

**UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES AND SOCIAL SCIENCES
SCHOOL OF LAW**

**ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: PUBLIC POLICY
LIMITATION IN KENYA**

BY

**MBOCE HARRIET NJOKI
(G62/69879/2013)**

SUPERVISOR: MR. LEONARD ALOO

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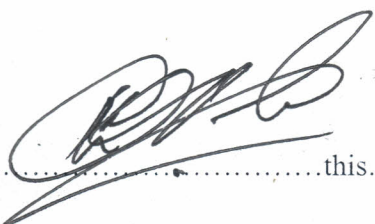
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TABLE OF CONTENTS

DECLARATION	2
TABLE OF CONTENTS	3
ACKNOWLEDGEMENT	5
DEDICATION	6
ABBREVIATIONS	7
A. LIST OF CONSTITUTIONS	8
B. LIST OF KENYAN STATUTES.....	8
C. LIST OF INTERNATIONAL CONVENTIONS AND INSTRUMENTS	8
D. LIST OF KENYAN CASE LAW	8
E. LIST OF NON-KENYAN CASE LAW	8
ABSTRACT	9
COPYRIGHT WARNING	10
CHAPTER ONE	11
1.1. INTRODUCTION	11
1.2. BACKGROUND TO THE PROBLEM.....	12
1.3. STATEMENT OF THE PROBLEM AND ISSUES ARISING.....	17
1.4. RESEARCH QUESTIONS.....	17
1.5. RESEARCH OBJECTIVES.....	17
1.6. HYPOTHESES	17
1.7. BROAD ARGUMENT LAYOUT.....	18
1.8. LITERATURE REVIEW AND DOCUMENT ANALYSIS.....	18
1.9. JUSTIFICATION OF THE STUDY.....	40
1.10. CONCEPTUAL AND THEORETICAL FRAMEWORK.....	41
1.11. RESEARCH METHODOLOGY	43
1.12. CHAPTER OUTLINE	43
CHAPTER ONE: INTRODUCTION	43
CHAPTER TWO: THE LEGAL AND INSTITUTIONAL FRAMEWORK ON ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN KENYA: JUDICIAL INTERPRETATION AND EFFECT OF THE PUBLIC POLICY CONSIDERATION	44
CHAPTER THREE: RELEVANT INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK: JUDICIAL INTERPRETATION AND EFFECT OF THE PUBLIC POLICY CONSIDERATION	44
CHAPTER FOUR: COMPARATIVE ANALYSIS.....	44
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS	45
CHAPTER TWO	46
KENYA’S LEGAL AND INSTITUTIONAL FRAMEWORK	46
2.1. INTRODUCTION	46
2.2. LEGAL FRAMEWORK.....	46
2.3. INSTITUTIONAL FRAMEWORK.....	52
2.4. CONCLUSION	54
CHAPTER THREE	56
INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK.....	56
3.1 INTRODUCTION	56
3.2. INTERNATIONAL LEGAL FRAMEWORK.....	57
3.3. INTERNATIONAL INSTITUTIONAL FRAMEWORK.....	59

3.4. CONCLUSION	63
CHAPTER FOUR	65
CASE STUDY AND COMPARATIVE ANALYSIS	65
4.1. INTRODUCTION	65
4.2. CASE STUDY: KENYAN POSITION	65
4.3. COMPARATIVE ANALYSIS: THE UK POSITION.....	80
CHAPTER FIVE	93
5.1. INTRODUCTION	93
5.2. CONCLUSIONS	93
5.3. RECOMMENDATIONS.....	94
BIBLIOGRAPHY	95
A. LIST OF TEXT BOOKS, JOURNALS AND OTHER TEXTS	95
B. LIST OF JOURNALS & ARTICLES	95

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DEDICATION

I dedicate this paper to a man who will never get to read it: my cherished late father, Paul Mboce Maina Karuri, for setting high standards of courage and success for his children. I do my best for you.

I also dedicate this paper to all those in the academic field, for the many nights of burning the mid-night candle, to shape society through literary discourse. It takes great effort.

To those grappling with the Public Policy limitation on enforcement of international arbitral awards, I hope this moves you closer to your answer.

ABBREVIATIONS

CIArb	Chartered Institute of Arbitrators
CEDR	Centre for Dispute Resolution, established in London in 1990 East Africa Law Reports
Geneva Convention	Geneva Convention on the Execution of Foreign Arbitral Awards, September 26, 1927
ICC	International Chamber of Commerce, located in Paris, established in Paris in 1923
ICA Court	International Court of Arbitration of the ICC
ICSID	International Centre for the Settlement of Investment Disputes also Convention on Settlement of Investment Disputes between States and Nationals of other States
KLR	Kenya Law Reports
LCIA	London Court of International Arbitration
LCIArb	London Chartered Institute of Arbitrators
LCICA	London Court of International Commercial Arbitration
Model Law	Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law.
USA	United States of America
WIPO	World Intellectual Property Organisation

A. LIST OF CONSTITUTIONS

1. Constitution of Kenya, 2010.

B. LIST OF KENYAN STATUTES

1. Arbitration (Amendment) Act 2009.
2. Arbitration Act, Chapter 49 Laws of Kenya.

C. LIST OF INTERNATIONAL CONVENTIONS AND INSTRUMENTS

1. United Nations Convention on International Trade Law (UNCITRAL).
2. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958.

D. LIST OF KENYAN CASE LAW

1. Anne Mumbi Hinga-vs- Victoria Njoki Gathara, [2009]Eklr.
2. Christ for All Nations-vs-Apillo Insurance Co. Ltd EALR [2002] 2 EA 366 (CCK).
3. Glencore Grain Ltd-vs-TSS Grain Millers Ltd, [2002]1 KLR.
4. Kenya Shell Limited –vs- Kobil Petroleum Limited [2006] eKLR.
5. Misc. Civil Application No. 171 of 2012, Tanzania Roads Agency-vs-Kundan Singh Construction Limited (UR).

E. LIST OF NON-KENYAN CASE LAW

1. China Agribusiness Development Corporation –vs-Balli Trading [1998]2 Lloyd's Rep.
2. Productions Group Inc –vs- Aeroflot Russian Airlines [2004] WL234871.
3. Richardson –vs-Mellish (1824)2 Bing.
4. Rosseel NV –vs- Oriental Commercial & Shipping Co (UK) Ltd [1991] 2 Lloyd's Rep.
5. Soleimany v Soleimany [1999] 3 All ER.

ABSTRACT

The lack of a concise definition for public policy as a ground for setting aside an arbitral award has complicated the inherent nature and perception of the arbitral process as an expeditious and effective mode of resolution of disputes. It has raised significant questions regarding the role of the state and the courts in the arbitral process which has hitherto been widely viewed as a private process, mainly driven by the parties in a dispute.

This thesis explores five closely related questions: First issue: what is the Kenyan law position on enforcement of international arbitral awards domestically? Second issue: what is the international law position on enforcement of international arbitral awards in Kenya? Third issue: what is the definition of public policy and what is its place in the enforcement of international arbitral awards? Fourth issue: how does the public policy consideration affect enforcement in Kenya? Fifth issue: how best can public policy be applied to the enforcement of international arbitral awards?

The main aim of the research is to contribute to the development of a bench mark as to what constitutes public policy as a ground for setting aside an international arbitral award. I suggest that a concise definition of public policy as a limitation on enforcement of international arbitral awards should be adapted to anticipate and promote the certainty and finality of the arbitral process.

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CHAPTER ONE

1.1. INTRODUCTION

A successful party in an international arbitration reasonably expects the award to be performed without delay.¹ If the losing party fails to carry out an award, the winning party is entitled to take steps to enforce the performance of the award.² Effectively, two steps may be taken, one of which includes invoking the powers of the state, through its national courts in order to obtain a hold on the losing party's assets or in some other way to compel the performance of the award.³ This process of compelling the performance of the award through national courts is referred to as enforcement.

An arbitral award is international if it is made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It also refers to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.⁴

Enforcement of an award may be refused if it is contrary to the public policy of the enforcement state.⁵ The term public policy is not defined and seemingly depends on the interpretation by the court faced with the application to set aside the international arbitral award on this ground.

This paper examines the problem of a lack of precise definition of public policy as a ground for setting aside of international arbitral awards.

The chapter starts by laying out the parameters of the research. Further, the basis of the research problem is explained and also briefly captured in subsequent statements of the

¹ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p. 621.

² Ibid, Redfern, A. and Hunter, M. (2009), p. 623.

³ The other step would be to exert some form of pressure, commercial or otherwise, in order to show the losing party that it is in their interests to perform the award. Redfern, p. 623.

⁴ Definition borrowed from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), Article 1. See also UNCITRAL Model Law, Article 1 (3) on the definition of an international arbitration.

⁵ Ibid, Redfern, A. and Hunter, M., (2009), p.657.

problem. Additionally, the chapter sets out the objectives of the search and briefly narrates the justification of this study. The chapter then briefly discusses the jurisprudential arguments relevant to the research problem. Moreover, the chapter studies the legal provisions as well as literary publications related to the problem. The chapter then states the hypothesis that this paper sets out to test. Additionally, the chapter offers an outlay of the sequence of the chapters as well as a brief summary of each of the chapters. Finally, the chapter explains how the research informing this paper will be conducted.

1.2. BACKGROUND TO THE PROBLEM

The enforcement of international arbitral awards in Kenya is one of the greatest attractions in international trade and investments in Kenya.⁶ It has led to a significant growth in the adoption of international arbitration as the preferred mode of dispute resolution in Kenya in the last 50 years as commercial parties seek to minimize the potential uncertainties and dragged out litigation process of local litigation procedures.⁷ Kenya's legal system recognises the enforcement of both domestic and international arbitral awards in Kenya.

Enforcement of an award acts as a sword.⁸ It is a positive action taken to compel the losing party to carry out an award that he is unwilling or unable to carry out effectively.⁹ It is the application of sanctions to ensure the award is carried out.¹⁰ Some of the sanctions that the courts apply to facilitate enforcement include seizure of assets and forfeiture of bank accounts.¹¹ Regeru and Redfern note that 'An unenforceable judgment is at best valueless, at worst; it is a source of additional loss'.¹² Enforcement of arbitral awards is therefore of great importance and significance in the arbitral process.¹³

⁶ [2012] Int.A.L.R., Issue 5, 2012 Thomson Reuters (Professional) UK Limited and Contributors, p. 186.

⁷ [2012] Int.A.L.R., Issue 5, 2012 Thomson Reuters (Professional) UK Limited and Contributors, p. 186.

⁸ Regeru, p.122. See also Redfern, A. Hunter, M. 1999, '*Law & Practice of International Arbitration*' 3rd edn. (Sweet & Maxwell : London). P.449. Also see Campell, D. and Summerfield, P., (1989), *Effective Dispute Resolution for the International Commercial Lawyer*: Kluwer Law and Taxation Publishers, Boston, p. 169.

⁹ Ibid, Regeru, p.122. See also Redfern, A. Hunter, M. (1999), p. 169.

¹⁰ Ibid, Regeru, p.122. See also Redfern, A. Hunter, M. (1999), p. 169.

¹¹ Ibid, Regeru, p.122. See also Redfern, A. Hunter, M. (1999), p. 169.

¹² *Soci t  Eram Shipping v Cie Internationale de Navigation* [2004] 1 AC 260 at [10]

¹³ Regeru, p.123

While Kenya has adopted international instruments for the enforcement of international arbitral awards and enacted domestic legislation giving effect to these instruments leading to a celebration of Kenya as an upcoming hub for arbitration, effective enforcement of international arbitral awards in Kenya faces challenges due to public policy consideration as a ground for setting aside of arbitral awards. This is particularly because public policy in this case is not expressly defined. The interpretation of public policy is therefore largely left to the discretion of the judge(s) presiding over an application for setting aside of an award. This lack of a clear cut definition of public policy in this case has led to a relative lull by international investors on arbitration in Kenya because of the uncertainty.¹⁴

This paper therefore seeks to critically examine the challenge of the definition of public policy consideration in enforcement of international arbitral awards in Kenya. The paper examines the effects of public policy consideration on enforcement of arbitral awards and whether and to what extent public policy limitation should be applied in considering enforcement of arbitral awards in Kenya.

The issue as to whether and to what extent public policy limitation should be applied in considering enforcement of international arbitral awards has been widely debated. Two main schools of thought have emerged from this debate: On the one hand is the private autonomy school which strictly supports the contractual nature of arbitration and opposes any legislative and judicial attempts to limit this. This school of thought suggests that parties to a contract have the right to dictate the extent and effects of their contracts and the law has no business impeding the recognition or enforcement of international arbitral awards. On the other hand is the public policy school of thought. This school brings argues in favour of the out the social obligation theory. This school of thought argues that the state is required to exercise restraint and to protect the right of the individual to contract freely, albeit by incorporation of legal limitations to the recognition or enforcement of international arbitral awards.

¹⁴ Dr. Kariuki Muigua, during his lectures at the University of Nairobi, LLM class of 2013 on International Commercial Arbitration.

Brief examination of domestic and international instruments on enforcement of international arbitral awards in Kenya.

