

Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community

*Francis Kariuki**

Abstract

Regional integration has the potential to contribute to increased trade and investment. Increased cross-border trade and investment creates odds for more commercial disputes to arise. International arbitration is one of the most appropriate ways of resolving commercial disputes in a regional economic block like the East Africa Community (EAC). International arbitration is, *inter alia*, efficient, cost-effective, flexible, confidential, neutral, binding and expeditious compared to litigation. Moreover, an arbitral award pursuant to international arbitration is final and binding on parties. Withal, in seeking the recognition and enforcement of a foreign arbitral award, a successful party is likely to face monumental challenges in another member State especially in a regional block, like the EAC, where states have not succeeded in harmonising and standardising their arbitration laws.

This paper examines some of the challenges a successful party may encounter in seeking the recognition and enforcement of an arbitral award within the East African Community. It is posited that failure to adequately address private international law issues in the integration process is likely to hamper the enforcement of arbitral awards. Moreover, the countries do not share a common legal history, meaning that their legal systems slightly differ posing serious conflict of laws difficulties. In particular, the countries have different rules and procedures for recognising and enforcing foreign arbitral awards. What is more, the grounds for refusing to recognize and enforce foreign arbitral awards are so wide, creating further uncertainty and unpredictability in the process.

1.0 Introduction

International commercial arbitration affords parties uniform or harmonised procedures in arbitration especially in the enforcement of foreign arbitral awards. Arbitration is a process founded upon the agreement of parties.¹ An arbitration agreement, acts as the primary source of the rights, powers and duties of the arbitral tribunal. Because arbitration mostly arises pursuant to agreement of the parties, party autonomy is one of the most important premise upon which arbitration is anchored. Party autonomy affords parties considerable freedom

*LLM & MCI Arb.

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¹ Noussia K, *Reinsurance arbitrations*, Springer Science & Business Media, Berlin, 2014, 195.

over the venue, governing law, language, choice of the arbiter and the confidentiality of the process. Such features afford parties great flexibility and neutrality, especially in international commercial arbitration where they come from different countries, and fear being subjected to unfamiliar and foreign judicial systems.² Party autonomy is equally central in international arbitration especially in the enforcement of arbitral awards because an award is the ultimate goal of any arbitration. This spirit is well captured by Redfern and Hunter when they observe that:

*'[P]arties who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that, unless a settlement is reached along the way, the proceeding will end with an award. They also expect that, subject to any right of appeal or recourse, the award will be final and binding upon them.'*³

In addition, a successful party in international arbitration expects the award to be enforceable.⁴ However, enforcement of international arbitral awards is not always easy. It is a complex process that is influenced by multiple factors. The intercourse between different legal systems in international arbitration requires a developed and harmonized legal infrastructure. Enforcement of awards can be subject to a multitude of different legal systems. There is no uniform legal regime governing the recognition and enforcement of international arbitral awards. An example is the East African region where Partner States have different legal systems and legal traditions. Some of the municipal laws of Partner States do not conform to the 1958 New York Convention and the UNCITRAL Model Law⁵ on enforcement of arbitral awards. Besides, there are other uncertainties in that under the New York Convention, a state can make reservations to certain provisions of the Convention and denounce its applicability to that state at any time.⁶ Still, the Convention provides for seven grounds upon which a party can rely on to oppose recognition and enforcement of an arbitral

² Rana R, 'The Tanzania Arbitration Act: Meeting the challenges of today with yesterday's tools?' 2 *Alternative Dispute Resolution Journal* (2014), 232-233.

³ Blackaby N & Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, Oxford, 2009, 513.

⁴ Opiya R, 'Recognition and enforcement of international arbitral awards: A comparative study of Ugandan and UK law and practice', LL.M Thesis, Oxford Brookes University, 2012, 14.

⁵ 24 ILM 1302 [1985].

⁶ These are found under Article I (3) of the Convention as follows: A State can restrict the applicability of the convention or some Articles thereof to awards made only in the territory of another Contracting State; and, the entitlement to a contracting state to indicate that it will only apply the convention to difference arising out of a legal relationship whether contractual or not 'which are considered as commercial under the national laws of the country making such declaration.

award, notable among which is the public policy ground.⁷ Some of these grounds have been interpreted rather liberally and broadly by courts to refuse recognition and enforcement of arbitral awards.

What is more, the fact that the law applicable to enforcement may not be definite, a successful party has an uphill task identifying the assets of the losing party and where they are located; deciding swiftly on the best form of execution in a particular situation and consulting and researching on whether a particular country will enforce the award. At times, this may involve seeking advice from lawyers of that country or even engaging them to seek enforcement in the local court if so required.⁸ At times, the assets of the debtor may be scattered and located in different jurisdictions which might involve a multiplicity of enforcement procedures with all the attendant expenses. As such, the successful party has to apply to a local court before the award is enforced. Further, because of the principle of party autonomy, enforcement of a particular arbitral award depends upon the choice of law made by the parties.⁹

Further, the enforcement of foreign arbitral awards is largely dependent on national courts. It is submitted that in international arbitration courts should aim at giving effect to the principle of party autonomy,¹⁰ by recognizing and enforcing arbitral awards. Quite often though, courts have not been supportive and facilitative of international arbitration.¹¹ a good example of this is in East Africa where in spite of the fact that most member states have adopted the UNCITRAL Model Law¹² and ratified the New York Convention, their arbitration statutes and judicial attitude is not pro-enforcement. Municipal courts have interpreted the grounds broadly thus frustrating attempts at enforcing foreign arbitral awards and at times overstepping their mandate.¹³ Instead of national courts and arbitral tribunals having a ‘competitive-collaboration’ relationship,¹⁴ courts have largely been anti-enforcement.

⁷ Article V of the Convention.

⁸ Opiya, ‘Recognition and enforcement of international arbitral awards’, 32.

⁹ Blackaby *et al*, *Redfern and Hunter on international arbitration*. See also Opiya, ‘Recognition and enforcement of international arbitral awards’, 14.

¹⁰ See Böckstiegel K, “Role of the state on protecting the system of arbitration”, CI Arb Centenary Conference, London, 3 July 2015.

¹¹ See Allsop CJ, “National courts and arbitration: Collaboration or competition? Courts and arbitration as partners in the international dispute resolution project”, CI Arb Centenary Conference, London, 3 July 2015.

¹² With the exception of Tanzania whose Arbitration Act does not reflect the ideals of the Model Law.

¹³ See Böckstiegel, “Role of the state on protecting the system of arbitration,” 2-3.

¹⁴ Allsop, “National Courts and Arbitration.”

