. Several other cases were brought to the writer’s attention in which the applications were made under the combined legal regimes.

at the stage of entertaining the request to turn the award into a decree. Of greater concern is the fact that the executing court may within certain limitations “treat a proceeding under section 34 as a suit or a suit as a proceeding, and may, if necessary, order payment of any additional court fees”.<sup>740</sup> As the Kenyan Arbitration Act, based on the UNCITRAL Model Law, could not have been intended to grant such liberties to the court beyond those prescribed by the Act, it is therefore necessary to provide clear guidelines for the execution of arbitral awards made under the Arbitration Act to prevent that kind of risk. As things stand the risk is even greater because the liberty of the executing court to apply any provisions of the Civil Procedure Rules as appropriate is underpinned by Rule 11 of the Kenyan Arbitration Rules of 1997 made under the Arbitration Act 1995.<sup>741</sup>

It must also be borne in mind that the Rules governing the execution of decrees under the Civil Procedure Act of 1985 as revised in 1998 principally envisaged and govern decrees emanating from suits between plaintiffs and defendants in litigation rather than between arbitral parties under the Arbitration Act of 1995. The need to effect amendments to the execution rules in order to bring the execution of awards made under the Arbitration Act in line with the tenor and intention of the provisions of that statute becomes apparent. It was strongly felt by this writer and the Kenyan registry officials that arbitration practice under the 1995 Act will be boosted if the execution of arbitral awards under that Act was freed from the shackles of the current Civil Procedure Rules applying to the execution of court decrees.

### 3.6.6 Impediments to Enforcement and Execution of Arbitral Awards.

The above concerns aside, there are significant further practical obstacles to the execution of arbitral awards in Kenya. The expeditious execution of an arbitral award through the Kenyan judicial system is neither guaranteed nor readily achievable. The court process is known to be sluggish. The simplest application can take several months before receiving attention in the court registry, not to mention the range of excuses an opponent may deploy to further delay its determination in the event the matter in contention necessitates reference to a judge as the process of case allocation to a judge can itself take several months. In the course of a field study interview with the Deputy Registrar of the Milimani Commercial Court, Mrs M Odero, she was unable to indicate a minimum time period for the completion of execution. On the

<sup>740</sup> Civil Procedure Act s 34 (1) and (2). This Act which dates back to 1975, was revised in 1985 and 1998.

<sup>741</sup> Rule 11 states: “So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules.” The executing court only has to treat an executing application as a proceeding or a suit to involve itself in a full-scale inquiry or hearing in an ostensible quest for judicial satisfaction.

other hand she referred to an instance in which execution took up to five years. A further observation was that cases in which the judgment-debtor would collude with an objector to execution to frustrate or delay the levy of execution are of common occurrence. England used the opportunity afforded by the enactment of the 1996 Arbitration Act to overhaul and streamline the court rules governing applications in respect of arbitration. (See the discussion in para 3.6.4 above.). The need for this matter to be considered in South Africa was raised by Justice MJ Hlophe, Cape Judge President who stressed the need for rules to make adequate provision for applications to court arising from arbitrations to avoid unnecessary delay with such applications.<sup>742</sup>

Arbitral awards are received and treated as miscellaneous applications by the High Court Registry. There is no separate arbitration registry as such in the civil division of the High Court of Kenya. Not only are arbitral awards not accorded any kind of precedence in the queue for applications for enforcement and execution but also the administrative staff who receive the awards for registration, with no special training, are not conversant with or minded to be compliant with time-limits prescribed by the Arbitration Act. Therefore despite the timeliness of the request or application for enforcement<sup>743</sup> the ensuing delay can be a challenge to the common assumption that arbitration, from commencement to the execution of the award, is invariably quicker than litigation.

For awards made under the Arbitration Act 1995 the initial hurdles of delay to be surmounted on the way to enforcement and execution are inherent in the temporal provisions of section 34 which allow a party thirty days after the receipt of the award to request its correction and interpretation<sup>744</sup> and the tribunal has an additional thirty days after the receipt of the request to make the correction or give the interpretation requested.<sup>745</sup> A period of sixty days or more can be consumed after the delivery of the award including such additional period of time necessitated by the exigencies of resort to court. Further the three-month waiting period that must elapse before the right under section 35(3) to set aside an arbitral award can be extinguished is, in this writer's experience, often queried by successful award-holders. The

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<sup>742</sup> See SA Law Commission Report *Arbitration: an International Arbitration Act for South Africa* 105 para 2.286.

<sup>743</sup> Under the Arbitration Act s 35(3), an application for setting aside an award may not be made after 3 months of receiving the award or from the date a request for correction was disposed of by the arbitral award. The reference in this provision to s 36 as noted is an error. It should read s 34 (not s 36) to be in line with Model Law Article 34(3), as read together with Article 33.

<sup>744</sup> The power of interpretation only applies under s 34(1)(b) if the parties so agree.

<sup>745</sup> In the case of a request under s 34(4), for an additional award on a matter omitted from the award, the request must be made within 30 days of receipt of the award, and the tribunal has 60 days to make the additional award.

complaint being that the waiting period is unjustifiably too long, it seems to this writer that the provision can be amended and a shorter period of say fifteen or at most thirty days substituted in the interest of consistency. In other words an award that may be corrected or interpreted within thirty days can also be set aside within the like period.

As the enforcement and execution of an arbitral award are matters of urgency and importance to an award-holder it may be thought and indeed suggested that the UNCITRAL Model Law and the national derivatives such as the Kenyan Arbitration Act could and should provide guidelines to expedite and facilitate the final act in the arbitration process. This will not only clarify and remove the anomalies noted above in the Kenyan practice but also streamline as far as practicable a uniform execution procedure for the benefit of contracting states.

The point of emphasis is that a simple request for an arbitral award to be made a court order for enforcement and execution can be overwhelmed by unexpected issues such as an opponent's complaint that the arbitrator exceeded his jurisdiction or that the award is made outside the time allocated for doing so. In so far as such issues are not covered by the governing statute a judge may well be inclined or persuaded to invoke the inherent jurisdiction of the High Court, as is frequently done in Kenya,<sup>746</sup> to receive the complaint and conduct a hearing for its investigation. As it is not open to a judge to consider the merits of the dispute at this stage it is submitted that a judge may not at this stage readily embark upon receiving and hearing complaints that ought to have been made, considered and disposed of before the request for enforcement and execution orders. The frequent use of the inherent jurisdiction of the court in questionable cases amounts to misuse of an otherwise important legal mechanism. The consequence can be a considerable period of frustrating delay. It seems to this writer that both judge and arbitrator in their respective capacities can contribute to the efficacy of the arbitration procedure by confronting and removing the obstacles herein identified to the expeditious enforcement and execution of the arbitral award for arbitration to merit the just expectations of arbitral parties who deliberately chose the arbitral route to justice in preference to other procedures.