The Constitution of Kenya, 2010 (the Constitution) requires the courts and tribunals in exercising their judicial authority to be guided the principle of alternative forms of dispute resolution (ADR).¹⁵ One such form of ADR is Arbitration.¹⁶ The Constitution also provides that the general rules of international law shall form part of the law of Kenya.¹⁷ The Constitution further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya, subject to the domestic laws of Kenya.¹⁸

The Arbitration Act, 1995, provides that ‘An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention (New York Convention) or any other convention to which Kenya is a signatory and relating to arbitral awards’.¹⁹ The New York Convention requires state parties to ensure that arbitral awards are recognised and enforced in their territories.²⁰ These provisions are not without limitation.

Challenge of public policy as a ground for setting aside an international arbitral award

Enforcement against an unscrupulous liable party can be achieved by an application, to the courts by a successful party, for the recognition and enforcement of the award. Often times however, it proves quite challenging to enforce an award against an unscrupulous liable party. This is because the law gives a variety of instances where the courts may refuse to recognize and enforce an arbitral award. Claim of public policy limitation is one such instance.

Both the domestic law in Kenya as well as international law applicable in Kenya lend public policy as a ground for the court’s refusal to enforce international arbitral awards in Kenya. Public policy is however not concisely defined. Public policy as a limitation has therefore

¹⁵Constitution of Kenya, 2010, (the Constitution) Article 159 (2).

¹⁶ Ibid, the Constitution of Kenya, article 159 (2).

¹⁷ Ibid, the Constitution of Kenya, article 2 (5).

¹⁸ Ibid, the Constitution of Kenya, article 2(6).

¹⁹ Arbitration Act, Act No. 4 of 1995 , Laws of Kenya, (the Act) section 36 (2)

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), article III.

often been invoked by parties desirous of evading enforcement of international arbitral awards.²¹ Some litigious parties almost always want to challenge all awards against them on this ground, to try out their luck.²² This position of uncertainty continues to weigh down on arbitration as a form of dispute resolution.²³

Definition of public policy

Despite the limitation imposed by the public policy consideration, another challenge arises from the fact that neither the domestic instruments, nor the international ones define the term ‘public policy’. Further, neither of them sets the parameters within which the public policy consideration is to apply.²⁴ The gap in defining public policy has often been pointed out by various quarters.²⁵

The courts have through judicial decisions attempted to give some guideline on definition of the term. In the case of *Christ for all Nations -vs-Apollo Insurance Company Limited* Ringera J. noted that:

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality”.²⁶

From his decision above, Ringera J set out three main grounds upon which an application for setting aside an arbitral award should be predicated upon as regards public policy. These are:

²¹ This position is well discussed in Misc. Civil Application No. 171 of 2012, Tanzania Roads Agency-vs-Kundan Singh Construction Limited (UR).

²² Supra, Kariuki Muigua, p. 224

²³ Supra, Kariuki Muigua, p. 224

²⁴ Supra, the Act, Section 37(b) (ii) and article V (2)(b), respectively

²⁵ See the holding by Ringera J. in the case of *Christ for all Nations -vs-Apollo Insurance Company Limited* (2002) 2 EA 366 (Christ for all Nations).

²⁶ Per Ringera J. In the case of *Christ for all Nations -vs-Apollo Insurance Company Limited* (2002) 2 EA 366 (Christ for all Nations).

- i. inconsistency with the Constitution or any other laws of Kenya, whether written or unwritten;
- ii. inimical to the national interests of Kenya; and
- iii. contrary to justice and morality

While Justice Ringera has attempted to define public policy in the above case, it is important to note that he has noted that Public policy is a broad concept incapable of precise definition.

As will be elucidated in this paper, despite Justice Ringera's attempt at defining public policy, different judges appear to have kept to their preferred definitions. This disparity in defining public policy continues to give their own these instances provide unscrupulous liable parties opportunities to avoid or defer enforcement. While the effect of each of the grounds for refusal of recognition and enforcement of arbitral awards are considerably similar, as with each of the grounds public policy limitation has its practical salient challenges.

An unenforceable judgment is at best valueless, at worst; it is a source of additional loss.²⁷ As will emerge from the discussion, certain specific challenges arise due to the legal opportunities to avoid or defer enforcement. In particular, this leads to uncertainty over whether or not an arbitral award is enforceable, which understandably undermines confidence in arbitration.

As proponents of international trade and investments continue to present arbitration as an attractive, effective and efficient mode of resolution of disputes in international trade, policy makers, legislators, and the judiciary are yet to gain sufficient consensus on the best way to address the challenges created by the lack of a clear definition of public policy as a ground for setting aside international awards in Kenya. It is therefore against this background that I am conducting this study. The study will focus mainly on the claim of public policy limitation.

²⁷ *Société Eram Shipping v Cie Internationale de Navigation* [2004] 1 AC 260 at [10]

1.3. STATEMENT OF THE PROBLEM AND ISSUES ARISING

This paper discusses the problem of a lack of a concise definition of public policy as a ground for setting aside of an international arbitral award in Kenya. It first looks at Kenya's domestic position on the issue. It examines the relationship between the domestic and international law position before subsequently examining the international law position on the issue. The paper examines whether and how public policy as a limitation to enforcement of international arbitral awards has been defined, and whether such definition is sufficient. The study also examines how Kenya has adopted, interpreted and applied the doctrine to limiting the enforcement in Kenya, of international arbitral awards. The paper also considers whether public policy as a limitation to domestic enforcement of international arbitral awards should be abolished and if so, what the alternatives may be. The paper refers to various relevant provisions in international legal instruments, the domestic laws of Kenya, decisions from Kenyan courts as well as opinions of various writers.

1.4. RESEARCH QUESTIONS

1. What is the Kenyan law position and definition of public policy in relation to enforcement of international arbitral awards domestically?
2. What is the international law position and definition of public policy in relation to domestic enforcement of international arbitral awards?
3. What is the Kenyan and non-Kenyan judicial interpretation of public policy as a ground for setting aside an international arbitral award?
4. How best can public policy be applied to the enforcement of international arbitral awards?

1.5. RESEARCH OBJECTIVES

This paper sets out to critically examine the predicament of definition of public policy limitation to the domestic enforcement of international arbitral awards in particular how the public policy consideration affects enforcement of international arbitral awards in Kenya.

1.6. HYPOTHESES

This study is premised on the author's hypotheses that:

1. Neither the domestic law of Kenya, nor international instruments which Kenya applies for purposes of enforcement of international arbitral awards define public policy.
2. There is a glaring uncertainty and disconnect in the interpretation given by the courts in Kenyan as well as non-Kenyan courts on public policy.
3. There is no concise definition of public policy as a ground or setting aside of international arbitral awards in Kenya.
4. There is a pressing need to have a clear definition of public policy as a ground for setting aside an international arbitral award.

1.7. BROAD ARGUMENT LAYOUT

Existing system on enforcement of transnational arbitral awards are universally inconsistent. The New York Convention, being the governing international instrument, vide article V has to a great extent subjected enforcement of awards to domestic legislation. Given that the various countries have relatively varying legislative positions on this, the system therefore becomes highly unpredictable. Kenya is no exception to this quagmire and although the judiciary has attempted to illuminate on this, the key elusive ailment has been to conclusively define the term 'public policy'. This is yet to be done.

1.8. LITERATURE REVIEW AND DOCUMENT ANALYSIS

This part highlights and analyzes some key domestic and international legal instruments, domestic and international judicial decisions as well as academic texts books and other writings by scholars relevant to this research. The discussion subsequently identifies some gaps emerging from the literature reviewed, that this research seeks to fill.

Domestic legal instruments

The Constitution of Kenya (2010), hereinafter referred to as ‘the Constitution’, requires the courts and tribunals to be guided by, among other principles, alternative forms of dispute resolution including arbitration in exercising their judicial authority.²⁸ It also provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya, subject to the domestic laws of Kenya.²⁹ This sets the stage for application of various international instruments and principles in line with domestic legislation in Kenya.

The Arbitration Act (1995), hereinafter referred to as ‘the 1995 Act’, as read together with its Amending Act (2009), hereinafter referred to as ‘the Amendment Act’ is the current substantive domestic legislations in Kenya on Arbitration, hereinafter jointly referred to as “the Kenyan Statutes”.³⁰ The 1995 Act distinguishes ‘international’ arbitrations giving rise to international arbitral awards, from ‘domestic’ arbitrations which result in domestic awards.³¹ Under the Act, arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into:

- a. where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

²⁸Supra, the Constitution of Kenya, article 159 (2).

²⁹ Supra, the Constitution of Kenya, article 2(5) and 2(6).

³⁰ Arbitration Act, Act No. 4 of 1995, Laws of Kenya. The 1995 Act was assented to on 10 August, 1995 and came into force 2 January, 1996. It repealed and replaced the 1968 Arbitration Act, Chapter 49 Laws of Kenya. The 1995 Act is substantially modelled along the provisions of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) of 1985 and amended in 2006. Despite its important contribution to arbitration law and practice in Kenya, the 1995 also exhibited various shortcomings. Key among this is that the 1995 Act did not provide for finality of an arbitral Award. There was therefore need to amend the 1995 Act. The amendment of the 1995 Act was done through amended by the Arbitration (Amendment) Act 2009 (“the Amendment Act”).

³¹ It is however argued that there is no real difference between ‘domestic’ and ‘international’ arbitrations. See Muigai, G., *op cit.* p. 3 reference to Russell on Arbitration at Paragraph 2-022. No such distinction s contained in the UNCITRAL Model Law. However, certain sections of the 1995 Act apply only to ‘domestic’ arbitrations. For instance, section 39 of the Act refers expressly to ‘domestic’ arbitrations. It is arguable therefore that there is indeed a difference between the two, be it by express provisions or by implication.

- b. where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;
- c. where the arbitration is between an individual and a body corporate:
 - (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and
 - (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or
- d. the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is Kenya.³²

On the other hand, arbitration is international if:

- a. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
- b. one of the following places is situated outside the state in which the parties have their places of business:
 - (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- c. the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.³³

³² Supra, the Act, Section 3(2).

³³ Supra, the Act, Section Section 3(3).

The 1995 Act provides that ‘An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards’.³⁴ The Act further provides that ‘The recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused ... if the High Court finds that... the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya’.³⁵

The 1995 Act, is not exhaustive, and for this reason, it empowers at Section 40, the Chief Justice to make court procedural rules for matters not prescribed in the 1995 Act, including recognition and enforcement of arbitral awards, setting aside of arbitral awards, stay of proceedings, and generally any proceedings under the Arbitration³⁶ Act. In exercise of the powers under section 40, the Arbitration Rules, 1997, were made on 6 May 1997, which rules also provide that the Civil Procedure Rules are applicable to applications under the 1995 Act.³⁷

By way of background, the 1968 Act was closely modelled on the English Act of 1950.³⁸ As a result of various challenges to this Act, and encouraged by the publication of the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law (UNCITRAL), Kenya’s parliament enacted the 1995 Arbitration Act, which repealed the 1968 Act, discussed above.

International legal instruments

The UNCITRAL Model Law on International Commercial Arbitration (the Model Law) (1985) was adopted by party states, Kenya being one of them, to provide a uniform model law on arbitration.³⁹ The Model Law covers all stages of arbitration and aims to provide a sample law, which the different states can uniformly adopt or highly borrow from, to apply with regards to the various stages of arbitration in their various jurisdictions, leading to a

³⁴ Supra, the Act, Section 36 (2). This Act was assented to on 10 August, 1995 and came into force 2 January, 1996. It repealed and replaced the 1968 Arbitration Act.

³⁵ Supra, the Act, section 37 (b)(ii)

³⁶ Supra, Githu, p.7.

³⁷ Supra, Githu, 6.

³⁸ Githu, p. 1.

³⁹ The Model Law was adopted by the United Nations General Assembly through Resolution 40/72, 11 December, 1985.

unified legal framework for a fair, efficient and reliable system of settlement of international commercial disputes arising from international commercial relations.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) provides that the Convention “applies to the recognition and enforcement of arbitral Awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”⁴⁰ The New York Convention further provides that it shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”.⁴¹ The New York requires each of its contracting states to recognize and enforce an arbitral 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 its article III.⁴²

Article V of the New York Convention contains sets the stage for denial of enforcement of these awards. It lays out public policy grounds that may be invoked by the competent authority of the country where the recognition and enforcement are sought to deny enforcement of the award. This discretion has been applied by many states in refusal for enforcement of foreign awards.

While it has attempted to set out an international system of regulation of arbitration, the New York Convention appears to have glaring contradictory provisions that are of fundamental importance to the effect of the entire convention. Article V seemingly waters down the aim of the entire convention by creating an avenue for interference by external factors to arbitration agreement. It can be said to be an obstacle to the creation of concrete certainty of international awards.

⁴⁰ NYC, Article I (1)

⁴¹Supra, NYC.

⁴² A contracting state means any state which has signed, ratified or acceded to the NYC, or notified extension under article X of the NYC. This includes any State which has on the basis of reciprocity declared that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. A contracting state will also include a state that has declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. See article I (3) of the NYC.

Domestic judicial decisions

On the definition of public policy as a limitation to enforcement of arbitral awards, the courts have attempted to give a guideline. In the case of *Anne Mumbi Hinga –vs- Victoria Njoki Gathara*, the Appellant sought to set aside an arbitral award on the grounds that: she had not been served with a notification of the delivery of the award, she had not been served with a notice of filing the award and that she had not been served with a copy of the application seeking to enforce the award.⁴³ The High Court dismissed the application, whereupon the Appellant appealed. In dismissing the appeal, the Court of Appeal held that the Appellant's application to set aside the arbitral award offended the doctrine of public policy. The court held that the underlying principle in the Arbitration Act is the recognition of an important public policy in the enforcement of arbitral awards and the principle of finality of arbitral awards.