2.0 Brief background on the East African Region

International commercial arbitration plays a crucial role in cross-border trade. Regional integration, which fosters harmonization and standardization of arbitration laws and procedures of enforcement of arbitral awards, can make this process to be even faster. However, there are a number of reasons as to why this has not been possible in the East African region. Firstly, Kenya, Uganda and Tanzania, the oldest members of the Community, inherited a common law heritage from the British while Rwanda and Burundi are civil law jurisdictions. With such a divergence of legal traditions, the process towards harmonization and standardization of arbitration laws is expected to be complex. Secondly, after the countries in the region attained independence, they took different political and economic ideologies. While Kenya was capitalist oriented, and Tanzania took the path of self-reliance and socialism,¹⁵ Uganda was under a dictatorship regime. Tanzania's emphasis on socialism, meant that it had little enthusiasm and interest on arbitration until it started to shift to privatization with the rise of capitalism.¹⁶ These ideological differences, amongst other factors, negatively contributed to the fall of the first regional framework, the East Africa Cooperation of 1967-1977. Such differences created suspicion and mistrust amongst member states forcing some to adopt protectionist tendencies.¹⁷ Narrow nationalistic tendencies meant to protect national interests at the expense of wider regional interests,¹⁸ can create an anti-arbitral awards-enforcement environment.

In light of the expected increase in international trade in the region, and possibility of increased disputes, there is need to harmonise arbitration laws to encourage investment by both foreigners and community members. Fostering commerce in the region will go a long way in the integration process by fostering a regional identity, strengthening the capacity of the region to trade competitively with other parts of the world as well as creating a more stable political economy. However, for all this to be achievable, there is need to assure the business community of a legal regime that is predictable and reliable thus providing the necessary certainty for long term investment. Part of this assurance is the knowledge that

¹⁵ Omoke G, 'The legal aspects of regional integration as a tool for development: A critical perspective of the challenges, realities and prospects of success of the East African Community,' 1 *University of Nairobi Law Journal* (2003), 239-240.

¹⁶ Mkata E, 'The recognition and enforcement of foreign arbitral awards: A need for reform of Tanzanian Legislation,' Postgraduate diploma in law thesis, University of Cape Town, 9 September 2014, 8.

¹⁷ Omoke, 'The legal aspects of regional integration as a tool for development,' 239-240.

¹⁸ *Ibid*, 242.

there is a clearly established mechanism of dispute resolution including that of enforcing international arbitral awards within the region.

3.0 East Africa's Regional Framework for Recognition and Enforcement of International Commercial Arbitration Awards

(a) East African Community Treaty

The Preamble to the East African Community Treaty¹⁹ indicates a wish by the member states to strengthen cooperation and trade in the region. So as to enhance trade within the region and to strengthen the East African Bloc as a trading region, the Treaty highlights one of the objectives of the Community as being the development of:

*“...policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.”*²⁰

Some of the fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States include mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; the *peaceful settlement of disputes* and co-operation for mutual benefit.²¹ To promote the Treaty objectives Article 5 of the Treaty urges Partner States to take steps to harmonise their legal training and certification; and encourage the standardisation of the judgments of courts within the Community.²² In addition, and through their appropriate national institutions, Partner States are to take all necessary steps to, *inter alia*, harmonise all their national laws (including arbitration laws) appertaining to the Community.²³ Article 47 of the Protocol on the Establishment of the East African Community Common Market further urges partner States to:

“...undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this protocol.”

The Treaty also establishes the East African Court of Justice,²⁴ and gives it jurisdiction to adjudicate over arbitration matters arising out of an arbitration clause in a contract giving the court such jurisdiction, or arising out of a dispute between partner states regarding the Treaty

¹⁹ Treaty for the Establishment of the East African Community, Adopted on November 30, 1999 at Arusha, Tanzania. Entry into force on July 7, 2000.

²⁰ *Ibid*, Article 5.

²¹ *Ibid*, Article 6.

²² *Ibid*, Article 126 (1).

²³ *Ibid*, Article 126(2) (b).

²⁴ *Ibid*, Chapter 8.

if the dispute is submitted to it under a special agreement between the Partner States concerned, or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.²⁵ Consequently, Rule 32 (3) of the Arbitration Rules of the East African Court of Justice provides that the:

*“Enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.”*²⁶

This provision assumes that member states laws on arbitration are pro-enforcement of international arbitral awards. It also fails to appreciate the divergent legislative approaches to arbitral law and practice. Successful enforcement of arbitral awards as envisaged in Rule 32(3) requires the harmonisation of both the substantive and procedural laws relating to arbitration within the Community.

(b) New York Convention²⁷

The New York Convention is the bedrock upon which international arbitration is founded. It is the most important international treaty in the recognition and enforcement of foreign arbitral awards. Most countries within the region have ratified the Convention or enacted legislation that substantially echoes its provisions.²⁸ The principal aim of the Convention is to ensure:

[T]hat foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.’

In addition, Article III of the Convention urges each Contracting States to:

“... recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (...) and that “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.”

²⁵ *Ibid*, Article 32.

²⁶ Rule 32 (3) of the Arbitration Rules of the East African Court of Justice.

²⁷ United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

²⁸ Some like Tanzania and South Sudan have arbitration laws that are largely not in line with the provisions of the Convention.

Article V (1) outlines the grounds upon which the recognition and enforcement of an award may be refused at the instance of the party against who it is invoked.²⁹ These grounds are that:

- (a) The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority 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; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or if the recognition or enforcement of the award would be contrary to the public policy of that country.³⁰ Whereas the procedural grounds safeguard the parties against private injustice, the substantive grounds may be used to frustrate the enforcement of foreign arbitral awards in the country's own interests. This is so because a court or the authority

²⁹ The grounds under Article V (1) are called procedural grounds and they can be raised by the parties. See Azizi R, 'Grounds for refusing enforcement of foreign arbitral awards under the New York Convention (A comparison of the US and sharia law)' April 20, 2010, SSRN <http://ssrn.com/abstract=1616746> on 8 September 2015.

³⁰ Article V (2). The Article V (2) grounds are called substantive grounds and may be raised by the parties or by the court *ex officio* while Article V (1) grounds are called procedural grounds.

presiding over the proceedings has the discretion to raise the substantive grounds to ensure that its national interests are safeguarded, for example on public policy grounds.³¹

Although the New York Convention has seen a remarkable success in the recognition and enforcement of foreign arbitral awards within the region, its ambit is somehow limited. Firstly, a state can make reservations to certain aspects of the Convention and make them inapplicable to it.³² Such reservations can be used to frustrate the recognition and enforcement of an arbitral award. Secondly, some states are not yet parties to the Convention and it might be difficult to enforce an award in those countries. Moreover, even where states have ratified the Convention some have not domesticated it.³³ Thirdly, the convention does not provide a detailed procedure on how recognition and enforcement can be dealt with in domestic courts and leaves that to the mercy of the local laws of a particular enforcing state. A successful party may therefore suffer injustice and even fail to enforce a foreign award where the domestic law is not pro-enforcement.³⁴ Some of the matters not dealt with by the Convention and that a party seeking enforcement must be informed of include, whether the award will be enforced by a court or which court; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement.³⁵ Such matters involve additional expenses in hiring local lawyers which might occasion unnecessary delay defeating the whole purpose of arbitration in the first place.