More than that both court and arbitral tribunal should lend support and provide guidance for the formulation of procedural and administrative guidelines to expedite the enforcement and

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<sup>746</sup> S 3A of the Civil Procedure Act, Cap 21 provides: "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

execution of awards. This is because an effective enforcement procedure is the surest means of delivering justice between the parties. It seems a self-serving exercise for an arbitrator to comply with his mandate within the law and rules of practice up to the making of his award and collection of his fees and, thereafter, leave the successful party to encounter problems of enforcement and execution and risk losing the fruits of the award. The various reasons for this unhappy situation, in the main, relate to the dogma of *functus officio*. One strand is that after turning an award into a court decree the winning party stands in no better or worse position than a successful party in litigation who has to enforce a favourable judgment without the involvement of the judge. In Kenya judges are involved in execution issues and disputes requiring judicial decisions and directions until the entry of the court bailiff, who serves the decree or warrant of attachment on the auctioneer mandated to levy execution. Even thereafter objection proceedings, involving third parties who claim to be the actual owners of the goods seized in execution, are entertained by judges. Another reason is that the levy of execution does not involve a judge any more than it does an arbitrator. A further reason is that execution is an administrative process with the authority of the state involving entities such as security officers and auctioneers in the company of commercial men and women looking for bargains at auctions. A yet further point in the same direction is that in looking at ways and means of facilitating the enforcement and execution of an award in the form of a court decree, one is in effect looking at the execution of a court decree under domestic law.

It is a trite assertion that as the arbitration process ends with the award the arbitrator should not be concerned with the procedures after delivery of the award. But should the function of the arbitrator end with the delivery of the award? And precisely what, it may be asked, does an arbitration achieve if the last act in the process is jeopardized by the lack of effective means of implementing the award?

It is submitted that the users of arbitration should be concerned with its enforcement procedures because the attraction of arbitration is not confined to a final decision on the dispute but must extend also to the speedy recovery of compensation for the loss or damage suffered by the successful party. The Model Law Article 35 and its national equivalents could, with more precision, provide the procedure for enforcement and execution of arbitral awards. This is not an argument against or in denial of a party's right to challenge an award. It is accepted that arbitrators can and do make mistakes, for which reason the unsuccessful party should not be shut out from the defences and justifiable grounds for challenges or the proper

exercise of the right to set aside an improper award. But as fairness decrees equality of treatment and administration of justice between the parties, the successful party should be able to enforce and execute a favourable award more easily through an expedited procedure provided by the law. Jurisdictions that do not have clearly formulated procedures for enforcement of arbitral awards should aim at doing so.

It may be asked whether the procedure for enforcement and execution of an arbitral award should differ from that for a court judgment. It is a difficult question if one sees an “award holder” as standing in the same position as a “judgment holder”, both of whom seek to enforce a favourable decision. But then there are significant and indisputable differences between the processes of arbitration and litigation, as noted in Chapter One of this study, as well as the quantum of resources and expenses committed by the parties in either process. Whereas the litigant stays within the court system from beginning to end and is facilitated to an extent by public funds and other resources, the award holder would normally have borne his own expenses privately. When he moves from the private to the public system to enforce and execute the award, there is the perception that the arbitral party is disadvantaged by the likelihood of additional costs and expense he might have been spared had he gone to litigation in the first place. This perception, which is not entirely accurate, can be countered by offering such party an enforcement and executory mechanism that is simple, inexpensive and quick, which after all are some of the advantages claimed for arbitration. From time to time, when this writer is asked, as arbitrator, as to what the next step is after delivery of the award, the response that it can be enforced in the same way as a judgment did not seem satisfying, enlightening or inspiring to the award-holder.<sup>747</sup> Such a person is not assisted by what seems to be an evasive response from the arbitrator that he is *functus officio* and can do nothing more beyond delivering the award.

### 3.6.7 Simplified Enforcement and Execution Procedure

The following simplified procedure is proposed primarily for the enforcement of awards made under the Arbitration Act 1995.<sup>748</sup> It is premised on the principle and approach that enforcement and execution of an arbitral award should be easy and capable of being done by

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<sup>747</sup> What is clear and consistent with Article III of the New York Convention is the principle that enables domestic arbitral awards to be enforced under the same provisions as foreign awards (*Shalimar & Others v Saz Caterers Ltd* HCCC Misc. Cause No 59 of 2003). What is urged here is the application of this principle and a simplified and clearly defined procedure for enforcement and execution of an arbitral award.

<sup>748</sup> Domestic awards and foreign awards, excluding awards made pursuant to a referral order of court (as to which see para 3.6.5.2 above).

the successful party without the necessity of legal representation; alternatively, if legal representation is unavoidable, then only the reasonable costs for such service should be recoverable.

- (i) The court registry should open and maintain a separate register for arbitral awards pending the completion of the administrative tasks necessary for the enforcement and execution of the award.
- (ii) A time limit of no more than 15 days from the filing of the award is proposed for any objections to the enforcement of the arbitral award to be raised. The objection is to be disposed of summarily by the court also within 15 days from the filing of the objection.<sup>749</sup> This means a total of no more than 30 days is made available for such administrative and judicial measures as may need to be undertaken and completed in readiness for execution of the award.
- (iii) The approach to court can be by a written request or application. A simple “request” is preferable to a formal “application” especially of the sort that involves the use of technical legal language and formal supporting affidavits. A simple request may also reduce expense. The request should be for the arbitral award to be made an order or decree of the court.<sup>750</sup> Leave of court need not be a pre-requisite as it will be sufficient for the request or application to be granted or refused for a compelling reason.
- (iv) In line with the existing requirements of Article 35 of the Model Law and its national equivalents, the request will be accompanied by the arbitral award.<sup>751</sup> The arbitrator can assist the process by providing certified copies of the award.
- (v) As arbitration is on the increase, an enforcement official can be assigned to the court registry with responsibility for arbitration matters. The duties of the official will include receiving and registering the awards. The official will

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<sup>749</sup> If an objection cannot be dealt with summarily the court must direct accordingly.

<sup>750</sup> The confusion surrounding the status of an arbitral award to be enforced as a judgment can be avoided by such definite request.

<sup>751</sup> As pointed out above, Article 35(2), as amended by UNCITRAL in 2006, no longer requires the original or authenticated copy of the arbitration agreement. This will also take care of situations where the arbitration was conducted on the basis of a defective agreement with regard to which the right of objection may have been waived or lost or an oral agreement is endorsed by the participation in the arbitration or where the pleadings constituted the agreement.

allocate arbitration index numbers and monitor the enforcement and execution processes. The Registrar of the High Court of Kenya engages the services of registered auctioneers to serve the decree and levy execution under the Registrar's direction.

- (vi) Some basic training in the management and administration of arbitration procedures for court clerks would better equip them to deal with arbitration matters and to facilitate compliance with, for example, time-limits imposed by the Arbitration Act and the relevant rules of practice.

An important objective will be to separate purely tactical objections from those that, upon investigation, may have merit.

As noted, the UNCITRAL Model Law does not prescribe procedural guidelines for the execution of awards, which is left to the national procedural law and practice. It is this writer's view that the omission is based on the unfortunate misconception that there is no practical need for unifying national procedural practice on recognition, enforcement and execution of awards. The misconception that resulted in the omission does not facilitate award enforcement. It also detracts from the notion of uniformity of national practice for the enforcement of an award "irrespective of the country in which it was made". In this writer's opinion, the provision of guidelines by UNCITRAL for the enforcement and execution of awards will greatly assist states willing to follow UNCITRAL's lead in this regard. Moreover, UNCITRAL's experience gained through examining various national systems of enforcement can throw more light on what can be done further by national jurisdictions to strengthen the execution of arbitral awards.

Successful, expeditious and cost-effective enforcement of the award will respond to the legitimate expectations of the arbitral parties for choosing and using arbitration instead of and in preference to other procedures, and also maximize confidence in the arbitral system of justice.