The Court of Appeal in the recent case of *Tanzania National Roads Agency-vs- Kundan Singh Construction Limited* was faced with two main issues: whether the Court of Appeal has 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.⁴⁴ 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

⁴³ *Anne Mumbi Hinga-vs- Victoria Njoki Gathara*, [2009]eKLR

⁴⁴ The decision was delivered on 14th November, 2014 by the court of appeal at Mombasa in civil appeal no. 38 of 2013, *Tanzania National Roads Agency-vs- Kundan Singh Construction Limited*.

respect of recognition and enforcement of international arbitral awards, 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.

The court noted the argument for the appellant that because of the application of the principles of International Law and Treaty on Conventions signed by Kenya, the invocation of Article 2(5) and 2(6) of the Constitution raises Constitutional issues and that the appellant therefore has an automatic right of appeal. The court rejected this argument. The court held that the invocation of a Constitutional provision does not necessarily give rise to a constitutional issue, particularly where neither the application of the constitutional provision nor the interpretation of the constitutional provision is in dispute, which the court held was the case in this appeal.

On the issue of general public importance and public policy, the court found that there is not right of appeal to the Court of Appeal anchored on matters of 'general importance'. A matter of public importance is one whose determination transcends the circumstances of the particular case, and has a significant bearing on the public policy interest. Public policy has been described as an intermediate principle which fluctuates with the circumstances of the time. Public policy is a broad concept incapable of precise definition... an award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either: inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or inimical to the national interest of Kenya, or (c) contrary to justice and morality".⁴⁵

This appeal does not raise an issue of general public importance but raises an issue concerning the recognition and enforcement of an agreement between two individuals.

⁴⁵Per Ringera J. In the case of Christ for all Nations -vs-Apollo Insurance Company Limited (2002) 2 EA 366 (Christ for all Nations' case).

In *Christ for all Nations -vs-Apollo Insurance Company Limited (Christ for all Nations)*, the Plaintiff, the Respondent in this matter had a comprehensive insurance cover with the Defendant/Applicant in respect of the Respondent's motor vehicle.⁴⁶ On 4 July 1997, an endorsement was effected to the policy. The endorsement extended the geographical area of the cover to include Tanzania and Zambia for the period up-to 3 October 1997. The endorsement indicated that the total sum insured was K. Shs. 1,500,000.00 and TPO⁴⁷. During the subsistence of this policy, the Respondent's insured motor vehicle was involved in an accident while in Zambia. The vehicle was written off. The Applicant refused to compensate the Respondent for the loss, on the ground that only third party policies were covered outside Kenya. The Respondent then sued the Applicant claiming compensation. The suit was stayed and referred to arbitration, pursuant to an arbitral clause in the insurance policy. The arbitrator decided in favor of the Respondent.

The Applicant made an application to the High Court, seeking to set aside the arbitral award in favor of the Respondent, on the ground that the award was in breach of public policy. The Applicant alleged that public policy would be breached because insurers would shy away from covering people going outside countries and this would mean loss of business for travelers. In dismissing the application, the court held that:

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act Laws of Kenya, as being inconsistent with the public policy of Kenya if it is shown that it was ... either (a) inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality”⁴⁸

The court then held that there was no evidence that the insurance industry would react in concert and negatively to the arbitral award. The Applicant had therefore not shown that the arbitral award was contrary to public policy. The application was dismissed.

⁴⁶ (2002) 2 EA 366

⁴⁷ TPO is not defined in the decision. As it has no specific effect on the issues addressed in this paper, no further inquiry will be had on it.

⁴⁸Per Ringera J. In the case of *Christ for all Nations -vs-Apollo Insurance Company Limited* (2002) 2 EA 366 (*Christ for all Nations*).

In *Glencore Grain Ltd-vs-TSS Grain Millers Ltd*, the court held that:

...an arbitral award will be against public policy, if it is immoral or illegal, or that it would violate in clearly unacceptable manner basic and/or moral principles or values in the Kenyan society. It has been held world over that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or acts that are void. ‘Against public policy’ would also include contracts or contractual acts or awards which would offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.’⁴⁹

International judicial decisions

This area will mainly consider the decisions of the courts in the United Kingdom (UK). This is mainly because Kenya heavily borrowed her Arbitration Act which includes the provisions on enforcement of international arbitral awards from the UK Arbitration Act 1996 (the UK Act). UK, just like Kenya is also a party to the New York Convention on the Recognition and Enforcement of International Arbitral Awards. The UK Act provides that enforcement of the award may be refused if it would be contrary to public policy to recognize or enforce the award’.⁵⁰

In the case of *Honeywell International Middle East Ltd –vs- Meydan Group LLC (formerly known as Meydan LLC)*, the court considered when and how public policy would be applied in setting aside an international arbitral award.⁵¹ The court held that ‘...the grounds on which a New York Convention award may not be recognised are limited as set out in section 103 of the Arbitration Act 1996. Section 103(3) provides that ... enforcement of the award may be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.’

The court in this case cited Dicey, Morris and Collins that English law recognises an important public policy in the enforcement of arbitral awards and the courts will only refuse to do so under s 103 in a clear case.⁵² Equally as stated in *Redfern and Hunter*, ‘the intention

⁴⁹ [2002]1 KLR 606 .p. 626.

⁵⁰ The UK Arbitration Act 1996 at Part III on the recognition and enforcement of Certain Foreign Awards (ss 99-104) at Section 103 (3).

⁵¹ Construction Law Reports/Volume 154 /Honeywell International Middle East Ltd -v-Meydan Group LLC (formerly known as Meydan LLC) - 154 ConLR 113 [2014] EWHC 1344 (TCC).

⁵² at para 16-150

of the New York Convention ... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.⁵³ They then cite Van den Berg The New York Arbitration Convention of 1958 (1981) at pp 267 and 268 where he said: 'As far as the grounds for refusal for enforcement of the Award as enumerated in art V are concerned it means that they have to be construed narrowly.' As held in the case of *Rosseel NV v Oriental Commercial & Shipping Co (UK)* enforcement may only be refused on the grounds set out in s 103 of the Act and are therefore exhaustive.⁵⁴ The burden of establishing the grounds under s 103(2) is upon Meydan, although the court can raise matters under s 103(3) of its own motion.

In the case of *Soleimany –v–Soleimany* (the Soleimany case), the court considered the issue of whether an international award could be enforced in the event of an illegality as against the backdrop of public policy consideration.⁵⁵ The court held that 'where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it'.

Parties in the Soleimany case were a father and son of Iranian Jewish origin. In contravention of Iranian revenue laws and export controls, the son arranged for the export from Iran of carpets which were subsequently sold by his father in England and other countries. A dispute arose over the division of the proceeds of the scheme, and the parties referred the matter to binding arbitration by the Beth Din, a body which applied Jewish law. The Beth Din's award explicitly referred to the illegal nature of the enterprise, but nevertheless awarded a substantial sum to the son; under Jewish law the illegality of the enterprise did not affect the rights of the parties. The High Court granted the son leave to enforce the award, but the father applied for leave to be set aside, contending that it would be contrary to public policy to enforce an award founded on an illegal transaction. That application was dismissed by the judge, and the father appealed. On the appeal the son contended that, at the enforcement stage, the court should not examine the underlying transaction.

The court held that: It would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the

⁵³ Redfern and Hunter on International Arbitration at paragraph 11.60.

⁵⁴ *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 at 629

⁵⁵ All England Law Reports/1999/Volume 3 /*Soleimany v Soleimany* - [1999] 3 All ER 847.

parties to conceal, through the procurement of an arbitration that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process. Thus, where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it. In the instant case, although the arbitration clause was valid, the award referred on its face to an enterprise with an illegal object which the English court viewed as contrary to public policy. Accordingly, the award would not be enforced, and the appeal would be allowed.

Not all challenges on the ground of public policy can be considered to be as clear cut as this. An attempt to define public policy is seen in the case of *Eco Swiss China Time Ltd v Benetton International NV* (the Eco case).⁵⁶ The court found that only if the terms of the award or its enforcement conflicted with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental.

B, a company established in the Netherlands, entered into a licensing agreement with E Ltd, a Hong Kong based retailer, and another company, under which it granted E Ltd the right to manufacture and sell watches and clocks bearing its name for a period of eight years. Article 26A of the agreement, which also involved a market sharing arrangement, provided that disputes between the parties were to be settled by arbitration in accordance with Netherlands law. In 1991 B terminated the agreement, whereupon arbitration proceedings were instituted in the Netherlands resulting in interim and final awards being made against B. B contended that the awards were contrary to public policy on the ground that the licensing agreement was void under art 81 EC (ex art 85) of the EC Treaty and applied to the District Court for their annulment under art 1065(1)(e) of the Code of Civil Procedure, and also a stay of enforcement. The District Court dismissed the application, but on B's appeal the Regional Court of Appeal granted a stay of the final award, holding that art 81 EC was a provision of public policy within the meaning of art 1065(1)(e). E Ltd appealed by way of cassation proceedings to the Supreme Court, which held that an arbitration award was contrary to public policy within the meaning of art 1065(1) (e) only if its terms or enforcement conflicted

⁵⁶ All England Commercial Cases/1999/Volume 2 /Eco Swiss China Time Ltd v Benetton International NV - [1999] 2 All ER (Comm.) 44

with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental. The court, however, was unclear whether the position was the same where the provision in question was a rule of Community law and therefore stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling the question, *inter alia*, whether, in such circumstances, a national court to which application was made for annulment of an arbitration award had to grant it where, in its view, that award was contrary to art 81 EC.

The court held that Article 81 was a fundamental provision which was essential for the accomplishment of the tasks entrusted to the Community and in particular for the functioning of the internal market. Its provisions, therefore, might be regarded as a matter of public policy within the meaning of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958. Furthermore, Community law required that questions concerning the interpretation of the prohibition laid down in art 81(1) EC (ex art 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award. It followed that a national court to which application was made for annulment of an arbitration award had to grant that application if it considered that the award in question was contrary to art 81 EC, where its domestic rules of procedure required it to grant an application for annulment founded on failure to observe national rules of public policy.

The court in the case of *Yukos Capital Sarl v OJSC Rosneft Oil Co* examined the issue of whose public policy should be considered in enforcement of international arbitral awards.⁵⁷ The court held that an award will not be enforceable in the UK if it contravenes or effecting it clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights. The court noted that this limitation was discussed and applied in *Kuwait Airways v Iraqi Airways Co*, where Lord Nicholls said that the acceptability of a provision of foreign law must be judged by contemporary standards.⁵⁸

⁵⁷ All England Law Reports/2013/Volume 1 /*Yukos Capital Sarl v OJSC Rosneft Oil Co* (No 2) - [2013] 1 All ER 223

⁵⁸ [2002] 3 All ER 209, [2002] 2 AC 883

The court also noted the decision in the case of *Blathwayt v Lord Cawley* where the court held that conceptions of public policy should move with the times.⁵⁹ The court noted the decision in the case of *Oppenheimer v Cattermole (Inspector of Taxes)* that ‘the courts of this country should give effect to clearly established rules of international law’. The court in this case noted held that this position is increasingly true today. As nations become ever more interdependent, the need to recognize and adhere to standards of conduct set by international law becomes ever more important....International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law.⁶⁰

The court in this case further cited the decision in the *Oppenheimer's* case and held that:

A judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations.⁶¹ This principle normally requires our courts to recognize the jurisdiction of the foreign state over all assets situated within its own territories.⁶² A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognize it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.

The court further held that:

‘The essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention, And there

⁵⁹ [1975] 3 All ER 625 at 636, [1976] AC 397 at 426 per Lord Wilberforce.

⁶⁰ see the discussion in *Oppenheim's International Law* (9th edn, 1992) vol 1, pp 371-376, para 113

⁶¹ *Oppenheimer v Cattermole (Inspector of Taxes)* [1975] 1 All ER 538 at 566-567, [1976] AC 249 at 277-278 per Lord Cross.

⁶² See *Oppenheimer v Cattermole (Inspector of Taxes)* [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Salmon.

is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.’⁶³

The court in this case held that ‘... there can be a still further distinction to be made between the act of state which cannot be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore can be challenged.’⁶⁴

The issue of whose public policy should be considered in enforcement of international arbitral awards was also examined by the court in the case of *Tamil Nadu Electricity Board – vs- St-CMS Electric Company Private Ltd* (the Tamil Nadu case). The court in this case held that “public policy” means international public policy and differs from public policy in a domestic context.