(a) UNCITRAL Model Arbitration Law³⁶

Most of the countries in the region³⁷ have arbitration laws that are based on the Model Law. The Model Law seeks to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration.³⁸ It aims at ensuring that the use of arbitration brings about greater predictability and certainty. To avoid uncertainty in arbitration laws, the Model Law outlines essential elements of a favourable legal framework for the conduct of

³¹ Opiya, 'Recognition and enforcement of international arbitral awards,' 48.

³² Article 1(3) of the Convention. Uganda for example by way of reservation restricted that it shall only recognise and enforce arbitral awards from member countries of the convention only.

³³ Check current number of member states that are parties to the Convention. See list of state parties at <http://www.newyorkconvention.org/list+of+contracting+states> accessed on 8 September 2015.

³⁴ Opiya, 'Recognition and enforcement of international arbitral awards,' 36.

³⁵ Rana, 'The Tanzania Arbitration Act,' 234.

³⁶ UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

³⁷ With the exception of Tanzania and Burundi.

³⁸ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, accessed on 8 September 2015.

arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal; jurisdiction of arbitral tribunal; conduct of arbitral proceedings; making of award and termination of proceedings; setting aside an arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement.

(b) The Washington Convention³⁹

The Convention applies to investment disputes between States and Nationals of other States. It seeks to encourage cross-border investments in developing states by providing an effective means of enforcing contractual rights. All the countries in the region are parties to the Washington Convention. Contracting parties to the Convention commit to enforce arbitral awards issued by tribunals under ICSID as if that award were a final judgment of its own courts. In essence, recognition and enforcement of ICSID awards is left to State parties and the process is to be governed by the local laws of the country in which recognition and enforcement is sought.⁴⁰ Some of the challenges that this might pose are that, firstly, some of the states parties to the convention especially the developing countries may not have up to date legislation to deal with enforcement and recognition of the awards. And secondly, state parties may abuse the discretion left to them to frustrate the enforcement process. It has been suggested that ICSID should develop a framework for the recognition and enforcement of awards instead of leaving it to the local jurisdiction which might lead to unnecessary delays and abuses.⁴¹

A recent decision of the Tanzanian High Court, demonstrates potential risks to parties seeking to rely on the protections of the ICSID regime. In *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company*,⁴² the Tanzanian High Court issued an injunction ordering the parties to an ICSID arbitration against Tanzania to refrain from 'enforcing, complying with or operationalising' the ICSID tribunal's 'Decision on Jurisdiction and Liability' of 12 February 2014. The court's order appears to have violated Tanzania's obligation under the ICSID Convention to enforce any ICSID award as a final judgment of its own courts. If the injunction is not lifted before the tribunal issues an award on damages, there is a risk that the investor will not be able to enforce that award in Tanzania. Such an

³⁹ The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States.

⁴⁰ Article 54 (2) requires a state to designate a court to deal with an enforcement procedure and this might involve budgetary issues to facilitate the personnel of such a court which some states might not be able leave alone willing to expeditiously carry out.

⁴¹ Opiya, 'Recognition and enforcement of international arbitral awards,' 41.

⁴² ICSID Case No. ARB/10/20.

approach by a court poses serious concerns for potential foreign investors about Tanzania's willingness to comply with its obligations under the ICSID Convention.

(c) Domestic Arbitral Laws

(i) Tanzania

The main law on arbitration in Tanzania is the Arbitration Act (Cap. 15 Revised Edition 2002). This law is not based on the UNCITRAL Model Law. Tanzania is also party to a number of international instruments on arbitration including the 1923 Geneva Protocol; the Geneva Convention on the Execution of Foreign Arbitral Awards, which came into force on 26 September 1927; the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which came into force on 10 June 1958; and the Washington Convention of 1965. Before the enactment of the Arbitration Act of 2002, arbitration in Tanzania was governed by the Arbitration Ordinance of 1931. The inability of the Ordinance to cope with the increasing demand for arbitration in commercial disputes, provided the basis for its revision by the Arbitration Act of 2002.

In Tanzania, a successful party can enforce a foreign award by relying upon the provisions of sections 17 and 29(1) of the Arbitration Act. These provisions state that a foreign award shall be enforceable in the high court either by action or as if it were a court decree. Therefore, a successful party who is desirous of executing foreign awards in Tanzania is required to request the arbitral tribunal to file the award, or cause it to be filed in court.⁴³

According to Mkata, the Act has failed in respect of the recognition and enforcement of foreign arbitral awards compared with domestic arbitral awards.⁴⁴ This contravenes Article III of the New York Convention. Makaramba observes that existing legislation including the Arbitration Act and the civil procedure (arbitration) rules, are mainly geared towards domestic arbitrations.⁴⁵ The Arbitration Act does not make a distinction between domestic and foreign awards as it brings their filing, recognition and enforcement under one umbrella creating much confusion among practitioners.⁴⁶ Rashda Rana makes the following observation regarding the Tanzanian Arbitration Act:

“It is unfortunate that despite the recent amendments to the Arbitration Act being brought into effect after the UNCITRAL Model Law was promulgated, the legislature

⁴³ Mkata, ‘The recognition and enforcement of foreign arbitral awards,’ 11.

⁴⁴ *Ibid*, 8.

⁴⁵ Makaramba J, ‘Curbing delays in commercial resolution: Arbitration as a mechanism to speed up delivery of justice,’ *The United Republic of Tanzania the Judicial Round Table Discussion*, 20 July 2012, 21.

⁴⁶ *Ibid*, 18.

did not see fit to reflect in it the Model Law. Rather the Arbitration Act still contains archaic provisions dealing with the arbitral process, those that have been given up by many jurisdictions in favour of current best practices and more effective means. For example, the Arbitration Act still refers to the Geneva Protocol on Arbitration Clauses 1923...and despite the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 coming into force in 1965 in Tanzania, the Arbitration Act still refers to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927...’’⁴⁷

Problems facing the recognition and enforcement of foreign arbitral awards are largely due to a failure by the Arbitration Act to give force to the provisions of the New York Convention which Tanzania ratified more than 47 years ago.⁴⁸ Some of the problems in enforcing foreign arbitral awards include: First, the fact that the Act provides the grounds for ‘*resisting the enforcement of a foreign award*’⁴⁹ and for ‘*contesting the validity of the award.*’⁵⁰ Having two sets of grounds for contesting foreign arbitral awards has been described as one of ‘the most disturbing aspects of the Arbitration Act,’⁵¹ and is against the New York Convention which has narrowed the grounds for refusing recognition and enforcement of foreign arbitral awards. The effect of a party successfully resisting the enforcement of the award is for the court either to refuse to enforce the award or adjourn the hearing until after the expiry of reasonably sufficient period of time to enable the party to take the necessary steps to have the award annulled by a competent tribunal.⁵² First, it imposes the burden of proof on the applicant who wishes to execute such awards in Tanzania. It also obliges the applicant who is the successful party in arbitration to tender afresh the evidence upon which he or she relied on in the arbitration on a matter already settled by a competent tribunal, thus occasioning unnecessary delay and expense in the enforcement of foreign arbitral awards.