### 3.6.8 Conclusion

In concluding this discussion it is recalled that both domestic and foreign awards, wherever obtained, are enforced in a domestic jurisdiction. There is therefore all the more reason for ensuring that the procedure for enforcement and execution of an arbitral award is clearly

defined and harmonized as far as possible. It is this writer's opinion that the harmonization of enforcement rules for international arbitration awards can promote the national processes for the recognition, enforcement and indeed the execution of arbitral awards generally. The question posed at the start of the discussion of this topic as to whether arbitration law and practice have done enough in this regard was itself prompted by another question from an award holder who wanted to know what happened next after a favourable award. That party was neither satisfied nor impressed with the response that he could use the award like a judgment.

Obviously the prospect of traipsing down court corridors, and the apprehension of more waiting time and further expenses to be incurred, while still unsure of what the enforcement of an arbitral award like a judgment entailed, was not attractive.

It has been demonstrated that arbitration law<sup>752</sup> does not go far enough in the enforcement of arbitral awards. It is practically silent on the execution of the award, the final act in the arbitral and judicial processes. In this writer's view a response such as that an arbitrator is no more concerned with the execution of an award than a judge is concerned with the execution of judgment is somewhat complacent and unhelpful. The successful arbitral party and those representing him from beginning to end have an interest in the recovery of the full benefit of the award. Such party must be assisted with well defined and precise rules for achieving the declared goals of arbitration that include the achievement of a just result, expeditiously and with less expense. The simple procedure proposed in this study<sup>753</sup> is, at the very least, an attempt to call attention to the need to explore further ways and means of achieving the sated purpose. It does not help that under section 35 of the Kenyan statute for example an objector to the award has as much as 3 months to apply to set aside the award. This writer cannot resist adding that practitioners, who prefer arbitration to litigation and others minded to draw sharpest distinctions between arbitration and litigation in favour of the former, must also be mindful, when advising clients, of the union between the two systems of justice in the final act when the arbitration award has merged with the judgment of the court for uniform enforcement and execution under the court system.

As pointed out above, UNCITRAL and its Working Group can potentially play a vital role in providing harmonised and effective procedures for the execution and enforcement of foreign

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<sup>752</sup> In particular, the provisions of the UNCITRAL Model Law Article 35 and its national derivatives.

<sup>753</sup> See para 3.6.6 above.

and international commercial arbitral awards, which could influence and hopefully enhance domestic arbitration practice and procedure.

### 3.7 A Code of Sanctions

If it is acknowledged that the arbitrator's frustration and the occasional lack of a sense of urgency are due in turn to the lack of effective sanctions to compel parties and their advisers to get to grips with the dispute and to take procedural steps timeously, then it is submitted, a Code of Sanctions might be necessary to assist the tribunal in the performance of the arbitral function. It has been noted that the six problems discussed above in this study are intertwined by their causes and consequences. Further, and in much the same way, the roles played by the principal stakeholders in arbitration – the parties, lawyers and arbitrators - are complementary, each to the other, in achieving the arbitral goal and the correct result. It is not doubted that the experienced arbitrator is able to manage these problems through a combination of his adjudicative and professional skills, personal standing and integrity, as well as his authority and self-confidence. But there is always the ever lingering perception and suspicion that however good an arbitrator is, he stands on a much less steady ground than the professional judge, in so far as the dimensions of the arbitrator's skill, dedication and the weight of his authority are personal to him. Some arbitrators respond to the awareness of this limitation with timidity, others with aggressiveness. Both responses are somewhat suspect and too malleable to ensure general acceptance or to sustain sound arbitration culture.

It has been said that

“[u]ltimately, of course, arbitrators' greatest source of coercive power resides in their position as arbiters of the merits of the dispute between the parties. Parties seeking to appear before the arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims.”<sup>754</sup>

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<sup>754</sup> Schwartz EA *Conservatory and Provisional Measures in International Arbitration* ICC Publication No 519 (1993) 128. For the expansion of the arbitrator's powers in South Africa, compare the Association of Arbitrators (Southern Africa) Standard Procedure Rules (6<sup>th</sup> edition 2009) rule 12 (power to rule on jurisdiction), 23 (security for costs), 32(3) (interim measures), 35(2) weight of evidence) and 38 (correction to the award) with s 14(1) and s 30 of the Arbitration Act 42 of 1965. See also the Law Commission's Draft Bill (2001) ss 26, 31(2)-(4) and 50.

This may indeed be so. Again, and although this statement was made with reference to interim measures, its impact and implications could be extended to other arbitral orders and procedural directives. Nevertheless it is suggested that because it is an observation based more on psychological disposition rather than any normative standard, it cannot be relied on to provide the coercive sanctions arbitrators could apply to enforce compliance with arbitral orders and directives. Something more is needed which, it is submitted, is not provided by the modest sanctions of the Model Law. The thrust of the submission is that an arbitrator must be given an extended range of sanctions perhaps comparable to those available under section 41 of the 1996 English Act, and that this could be done by legislation and institutional rules. It is proposed therefore that what is needed, beside the modernization of arbitration law and practice, is a Code of Sanctions in support of arbitral authority for the fulfillment of the arbitral mandate, and to promote compliance with arbitral orders and deter non-compliance.

### 3.7.1 Remedies and Sanctions

In a literal sense a remedy implies reparation or redress for a wrongful act or omission while a sanction connotes a penalty expressly attached to non-observance of a law or a lawful order or prescription.<sup>755</sup> Arbitral remedies for breaches of contractual relationships and legal duties in the common-law system are, in the main, the same as or akin to judicial remedies. Commonly these remedies consist of (i) an award of damages or monetary compensation; (ii) specific performance; (iii) restitution or restoratory awards; (iv) declaratory relief; (v) interim measures of protection; (vi) interest on awards and (vii) the successful party's own costs and the costs of the award.<sup>756</sup> In general the principles governing these civil remedies are the same in both litigation and arbitration.

The thrust of this part of this study is, however, on sanctions, that is, coercive sanctions to compel compliance with arbitral orders and directives. Although, and depending on a particular context, the terms "remedies" and "sanctions" may be employed synonymously, it is probably accurate to suggest that sanctions tend to come into play where there is non-compliance with judicial or arbitral remedial orders.<sup>757</sup> In what follows the term "remedy" or "sanction" takes its meaning from the context of its usage.

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<sup>755</sup> *Chambers Concise 20<sup>th</sup> Century Dictionary*; Dobbs DB *Handbook on the Law of Remedies* (1973); also McCormick CT *Handbook on the Law of Damages* (1935).

<sup>756</sup> Redfern & Hunter *International Commercial Arbitration* 356-400; English Arbitration Act 1996 s 49.

<sup>757</sup> See the English Arbitration Act s 48.

Sanctions are necessary in the administration of justice. That is why in the public domain, judges, the police authority and other law enforcement agencies of the state are empowered by law to impose, apply and enforce legal sanctions in the administration of justice. Arbitration, it is submitted, can benefit from a set of sanctions available to the arbitral tribunal in support of its orders, rulings, decisions, directives and awards. The justification, on one theory, is that arbitration is part of the justice system of states and unless arbitral orders are backed by clearly defined coercive sanctions, the effectiveness of arbitration will remain dimmed. It may indeed be argued that as regards sanctions, arbitration is constrained by its private nature. Yet it is also a fact that private arbitral awards can have public consequences and they are enforceable at law because the award is a contractually and legally binding decision on the dispute between the parties. Further, if a final arbitral award that is not voluntarily complied with can be merged with and enforced as a court judgment and decree, it makes sense for the arbitral tribunal that makes the award to be equipped with effective and enforceable sanctions in the process that leads to the making of the final award.

### 3.7.2 Sanctions for Effective Delivery of Arbitral Justice

In the discussion below, sanctions are proposed to support the arbitrator's authority in the context of each of the six problems discussed earlier in this chapter.