The claimant was the state electricity board for the state of Tamil Nadu. Its principal objective was the generation and distribution of electrical power. The defendant was an Indian company incorporated by foreign investors from the United States, Switzerland and the Netherlands in 1993, for the purpose of the development and operation of a 250 MW lignite-fired power plant at Neyveli in Tamil Nadu. At the time of the defendant's incorporation, foreign companies were not permitted to construct or own power plants; hence an Indian company was formed. The parties concluded a long term supply agreement in 1993, which was subsequently restated and amended in November 1996 (the PPA). Under the PPA disputes were to be settled by ICC arbitration in London, governed by English laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; by contrast, the PPA itself was to be governed by Indian law. A dispute subsequently arose as to charging under the PPA, which the defendant referred to arbitration. It alleged that the claimant had used a computation methodology not provided for by the PPA and disregarded certain key terms of the PPA. It stated that the claimant had, inter alia, refused to give the complete benefit of the foreign exchange rate variation on the foreign

⁶³See *Oppenheimer v Cattermole (Inspector of Taxes)* [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Hope

⁶⁴See *Oppenheimer v Cattermole (Inspector of Taxes)* [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Hope

currency elements of the actual capital cost, for which specific provision was made in the PPA. It sought an award declaring that the actual capital of cost was as it had calculated, and a direction that the claimant pays the sum claimed.

The claimant applied to the court under s 72 of the Arbitration Act 1996 for declarations that the matters submitted to arbitration were not within the scope of any arbitration agreement between the parties. Two contractual exceptions existed to the application of the arbitration clause: the first related to a dispute about an acceptance test, which was to be resolved by an independent engineer, and secondly in the event of a 'buy-out', the price was to be determined ultimately by an independent appraiser absent agreement. The claimant also submitted that by virtue of the choice of Indian law as the governing law of the PPA, there was a further exception to the jurisdiction of the arbitrator, namely the compulsorily applicable principles of Indian law. It submitted that those principles, required determination of the tariff to be charged by the statutory Indian body, which had to be recognised as a matter of English conflicts principles. It further argued that the defendant was estopped from denying that the pricing had to be determined by the Indian authorities and not by arbitration.

Whether or not there might be a defense to enforcement in India under Article V.2 (b) of the New York Convention, as a matter of the public policy of India, is neither here nor there for these purposes, but in the context of an international treaty, “public policy” means international public policy and differs from public policy in a domestic context. The courts of many parties to the Convention have expressly recognised this - see *The New York Arbitration Convention of 1958 - towards a Uniform Judicial Interpretation* by van den Berg at pages 359-368, illustrated in the decision of Hobhouse J (as he then was) in the *Marques de Bolarques* [1984] 1 WLR 642 at 658-659.

Furthermore, on the evidence of ST-CMS' expert on Indian law this distinction is clearly recognised in the law of India. In his second affidavit, Mr. Jaitley referred to the decision of the Supreme Court of India in *Renusagar Power Company Ltd v General Electric Co.*, AIR.⁶⁵ There, when looking at Article V(2)(b) of the New York Convention and the section of the Foreign Awards Act which enacted it in India, it was held that the expression “public policy” in the Act must necessarily be construed in the sense that the doctrine of public policy is

⁶⁵ *Renusagar Power Company Ltd v General Electric Co.*, AIR 1994 SC 860.

applied in the field of private international law. Consequently, “it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law or (ii) the interests of India or (iii) justice or morality.” In order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. In an earlier decision, the Supreme Court, in *Murlidhar Aggarwal v State of Uttar Pradesh* (1974) 2 SCC 472, it was held at paragraph 28, by reference to English law authorities, that the expression “public policy” had an entirely different meaning from “the policy of the law” and depended upon “customary morality” and “social consequences” with regard to the “current needs of the community”.

The court ruled: On the true construction of the PPA, the Indian law clause and related provisions did not equate to provisions requiring a dispute resolution other than arbitration, so as to render the dispute out with the arbitration clause. There was no principle of English private international law, nor any public policy basis, for not adopting the construction of the arbitration clause under English law, on which basis the claimant's argument had to fail. In any event, on the evidence as to Indian law, there was nothing which impinged on the right to arbitrate. Nor had the claimant established any estoppel: it had not acted on any shared or agreed assumption with the defendant that the Indian authorities would make a final and binding decision on the relevant matters to the exclusion of any jurisdiction of the arbitrators. The claimant's applications would be dismissed and the defendants would be entitled to declarations as to the validity of the arbitration

The questions of definition of public policy as well as whose public policy should be considered was also examined in the case of *R –v- V*.⁶⁶ The court held that:

‘Previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well.

⁶⁶ [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep 97

The claim had been brought under the terms of a consultant agreement of March 2002. The defendant was beneficially owned by F, whose personal services as a consultant were being retained by the claimant. The recitals to the agreement recorded that the defendant had expertise in Libya concerning the oil industry (F had been retained by the claimant and others for some years as a consultant in that field).

The agreement provided for F to use his influence and information, concerning, inter alia, negotiations with Government officials and state and private corporations, to assist the claimant in connection with the promotion of its interests in Libya. Subsequently the claimant took the view that the agreement was unenforceable on three grounds: (i) lack of consideration; (ii) that F was in breach of his fiduciary duty and was precluded from obtaining any personal benefit from the agreement; and (iii) the agreement was illegal under Libyan law and contrary to English public policy in regard to influence peddling. The dispute was referred to arbitration in London under the auspices of the ICC. By an award of December 2007, the tribunal rejected the claimant's contentions and upheld the defendant's claim for immediate payment of \$US 3,000,000 and substantial further payments due on the achievement of specified oil production figures. The claimant applied to challenge the award under (i) s 68(2) (g) of the Arbitration Act 1996 on the ground that it was contrary to English public policy; and (ii) s 81(1)(c) of the Act on the ground that it was contrary to public policy at common law.

The court held that previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well. There was no material distinction between that previous authority and the instant case, which accordingly had to fail. There was ample material before the tribunal that the contract was not illegal under Libyan law and the arbitrators had expressly so held. No new evidence to the contrary had been adduced by the claimant. The tribunal was composed of arbitrators who were highly commercially experienced and there was no suggestion of bad faith. Moreover, the claimant's challenge would in any event have failed on the merits. The applications were dismissed.

Academic texts books, journals and other writings

Kariuki Muigua in his book on *Settling Disputes through Arbitration* (2012) makes various observations on the issue. He observes that ‘the aim of all legal proceedings is to achieve justice and efficiency. Arbitration is widely preferred for its advantage with regards to efficacy.’⁶⁷

Muigua notes that the practice of commercial arbitration in Kenya continues to be weighed down by ‘litigious parties who even after the arbitrator makes an Award, would still want to challenge it in court on public policy grounds.’⁶⁸ He takes the view that this could hamper the enforceability of arbitral Awards and also erode the gains made in fronting arbitration as an expeditious dispute settlement mechanism in Kenya. Muigua however cautions that ‘if the final Award cannot be timeously recognised and enforced by a competent court, the superiority of arbitration in terms of efficiency will be weakened or even thoroughly frustrated.’⁶⁹

Githu Muigai and Jacqueline Kamau, in their chapter on the legal framework of Arbitration in Kenya make various observations.⁷⁰ They note that an arbitral Award is binding and final upon parties.⁷¹ With this regard, they point out that Award can only be appealed against if parties reserve their right of appeal.⁷² Even then, they note, such reservation and appeal can be only on points of law.⁷³ They further note that there has been rapid growth in international commerce, effectively requiring that international commercial arbitration have an international enforcement mechanism of enforcement of international arbitral Awards.⁷⁴ Muigai and Kamau note that this mechanism has taken the form of the New York Convention.⁷⁵

⁶⁷ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 2nd ed.(Kenya: Glenwood Publishers Limited, 2012) p. 205

⁶⁸ Kariuki Muigua *op. cit.* p.224

⁶⁹ Kariuki Muigua *op cit.* p. 205

⁷⁰ Muigai, G. and Kamau, J., *Arbitration Law and Practice in Kenya: the legal framework of arbitration in Kenya*, 2nd ed. (Kenya: Law Africa Publishing (K) Limited, pp 1-10

⁷¹ Githu, p. 6. See also section 32 A through amendments by the Amendment Act.

⁷² Githu, p. 6. See also Section 39 of the Arbitration Act. As also read with section 32A vide the Amendment Act.

⁷³ Section 39 of the Arbitration Act. As also read with section 32A vide the Amendment Act.

⁷⁴ Githu, p. 9.

⁷⁵ Kenya acceded to the New Your Convention on 10 February, 1989, with a reservation on reciprocity.

Njoroge Regeru in his chapter on Recognition and Enforcement of Arbitral Awards cautions that an arbitral Award, though automatically binding upon the parties, does not immediately entitle the successful party to levy execution against the unsuccessful party.⁷⁶ Regeru notes that the successful party must first lodge the Award with the court for recognition and enforcement, where after it shall be treated as a judgment of the court, where execution of the Award may ensue.⁷⁷ Regeru thus observes that the recognition and enforcement of arbitral Awards is of great importance and significance in the arbitral process.⁷⁸ He says that the Award is the culmination of the arbitral process and the recognition and enforcement of the Award as the final vindication of the process.⁷⁹

As stated by Kariuki Muigua, Regeru notes that:

The purpose of enforcement is to act as a sword and it is a positive action taken to compel the losing party to carry out an award that he is unwilling or unable to carry out effectively. It therefore means applying sanctions to ensure the award is carried out. Possible sanctions include seizure of assets and forfeiture of bank accounts.⁸⁰

Brenda Branch, in her paper presented in the year 2003 on the Climate of Arbitration in Kenya brings discusses the advantages of arbitration including the expeditious disposal of matters, as compared with the court process.⁸¹ Brenda points out an infamous adage that: 'It is better to enter the mouth of a lion than a Kenyan court of law'.⁸² Brenda refers to the words of the Chief Justice of Tanzania, the Hon Justice Nyalali once said: 'The use of custom, special

⁷⁶ Regeru, N., in *Arbitration Law and Practice in Kenya: Recognition and Enforcement of Arbitral Awards*, 2nd ed. (Kenya: Law Africa Publishing (K) Limited, pp 121-156, p. 123.

⁷⁷ Regeru, p. 123.

⁷⁸ Regeru, p.123

⁷⁹ Regeru, p.123.

⁸⁰ Regeru, p.122. See also Redfern, A. Hunter, M. 1999, '*Law & Practice of International Arbitration*' 3rd edn. (Sweet & Maxwell: London). P.449. Also see Campell, D. and Summerfield, P., (1989), *Effective Dispute Resolution for the International Commercial Lawyer*: Kluwer Law and Taxation Publishers, Boston, p. 169.

⁸¹ Branch, B., *The Climate of Arbitration and ADR in Kenya*: Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003. The paper is presented at a time soon after a new government had assumed power in Kenya. (This paper has since been published in the *Commonwealth Lawyer* 2003, *Indian ICFAI Journal of ADR*, *Corporate Africa*, CEDR (Centre for Effective Dispute Resolution) London Website).

⁸² *Ibid*, Branch, B.,

rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over'.

Brenda cautions that while enacting legislation is a positive step, the reality is that it does not necessarily provide certainty. She points out that Kenya's legal fraternity is concerned at judges recently overturning arbitral awards on seemingly weak grounds. She notes that at the international level, arbitration is still very much in its infancy but Kenya can boast competent, if insufficient numbers of, experienced arbitrators. She notes that donor contracts, citing World Bank and construction-related contracts usually espouse and envisage arbitration as the first stop in dispute resolution and there is no question that arbitration makes a significant contribution to commercial justice in Kenya and that concerted efforts are needed to ensure the development of ADR on a Pan-African scale. Brenda states that a Regional Arbitration Centre has been discussed by our Attorney General over the past five years but nothing has transpired. It is important to point out that Brenda's paper was presented in the year 2003. A considerable number of issues have changed since 2003 in the field of international arbitration in Kenya. For purposes of this paper, Brenda's paper has been used as one of the reference points in terms of Kenya's journey in the arena of international arbitration.

Aakanksha Kumar in the journal 'Foreign Arbitral Awards Enforcement and the Public Policy Exception - India's Move Towards Becoming an Arbitration-Friendly Jurisdiction', examines Arbitration as the most popular method of dispute resolution.⁸³ Kumar explains that arbitration is currently the predominant method of the settlement of disputes arising in international commercial relations. Kumar observes that for many lawyers, and clients too, worldwide arbitration is one of the most successful and flexible forms of dispute resolution.

Mohamed Al-Nasair and Ilias Bantekas in the journal on the Effect of Public Policy on the Enforcement of Foreign Arbitral Awards in Bahrain and United Arab Emirates (UAE) considers public policy violations in Islamic law in the UAE and Bahrain.⁸⁴

Nasair and Bantekas in attempting to shed some light on the notion of an Islamic public and to define the concept of public policy or public order from the perspective of Islamic, and

⁸³ Aakanksha Kumar 'Foreign Arbitral Awards Enforcement and the Public Policy Exception - India's Move Towards Becoming an Arbitration-Friendly Jurisdiction [2014] Int. A.L.R. 76.

⁸⁴ International Arbitration Law Review [2013] Int. A.L.R. 88-96

from that of the law of the UAE and Bahrain argue that while it might be expected that public policy in the Muslim world would have encompassed all those religious elements that are usually associated with *Qua'ranic* prohibition, such as usury and the charging of commercial interest, this is not the case in general terms, and that the laws of the UAE and Bahrain are no longer opposed to commercial practices that are routinely encountered in the industrialised nations of the West.