Secondly, for a foreign arbitral award to be enforced in Tanzania, it must be final in the place it was made meaning that it should not be open to opposition, appeal or *pourvoir en cassation* in the country where such forms of procedure exist, or if any proceedings for the purpose of contesting its validity are pending. This imposes a burden on the successful party seeking enforcement in Tanzania to tender prove of a leave of enforcement know as

⁴⁷ Rana, ‘The Tanzania Arbitration Act,’ 229-237.

⁴⁸ Makaramba, ‘Curbing delays in commercial resolution,’ 18.

⁴⁹ Section 30(1)(a)-(e).

⁵⁰ Section 30(2)(a)-(c).

⁵¹ Makaramba, ‘Curbing delays in commercial resolution,’ 21.

⁵² *Ibid*, 21.

exequatur, or any like document issued by the court of the country of origin where such award has been made evidence. Moreover, it affords the unsuccessful party a loophole for obstructing the finality of the award by filing proceedings to contest its validity in the country where it has been made.⁵³

Thirdly, a foreign arbitral award that is to be enforced in Tanzania must not be made contrary to the principles of the law of the forum state.⁵⁴ It is posited that this provision invites Tanzanian courts to engage in a full merits review, in line with substantive laws, to determine whether the award was in conformity with the laws of the United Republic of Tanzania or not.⁵⁵ The fact that an award made in another state has to conform to the law of the forum state creates fora for Tanzanian courts to refuse to recognize and enforce foreign arbitral awards.

Fourthly, for a foreign arbitral award to have legal validity so as to be enforceable in Tanzania, such an award must have been made in pursuance of an arbitration agreement which was valid under the law governed.⁵⁶ However, the current Tanzanian Arbitration Act does not only neglect to stipulate the definition and form of ‘arbitration agreement’, it also does not define other terms, such as ‘foreign awards’, and does not portray how such awards are to conform to the new developments in laws governing commercial arbitration worldwide, especially the Model Law of 2006. The other challenge in Tanzania is whether Tanzanian courts can enforce the provisions of the New York Convention when the same has not been legislated in the Arbitration Act. It is not yet settled whether recourse should be had by Courts to private international law principles to interpret a local statute dealing with private law matters in the course of enforcement and recognition of a foreign arbitral award.⁵⁷

With such an arbitration framework, business people cannot have confidence in dispute resolution processes available to them for the speedy and effective resolution of disputes and enforcement of awards.⁵⁸ One effect of the Tanzanian arbitration law is that it makes it difficult to enforce international arbitral awards,⁵⁹ as it also affords courts great procedural opportunities for interfering with the conduct of arbitral proceedings and the ensuing award. Mashamba argues that court intervention does not amount to an appeal

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Mkata, ‘The recognition and enforcement of foreign arbitral awards,’ 13.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 17.

⁵⁸ Rana, ‘The Tanzania Arbitration Act’, 236.

⁵⁹ Ringo F, ‘Development of alternative dispute resolution mechanisms in EA: A case for enforceable non-court mediated settlement agreements,’ *The East African Lawyer*, 15 (2009), 18-21.

against the decision of the arbitral tribunal because there is no right of appeal to the losing party, but it simply amounts to overturning of the arbitration outcome.⁶⁰ Section 16 of the Arbitration Act makes this point more explicit by providing that:

“Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award.”

In *Tanzania Electric Supply Company Ltd v Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)* Mushi J observed that the intervention by the court in section 16 of the Act ‘is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts.’⁶¹ However, Mushi J dismissed the petition as it sought to resist the enforcement of an ICC award on the grounds, *inter alia*, that its enforcement is contrary to public policy. At page 88 of the judgment, the Judge construed the grounds narrowly so as to enforce the ICC award and noted that:

“...I find it would not be proper for this court to interfere with the findings of the ICC’s Arbitral Tribunal, for, in doing so, it would amount to re-opening and re-arguing of the issues of fact and issue of law that the parties, by their own agreement, submitted to the ICC Arbitral Tribunal for its consideration and decision.”

Further, the judge noted that since the finality and binding nature of arbitral awards is already envisaged under the Tanzanian Civil Procedure Code and the Arbitration Act, the public policy was in favour of finality of arbitral awards. He thus noted as follows:

“Therefore, it is my decided opinion that, it is one aspect of our ‘public policy’ towards the need to having finality of disputes and arbitral commercial awards. It is my hope that, both the parties (and GOT, for that matter) in this Petition, would receive that simple message.”

It is, therefore, argued that the continued use of the archaic and obsolete provisions of the Arbitration Act and the Civil Procedure (Arbitration) Rules under the Tanzanian Civil Procedure Code continues to contribute to the narrow scope and nationalistic tendency of the arbitral law with a negative effect on international commercial arbitration.⁶²

(ii) Kenya

Recognition and enforcement of foreign arbitral awards in Kenya is largely regulated by the Arbitration Act and the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The

⁶⁰ Mashamba C, *Alternative Dispute Resolution in Tanzania-Law and Practice*, Mkuki na Nyota Publishers, Dar es salaam, 2014, 152.

⁶¹ High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

⁶² Makaramba, ‘Curbing delays in commercial resolution,’ 25.

Arbitration Act is based upon the UNCITRAL Model law and thus allows for the recognition of foreign arbitral awards. Sections 36 and 37 of the Arbitration Act of Kenya give equal treatment to foreign and domestic awards in terms of their recognition and enforcement. This is in line with Article III of the New York Convention. Similarly, the grounds for refusal of recognition and enforcement of foreign awards under the Kenyan Arbitration Act are similar to those outlined in the New York Convention. However, under the Kenyan Arbitration Act additional grounds are available for the refusal of recognition and enforcement of arbitral awards if the granting of the award was induced or affected by fraud, bribery, corruption or undue influence.⁶³ Such modifications are not in line with the New York Convention which limits the grounds for refusing to recognise and enforce foreign arbitral awards. They also afford courts more fodder for refusing to recognise and enforce foreign arbitral awards. Withal, the High Court⁶⁴ has opined that the recognition and enforcement of arbitral awards (both domestic and foreign) is automatic under the provisions of section 36 of the Act and can only be refused if the party against whom it is sought is able to satisfy the requirements of section 37 of the Arbitration Act.