#### 3.7.2.1 Sanctions to Compel Compliance with the Arbitration Agreement

The agreement to arbitrate is an enforceable contract. Yet the reluctant party is prone to avoid its enforcement. The ability and opportunity to wriggle out of it stem from the lack of genuine consent to arbitrate which is the first of the six problems discussed in this study. It has been suggested that the arbitration agreement is an imperfect obligation for which the award of damages or specific performance are impractical remedies because such damages are difficult to quantify and a party cannot be compelled to arbitrate against his will.<sup>758</sup> These arguments are neither compelling nor attractive because (i) a valid arbitration agreement is enforceable like any other agreement; (ii) the difficulty of quantifying damages has never been accepted as an excuse for not awarding damages; and (iii) once a party has validly consented to arbitration, he cannot unilaterally withdraw that consent. Additionally the fact that under modern domestic arbitration law the court before whom an arbitration matter is brought is empowered to stay the proceedings and refer the matter to arbitration is an

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<sup>758</sup> Redfern & Hunter *International Commercial Arbitration* 7-8.

additional boost to arbitration and an endorsement of the tribunal's authority to enforce the arbitration agreement.

It is proposed that an arbitration law should incorporate a Code of Sanctions that expressly and specifically provides an arbitral power to compel party compliance with the arbitration agreement.<sup>759</sup> In this connection the adoption of the second optional definition of arbitration agreement under the revised Article 7 of the Model Law<sup>760</sup> is recommended. It is submitted this could in the first instance facilitate the determination of the validity or otherwise of the arbitration agreement. Once the validity is determined and upheld, the arbitral tribunal must enforce the agreement. It may start by notice and direction or order to the parties for the continuation of the arbitration. The proposed sanction is that, without prejudice to the generality of the exercise of the court's supervisory powers in appropriate circumstances, there shall be no appeal or recourse to court against the arbitral directive or order for the resumption and continuation of the arbitration or for the speedy determination of the claim. Specifically the court shall not entertain an application to stay the arbitral proceedings or grant an order to that effect. In the event of non-compliance, the tribunal shall proceed to a summary determination or dismissal of the claim on the evidence before it. Punitive costs, rather than party and party costs, shall be awarded against the frivolous challenger of the arbitration agreement, if so found.<sup>761</sup>

### 3.7.2.2 Sanctions to Stem Unwarranted Challenges to the Arbitral Jurisdiction

A party who initiates jurisdictional challenges found to be frivolous and unmerited should be mulcted in punitive costs. The idea behind substantial and punitive costs, it is submitted, is

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<sup>759</sup> For recent examples of how the English court makes parties stick to their agreement to arbitrate in relation to challenges to awards and appeals under ss 67, 68 and 69 of the English Arbitration Act 1996 see Closter E "Attempts to Thwart the Arbitration Process: Current Examples of How the Court Makes Parties Stick to their Agreement to Arbitrate" (2007) 73 *Arbitration* 407-412. After analyzing recent judicial decisions, the author concludes that, in all, the courts remain extremely keen to maintain the autonomy of the arbitral process, notwithstanding challenges on human rights grounds; but that, in certain factual situations, it may be possible to challenge, at the Court of Appeal level, a High Court judge's refusal to intervene under either s 68 or s 69 to address alleged contraventions of human rights by the arbitrators themselves in the arbitral process (pursuant to the European Convention for the Protection of Human Rights (Article 6) and the English Human Rights Act (section 3)).

<sup>760</sup> See para 2.4.4.5(ii) above. The critical issue is then whether or not there was consent, rather than compliance with formalities.

<sup>761</sup> These sanctions should specifically relate to the enforcement of the arbitration agreement under Article 7 as distinct from the tribunal's power to rule on its own jurisdiction under Article 16 or the exercise of the default power under Article 25. The sanction proposed here for the dismissal of the claim or for its speedy determination is more akin to that contained in s 26(d) of the Kenyan Arbitration Act, for which there is no equivalent in the Model Law, and which empowers the arbitral tribunal to make an award dismissing the claim or to give directions, with or without conditions, for the speedy determination of the claim.

that it will act as a deterrent to parties who knew they have consented to arbitration but are wont to test the waters, so to speak, by feigning surprise or ignorance or by just being downright dishonest in denying the arbitral jurisdiction. Once arbitral parties become sensitized to the existence and reality of arbitral sanctions and the severity of punitive costs they may have second thoughts about and or wholly desist from unmerited jurisdictional challenges.

### 3.7.2.3 Sanctions to Boost the Powers of the Arbitral Tribunal

The general and special powers of the arbitral tribunal have been discussed in paragraph 3.3 above. The sanctions advocated here are intended to augment the authority of the arbitral tribunal, to impose punitive measures for acts, particularly willful acts, of commission or omission by parties during the proceedings. An example is the specific power to order a defaulting party to pay substantial wasted costs within a strictly limited period of time, of say seven to ten days, before further participation in the proceedings. In default, the proceedings shall continue without the non-compliant party to the making of an award. What is emphasized here is the sense of strictness and gravity conveyed by the existence of the Code of Sanctions by the requirement of immediate and substantial atonement for any disobedience to arbitral orders including the real risk of forfeiting the right of further participation in the proceedings. Non-attendance at proceedings without reasonable and acceptable excuse should not invariably result in automatic adjournment or postponement of proceedings as most defaulters take for granted. On the contrary, it should attract monetary loss and the real risk of disqualification from further participation in the proceedings. Parties and lawyers in Kenya wait incredibly long hours in court corridors for their cases to be called (and often only to be adjourned to another date) in the knowledge that their cases might be dismissed for non-appearance. The Code will concretize arbitral sanctions and put all concerned on notice of the coercive measures at the disposal of the arbitral tribunal. Arbitration, arbitral parties and their representatives will benefit if they and the courts come to know and expect that arbitration sessions are likely to proceed as fixed and not adjourned as frequently done by the courts, when choosing arbitration as their preferred mode of dispute resolution.

### 3.7.2.4 Sanctions against Frequent Adjournments

Requests for adjournments in domestic arbitration are common but not always genuine. At the drop of a hat so to speak lawyers who are not prepared or have not received fee deposits or

lack adequate instructions from their clients will enshroud the request for adjournments with principles that make the adjournments technically difficult for the tribunal to decline. Sanctions for securing compliance with strict time limits are necessary to aid the tribunal to overcome delays occasioned by dubious requests for adjournments. The likelihood of attracting substantial costs of an adjournment should deter unwarranted adjournments. Predetermined and fixed costs for unmerited postponements at various stages of the proceedings may be a possible sanction in this context.

The sanction proposed here against unmerited postponements and adjournments is again separate and distinct from the default powers under section 26 of the 1995 Kenyan Arbitration Act that empower the arbitral tribunal to, inter alia, dismiss the claimant's claim for failure to prosecute it or to direct the speedy determination of the claim.<sup>762</sup> The party responsible for unmerited postponement or adjournment must be ordered by the tribunal to pay the full predetermined costs occasioned by it.

#### 3.7.2.5 Sanctions to Compel Compliance with Interim Measures

Orders for interim measures by the tribunal have been discussed extensively above.<sup>763</sup> What must be added here are the sanctions to be applied where orders for interim measures are disobeyed or ignored. Firstly, the grant of interim measures is almost invariably accompanied by conditions and time limits. Secondly, the nature of interim measures is such that they are understood to be temporary in duration except on interlocutory issues whose determination can be final. Here as in paragraph 3.7.2.3 above, effective arbitration will benefit from the imposition of monetary sanctions that may promote adherence to fixed time limits and the strict application by the tribunal of default provisions accompanying its orders for interim measures. Again, a claimant who is in default with payment of security for costs will risk the consequential dismissal of his claim. A respondent in default of compliance with interim measures will similarly risk the rejection of his defence, leaving the claimant to prove his claim. National laws that already apply such standards can be boosted by more clearly defined and effective coercive sanctions including more stringent prescriptions on appeal.