Keith Rosenn in the journal article on the enforcement of Foreign Arbitral Awards in Brazil the requirements for procedures before an arbitral award is enforced.⁸⁵ Rosenn observes that the requirements for confirmation and other procedures before an arbitral award is enforced defeat the purpose of inexpensive and speedy resolution of disputes as aimed in international commercial arbitration.⁸⁶

Leonardo de Campos Melo in his article on the Recognition of Foreign Arbitral Awards in Brazil,⁸⁷ observes that a key indicator that Brazil is becoming a key player in world trade is the fact that its nationals and companies are increasingly involved in international contracts. He notes that effectively, the contracts have led to subsequent disputes. Melo observes that if an arbitral award is to become effective in Brazil, the winning party will have to file a request for the recognition of the foreign arbitral award before the Brazilian *Superior Tribunal de Justiça* ("STJ") and the STJ has final jurisdiction over disputes which raise issues of Brazilian federal law and also has original and exclusive jurisdiction over the recognition of foreign arbitral awards. Therefore, Melo observes that it is only upon such recognition by the STJ that a successful party in a foreign arbitration can be enforced or otherwise relied upon in Brazil.

While Brazil is not a Model state and therefore can be argued to have a different arbitral system from Kenya, Rosenn's and Melo's articles, expose substantively similar challenges on enforcement of international awards in Brazil to the Kenyan situation, hence forming part of

⁸⁵ The American Journal of Comparative Law, Vol. 28, No. 3 (Summer, 1980), pp. 498-506, Published by American Society of Comparative Law, <http://www.jstor.org/stable/839597> accessed: 13/11/2013 08:14

⁸⁶ Rosenn, p.498.

⁸⁷ Leonardo de Campos Melo, Article: Recognition Of Foreign Arbitral Awards In Brazil, Hans Smit and Juris Publishing, Inc.,2013: <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=24+Am.+Rev.+Int'l+Arb.+113&srctype=smi&srcid=3B15&key=5e112d8da78d1098136ef2dfc10ae8d2>

this discussion. Through their study of the Brazilian position on this problem, they expose an example of a system that subjects foreign awards to rigorous tests before enforcement.

Christopher Koch, in his article on the comparison between the French and U.S. experience in the Enforcement of Awards Annulled in their Place of Origin also makes observations relevant to this study.⁸⁸ Koch compares the approach by France and the United States. He examines the extent to which awards which have been annulled in their country of origin can be enforced in the two countries. Citing the 1990's *Hilmarton* case in France and the United States decision in *Chromalloy* Koch notes that in both cases, the courts enforced awards that had been set aside in their place of origin, not pursuant to the New York Convention, but on the basis of the more favorable provisions of domestic arbitration law. Koch takes a similar position as Mehren that the French courts continue to ignore foreign annulment decisions, and will enforce an international arbitration award despite what the domestic jurisdiction finds as to its validity. The courts in the United States on the other hand have gradually refused to enforce awards, which were set aside at the place of arbitration: they will disregard a foreign annulment decision only if it fundamentally violates the United States public policy. This comparative study illuminates the glaring inconsistency of enforcement of transnational awards.

Taylor von Mehren, in his journal Article on the contribution of the French Jurisprudence to international commercial arbitration discusses the principle of private autonomy as a guiding principle in arbitration.⁸⁹ He demonstrates how France has well incorporated this principle in enforcement of foreign arbitral awards. He further supports his analysis of the "contractual nature of arbitration" approach by France by stating the fact that a foreign decision annulling or suspending an award-even an award rendered on the foreign court's territory-poses no legal impediment to the award's recognition or enforcement in France. This principle of private autonomy espouses that parties have a right to dictate the extent and effects of their contracts without interference by external factors including national legislation systems. This principle is relevant to the study because arbitral awards are borne out of arbitration agreements set out by the parties to a contract.

⁸⁸ Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience' (Kluwer Law International, 2003), 26 *Journal of International Arbitration* -2.

⁸⁹ Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 *La. L. Rev.* (1986) Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol46/iss5/2>, accessed 12/11/2013.

1.9. JUSTIFICATION OF THE STUDY

The Constitution of Kenya requires the courts and tribunals to be guided by, among other principles, alternative forms of dispute resolution including arbitration in exercising their judicial authority.⁹⁰ It also provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya, subject to the domestic laws of Kenya.⁹¹

Kenya's legislation as well as international law provides that subject the domestic enforcement of international arbitral awards to the consideration of the public policy of the country. The Arbitration Act of Kenya (1995) provides that:

The recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused ... if the High Court finds that... the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya'.⁹²

A provision with a similar effect is contained in the New York Convention.

The international law principle of private autonomy suggests that parties have a right to dictate the extent and effects of their contracts, and that, the law has no business impeding the recognition or enforcement of international arbitral awards. Another international law principle, public policy, on the other hand suggests that the state is required to exercise restraint and to protect the right of the individual to contract freely, albeit by incorporation of legal limitations to the recognition or enforcement of international arbitral awards.

There is need therefore to examine the meaning of public policy as a limitation on enforcement of international arbitral awards in Kenya and the setback of this limitation.

This study will therefore critically examine public policy limitation on enforcement of international arbitral awards in Kenya under both domestic as well as international law. The study will also analyze Kenyan law and practice on the meaning and application of public policy limitation on enforcement of international arbitral awards. The study will further

⁹⁰Constitution of Kenya, 2010, (the Constitution) Article 159 (2).

⁹¹ Article 2(5) and 2(6).

⁹² Arbitration Act, section 37 (b)(ii) see also the NYC Article V

examine the interpretation and effect of public policy as a limitation on enforcement of arbitral awards in Kenya, the effect of its lack of a concise definition. The study will also compare Kenya's position on the issue to some other selected jurisdictions.

Further, the paper will highlight the challenges of public policy as a limitation of enforcement of international arbitral awards in Kenya. The study will finally recommend possible interventions to address the identified challenges concerning public policy as a limitation to enforcement of international arbitral awards in Kenya. By highlighting the challenges and suggesting possible interventions, the paper will be charting a way forward to improve the application of public policy as a limitation to enforcement of international arbitral awards in Kenya.

1.10. CONCEPTUAL AND THEORETICAL FRAMEWORK

This study is mainly informed by three schools of jurisprudence: the Classical Contract theory, social obligation theory and the conflict of laws theory. It also borrows from various other schools of thought.

Classical contract theory advocates for the unrestricted freedom of contract between parties who bear equal bargaining power, perfect knowledge of relevant market conditions and equal skill.⁹³ Roscoe Pound, a classical positivist observed that "the social order rests upon stability and predictability of conduct, of which keeping promises is a large item"⁹⁴. They argue that the doctrines of promissory estoppel and unconscionability ought to apply with regards to protection of the benefits that freedom of contract was believed to establish. They observe that social order rests upon stability and predictability of conduct, of which keeping promises is paramount. They thus propose that enforcement of bargains as made protects the reasonable expectations of the parties that promises will be performed and contributes to

⁹³ Freedom of contract is defined as the power to decide whether to contract and to establish the terms of the bargain.

⁹⁴ Roscoe Pound, III Jurisprudence 162-63 (1959).

certainty and stability in the marketplace. Accordingly, they say, the government has a duty to exercise restraint and to guard the right of the individual to contract freely.⁹⁵

The social obligation theory on the other hand advocates that it is the duty of government to exercise restraint and to protect the right of the individual to contract freely. They therefore encourage incorporation of community norms into the contract relationship. They also suggest the role that courts should also play in matters of private bargaining.⁹⁶

Conflict of laws theory advances that party autonomy presents a problem in that if individuals are allowed to choose which law will be applied to their dispute, it would appear that private persons could determine the outcome of the battle between states. Under this, the principle of Party autonomy which has become the one principle in conflict of laws that is followed by almost all and which is said to be the most widely accepted private international law rule of our time will be keenly examined.⁹⁷

In light of this, the study examines the existing system of enforcing trans-national awards issued to be executed outside the geographical jurisdiction of the awarding tribunal. It looks at the international instruments governing enforcement of these awards. It examines domestic instruments in selected countries across the world: Brazil, the United States of America (U.S.A) and France. It further inquires into the interaction between the international and domestic instruments and points out the challenges. It examines to what extent the two jurisprudential schools should be embraced. Finally the paper recommends interventions to achieve a cohesive system of enforcing trans-national arbitral awards internationally.

⁹⁵ See also Emmanuel Gaillard: *Legal Theory of International Arbitration*: <http://www.brill.com/legal-theory-international-arbitration>, accessed 15/08/2014.

The author notes that fundamentally philosophical notions of party autonomy and freedom are at the heart enforcement of international arbitral Awards: the questions of legitimacy raised by the parties' freedom to favor a private form of dispute resolution over national courts, to choose their judges, to tailor the procedure and to choose the applicable rules of law, and by the arbitrators' freedom to determine their own jurisdiction, to shape the conduct of the proceedings and to choose the rules applicable to the dispute.

The present work, based on a Course given at The Hague Academy of International Law in the summer 2007, identifies the philosophical postulates that underlie this field of study and shows their profound coherence and the practical consequences that follow from these postulates in the resolution of international disputes.

⁹⁶ See generally Symeon C. Symeonides, *General Report*, in *Private International Law at the End of the 20th Century: Progress or Regress?* 1, 38– 40 (1999) (demonstrating that party autonomy is followed by virtually all major legal systems), and Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 *Recueil Des Cours* 239, 271 (1984).

⁹⁷ *Ibid* fn.95.

1.11. RESEARCH METHODOLOGY

The study mainly involves desktop research. Library research and internet research will be conducted.

The primary sources of information shall include:

1. Constitution of Kenya, 2010;
2. Acts of Parliament of Kenya including:
 - i. Arbitration (Amendment) Act 2009;
 - ii. Arbitration Act, Chapter 49 Laws of Kenya;
3. Case law from Kenya and other relevant jurisdictions; and
4. International legal instruments.

The secondary sources of information shall include:

1. Text books, journals and other texts by authoritative authors; and
2. The internet including online libraries and websites.

1.12. CHAPTER OUTLINE

Chapter one: Introduction

The chapter starts by laying out the parameters of the research. Further, the basis of the research problem is explained and also briefly captured in subsequent statements of the problem. Additionally, the chapter sets out the objectives of the search and briefly narrates the justification of this study. The chapter then briefly discusses the jurisprudential arguments relevant to the research problem. Moreover, the chapter studies the legal provisions as well as literary publications related to the problem. The chapter then states the hypothesis that this paper sets out to test. Additionally, the chapter offers an outlay of the sequence of the chapters as well as a brief summary of each of the chapters. Finally, the chapter explains how the research informing this paper is conducted.

Chapter two: The legal and institutional framework on enforcement of international arbitral awards in Kenya: judicial interpretation and effect of the public policy consideration.

This chapter examines the first research question: What is the Kenyan law position on enforcement of international arbitral awards domestically? The chapter examines the legal framework in Kenya on enforcement of international arbitral awards. The chapter then looks at the institutions that Kenya has set up to effect international arbitral awards. The chapter particularly examines the interpretation the courts in Kenya have applied to this legal and institutional framework with regards to the public policy limitation on enforcement of international arbitral awards in Kenya.

Chapter three: Relevant International legal and institutional framework: judicial interpretation and effect of the public policy consideration.

This chapter examines the second research question: What is the relevant international law position on enforcement of international arbitral awards in Kenya? This chapter defines international legal instruments, in particular conventions and treaties which Kenya has ratified. The chapter examines the two main modes of conducting it: institutional and *ad hoc* arbitration. This chapter then looks at some of the international institutions set up by the international instruments to handle arbitration. The chapter espouses on the differences and relationship between the concepts of enforcement and recognition of award. The paper discusses the various international instruments and institutions on these issues. The chapter particularly examines the interpretation the courts in non-Kenyan jurisdictions have applied to this legal and institutional framework with regards to the public policy limitation on enforcement of international arbitral awards in Kenya.

Chapter four: Comparative analysis

Having looked at the legal and institutional framework in Kenya and under international law on enforcement of international arbitral awards in chapter two and three respectively, this chapter focuses on the position the courts have taken in interpreting these legal instruments provisions on public policy as a ground for setting aside an international arbitral award.

This chapter therefore focuses on answering question three: What is the Kenyan and non-Kenyan judicial interpretation of public policy as a ground for setting aside an international arbitral award? This chapter compares and examines how various courts both locally and internationally as well as international arbitral institutions define and effect public policy as a ground for setting aside an international arbitral award.

Chapter five: Conclusions and recommendations

This chapter sums up the discussions in the preceding chapters. The chapter makes a conclusion on the research problem, in light of the discussions. The hypotheses laid out at the beginning of the research, in chapter one, are then compared with the findings of the research; this either proves or disproves the hypotheses. Finally, the chapter makes recommendations on how to ensure a system that gives a harmonized system of enforcement of transnational arbitral awards to give credence to such awards. In particular, the chapter recommends what can be done to the Kenyan system to make Kenya friendly to enforcement of arbitration, thereby promoting Kenya as the hub of arbitration.

The paper suggests that where parties have valid arbitral agreements, an award ought to be enforced regardless of domestic provisions unless the defaulting party can offer commensurate satisfaction of the award in another country without prejudicing the beneficiary.

CHAPTER TWO

KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK

2.1. INTRODUCTION

In chapter 1, the paper has laid out the challenge that has come about as a result of lacking a concise definition of public policy as a ground for setting aside an arbitral award. The discussion concludes that the lack of a concise definition of public policy has greatly challenged the inherent nature and perception of the arbitral process as an expeditious and effective mode of resolution of disputes. It has raised significant questions regarding the role of the state and the courts in the arbitral process which has hitherto been widely viewed as a private process, mainly driven by the parties in a dispute. The chapter suggests that that a concise definition of public policy as a limitation on enforcement of international arbitral awards should be adapted to anticipate and promote the certainty and finality of the arbitral process.