In addition, foreign arbitral awards that are against Kenyan public policy cannot be enforced by Kenyan courts. The ambiguity surrounding the definition and scope of public policy exception gives municipal courts a blank cheque to refuse the recognition and enforcement of foreign awards. In some instances, courts in the region, like in the case of *Tanzania Electric Supply Company Ltd (supra)* have interpreted the public policy exception narrowly and restrictively so as to enforce an arbitral award. The decision of Ringera J (as he then was) in *Christ for All Nations v Apollo Insurance Company Ltd*⁶⁵ offers useful parameters for assessing whether a foreign arbitral award can be refused recognition and enforcement in Kenya. The learned Judge opined that an award would be inconsistent with the public policy of Kenya if it was shown that it was either:

“...(a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity

⁶³ Section 37(1)(a)(vii), Arbitration Act (Chapter 49 Laws of Kenya).

⁶⁴ *Tanzania National Roads Agency v Kundan Singh Construction Limited* Miscellaneous Civil Application No. 171 of 2012.

⁶⁵ [2002] 2 EA 336 (CCK).

of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.”

Because the Kenyan Arbitration Act unlike the Tanzanian Act is founded on the UNCITRAL Model Law, which puts emphasis on the concept of finality in arbitration,⁶⁶ Kenyan courts have endeavored to avoid interfering with arbitral processes as a matter of public policy. The principle of finality in both domestic and international arbitration, and limited court interference is illustrated by a number of decisions from Kenyan courts. In *Anne Mumbi Hinga v Victoria Njoki Gathara*,⁶⁷ the Court emphatically made the following observation;

“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act.”

Earlier on in the case of *Prof. Lawrence Gumbo & another v Hon. Mwai Kibaki & Others*,⁶⁸ Nyamu J (as he then was) took the following view:

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally.”

In *Kenya Shell Limited v Kobil Petroleum Limited*⁶⁹ the court pointed out that the spirit of sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Arbitration Act aims at achieving finality of disputes and a severe limitation of access to the courts. Omolo, Waki & Onyango Otieno, JJ.A thus observed:

“We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the arbitration Act under which the proceedings in this matter were conducted underscores that policy.”

⁶⁶ See generally Article 5 of the UNCITRAL Model Law which provides that ‘no court shall intervene except where so provided in law.’ Section 10 of the Kenyan Arbitration Act is couched in similar terms.

⁶⁷ Civil Appeal No. 8 of 2009.

⁶⁸ High Court Miscellaneous No. 1025 of 2004.

⁶⁹ Civil Application Nairobi No. 57 of 2006.

A common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Act.⁷⁰ The Court of Appeal in *Tanzania National Roads Agency v Kundan Singh Construction Limited* was faced with the issue whether it had jurisdiction to hear an appeal against the Order of the High Court made in exercise of powers under section 37 of the Act and what constitutes the public policy of Kenya.⁷¹ On jurisdiction, the Court of Appeal held that jurisdiction regarding the recognition and enforcement of arbitral awards is vested in the High Court. Article 164(3)(a) of the Constitution gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. There is a clear distinction between jurisdiction or power to hear and determine an appeal which is vested in the court and a right to appeal which is vested on a litigant. In this case, the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the Arbitration Act and rules which regulate the procedure in arbitration matters. Although the Arbitration Act provides a right of appeal in the case of domestic arbitral awards, it does not provide any right of appeal in the case of international awards.

The appellant can only find respite if there is a right of appeal under UNCITRAL Model Law which governs international commercial arbitration and to which Kenya is a signatory. In respect of recognition and enforcement of international arbitral awards, the UNCITRAL Model Law, like the Arbitration Act only provides a one-step intervention in a ‘competent’ court. The court proceeded to note that in this case, the ‘competent court’ is the High Court which is the one vested with powers under sections 36 and 37 of the Arbitration Act to determine applications for recognition and enforcement of international arbitral awards. The court concluded that no further right of appeal has been provided for thereby curtailing the intervention of the court.

Similarly, the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited*⁷² has held recently that none of the parties can appeal against the setting aside ruling of the High Court. Mwera J stated as follows in that case:

“My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for

⁷⁰ See *Anne Mumbi Hinga v Victoria Njoki Gathara* Civil Appeal No. 8 of 2009. See also *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR.

⁷¹ Court of appeal at Mombasa in Civil Appeal No. 38 of 2013, *Tanzania National Roads Agency v Kundan Singh Construction Limited*.

⁷² [2015] eKLR.

determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators' award shall be final, it can be taken that as long as the given award subsists it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own (sic). None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so."

The court appears to be saying that even the decision of the High Court on setting aside is the parties' and they have an obligation to abide by it to curb the perpetual interference by courts in arbitration through appeals.

(iii) Uganda

The Uganda Arbitration and Conciliation Act⁷³ is the principal legislation dealing with domestic and international arbitration including the recognition and enforcement of arbitral awards. The law has been described as out-dated and in urgent need of overhaul as it does not reflect the present circumstance of Uganda's arbitration regime.⁷⁴ Part II and III of the Act provide for the recognition and applicability of New York and ICSID Conventions in Uganda in so far as recognition and enforcement of foreign arbitral awards is concerned.⁷⁵ A New York Convention award is enforceable as if it were a local arbitration award made within Uganda. Section 42 of the Act refers us to section 35 which provides the procedure of enforcing local arbitral awards in Uganda. Section 35(1) provides that an arbitral award shall be recognised as binding and upon application in writing to the court shall be enforced subject to the exceptions as provided in the section.⁷⁶

(iv) Rwanda

Rwanda began its move towards acceding and adopting laws on international commercial arbitration not so long ago. In fact, arbitration was effectively recognized in 2008 through Law N° 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters. This law is based on the UNCITRAL Model Law. Again on 3rd November 2008, Rwanda acceded to the New York Convention, becoming the 143rd State Party to the

⁷³ Chapter 4 Laws of Uganda, 2000 Edition.

⁷⁴ Opiya, 'Recognition and enforcement of international arbitral awards,' 17.

⁷⁵ *Ibid*, 17.

⁷⁶ *Ibid*.

Convention.⁷⁷ The Convention entered into force on 29th January 2009.⁷⁸ In 2010, the country enacted a law⁷⁹ establishing the Kigali International Arbitration Centre and determining its organization, functioning and competence. And, in 2012 through a Ministerial Order,⁸⁰ the country formulated arbitration rules for the Kigali International Arbitration Center. Being a party to the New York Convention enables the KIAC arbitral Awards to be enforced in any other country that is signatory to the Convention.

The country recognizes and enforces awards made in countries that recognize and enforce awards made in Rwanda under the provisions of Article 50 of the 2008 Law on Arbitration and Conciliation in Commercial matters.⁸¹ Article 50 provides as follows:

“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and without prejudice to provisions of this Article as well as Article 51 of this Law. However, this shall not be respected if the country in which the award was issued does not respect the provisions of this paragraph with reference to cases decided in Rwanda.”