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<sup>762</sup> This power under s 26(d) of the Kenyan, as noted above, is not part of Model Law Article 25 and is conducive to effective arbitration but not enough by itself.

<sup>763</sup> See para 3.5.3.1 above.

### 3.7.2.6 Sanctions against Non-Compliance with the Award

It is submitted that sanctions in aid of enforcement and execution of the arbitral award are also essential for effective arbitration. It has been noted that once the tribunal has delivered its final award its existence and function are deemed at an end,<sup>764</sup> and that if the award is not voluntarily implemented the successful party will seek court assistance with its enforcement and execution. The recommendations made to promote and expedite award enforcement and execution under paragraphs 3.6.5.2, 3.6.6 and 3.6.7 are apposite. The sanctions that must be stipulated by arbitration law and applied by the court would include time-limits to be observed in the process of enforcement and execution. It may be of some assistance to the successful arbitral party if the manner of enforcement and execution is elaborated in the Code of Sanctions. This may well reduce unmerited challenges to the award and the need to resort to court for enforcement, with the agonizing process and delay to which an otherwise successful party is subjected at the stage of enforcement and execution of the award. Public and general awareness that arbitration works can promote its use.<sup>765</sup>

### 3.7.3 Proposals for implementation

The need for enforceable sanctions against the infringement of arbitral orders deserves greater recognition and attention than has been given to it so far by the law, the arbitral tribunal, practitioners and the national courts. Yet the inadequacy or lack of coercive sanctions is a known source of frustration and a drawback to the arbitral process. It is submitted that more can be done by the drafters of arbitration statutes, arbitral tribunals, arbitration practitioners and the courts to prescribe and ensure the enforcement of effective arbitral sanctions.

The multiplicity of advantages attributed to arbitration such as speed, flexibility, expert adjudication, cost-effectiveness, confidentiality and so on preponderate towards expeditious and effective disposal of arbitration disputes unhindered by frivolous and unmeritorious challenges and the trappings of technicalities.

Expansion of the arbitral jurisdiction, powers and sanctions is not in conflict with the purposes of arbitration or with well established notions of fairness and justice. Unfortunately

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<sup>764</sup> See para 3.6.1 above.

<sup>765</sup> The views of a senior Kenyan practitioner on the finality of a binding and enforceable award have been noted in the text to footnote 683 above.

it is part of the crisis of arbitration<sup>766</sup> that the more powers are sought and ceded to arbitrators, the greater the need to ensure probity and fairness in the use of such powers. It is therefore a question of balance and the need for all actors in the field to respect and maintain the highest standards of arbitration practice.

Effective sanctions depend on the powers available to arbitrators and their willingness to enforce the range of sanctions that will include (i) strict adherence to fixed time limits; (ii) dismissal of unpursued claims; (iii) facilitation of *ex parte* proceedings before arbitral tribunals; (iv) costs awards which ensure that the non-complying party pays the full costs occasioned by its conduct or omission; (v) default orders; (vi) injunctive measures; and (vii) the award of punitive damages, as appropriate, so as to strengthen and reinforce the authority of the arbitral tribunal and enhance respect for the arbitral process.<sup>767</sup> This is desirable as it will constrain the parties to prosecute or defend the claim with expedition, leading to the making of a timeous award and consequently its timeous enforcement and execution, in the absence of prompt voluntary compliance.

It is proposed as a start that the Chartered Institute of Arbitrators in Kenya should draw up a Code of Sanctions on the proposed lines as part of its institutional Rules. In Kenya it will be open to the institute to draw up and forward the recommendations to the Chief Justice for consideration by the Rules Committee for enactment as Arbitration Rules pursuant to section 40 of the 1995 Arbitration Act.

The point to emphasize is that it is not enough to liberalise the arbitral process by merely divorcing it, to the maximum extent possible, from any interference by the national court. It is an irresistible consequence also to take the corresponding further step to empower the liberated arbitral process to stand as fully as possible on its own feet – with effective and enforceable sanctions and all that this entails – as a viable alternative system of justice.

### **3.8 Conclusions to the Research Questions**

1. The investigation of the first research question on the need for genuine party consent to arbitration shows that the arbitral consent inferred from or established through compliance with the formal requirements of an arbitration agreement termed here “legal” or

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<sup>766</sup> See para 1.2 above.

<sup>767</sup> On the award of punitive damages in arbitration see para 3.3.7 above.

“technical” consent, is frequently contested in Kenyan arbitration practice by parties who have not consciously given their consent to arbitrate, despite the existence of a valid arbitration agreement; that unless consent is expressly manifested in the arbitration agreement it is illusive and provides an avoidable opportunity for its denial and time-consuming investigation. Therefore arbitration legislation should expressly provide a requirement for the manifestation of consent to arbitrate to eliminate illusiveness. A comparative example is provided by Article 1677 of the Belgian Code Judiciaire.<sup>768</sup> The integration of Customary Law Arbitration and Statutory Arbitration is proposed and statutory recognition of the verbal form of the arbitration agreement is recommended as done in New Zealand.<sup>769</sup>

On the question whether an arbitral party can unilaterally withdraw its consent once it has been given, an example of national legislation on the point is found in section 2 of the Nigerian Arbitration Conciliation Act by which consent is irrevocable except by agreement, or leave of court or a judge. This can be emulated in Kenya. The language of Article 7(2) of the Model Law on the incorporation of other documents by reference stemmed from the application of the requirement of writing in Article 11 of the 1958 New York Convention as adopted by Article 7(2) of the Model Law and the derivative national arbitration statutes of Kenya, Nigeria and Zimbabwe. The language is somewhat obscure, and should not be interpreted as requiring reference by incorporation of a specific arbitration clause as long as the intention to incorporate general conditions including the arbitration clause is manifest. A comparative example offered to Kenya are the provisions of Article 1021 of the Netherlands Code of Civil Procedure.<sup>770</sup> The problems of multi-parties and non-signatories to the arbitration agreement can be resolved by domestic law theories and concepts such as the doctrines of assignment, incorporation by reference, the third party beneficiary, agency, equitable estoppel and the “group of companies” doctrine. It should be possible for parties to agree to consolidation of multi-party contracts and, short of consolidation, concurrent hearings of separate arbitrations should be a permissible option. National arbitration law at the seat of arbitration should permit court ordered consolidation, the most satisfactory solution however being consolidation by consent. Comparative examples recommended are provided by the UNCITRAL Arbitration Rules, LCIA Rules (1998) Article 22(1) (h) and the Hong Kong Arbitration Ordinance as discussed in paragraph 3.1.6.

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<sup>768</sup> See para 3.1.3 above.

<sup>769</sup> As in the New Zealand Arbitration Act

<sup>770</sup> See para 3.1.5 above.