In this Chapter, I draw from the findings in Chapter 1 to answer the research question one: What is the Kenyan law position and definition of public policy in relation to enforcement of international arbitral awards domestically? I explore the regulatory and institutional framework in Kenya on enforcement of international arbitral awards. I also examine question the interpretation of Kenyan courts on these legal positions on public policy as a ground for setting aside international arbitral awards in Kenya.

The conclusions drawn from this chapter will together with the conclusions drawn in the rest of the chapters assist in answering the question: How best can public policy be applied to the enforcement of international arbitral awards?

2.2. LEGAL FRAMEWORK

“The necessary power to give effect to the legal consequences of arbitration, which is the whole *raison d’etre* of the arbitral process, is invariably vested in national courts by legislation. So far as known to this author, this is the position in all legal systems throughout the world. In the ultimate analysis of the effectiveness of the private

process must therefore rest upon the binding, and even coercive powers which each state entrusts to its courts. It is the exercise of these powers which each state entrusts to its courts. It is the exercise of these powers which determines whether the acts of the arbitral award are to be recognised and enforced or are rendered nugatory and ineffective.⁹⁸

The domestic framework on enforcement of international arbitral awards in Kenya is mainly found in the Constitution of Kenya, 2010, the Arbitration Act, 1995 (and the Arbitration Amendment Act of 2009).⁹⁹ These lay the basis for application of the relevant international legal framework. The Arbitration Act, 1995 as read together with the Arbitration Amendment Act of 2009 is the substantive law on arbitration.¹⁰⁰

Arbitration Act, 1995

The Arbitration Act, 1995 at section 37 provides that:

The recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused only:

- (a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that:
 - (i) a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
- (ii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

⁹⁸ Per the late Sir Kerr, M., LJ CA: Arbitration and the Courts: The UNCITRAL Model Law (1985)34 ICLQ. Cited by Regeru, N., p.154

⁹⁹ The Constitution of Kenya

¹⁰⁰ The Constitution of Kenya

- (iii) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
 - (v) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
 - (vi) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.
- (b) if the High Court finds that—
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

There are therefore several grounds for setting an international arbitral award. The decisions discussed in this paper touch on most of them. While the other grounds for setting aside of an international arbitral award will be referred to from time to time in this paper, the paper is mainly concerned with public policy, in particular, the lack of a definition of the term.

Nairobi Centre for International Arbitration Act¹⁰¹

This act provides for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.¹⁰²

The key international legal framework currently applicable to enforcement of international arbitral awards in Kenya is found in the United Nations Convention on the Recognition and enforcement of Foreign Arbitral Awards, the United Nations Commission on International Trade Law, hereinafter referred to as UNCITRAL, Arbitration Rules, 1978, the UNCITRAL Model Law on International Commercial Arbitration 1985, hereinafter referred to as the UNCITRAL Model Law, and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts, hereinafter referred to as UNIDROIT.¹⁰³

The relevance of enforcement in arbitration cannot be emphasized enough. Njoroge Regeru cautions that an arbitral award, though automatically binding upon the parties, does not immediately entitle the successful party to levy execution against the unsuccessful party.¹⁰⁴ Regeru notes that the successful party must first lodge the award with the court for recognition and enforcement, where after it shall be treated as a judgment of the court, where execution of the award may ensue.¹⁰⁵ He states that the arbitral award is the culmination of the arbitral process and the recognition and enforcement of the award as the final vindication of the process.¹⁰⁶

Regeru notes that the enforcement is a positive action taken to compel the losing party to carry out an award that he is unwilling or unable to carry out effectively through various sanctions.¹⁰⁷

¹⁰¹ Act No. 26 of 2013

¹⁰² *Ibid*, preamble.

¹⁰³ The United Nations Convention on the Recognition and enforcement of Foreign Arbitral Awards is commonly referred to as the “New York Convention”, and herein referred to as the “NYC”. The NYC was adopted by party states in 1958 and became effective as of June 1959.

¹⁰⁴ Njoroge Regeru, p. 123.

¹⁰⁵ Regeru, p. 123.

¹⁰⁶ Regeru, p.123.

¹⁰⁷ Regeru, p.122. See also Redfern, A. Hunter, M. 1999, ‘*Law & Practice of International Arbitration*’ 3rd edn. (Sweet & Maxwell: London). P.449. Also see Campell, D. and Summerfield, P.,

The practice of commercial arbitration in Kenya continues to be weighed down by 'litigious parties who even after the arbitrator makes an award, would still want to challenge it in court on public policy grounds.'¹⁰⁸ This could hamper the enforceability of arbitral awards and also erode the gains made in fronting arbitration as an expeditious dispute settlement mechanism in Kenya.

The practice of domestic and international arbitration in Kenya is conducted within the framework of our 1995 Arbitration Act and is interpreted as: 'any arbitration whether or not administered by a permanent arbitral institution'. The Act follows the UNCITRAL model almost word for word but with several omissions on costs and interest, which omissions are dealt with by the Rules of an active local branch of the Chartered Institute of Arbitrators-Kenya. In addition to ratifying the UNCITRAL Model Law, Kenya has also ratified the New York Convention, the WTO and WIPO Treaties relating to arbitration.

The national arbitration legislation remains relevant to the enforcement of international arbitral awards even in the existence International legal and institutional framework

There are a number of important areas in which the application of national arbitration law is mandatory even where the parties have agreed upon an ad hoc procedural framework or to subject their arbitration to institutional arbitration rules.¹⁰⁹ One such area is the enforcement of the award in a particular jurisdiction.

A substantial number of countries have in recent years reformed their national arbitration legislation to a greater or lesser extent on the basis of or by reference to the UNCITRAL Model Law on International Commercial Arbitration, which was first published by UNCITRAL in 1985 (Model Law (1985)) and in an amended version in 2006 (Model Law

(1989), *Effective Dispute Resolution for the International Commercial Lawyer*: Kluwer Law and Taxation Publishers, Boston, p. 169.

¹⁰⁸ Dr. Kariuki Muigua in his book on *Settling Disputes through Arbitration*, published in the year 2012 makes various observations on the issue, P.224

¹⁰⁹ M Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", *Journal of International Arbitration* (1997) pp 23 – 40; G C Moss, *International Commercial Arbitration – Party Autonomy and Mandatory Rules* (1999); and J Sicard-Mirabal, "Mandatory Rules: What's a Lawyer to Do?", in A J van den Berg (edn), *Arbitration Advocacy in Changing Times, ICCA Congress Series* (2010) pp 348 – 361.

(2006)).¹⁷ The Model Law (1985) (as amended by the Model Law (2006)) is increasingly accepted internationally as the model to which countries look when it comes to updating their arbitration legislation. As a result, the emerging similarity of approach makes arbitration laws increasingly more uniform and arbitration more attractive as a means of resolving international business disputes.¹¹⁰

A key feature of arbitration is that it provides the parties with a large degree of autonomy in the conduct of their arbitral proceedings,¹¹¹ and the arbitral tribunal with wide-ranging procedural powers, to ensure that the conduct of any arbitration is proportionate and appropriate to the issues in dispute, subject only to such safeguards as are necessary in the public interest.¹¹²

This Chapter examines the arbitration statutes in leading arbitral centres particularly the United Kingdom. The treatise's focus is expressly international, focusing on how both developed and other jurisdictions around the world give effect to the New York Convention and to international arbitration agreements and arbitral awards.

The treatise also focuses on leading institutional arbitration rules, particularly those adopted by the International Chamber of Commerce, the London Court of International Arbitration and the American Arbitration Association's International Centre for Dispute Resolution, as well as the UNCITRAL Rules 14.

The Chapter's international and comparative focus rests on the premise that the treatments of international arbitral awards in states that are parties to the NYC is highly similar. From this perspective, the treatment of a court in one NYC jurisdiction for instance in the UK which is a signatory to the NYC regarding enforcement of international arbitration awards is based on an application of highly similar considerations. I therefore limit my comparisons to NYC countries.

¹¹⁰ F Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd Edition, 2009) ch. 1, recital 1.99 *et seq.* See http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_OVERVIEW.pdf

¹¹¹ Cf M Pryles, "Limits to Party Autonomy in Arbitral Procedure", *Journal of International Arbitration* (2007) pp 327 – 339; J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (2003) s 1.11; and N Blackaby, C Partasides, A Redfern and J M H Hunter, *Redfern and Hunter on International Arbitration* (5th Edition, 2009) s 1.73.

¹¹² Regeu, p. 123.

In practice, the principle of judicial non-interference in the arbitral process¹¹³, the immunities of arbitrators and the recognition and enforcement of arbitral awards, decisions in individual national courts have drawn upon and developed a common body of international arbitration law. Guided by the constitutional principles of the New York Convention, legislatures and courts in Contracting States around the world have in practice looked to and relied upon one another's decisions and have formulated and progressively refined legal frameworks of national law to ensure the effective enforcement of international arbitration agreements and awards.

2.3. INSTITUTIONAL FRAMEWORK

In the year 2013, the Nairobi Centre for International Arbitration (NCIA) was established in Kenya by passing the Nairobi Centre for International Arbitration Act No. 26 of 2013. The main objective of the NCIA is to facilitate the establishment of an independent and nonprofit centre with a broad mandate necessary to administer domestic and international arbitration in Kenya.¹¹⁴

The centre is expected to create and maintain proactive cooperation with other regional and international institutions in the field of alternative dispute resolution.¹¹⁵

Arbitration in Kenya before the Centre

Historically, arbitration in Kenya was of a purely domestic nature, with principles substantially drawn from the English Arbitration Act 1996.¹¹⁶ In the absence of specific provisions for regional and international arbitration, major multinational entities setting up in Kenya generally opted to include clauses for the resolution of disputes through arbitration in

¹¹³ Refer to Arbitration & Civil Procedure Act.

¹¹⁴ Kamau Karori, A momentous step: Kenya establishes international arbitration centre International Arbitration Newsletter, 20 December 2013, accessed 18 August 2014.

¹¹⁵ Kamau Karori, A momentous step: Kenya establishes international arbitration centre International Arbitration Newsletter, 20 December 2013, accessed 18 August 2014.

¹¹⁶ Kamau Karori, A momentous step: Kenya establishes international arbitration centre International Arbitration Newsletter, 20 December 2013, accessed 18 August 2014.

other international seats, such as London or Mauritius, which have well-established international arbitration mechanisms.

From around 2010, the Kenyan business community started to push for the creation of a legal and institutional framework for international arbitration.¹¹⁷ This arose from the rapid growth in foreign investment in the various sectors of the economy and the *de facto* establishment of Nairobi as the regional commercial hub. To facilitate the penetration of arbitration and other forms of alternative dispute resolution, the drafters of the 2010 Constitution of Kenya gave the courts a wide latitude to utilize alternative dispute resolution mechanisms. In line with that thinking, the NCIA was established under the Nairobi Centre for International Arbitration Act No. 26 of 2013.

The NCIA

It is expected that the centre will draw heavily from the experiences of the more established institutions such as the International Chamber of Commerce and the London Court of International Arbitration. To ensure the centre is well funded, provision has been made for the centre to receive funds from the government as well as monies donated or otherwise made available to the centre from other sources.

Under the statute establishing it, the centre will have an Arbitral Court comprised of a president, two deputy presidents, the registrar and 15 other members, all of whom are to be leading international arbitrators from countries in the region. The Arbitral Court will have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law. The board appointed under the governing statute will have the power to make rules for the recognition and enforcement of arbitral awards.

Expected impact of the NCIA

¹¹⁷ Kamau Karori, A momentous step: Kenya establishes international arbitration centre International Arbitration Newsletter, 20 December 2013, accessed 18 August 2014.

The establishment of the NCIA is a momentous step towards having a well institutionalised and better co-ordinated arbitration centre for international arbitration in Kenya. The centre has placed Nairobi on the path to being on a par with other major financial hubs that are highly attractive to international investors due to their capacity for speedy commercial dispute resolution. It is expected that Kenya's international arbitration centre will quickly commence its dispute resolution functions and offer a new platform with the capacity and goodwill to serve the region's ever-increasing international arbitration needs.

2.4. CONCLUSION

This chapter has explored the first research question: What is the Kenyan law position on enforcement of international arbitral awards domestically? The hypothesis that has undergirded this study is that there is no concise definition of public policy as a limitation to enforcement of international arbitral awards in Kenya.

In this effort, the chapter has analyzed the provisions and process of enforcement of international arbitral awards generally, and public policy as a ground for setting aside of international arbitral awards in particular. It has described the legal framework of enforcement of international arbitral awards in Kenya, and the resultant institutional framework with the aim of appreciating the vagueness in defining public policy as set in the various instruments and functions of various stakeholders in the international arbitral process.

The main aim of this discourse has been to examine whether Kenya's legislative framework has given a definitive test as to what constitutes public policy as a ground for setting aside an international arbitral award in Kenya.

As discussed in section 2.2 Kenya's legislative framework does not offer a clear definition of public policy. Courts play a key role in the recognition and enforcement of arbitral awards.¹¹⁸ The court's main role in the arbitration process is to recognize and enforce the arbitral award.¹¹⁹ This role of the courts is more elaborately discussed at chapter four. This chapter has also established that current legislation and practices in Kenya regarding domestic recognition and enforcement of international arbitral awards are consistent with the New

¹¹⁸ Regeru, 155.