Regarding the procedure for seeking recognition and enforcement of foreign arbitral awards, Article 50 stipulates that:

“The party relying on an award taken or applying for its enforcement shall supply the duly authenticated original award or its duly certified copy, an copy original arbitration agreement referred to in Article 9 of this Law or its duly certified copy. If the award or agreement is not made in an official language of the Republic of Rwanda, the party shall supply a translated copy in one of the recognised languages in Rwanda.”

The grounds for refusing the recognition and enforcement of arbitral awards in Rwanda are similar to the ones listed in the New York Convention.⁸² One advantage with Rwanda is that the judiciary follows a pro-arbitration policy, which includes, for instance, prioritizing arbitration related matters and handling them in a timely manner. This is likely to expedite enforcement of foreign arbitral awards and attract more trade and investments to Rwanda. Rwanda is also regarded as an independent and neutral arbitration venue as it is politically stable with well-functioning institutions, rule of law and zero tolerance for corruption.

⁷⁷ Available at <http://www.unis.unvienna.org/unis/pressrels/2008/unisl123.html>, accessed on 16/07/2015.

⁷⁸ *Ibid.*

⁷⁹ Law No. 51/2010 of 10/01/2010.

⁸⁰ No16/012 of 15/05/2012.

⁸¹ Leonard Sebucensha, national and international arbitration in Rwanda, in Hartmut Hamann and Emmanuel Ugirashebuja (eds.), *Africa Law Study Library Vol. 18, Rule of Law Program for Sub-Saharan Africa*, 2013.

⁸² See generally Article 51 of Law N° 005/2008 on Arbitration and Conciliation in Commercial Matters.

According to the 2012 Corruption Perceptions Index (CPI), Rwanda was ranked 4th in Africa and 1st in East Africa for fighting corruption and the 3rd easiest country to do business in according to the 2012 ‘World Bank Doing Business’ report.⁸³

4.0 Other Challenges in Recognition and Enforcement of Arbitral Awards

(a) Different Legal Systems and Legislative Approaches

As highlighted elsewhere in this contribution, the countries of the East Africa region have different legal traditions, which is largely due to their colonial history. While Kenya, Tanzania and Uganda follow the common law system, Rwanda and Burundi are civil law systems. This can present difficulties in arbitration. Common law and civil law approaches differ significantly. In arbitration, between a party from a common law country and one from a civil law country, the parties may see disclosure or production of documents differently. The party from a common law jurisdiction is likely to favour a great deal of discovery than the civil law party.⁸⁴

It is argued that difficulties are bound to arise when it comes to settlement of international commercial disputes due to divergence of national legal procedures and practices.⁸⁵ Kariuki argues that differing procedural rules and practices, for example when it comes to the timeframes for approaching the court to set aside an award among the member states are a threat to international arbitration. In Uganda, the law stipulates that an application to set aside an arbitral award cannot be made after one month has lapsed since the date when the party making that application received the arbitral award. In Kenya, the Arbitration Act sets the period for a similar application at three months.

Moreover, a cursory look at the arbitral laws of the countries in the region reveals that not all of them have adopted an attitude that is pro-enforcement of arbitral awards. And although most of them have ratified the New York Convention and have adopted the Model Law, their legislative approaches to enforcement of foreign arbitral awards vary. Moreover, even where the countries have ratified the New York Convention, in most cases it is not implemented and applied in a pro-enforcement manner. It is apparent that the ratification and adoption of the New York Convention without more is not enough, and there is need for domestic courts and judges to be sufficiently informed, educated and willing to apply such

⁸³ Annual Report 2013-2014, Kigali International Arbitration Centre-Efficiency in Disputes Resolution, available at <http://www.kiac.org.rw/IMG/pdf/-5.pdf>, accessed on 09/09/2015.

⁸⁴ Ramsey V, “National Courts and Arbitration: Collaboration or competition? The Courts as Competitors of Arbitration,” CI Arb Centenary Conference, London, 3 July 2015.

⁸⁵ Muigua K, ‘Building legal bridges: Fostering Eastern Africa integration through commercial arbitration’ 3 *Alternative Dispute Resolution* 1 (2015), 45.

rulings in practice.⁸⁶ A party seeking the enforcement of foreign awards must therefore understand the relevant arbitral law and practice in the country of enforcement.⁸⁷ It is also reported that there are few court decisions on enforcement of foreign arbitral awards.⁸⁸ As pointed out earlier, some of the grounds for refusing recognition and enforcement of arbitral awards are unclear and ambiguous thus offering national courts an opportunity to refuse to recognise and enforce foreign awards. Resultantly, this can put off potential investors and by extension slow down growth and development of international commercial arbitration in the region.⁸⁹

In relation to Uganda, the Arbitration and Conciliation Act⁹⁰ makes provision for enforcement of both domestic and foreign arbitral awards. However, even though the Act outlines the grounds for setting aside an arbitral award, it does not provide the grounds on which the recognition and enforcement of an award may be refused.⁹¹

Diversity and variance in arbitration law approaches is a challenge even to the integration process as it slows down the work of harmonising and standardising the different municipal laws with the Community's spirit. For example, it is asserted in the case of Burundi, that its code does not contain provisions harmonising it with the regional initiatives to reflect Burundi's entry into the Community.⁹² Further, the different procedures and legislative practices in the legal systems give priority to national interests over those of the community. This has been a great impediment to meeting the set timelines.⁹³

⁸⁶ Böckstiegel K, "Role of the state on protecting the system of arbitration," p. 3.

⁸⁷ Finizio S, Morris D and Drage K, 'Enforcing arbitral awards in Sub-Saharan Africa-Part 1, 7 July 2015 https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/enforcing-arbitral-awards-in-sub-saharan-africa-part-1-lexispslarbitration.pdf on 7 September 2015.

⁸⁸ *Ibid.*

⁸⁹ See for example in the case of Kenya, Muigua K, 'Role of the court under Arbitration Act: Court intervention before, pending and during arbitration in Kenya,' 1 March 2010 <http://kenyalaw.org/kl/index.php?id=1923> on 7 September 2015.

⁹⁰ Chapter 4 Laws of Uganda, 2000 Edition.

⁹¹ Oppong R, *Private International Law in Commonwealth Africa*, Cambridge University Press, Cambridge, 2013, 414.

⁹² United Nations Conference on Trade and Development, Unofficial, edited translation of Chapter IV of the Investment Policy Review of Burundi (French original), 2010, p.4. http://unctad.org/en/docs/diaepcb200917ch4_en.pdf on 8 September 2015.

⁹³ Agaba S, Regional Harmonization of Commercial Laws: Opportunities and Implementation Challenges, The Network of Reformers Conference, available at https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/steven-agaba-regional-harmonization-of-commercial-laws-opportunities-and-implementation-challenges-_detailed_.pdf on 8 September 2015.