2. Exploration of the challenges to arbitrators and the arbitral jurisdiction, involving consideration of the arbitrator's qualifications, suitability, impartiality and independence led to the comparative study of the provisions of the UNCITRAL Model Law and the derivative African jurisdictions, the English approach, the Institutional rules of the LCIA, ICC, IBA Guidelines, and the views of commentators. What emerges are proposals for the arbitral party to seek specialist advice on the appointment of the arbitrator, the need for disclosure of conflicts of interest, the imposition by rules of a duty of disclosure of relevant information on arbitral parties including a duty to perform a reasonable research of publicly available information as recommended on the model of the IBA Guidelines, and Articles 9 and 10 of the UNCITRAL Arbitral Rules.<sup>771</sup> The contrasting English approach which imposes no duty of disclosure before the arbitrator accepts an appointment and cannot be challenged for lack of independence unless justifiable doubts existed about the arbitrator's impartiality – is another approach worthy of consideration by the African jurisdictions of Kenya, Nigeria and Zimbabwe.

The IBA guideline for a subjective test to be applied generally to disclosure and an objective test to apply to disqualification is also recommended.<sup>772</sup>

African jurisdictions are however cautioned not to follow blindly foreign rules and prescriptions from the substantially larger foreign jurisdictions because the problem of independence and conflict of interest are much harder to deal with in African jurisdictions where the available arbitrators grew up together in small communities, through schools and churches and interact freely with the arbitral parties in wide ranging circumstances. A balance between the unique circumstances in African societies and the foreign prescriptions must be struck by African legislation. The competence and powers of the arbitrators are investigated with examples from UNCITRAL and English judicial experience. Regarding subject matter arbitrability the Zimbabwe example of enumerating by legislation what is and what is not arbitrable in section 4 of the Arbitration Act is exemplary and recommended for Kenya. Approaches for the reduction of challenges to arbitrability are discussed in paragraph 3.2.4 with the comparable and contrasting positions of the OHADA Uniform Act and the UNCITRAL Model Law.<sup>773</sup> The impact of fraud and public policy are discussed in the light of judicial decisions from Kenya and

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<sup>771</sup> See para 3.2.1 – 3.2.1.2

<sup>772</sup> See para 3.2.12

<sup>773</sup> See para 3.2.4

Nigeria.<sup>774</sup> A recommendation is made for national arbitration laws and courts to balance the domestic importance of reserving matters of public interest to the courts against the general public interest of promoting trade and commerce and the settlement of disputes by arbitration. Regarding who should have the final say in arbitration, arbitrator or judge, this writer's view is that, subject to the noted essential qualifications and safeguards of public policy and the fact that the arbitrator is appointed by private parties and not the state, the arbitrator should finalise all matters in dispute within the arbitral mandate.<sup>775</sup>

3. Regarding the third research question, the need for effective powers for the arbitral tribunal involving consideration of the classification of sources of the tribunal's procedural powers, led to the recommendation for improvements in legislation and arbitration rules to expand and clarify the arbitrator's powers and ability to curb unmerited interruptions and tactical delay.<sup>776</sup> The comparative study involved references to the Model Law provisions of Articles 19(1) and 14(2), the equivalent provisions of the Kenyan and the compatible national statutes,<sup>777</sup> and the reformulation of Lord Diplock's dictum<sup>778</sup> for the tribunal to conduct the arbitration subject to the provisions of the relevant arbitration law and the rules of natural justice. The Kenyan, Nigerian and Zimbabwean positions on the subject are considered in the comparative context of the Model Law, English Law, the South African experience<sup>779</sup> and the institutional rules of the LCIA, IBA and UNCITRAL. Because of the importance and differences in institutions and their rules there is a suggested criteria for evaluating arbitration rules to include consideration of the institution's structure, procedure for selecting arbitrators, the degree to which the institution supervises arbitrators, if at all, the scale of administrative charges, the arbitrator's fees and requirements for advance payment of deposits.<sup>780</sup> The recommended criteria also include whether the rules provide for the tribunal to grant interim measures, well-defined standards and procedures for dealing with challenges to arbitrators, a procedure for defining the dispute, obtaining access to evidence and for conducting the hearings. Rule 16 of the Kenyan Branch of the Chartered Institute of Arbitrators granting unfettered discretion to the arbitral tribunal is made subject to the mandatory provisions of the Kenyan Arbitration Act.

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<sup>774</sup> Para 3.2.4

<sup>775</sup> Para 3.2.6

<sup>776</sup> Para 3.3.1.

<sup>777</sup> Sections 20 Kenyan statutes, First Schedule Article 19 of the Zimbabwean statute and section 15 Nigerian statute. See also para 2.4.4.5 above.

<sup>778</sup> Para 3.3.2.

<sup>779</sup> Para 3.3.2

<sup>780</sup> Para 3.3.3.

The expansion of arbitration rules for arbitrators and the creation of uniform standards for the admissibility of evidence on the lines of the IBA Rules for Taking Evidence is recommended for Kenya.<sup>781</sup> An expedited procedure is also recommended.<sup>782</sup> Guidance for the arbitrator in dealing with evidence and any objections to admissibility is deemed necessary in jurisdictions such as Kenya, where the Evidence Act does not apply to an arbitration.<sup>783</sup> The comparative content includes references to the Model Law, the English Act, the national statutes of Kenya, Nigeria, Zimbabwe, and Mauritius<sup>784</sup> whose jurisdictions are influenced by the Model Law. There is the observation that English arbitrators have substantially more express procedural powers than those of the Model Law jurisdictions. The inclusion of exemplary and punitive damages in arbitration law and rules is recommended for Kenya to deter and prohibit unwarranted conduct.<sup>785</sup>

4. The investigation of the fourth research question led to a recommendation for the arbitrator to take effective charge of the arbitration in order to minimise the frequency of adjournments, postponements and delay.<sup>786</sup> As the African jurisdictions provide scant guidance on how to do this, the comparative examples from English Law are offered for consideration.<sup>787</sup> The views of commentators are brought into the discussion on the issue of delay, while drawing attention to the significant differences in the default provisions of the national statutes of Kenya, Nigeria, Zimbabwe, England and South Africa, and the time limits for making of an award – four months under the 1965 South African Act, or “as soon as practicable” under rule 36.4 of the Standard Procedure Rules of the Association of Arbitrators (Southern Africa). The Centre for Arbitration and Dispute Resolution (CADER) of Uganda prescribes 60 days.

The recommendation is that adjournments, delays and prolongation of arbitration ought to be more effectively controlled and curbed by specific improvements in the African statutes taking advantage of the experiences of other jurisdictions.

5. On the fifth research question regarding interim measures, the tribunal’s powers to grant such measures, considered in paragraphs 3.5.3 led to consideration of Article 17 of the Model Law (1985), section 18(1) of the Kenyan Arbitration Act 1995, section 17(2) of the

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<sup>781</sup> See IBA Rules Articles 3 and 9.

<sup>782</sup> Para 3.3.3.1.

<sup>783</sup> Para 3.3.3.2.

<sup>784</sup> Para 3.3.4.

<sup>785</sup> Para 3.3.7

<sup>786</sup> Para 3.4

<sup>787</sup> Para 3.4

Zimbabwe Act 1996, section 13 of the Nigerian statute, the South African Law Commissions report on international arbitration (paras 2.183 – 2.186), and a recommendation to provide by legislation for the enforcement of an interim order as if it were an award. The contrasting position under UNCITRAL’s 2006 amendments (Articles 17H and 17 I) prescribes the conditions to be met before the tribunal grants such measures and court assistance for their enforcement. The recommendation is that an interim measure granted by the tribunal must be made binding unless modified, suspended or terminated by the tribunal under a prescribed provision. On security for costs the comparative experiences of jurisdictions other than Kenya, Nigeria and Zimbabwe are introduced.<sup>788</sup> It is emphasised that Articles 9 and 17 and their derivatives in Kenya, Nigeria and Zimbabwe demonstrate two important principles of modern arbitration practice – namely, that resort to court must be available to obtain an interim measure, and that wherever practicable, the power to grant an interim measure should be exercisable by the arbitral tribunal rather than the court.<sup>789</sup>

Regarding the extraterritorial aspect of interim relief, Model Law Articles 17 (H) and 17 (I) providing for court enforcement of interim measures ordered by the tribunal irrespective of the seat of arbitration can be emulated by Kenya and the counterpart jurisdictions.