¹¹⁹ Regeru, 155.

York Convention (the NYC) and the UNCITRAL Model Law.¹²⁰ It is therefore important to examine whether these instruments define public policy. A concise definition in these international instruments, in particular the NYC would cure the lack of a concise definition under Kenyan legislation. This is because an international arbitration award in Kenya enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.¹²¹ This raises important issues, with regard to the role of the international instruments on the enforcement of international arbitral awards in Kenya.

Chapter three attempts to answer this question by exploring the second research question: What is the relevant international law position on enforcement of international arbitral awards in Kenya? This mainly includes: The UNCITRAL Model Law and the New York Convention on the Recognition and enforcement of International Arbitral awards. Other international instruments will also be examined together with the international institutional framework.

¹²⁰ Regeru, p. 155

¹²¹ Arbitration Act, section 36(2).

CHAPTER THREE

INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 INTRODUCTION

The Arbitration Act of Kenya provides that:

An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.¹²²

Having examined in Chapter 2 Kenya's framework and judicial interpretation on public policy consideration in setting aside of an international arbitral award, and having concluded that Kenya's legislation and practices in relation to enforcement of international arbitral awards is based on international treaties and conventions, in particular, the New York Convention and the UNCITRAL Model Law, it is important to examine in detail the international law position on the issue.

This chapter therefore examines the second research question: What is the international law position and definition of public policy in relation to domestic enforcement of international arbitral awards? This chapter defines international legal instruments, in particular conventions and treaties which Kenya has ratified. The chapter examines the two main modes of conducting it: institutional and *ad hoc* arbitration. This chapter then looks at some of the international institutions set up by the international instruments to handle arbitration. The chapter espouses on the differences and relationship between the concepts of enforcement and recognition of Award. The paper discusses the various international instruments and institutions on these issues concerning their position and effect on public policy as a limitation to the enforcement of international arbitral awards.

¹²² The Arbitration Act (1995), Section 36(2).

3.2. INTERNATIONAL LEGAL FRAMEWORK

International arbitration has become the principal method of resolving disputes between states, individuals, and corporations in almost every aspect of international trade, commerce and investment....States have modernized their laws so as to be seen to be ‘arbitration friendly’; firms of lawyers and accountants have established dedicated groups of arbitration specialists; conferences and seminars proliferate; and the distinctive law and practice of international arbitration has become a subject for study in universities and law schools alike....¹²³

Effectively, international arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creation of contract, where the parties' decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contract.¹²⁴

The practice of international arbitration has developed to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems. The ability to resolve disputes in a neutral forum and the enforceability of binding decisions are often cited as the main advantages of international arbitration over the resolution of disputes in domestic courts.¹²⁵

The principal instrument governing the enforcement of commercial international arbitration agreements and awards is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958).¹²⁶ The New York Convention was drafted under the auspices of the United Nations and has been ratified by about 146 states including most of the leading trading nations and other multilateral conventions or bilateral treaties providing for

¹²³ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p.1

¹²⁴ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p.2.

¹²⁵ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p.2.

¹²⁶ Hereinafter referred to as ‘the New York Convention.’

the recognition and enforcement of awards between signatory states.¹²⁷ It is, therefore, generally possible to enforce an award in another jurisdiction more easily than a foreign court judgment.

The New York Convention requires the states that have ratified it to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions.¹²⁸ These provisions of the New York Convention, together with the large number of contracting states, has created an international legal regime that significantly facilitate the enforcement of international arbitration agreements and awards.¹²⁹

As a practical matter, what that means is that an international award originating in a country that is a party to the New York Convention may be enforced in any other country that is also a signatory, as if that award were actually rendered by the domestic courts of that second country.

There is no equivalent treaty for the international recognition of court decisions, although a draft treaty, the Hague Convention of 30 June 2005 on Choice of Court Agreements, was concluded in 2005, but had as of 2013 not entered into force).¹³⁰

Parties to international contracts can therefore decide to site their disputes in a third, neutral country, knowing that the eventual award can be easily enforced in any country that is a signatory to the New York Convention, which has been ratified by a significant majority of commercial nations. An international award therefore has substantially greater executory (legal) force than a domestic court decision.

¹²⁷ See [http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html] (accessed 23 January 2012).

¹²⁸ Article IV provides various items that the party applying for recognition and enforcement shall, at the time of the application. These are the duly authenticated original award or a duly certified copy thereof and the original agreement to arbitrate or a duly certified copy thereof. Further, Article VI provides grounds upon which a court may refuse to enforce an arbitral award. This includes at 2 (b) if the competent authority of the country where enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

¹²⁹ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p.7.

¹³⁰ See if this is now in force. If not, change the date to be 'as of now'

International arbitration can be conducted as either an institutional arbitration or *ad hoc* arbitration.

An “institutional” arbitration is an arbitration conducted under the auspices and pursuant to the rules of an established arbitral institution.¹³¹ In institutional arbitrations, certain procedural steps, for example the appointment of the arbitral tribunal or service of documents, may involve or be administered by the president or secretariat of the arbitral institution.

3.3. INTERNATIONAL INSTITUTIONAL FRAMEWORK

The resolution of disputes under international commercial contracts is widely conducted under the auspices of several major international institutions and rule making bodies such as the International Chamber of Commerce (ICC),¹³² the London Court of International Arbitration (LCIA),¹³³ the Swiss Chambers of Commerce and Industry¹³⁴, the International Centre for Dispute Resolution (ICDR), the international branch of the American Arbitration Association) and the Singapore International Arbitration Centre (SIAC). Most of these institutions have adopted the UNCITRAL Rules for use in international cases.

An important additional aspect of international arbitration is international investment arbitration.¹³⁵ International investment arbitrations are proceedings brought by foreign investors against the state in which they invested (the host state) to settle claims arising directly out of their investment pursuant to an international investment treaty.¹³⁶ There are now over 2,500 international investment treaties and the growth in this form of dispute resolution in the last two decades has been exponential. The most important arbitral institution for the settlement of investment arbitration is the International Centre for the Settlement of Investment Disputes,¹³⁷ based on the Washington Convention (ICSID),¹³⁸ and

¹³¹ See Muigua, K. training material

¹³² See: [<http://iccwbo.org/>] (accessed 13 August 2014).

¹³³ See: [<http://www.lcia.org/>] (accessed 13 August 2014).

¹³⁴ See: [<http://www.cci.ch/>] (accessed 13 August 2014).

¹³⁵ Cf for details R D Bishop, J Crawford *et al*, *Foreign Investment Disputes* (2005); and R Dolzer and C Schreuer, *Principles of International Investment Law* (2008).

¹³⁶ For details regarding international investment treaties see A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).

¹³⁷ On ICSID arbitration see L Reed, J Paulsson and N Blackaby, *Guide to ICSID Arbitration* (2010).

which provides comprehensive rules for the initiation and conduct of investment arbitral proceedings.¹³⁹ Because of the involvement of state parties, investment arbitration differs from arbitration between private entities, which is often referred to as commercial arbitration. The focus of the present Guide is on commercial arbitration between private entities.

There are also a number of trade associations, which administer their own specialist arbitration schemes. These include World Intellectual Property Organisation (WIPO), which has an arbitration and mediation center and a panel of international neutrals specializing in intellectual property and technology related disputes.¹⁴⁰ Leading examples of such specialist arbitration schemes are those set up by the Grain and Feed Trade Association (GAFTA),¹⁴¹ the Waren-Verein der Hamburger Börse e.V.,¹⁴² the London Metal Exchange (LME),¹⁴³ the German Maritime Arbitration Association (GMAA)¹⁴⁴ and the London Maritime Arbitrators Association (LMAA)¹⁴⁵.¹¹ Many countries also have arbitral institutions which deal primarily with disputes in the construction industry.¹⁴⁶ Include WIPO

Most arbitral institutions have promulgated model clauses for parties to use to authorize the institution to oversee the arbitration. They also have published their own arbitration rules, which parties may incorporate into their arbitration agreements by reference, using standard form arbitration clauses suggested by these arbitral institutions. If institutional arbitration rules are adopted by the parties in their arbitration agreement, these rules replace (to the extent permitted by the substantive law governing the arbitration agreement and the procedural law governing the arbitral proceedings, and to the extent that the parties have not agreed otherwise) the non-mandatory statutory arbitration procedure provided for by the national arbitration laws of the country where the arbitration has its “seat”. Most arbitral institutions also have a secretariat which, in return for payment of a fee, will assist the parties

¹³⁸ See CMS Guide to Arbitration, vol II, appendix 1.2.

¹³⁹ See *ibid*, 3.9.

¹⁴⁰ See <http://www.wipo.int/amc/en/>.

¹⁴¹ [<http://www.gafta.com/>] (accessed 23 January 2012).

¹⁴² [<http://www.waren-verein.de/>] (accessed 23 January 2012).

¹⁴³ [<http://www.lme.com/>] (accessed 23 January 2012).

¹⁴⁴ See: [<http://www.gmaa.de/>] (accessed 23 January 2012).

¹⁴⁵ See: [<http://www.lmaa.org.uk/>] (accessed 23 January 2012).

¹⁴⁶ J Jenkins and J Stebbings, *International Construction Arbitration Law* (2006); and E H W Chan and C K L Chan, et al., “Construction Industry Adjudication: A Comparative Study of International Practice”, *Journal of International Arbitration* (2005) pp 363 – 374.

with the administration of their arbitral proceedings and with constituting an arbitral tribunal by appointing arbitrators where this cannot be achieved by agreement between the parties.¹⁴⁷

Agreeing to the rules of an international arbitral institution, presents various advantages including that: the arbitration will take place within an internationally recognised and established procedural framework; the arbitration will take place pursuant to comprehensive, clear and tested arbitration rules; the arbitration will take place with the administrative assistance of an experienced secretariat, which will be able to help the parties and the arbitral tribunal on a large variety of procedural issues; the arbitral institution can assist the parties with respect to the appointment of arbitrators and is well-suited to make a default appointment if a party fails to appoint an arbitrator or if it is not possible to agree on an arbitrator; some arbitral institutions (in particular the ICC) carry out quality control over the work of the arbitral tribunals appointed under their auspices (e.g. by reviewing draft awards prior to their publication) and monitor the progress of the proceedings; disputes between the parties about the application of statutory arbitration procedures of the country where the arbitration has its seat can be avoided so long as the provisions are not mandatory; and in international commercial arbitration, institutional arbitration is often regarded as a “neutral choice”.

On the other hand, some disadvantages of institutional arbitration include that; additional costs are incurred by the parties in the form of fees for the administrative services provided by the arbitral institution; taking into account the overall costs of arbitral proceedings, however, these fees are modest in most cases (a very low percentage of a party’s overall legal expenditure when conducting arbitral proceedings); and the involvement of a secretariat may delay the arbitral proceedings.

An “ad hoc” arbitration is arbitration conducted pursuant to an arbitration agreement between the parties that does not specify an arbitral institution to provide administrative services and / or the procedural rules pursuant to which arbitration shall be conducted. When agreeing to an ad hoc arbitration, the parties can either design their own arbitral procedure to suit their particular requirements, refer to “non-institutional” arbitration rules such as the UNCITRAL

¹⁴⁷ J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (2003) s 10.51 *et seq.*

Arbitration Rules (2010),¹⁴⁸ or simply rely on the arbitration law of the country where the arbitration has its seat to provide the procedural framework for their arbitral proceedings.

In some circumstances, there may be advantages to opting for an ad hoc arbitration. Ad hoc arbitration offers increased flexibility by permitting the parties to agree the dispute resolution procedures themselves (although this process is likely to be easier if the procedure is agreed before a dispute arises). This added flexibility may be used, for example, to allow the parties to impose or control the speed with which the arbitration progresses to an award and the costs of the arbitration. In contrast, in an institutional arbitration, the parties may be subject to rules that impose longer deadlines or require lengthy, time-consuming procedures (e.g. English-style disclosure). Similarly, the arbitral institution will set the costs of the arbitration and apply its own administration costs for its work, whereas in an ad hoc arbitration, for example, the arbitrators and the parties may negotiate directly the arbitrators' fees and avoid the arbitral institution's administration fees (although it is noted that these costs savings may be diminished from having to incur the costs to agree the terms of the ad hoc arbitration rules between the parties).

There are advantages and disadvantages connected with both institutional and ad hoc arbitration. However, despite the advantages of ad hoc arbitration discussed above, as a general rule, parties are well advised to agree on arbitration administered by one of the leading arbitral institutions. The main international arbitral institutions regularly revise and update their rules and they are generally keen to ensure that the parties, having chosen their arbitral institution, benefit from the advantages outlined above. For example, unlike in ad hoc arbitral proceedings, the arbitral institution may exercise some informal control over the speed at which the arbitrators deal with the matter and the fixing of the arbitrators' fees.¹⁴⁹

Most countries also have their own commercial arbitral institutions that deal both with domestic and international arbitrations. Kenya currently has the Chartered Institute of Arbitrators¹⁵⁰ and the Nairobi Centre for Arbitration.

¹⁴⁸ See CMS Guide to Arbitration, vol II, appendix 3.2.

¹⁴⁹ See Report from the ICC Commission on Arbitration (ICC Publication 843), *Techniques for Controlling Time and Costs in Arbitration*, 2007; and see CMS Guide to Arbitration, vol II, appendix 4.3.