(b) Private International Law Problems

Private international law allows for the co-existence of multiple legal regimes and provides dispute resolvers with requisite tools for determining which municipal law to apply in a given context. Private international law comes in handy in a region that is yet to fully harmonise its arbitration laws. It provides a basis for determining the extent to which a country's municipal laws can engage with other legal systems, municipal and international. Application of private international law will not only provide a level of certainty in commerce and dispute resolution therein, but also a predictable business environment. Nonetheless, Oppong notes that Africa as a whole has not fully participated in the development of private international law compared to other regions of the world.⁹⁴ As such, there has not been a real appreciation of the role that it can play in regional integration and especially in dispute resolution and the enforcement of international arbitral awards. This has been experienced in East Africa where despite the ratification and accession to the Treaty, there is still lack of harmonisation of laws to facilitate commerce and dispute resolution. Some of the challenges facing harmonisation in the Kenyan context include poor coordination at the national level, competing government interests, sectoral interests, inadequate resources and the fact that approximation/harmonisation of laws is not a priority to most government agencies.⁹⁵ As a result, national courts and the regional tribunals play a more significant role in applying conflict of laws rules in dispute resolution. This state of affairs may also lead to a situation where arbitral tribunals are left with the task of ascertaining applicable laws in arbitration by applying the choice of laws rules of different countries. Application of the choice of law rules of a country may lead to a law that was not intended by the parties thus undermining party autonomy.

(c) Different Levels of Development

Moreover, the fact that the countries of the region are at different levels of economic and legal development presents a challenge in them harmonising and synchronising their national laws to reap the benefits of integration. There is also the fear among some partner states that uniformity of laws will not be in their national interests. By extension, this affects

⁹⁴ See Oppong R, 'Private international law in Africa: The past, present and future,' 55 *The American Journal of Comparative Law* (2007), 677.

⁹⁵ Okello J, Approximation/harmonization of laws: Kenyan context, EAC Network of Reformers Conference, Arusha, 06-07 August 2012 https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Presentation-on-EAC-Legal-Harmonization-in-Kenya_Johnson-Okello.pdf on 8September 2015.

the practice of international commercial arbitration as individual countries' arbitral laws are seen to adopt a protectionist approach that may favour local investors. Consequently, foreign arbitral awards may not be recognised and enforced if in conflict with local interests.

(d) Public Policy

Public policy is one of the grounds for setting aside and refusal of recognition and enforcement of arbitral awards under the New York Convention. However, the Convention does not define what public policy is. Uncertainty and ambivalence surrounding the scope of applicability and meaning of this doctrine presents one of the main obstacles to the recognition and enforcement of foreign arbitral awards. According to Buchanan:

*“Public Policy is the final parameter of the law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitutions are silent.”*⁹⁶

It, therefore, follows that public policy issues transcend what is provided in national constitutions and statutes, to matters where the law is silent. There are therefore aspects of public policy that the law may not provide for, yet they are embodied within the concept of public policy.⁹⁷ A court in enforcing foreign arbitral awards has a duty to always adopt a narrow and much stricter approach when interpreting public policy to avoid upsetting cardinal principles of arbitration such as party autonomy and finality of awards. Such a strict and narrow interpretation of public policy issues by courts is informed by the fact that most courts would want to ‘give respect to the enforcement of arbitral awards, party autonomy, sensitivity to the international system and the desire for finality’.⁹⁸

Courts have pronounced themselves on the potential difficulties in defining public policy in Kenya.⁹⁹ In some jurisdictions, public policy has been defined to include both substantive and procedural matters making it a most broad concept¹⁰⁰ for refusing to recognize and enforce arbitral awards. It remains to be seen how courts in the region will treat public policy in the enforcement of foreign arbitral awards. Some countries such as Rwanda have

⁹⁶ Buchanan M, ‘Public policy and international commercial arbitration,’ 26 *American Business Law Journal* (1988), 511-513.

⁹⁷ *Ibid.*

⁹⁸ Choi S, ‘The interaction between national courts and international tribunal’ *New York University Journal of International Law and Politics*, Symposium Issue (1995), 124.

⁹⁹ See *Christ for All Nations v Apollo Insurance Company Ltd* [2002] 2 EA 336 (CCK), discussed earlier.

¹⁰⁰ Whittaker J, ‘Principles relating to public policy in the International Arbitration Act, 29 November 2012 <http://www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/> on 7 September 2015.

defined the public policy exception in a broader manner than under the Model Law thus risking encouraging courts to refuse to enforce foreign arbitral awards.¹⁰¹ Under Rwandan law,¹⁰² courts may refuse to enforce an award that is in conflict with Rwanda's public security. Public security is not defined and it is unclear the extent to which a court may go in determining whether security matters should act as a bar to enforcement. This creates uncertainty and ambiguity when it comes to the enforcement of foreign arbitral awards. An investor seeking recognition and enforcement of an award is thus never sure whether a particular municipal court might adopt a reasoning whose effect would be to annul an award or not.

(e) Arbitrability

Where the subject matter of arbitration is not capable of settlement by arbitration under the applicable law, a court may on its own motion or upon being moved by a party refuse to recognise and or enforce an award on the basis of non-arbitrability.¹⁰³ Van Den Berg argues that this ground is superfluous as the arbitrability of a subject matter is generally regarded as forming part of the general concept of the public policy of a country.¹⁰⁴ Arbitrability can therefore, afford national courts an opportunity to refuse the recognition and enforcement of foreign arbitral awards. In Kenya, for instance it is argued that the concept of arbitrability has been widened under the Constitution of Kenya 2010 which allows for the use of ADR processes in a wide array of disputes.¹⁰⁵ Although widening the scope of arbitrability is a welcome thing, defining and setting out clearly the matters that are arbitrable is important to avoid non-refusal of recognition of arbitral awards on grounds of non-arbitrability.

(f) Role of Courts in the Recognition and Enforcement of Foreign Arbitral Awards

According to Karrer, the success of international arbitration is largely dependent on how well the arbitration law at the seat is applied by the national courts at that seat. It is, therefore, germane to ask the questions: how good will national courts be? How many national courts may be involved? How long will it take? How experienced will it be for a

¹⁰¹ Finizio S, Morris D and Drage K, 'Enforcing arbitral awards in Sub-Saharan Africa-Part 1.

¹⁰² See Articles 47 and 51 of Law No. 5/2008 relating to Arbitration and Conciliation in Commercial Matters.

¹⁰³ Article V ((2) (a), UNCITRAL Model Law.

¹⁰⁴ Van den Berg A, 'The New York Convention of 1958: An Overview' Year Book Vol. XXIII (2003), 49.

¹⁰⁵ See Kariuki F 'Redefining 'arbitrability:' Assessment of articles 159 & 189 (4) of the Constitution of Kenya,' 1 *Alternative Dispute Resolution Journal* 1 (2013), 174-188.

foreign party to litigate before the state court?¹⁰⁶ As already mentioned, courts within the region have not been uniform in construing the refusal grounds. At times, courts have interpreted the refusal grounds broadly to deny the recognition and enforcement of foreign arbitral awards. Nonetheless, there is progressive arbitral jurisprudence from courts within the region which tends to uphold finality of arbitral awards as a matter of public policy.