Paragraph 3.5.7 contains a summary of recommendations for Kenyan national practice on this subject.

6. The final research question on the enforcement and execution of the arbitration award involved setting out the requirements of a valid final award,<sup>790</sup> the recognition and enforcement of the award under the Model Law,<sup>791</sup> the New York Convention, court recognition and enforcement of the award in the three African jurisdictions,<sup>792</sup> enforcement of the final award in paragraph 3.6.5.1 as distinct from its execution in paragraph 3.6.5.2. The recommendation for a national arbitration statute to cover the whole field is innovative, the methods for removing impediments to enforcement and execution of awards are set out in paragraph 3.6.6. A simplified enforcement and execution<sup>793</sup> procedure based on the Kenyan experience and perspective is original,

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<sup>788</sup> See para 3.5.3.2

<sup>789</sup> See para 3.5.3.3

<sup>790</sup> Para 3.6.2

<sup>791</sup> Para 3.6.3

<sup>792</sup> Para 3.6.4

<sup>793</sup> Para 3.6.7

innovative and a contribution to knowledge on a controversial topic. The same can be said for the Code of Sanctions proposed for Kenya. As a start, it is recommended that the Kenyan Branch of the Institute of Arbitrators should work on and draw up a Code of sanctions as part of its institutional rules and recommend its enactment to the Chief Justice pursuant to section 40 of the Arbitration Act.

### 3.9 Concluding Comments on the Future of Arbitration in Africa

*“It would be a pity to miss the opportunity to enrich our social and legal culture by some imaginative fusion of distinctly African models of, for example, dispute settlement.”*<sup>794</sup>

The vision of arbitration as a complete and competent dispute resolution system is neither strained nor fanciful. It is achievable and so supportable. This vision, founded on this writer’s experience and appraisal of arbitration practice is shared, with qualifications, by others.<sup>795</sup> One may recall Lord Wilberforce’s<sup>796</sup> optimism for arbitration not to be viewed as “a kind of annex, appendix or poor relation to court proceedings” but, subject to statutory guidelines, as “a freestanding system, free to settle its own procedures and free to develop its own substantive law”.<sup>797</sup>

An attempt is made towards the realization of this goal in the discussion of arbitration in the three chapters of this study: first, by the presentation of an overview of arbitration as a procedure in a crisis of evolution, transformation, modernization and progress, in the face of surmountable challenges, and some of the major procedural dilemmas that reveal arbitration

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<sup>794</sup> Nhlapo RT “The Status of Customary Law in Africa: From the Age of Law and Modernization to the Era of Human Rights and Constitutionalism” in Ajibola B and Van Zyl D (eds) *The Judiciary in Africa* (1987) 226.

<sup>795</sup> In separate interviews and discussions with Dr Gerold Herrmann (President of ICCA) and Prof Martin Hunter (co-author of Redfern & Hunter) at an LCIA seminar at Tynley Hall, Hampshire, England, 7-9 May 2010, both eminent arbitrators felt international commercial arbitration, after the adoption of the UNICTRAL Model Law, was practically a complete system; but that it remained state responsibility to ensure the effectiveness of the arbitral process by the introduction and use of procedural regulations to fast-track the enforcement and execution of arbitral awards.

<sup>796</sup> Lord Wilberforce, a former senior English judge, is credited with playing a major role in the enactment of the English Arbitration Act 1996 when the Bill was considered by the House of Lords. (See also para 1.9 n 212 above.)

<sup>797</sup> See para 1.7 above; Bernstein et al *Handbook of Arbitration Practice* 90. Unstinted support for arbitration was evident in this writer’s interviews and discussions with a broad spectrum of the eminent practitioners and participants in attendance at the abovementioned LCIA arbitration seminar at Tynley Hall, England, (7-9 May 2010) that included: Dr Serge Lazareff (Chairman ICC Institute of World Business Law), Jan Paulsson (President LCIA), (France); Dr. Laurent Levy (Switzerland); Justice Ken Handley (Australia); Prof William Park, Jose Astigarraga and David Rivkin (USA); Toby Landau QC, VV Veeder QC, Peter Leaver QC (England); Dr Gerold Herrmann (Austria); D. Bernard Hanotiau (Belgium); Prof Filip de Ly (The Netherlands) and several other seminar participants.

as a procedure in a continuum of change.<sup>798</sup> Secondly, and upon this foundation is presented the legal framework in which arbitration operates in Africa, being principally the statutory systems derived from OHADA and the UNCITRAL Model Law,<sup>799</sup> as well as customary-law arbitration.<sup>799</sup> Thereafter follows the discussion of the six selected problems that commonly beset arbitration practice, forming the central focus of this study.<sup>800</sup>

Some essential criteria for effective arbitration have been discussed.<sup>801</sup> The first is appropriate arbitration law and supportive judges. In this respect the adoption of the UNCITRAL Model Law in Kenya and other African jurisdictions for domestic arbitration can be regarded by the promoters of the Model Law in Africa as an advance on the previous colonial-style arbitration legislation. However as the Model Law is demonstrably incomplete, UNCITRAL's 2006 amendments to that Law and the pertinent aspects of the 1996 English Arbitration Act discussed in this study are, in this connection, noteworthy as a basis for further statutory additions and refinements.<sup>802</sup> Continuous reappraisal and development of the legal framework of Kenyan and African arbitrations in both the statutory and customary law forms are specific challenges. Balanced judicial support for arbitration, with appropriate supervision, continues to be important, as is recognised in the Model Law.<sup>803</sup>

Secondly, proactive arbitrators are required. In this connection, the need for qualified and suitable arbitrators, the competent discharge by them of their duties, the adequacy or otherwise of their powers and the enhancement of those powers by effective sanctions, have been discussed.<sup>804</sup> Thirdly, a positive contribution by the parties' lawyers is needed. Attention has been drawn to the role of lawyers in arbitration and the need for the coercive sanctions to compel compliance by parties and the cooperation of their representatives, for the avoidance of delay.<sup>805</sup> Fourthly, willing participants, with a preference for arbitration in contrast to litigation is commonly canvassed by pro-arbitration commentators and institutions. This support in practice has contributed significantly to the gradual emergence of arbitration generally as a preferred mode for settling disputes. In Kenya the Chartered Institute of Arbitrators (Kenya Branch) (CI Arb) plays a leading role in the training of arbitrators. In an

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<sup>798</sup> See para 1.2 above.

<sup>799</sup> See chapter Two.

<sup>800</sup> See paras 3.1-3.6 above.

<sup>801</sup> The legal framework for arbitration is discussed in Chapter 2

<sup>802</sup> See Chapter Two, paras 2.4.4(7), 2.6 and Chapter Three paras 3.3.4 and 3.3.7.

<sup>803</sup> See Article 5 (Extent of Court Intervention), Article 6 (Court assistance and supervision required by Articles 11(3), 11(4), 13(3), 14, 16(3), 34(2)), and the recognition and enforcement of arbitral awards under Articles 35 and 36 of the Model Law and its national equivalents. See also para 2.4.4.5(iii) above.

<sup>804</sup> See particularly paras 3.3 and 3.7 above.