(g) International Arbitral Institutions

East Africa is experiencing growth in international trade and investments which has led to an increase in international arbitration institutions. Kenya and Rwanda have already established international centres for arbitration, Nairobi Centre of International Arbitration and the Kigali International Arbitration Centre respectively. The challenge is that most of these centres have been set up by the governments of the respective states and may be seen as promoting national as opposed to international interests. Moreover, their setting up is not coordinated to address issues of international arbitration from a common standpoint. They may thus be seen as competitive rather than collaborative.

The East African Court of Justice is vested with arbitration jurisdiction. The Court has issued rules on the conduct of arbitration.¹⁰⁷ However, it does not provide a robust facilitative regional judicial system for the resolution of cross-border commercial disputes. It faces capacity, outreach and visibility pit falls demonstrated by the low number of commercial dispute references it receives.¹⁰⁸ It has also not had an opportunity to address conflict of law questions when it comes to enforcement of foreign arbitral awards.

(h) State Immunity

State Immunity ‘is the protection given to a state from being sued in the courts of other states.’¹⁰⁹ The doctrine stems from the notion of sovereign equality of states under international law that a sovereign state cannot be compelled to submit to the jurisdiction of and be judged by another state. Although state immunity is not a ground of the refusal under the New York Convention and the Model Law, it is often advanced by unsuccessful parties

¹⁰⁶ Karrer P, “The Model Law or Our Own? A choice between two Good things,” CIArb Centenary Conference, London, 9th February 2015, pp. 3-4.

¹⁰⁷ East African Court of Justice, Rules of Arbitration, Arusha, Tanzania, March 2012.

¹⁰⁸ Byenkya T, Harmonization of commercial laws in the East African Community: East Africa law society perspectives, 6 August 2012, available at https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Presentation-on-EAC-Legal-Harmonization-EALS_Tito-Byenkya.pdf on 8 September 2015.

¹⁰⁹ Reilly F, State Immunity and arbitration’ Norton Rose LLP Practice Notes available at <http://arbitration.practicallaw.com/2-318-7956?q=&qp=&qe=> accessed 4/9/2012

who are either a sovereign state or a state agency.¹¹⁰ As such, where the unsuccessful party is a sovereign state or a state agency, the defence of sovereign or state immunity can be raised to claim both jurisdictional and immunity from execution as both the New York and ICSID conventions do not prohibit the same.¹¹¹

(i) Partner States' being Members of other Regional Groupings

It is, noteworthy, that member states of the East African community are parties to different regional groupings. Membership to a multiplicity of regional groupings can be a threat to regional integration, especially looked from a legal perspective. Being members of different trans-national organizations creates antagonistic tension between the partner states' commitments to the Community and their commitments to these other regional organisations.¹¹² There can be no satisfactory harmonization of tariff and non-tariff barriers in the Community; when the Partner States are adopting vastly different schemes under other regional frameworks. It is rightly suggested that Partner States ought to come to a consensus whereby they will all be members of the same regional blocks or agree to approximate and harmonize their laws.¹¹³ This can ensure that they adopt similar arbitral laws and procedures especially in the recognition and enforcement of foreign arbitral awards. In the case of the EAC states, Tanzania is a member of SADC¹¹⁴ while Uganda, Kenya, Burundi, Rwanda and South Sudan are members of COMESA¹¹⁵ meaning that they have to follow commitments under these schemes.

(j) Persistent Conflicts

Persistent conflicts in some parts of the East Africa region also portend a major threat to international commercial arbitration, especially the enforcement of foreign arbitral awards. An economy cannot thrive in an atmosphere of conflicts. Similar, regional cooperation including in the area of harmonising laws dealing with arbitration cannot be feasible.

¹¹⁰ Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, ' 622.

¹¹¹ *Ibid*, 666.

¹¹² Lumumba PLO, 'The East African Community two: Destined to succeed or doomed to fail?' 5 *Law Society of Kenya Journal* 1 (2009), 105-132.

¹¹³ *Ibid*, 127.

¹¹⁴ See the Member states of the Southern African Development Community at <http://www.sadc.int/member-states/>, accessed on 8 September 2015.

¹¹⁵ See COMESA member states at http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121, accessed on 8 September 2015.

5.0 Conclusion and Way Forward

The paper set out to highlight the challenges a successful party may encounter in seeking the recognition and enforcement of a foreign arbitral award. It is clear from the discussion, that in spite of the role of international arbitration in fostering international trade and investment in the region, arbitration laws of the countries within the region are not facilitative of international commercial arbitration, especially in recognition and enforcement of foreign arbitral awards. Some countries still have out-dated and archaic colonial arbitral laws that are not adequate in the 21st century commercial world. It is also evident that even where countries have ratified the UNCITRAL Model Law and the New York Convention, their arbitration laws do not conform to their letter and spirit. The effect is that national courts have had numerous opportunities to interfere with the arbitral process and to refuse to recognise and enforce foreign awards, negatively affecting the flow of trade and investments. It is recommended that there is need for all countries in the region to base their arbitration laws on the Model Law and to fully implement the New York Convention. Further, courts have a crucial role in upholding the finality of arbitral awards by recognising and enforcing them as a matter of public interest.

Courts, both national and international, hold the sway in promoting arbitration. As pointed out by Chief Justice Allsop courts must be international in outlook, commercial in skill and arbitration sympathetic. An international outlook requires an attitude or state of mind of judges, of court administrators and officers, and of practitioners to welcome and encourage foreign commercial parties to the jurisdiction. The Court must be commercial in its focus, skills and approach. This requires that the judges handling arbitral proceedings (whether support, supervision or enforcement) understand the commerce involved in the substantive dispute. The court must understand arbitration in the sense of not merely knowing about arbitration law and practice but also understanding the perspective and approach that facilitates the smooth working of the arbitral system.¹¹⁶ The East Africa Court of Justice offers fora for resolution of commercial disputes in the region. Parties should look at the advantages and disadvantages of the two methods and choose the one to adopt in a particular case.¹¹⁷ Although international arbitration will be the preferred method in most commercial disputes, there are some disputes that more amenable at the East Africa Court of Justice. There is also need for a cooperative and collaborative relationship between international

¹¹⁶ Allsop CJ, 'National courts and arbitration,' 1-3.

¹¹⁷ Ramsey V, "National Courts and Arbitration: Collaboration or competition? The Courts as Competitors of Arbitration," p.9.

arbitration and national courts¹¹⁸ including the EACJ because it also has jurisdiction to arbitrate disputes.

¹¹⁸ See Oppong R, 'Private international law in Africa: The past, present and future.'