<sup>805</sup> See paras 3.4.2 and 3.4.3 and 3.7.3 above.

interview with Simon Ondiek, Acting Chief Executive of the CI Arb he comments that parties have become aware of arbitration through their lawyers who lead them to arbitration, such that applications for appointment of arbitrators have tripled in the last three years averaging from two to six appointments per month in work areas involving construction disputes, civil and commercial arbitration, family disputes, IT and intellectual property disputes and land matters. While lauding the role of lawyers Ondiek also criticizes them for their delaying tactics and inefficient use of arbitration time. The Institute is therefore conducting “advocacy cases” to teach lawyers how to manage arbitration cases. Judges who support arbitration, Ondiek says, refer arbitration disputes to the CI Arb for appointment of arbitrators; but judges who are unfamiliar with the arbitration process see no need to refer disputes to arbitrators. Therefore the Institute plans to market arbitration to raise awareness of its advantages and the contribution of the Institute to dispute resolution by both arbitration and mediation. Obviously, improvements to arbitration legislation and institutional rules would benefit the successful party. Conversely the opponent may prefer the opportunities for delay inherent in litigation. This consequence is not inevitable if, as suggested, arbitration law is strengthened by sanctions to enable arbitrators to enforce effectively the parties’ agreement to arbitrate their dispute and the resulting award.<sup>806</sup>

The role and use of effective sanctions in aid of arbitration require greater recognition and development. The importance attached to sanctions in this study is reflected in the recommendation of a Code of Sanctions with remedies not only to compel, *inter alia*, compliance with the arbitration agreement but also to boost the powers of the arbitral tribunal.<sup>807</sup> Dispute resolution practitioners cannot be unaware that the advantages commonly claimed for arbitration such as, flexibility of the procedure, speed and cost-effectiveness, have been wearing thin over the years and that these very advantages that once gave prominence and pride of place to arbitration over litigation are not only becoming more and more dubious,<sup>808</sup> but are also now being claimed by other ADR methods. In effect, arbitration in its present form is facing increased competition from other ADR procedures such as mediation, early neutral valuation, expert determination and their hybrids. It is competition that challenges the future of arbitration as a preferable dispute resolution option.

A perspective on the future of any human endeavour is inevitably speculative. Nevertheless, informed speculation based on performance indicators of the past and present could provide

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<sup>806</sup> See para 3.7.3 above.

<sup>807</sup> See para 3.7 above.

<sup>808</sup> See para 1.3 above.

valuable insights and useful guidance for future conduct and action. The future of arbitration<sup>809</sup> is and ought to be of continuing interest to users of the techniques for resolving disputes and conflicts on the African continent. The point then is that in the face of competition, arbitration cannot and ought not to remain stagnant or complacent, particularly because disputes in modern times are often multi-faceted, more complex and technical than ever before, requiring participants with the relevant knowledge, training and expertise to deal with them.

Modernization and harmonization of the dispute resolution laws and practice rules across Africa therefore pose huge challenges for law makers, not least because of the existence of plural societies and the diversity of cultures and practices on the continent. Quite clearly therefore, and for the future, the reservoir of knowledge and source material that influence the formulation of arbitration and ADR laws in Africa cannot but include the expanded contribution of experts and others from the spectrum of disciplines that inform law making. This statement is not made lightly in view of the tendency to resist change in conservative quarters. In the words of a distinguished scholar:

“There has been a crossing of the Rubicon; disciplines are blurring. Not long ago only the few were interested in anthropologists’ esoteric works on African customary law. Today those interested in traditional peacemaking in Africa include professionals from disparate fields – psychology, law, political science, globalization studies, and military studies, as well as the study of pan-African nationalism.”<sup>810</sup>

It has been demonstrated that current arbitration law<sup>811</sup> does not go far enough in the enforcement of arbitral awards. It is practically silent on the execution of the award, the final act in the arbitral and judicial processes. In this writer’s view, a response to the effect that an arbitrator is or should be no more concerned with the execution of an award than a judge with the execution of judgment is somewhat complacent, platitudinous and unhelpfully evasive.

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<sup>809</sup> On the future of arbitration, see Leahy ER & Bianchi CJ “The Changing Face of International Arbitration” (2000) 17(4) *Journal of International Arbitration* 19-61; Böckstiegel K-H “Major Criteria for International Arbitrators” in *Shaping an Efficient Procedure in Arbitration in the Next Decade* (1999); Smit H “The Future of International Commercial Arbitration: A Single Transnational Institution” (1986) 25 *Columbia J of Transnational Law* 9, 18. On the future of ADR see Redfern & Hunter *International Commercial Arbitration* 44 para 1.93; also Short D “E-Discovery and International Commercial Arbitration: A Convergence of Realities from a Canadian Perspective”, presentation at the Commonwealth Law Conference, September 2007, Nairobi, Kenya.

<sup>810</sup> Nader L *The Life of the Law* University of California Press, 2002, 1-2.

<sup>811</sup> For example, the provisions of the Model Law Article 35 and its national derivatives. See paras 3.6.3-3.6.5 above.

The successful arbitral party and those representing him from beginning to end have an interest in the prompt recovery of the full benefit of the award. Such party must be assisted with well defined and precise rules for achieving the declared goals of arbitration including principally a just result. The simple procedure proposed in this study is, part of the attempt to explore further ways and means of making the enforcement and execution of arbitral awards less onerous.<sup>812</sup>

A firm recommendation is that arbitration should not stop with the making of an award that merely dangles the fruit of the award before the successful party, who is then left to embark on a fresh and often harrowing exercise to execute the award. Arbitration law ought to cover the whole field,<sup>813</sup> from commencement of proceedings to the execution of the award, to facilitate the prompt delivery of the final outcome to the deserving party in consonance with the vision of arbitration as a competent, complete and freestanding system.

It can be said finally that African states, which hitherto had been clients of a bipolar world, have had to face numerous challenges, one of which is the adoption of a new set of responses to impulses coming from the wider world. Autocracies have been dismantled. Frozen centralized economies are opening up while whole commercial and trading relationships with multilateral institutions are similarly being realigned and redefined. Recent natural resource finds in East, West and Southern Africa (coal, gas and oil) have renewed global interest in Africa with a role to play for dispute resolvers in the continent. In the wake of such momentum, Africa has to, as it were, reinvent itself and learn new ways of doing business and resolving disputes and conflicts peaceably in a changing world. That challenge lingers and is one of the defining characteristics of the present and future of effective arbitration in particular, and conflict resolution generally, in Africa.<sup>814</sup>

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<sup>812</sup> See para 3.6.7 above.

<sup>813</sup> This arguably novel view received substantial support from some of the notable seminar participants at Tylney Hall (see n 799 above).

<sup>814</sup> The reflections in the concluding paragraph are developed from the twin challenges of fostering harmonious economic relations through peaceful resolution of disputes (extrapolated from “African Insight”. *Daily Nation*, Kenya, 6 January, 2006) and underscoring the value and contribution of arbitration in facilitation of wholesome economic relations (extrapolated from UN General Assembly Resolution 4072 of 11 December 1985, UN doc A/40/53). In essence the contribution of arbitration in promoting harmonious economic relations is not confined to business enterprises. In an increasingly interdependent world, beneficial economic relations are vital building blocks in the structure of world peace. See also Okefeifere AI “Enhancing the Implementation of Economic Projects in the Third World through Arbitration” (2001) 67 *Arbitration* 240-253.

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- UNCITRAL *Secretariat Notes A/CN9/204: Commentary of the Working Groups Draft of Article 35*
- UNCITRAL *Working Group Reports – Various in A/CN9/ series*