¹⁵⁰ Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), pp.6-7.

The legal rules and institutions relevant to international commercial arbitration have evolved over time, in multiple and diverse countries and settings. In recent decades, the resulting legal framework for international commercial arbitration has achieved progressively greater practical success and acceptance in all regions of the world and most political quarters. This Chapter rests on the premise that these instruments, particularly the New York Convention, impose important international limits on the ability of Contracting States to deny effect to international arbitration agreements and arbitral awards. The Contracting States therefore retain some autonomy to give effect to the basic principles of the Convention, a key aspect of this is the Public Policy limitation.

The Chapter devotes substantial attention to leading international arbitration instruments mainly including the United Nations Convention on the Recognition and enforcement of Foreign Arbitral Awards (the New York Convention) and UNCITRAL Model Law on International Commercial Arbitration (the Model Law) of 1985 and amended in 2006 (the UNCITRAL Model Law).

Taken together, international arbitration conventions (particularly the New York Convention), national arbitration legislation and institutional rules provide a legal framework for the international arbitral process. That framework requires Contracting States to effectuate the broad constitutional mandate of the New York Convention – to recognize and enforce arbitration agreements and arbitral awards – while affording individual states considerable latitude in implementing these obligations. In turn, most Contracting States have used that latitude to adopt vigorously pro-arbitration legislative frameworks, which grant arbitral institutions, arbitrators and parties broad autonomy to devise mechanisms for the arbitral process and which give effect to international arbitration agreements and arbitral Awards. The resulting legal framework provides a highly effective means for resolving difficult international commercial disputes in a fair, efficient and durable manner.

3.4. CONCLUSION

In Chapter two, the paper explored whether Kenya’s legislative framework offers a definition of public policy as a ground for setting aside an arbitral award. None has been found. Chapter two however concluded that if a definition is to be found under the NYC or UNCITRAL

Model Law, then it would cure the problem of the missing definition in Kenyan Law. It is therefore on this basis of seeking a definition under these international instruments so as to cure the gap in the domestic legal framework that chapter three is set.

The discussion in this chapter was therefore aimed at answering the second research question: What is the relevant international law position on enforcement of international arbitral awards in Kenya? Despite the fact that the enforcement of international arbitral awards in Kenya is done in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards neither of these international instruments lends a definition of public policy despite setting it out as a ground for domestic courts to refuse enforcement of international arbitral awards.

This discussion has demonstrated a fundamental gap in the sphere of international arbitration in that stakeholders in arbitration are dealing with a ground of public policy which has no clear definition and which therefore leaves stakeholders with great uncertainty.

Despite the existence of a number of comprehensive domestic and international instruments on the enforcement of international arbitration, there is a fundamental gap that must be addressed: the definition of public policy. There is therefore a need for a clear definition of public policy, if arbitration is to maintain its lustre as an attractive mode of resolution of international disputes.

In Chapter four, I use the findings of chapters two and three to explore how the courts have interpreted public policy as a ground for setting aside an international arbitral award domestically.

CHAPTER FOUR

CASE STUDY AND COMPARATIVE ANALYSIS

4.1. INTRODUCTION

Having considered the laws and institutions governing the enforcement of arbitral awards in Kenya and in the international sphere in chapter three and four respectively this chapter focuses on the position the courts have taken in interpreting these legal instruments provisions on public policy as a ground for setting aside an international arbitral award.

This chapter therefore focuses on answering question three: What is the Kenyan and non-Kenyan judicial interpretation of public policy as a ground for setting aside an international arbitral award? This chapter compares the examines how various courts both locally and international as well as international arbitral institutions define and effect public policy as a ground for setting aside an international arbitral award.

In this regard, I will interrogate and seek to apply the recent decisions of the Court of Appeal delivered on 14th November, 2014.¹⁵¹ I will also examine some judicial interpretations from the United Kingdom (UK). This is mainly because the Kenyan Arbitration Act, including its provisions on domestic enforcement of international arbitral awards is heavily informed by the UK Arbitration Act. Further, the UK is a party to the New York convention and therefore applies the provisions of this Convention, as is the case with Kenya,

4.2. CASE STUDY: KENYAN POSITION

Interpretation by Kenyan courts

This is a recent decision by the Court of Appeal presided over by Justices Okwengu, Asikhe-Makhandia and F. Sichale (the **Court**). The Court in the case was faced with the determination of the following two main issues:

¹⁵¹ Civil Appeal No. 38 of 2013, Tanzania National Roads Agency-vs- Kundan Singh Construction Limited.

1. whether the Court of Appeal has jurisdiction to hear an appeal against an order of the High Court made in exercise of powers under section 37 of the Act; and
2. what constitutes the public policy of Kenya?¹⁵²

The two issues are at the core of this paper. The submissions by the parties as well as the decision of the Court breathe life into the instruments relevant to the enforcement and recognition of arbitral awards in Kenya discussed in the various chapters in this paper. These instruments include:

1. article 2(5) and 2(6) of the Constitution of Kenya 2010 (the Constitution);
2. sections 36 and 37 of the Arbitration Act (the Act);
3. Articles 2 and 36 of the UNCITRAL Model Law (the Model Law)

It is these reasons that have necessitated an in-depth examination of this case including the submissions by counsel on both sides and the decision of the court in each issue.

Summary of the Court's decision

Below is a summary of the court's decision on the various issues raised. A comprehensive summary of the issues, submissions and court's decision is supplied later in this chapter.

On jurisdiction

The High Court of Kenya is the only court in Kenya which has authority in relation to enforcement of arbitral awards. 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 that 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

¹⁵² The decision was delivered on 14th November, 2014 by the Court of Appeal sitting in Mombasa in civil appeal no. 38 of 2013, Tanzania National Roads Agency-vs- Kundan Singh Construction Limited.

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 the 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 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.

The court noted the argument by the appellant that because of the application of the principles of International Law and Treaty on Conventions signed by Kenya, the invocation of Article 2(5) and 2(6) of the Constitution raises Constitutional issues and that the appellant therefore has an automatic right of appeal. The court rejected this argument. The court held that the invocation of a Constitutional provision does not necessarily give rise to a constitutional issue, particularly where neither the application of the constitutional provision nor the interpretation of the constitutional provision is in dispute, which the court held was the case in this appeal.

General public importance and Public Policy

There is no right of appeal to the Court of Appeal anchored on matters of ‘general importance’. A matter of public importance is one whose determination transcends the circumstances of the particular case, and has a significant bearing on the public policy interest. Public policy has been described as an intermediate principle which fluctuates with the circumstances of the time. Public policy is a broad concept incapable of precise definition... an award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either: inconsistent with the Constitution of Kenya or any other law of Kenya whether written or

unwritten, or inimical to the national interest of Kenya, or (c) contrary to justice and morality”.¹⁵³

This appeal does not raise an issue of general public importance but raises an issue concerning the recognition and enforcement of an agreement between two individuals.

SUMMARY OF THE CASE¹⁵⁴

This is an Appeal from the whole of the Ruling of the High Court of Kenya at Mombasa by Justice Muya dated 15th August, 2013, to an application dated 15th January, 2013 by Tanzania Roads Agency (the **Appellant**). The Appellant was seeking orders from the High Court at Mombasa that the international Arbitral Award from Stockholm Chamber of Commerce No. V:09/2009 between Kundan Singh Construction Limited (then as the Claimant) (the **Respondent**) and Tanzania Roads Agency (then as the Respondent) dated 25th January, 2012 together with interpretation and clarification of the same dated 8th March, 2012 be recognised and enforced as a decree of this court.

The dispute giving rise to this appeal is traced back to a contract entered into between the Appellant and the Respondent on 1st August, 2007. The Respondent agreed to undertake upgrading works on a particular road section known as the ‘Mbeyachunya-Makongolosi Road Section: Lwanjilo’ in Tanzania at a consideration of T.Shs. 27,463,878,000/-.According to the contract, any dispute arising between the parties would be resolved initially through a reference to the Disputes Resolution Board under the contract. Thereafter, if either party was not satisfied with the decision of the Board, they would refer the matter for arbitration to the Stockholm Chamber of Commerce.

A dispute arose between the parties. The matter was then referred to the Dispute Resolution Board under the contract. The Respondent, being dissatisfied with the decision of the Dispute Resolution Board, referred the matter to arbitration at the Stockholm Chamber of Commerce. The Arbitration proceedings were carried out by a panel of three arbitrators, who determined

¹⁵³Per Ringera J. in the case of Christ for all Nations -vs-Apollo Insurance Company Limited (2002) 2 EA 366 (Christ for all Nations' case).

¹⁵⁴The summary of this case has been wholly extracted from the decision of the bench constituting the following Judges of the Court of Appeal: JJA H.M. Okwengu, Asikhe-Makhandia and F. Sichale.

the dispute through a majority award dated 25th January, 2012. The Award was signed by two of the three arbitrators, one arbitrator dissenting. It is this award that the Appellant moved to the High Court at Mombasa to enforce.

Meanwhile, the Respondent, being dissatisfied with the award, challenged the award through an appeal before the Stockholm Court of Appeal. The issue of this Appeal was not canvassed before the court in this matter. The court therefore did not deliberate on it.

The Respondent had also filed an application dated 24th April, 2012 before the High Court in Nairobi. The Respondent in its application was seeking orders that a part of the majority award which allowed the counterclaim of the Appellant in the arbitration proceedings be set aside or alternatively, that part of the majority award be remitted to the majority arbitrators to decide the same, applying the Tanzanian Law which the parties to the arbitration specifically agreed would govern the arbitral proceedings. The Appellant made a preliminary objection in regard to this application on the grounds that the Kenyan Courts had no jurisdiction to set aside an arbitral award. The objection was upheld by Havelock J in his ruling on 18th December, 2012, that Sweden is the country of the primary jurisdiction in relation to the arbitration and that Kenya only had a secondary jurisdiction in terms of the recognition and enforcement of the arbitral award.

The application dated 15th January, 2013 was concluded by the ruling of Muya J dated 15th August, 2013. Muya J dismissed the application. In his ruling, Muya J. Held *inter alia* that under sections 36 and 37 of the Arbitration Act, Chapter 49 Laws of Kenya (the **Arbitration Act**), the Court has jurisdiction to recognise and enforce any arbitral award irrespective of the country in which it was made, save that the recognition or the enforcement of the award could be refused where the court finds that the recognition would be contrary to the public policy of Kenya; that the arbitration award was arrived at in breach of the express terms of the agreement between the parties which provided that the arbitration shall be governed by the law of Tanzania; and that enforcing such contract would be contrary to the public policy of Kenya.

At the appellate stage:

The Appellant filed a Memorandum of Appeal challenging the ruling of Muya J dated 15th August, 2013. The appeal was based on the grounds that the learned judge erred in:

1. failing to find that the issues concerning the arbitral award being in conflict with public policy of Kenya, and the interpretation of section 37 (1)(b) of the Arbitration Act, were issues which were *res judicata* having been raised and addressed in the ruling delivered by *Havelock J* on 18th December, 2012;
2. failing to find that following the ruling of 18th December, 2012, the enforcement of the arbitral award became automatic as the jurisdiction of the court to decline enforcement and recognition of the arbitral award under section 37 of the Arbitration Act was lost;
3. relying on an expert opinion which was irregularly introduced in the proceedings; and
4. defining what amounts to public policy in Kenya with regards to the recognition and enforcement of international arbitral awards.

The Respondent filed two notices of preliminary objection to the appeal on the grounds of justification and the competence of the trial. Directions were issued that the preliminary objection be argued within the substantive appeal and that the court would first address the objection in the ruling.

Appellant's Case

The Appellant's counsel argued that:

1. where an application in regard to arbitration proceedings is filed in the High Court under section 37 (1)(b)(ii) of the Arbitration Act, a successful ruling leads to a decree or order which ushers in execution. Therefore, the unsuccessful party, in this case the appellant, is entitled to a right of appeal as of right and no leave is required;
2. although the Act defines what amount to an international arbitral award under section 3(3) of the Act, the Act is silent on the question of an appeal to the Court of Appeal in relation to an order failing to recognize and enforce an international award under section 37 of the Act;

3. though section 39 of the Arbitration Act provides for the process to be followed in lodging an appeal against a domestic arbitral award, neither the Arbitration Act nor the Arbitration Rules provide for the procedure to be followed in lodging an appeal against an international award;
4. Article 2 of the Model Law to which Kenya became a signatory on 2nd January, 1996, requires that any questions concerning matters governed by the Model Law not expressly provided for in the Model Law be settled in conformity with the general principles on which the law is based.

The Appellant’s counsel further submitted that:

5. in light of article 36 of the Model Law, and amendments to section 37 of the Act,¹⁵⁵ to conform to Article 36 of the Model Law by adopting international practise, sections 36 & 37 are substantive and not procedural provisions;
6. the procedure for recognition and enforcement of the international arbitration ought to have been in the rules;
7. since the rules have not been amended to reflect the international best practice, Kenya had not fully complied with the Model Law and therefore there is a vacuum;
8. the issue of enforcement and recognition of international arbitral award is a Constitutional issue under article 2(5) and 2(6) of the Constitution which provides that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the laws of Kenya;
9. an appeal emanating from a finding of the High Court under section 37 (1)(b)(ii) of the Act being one involving the application of international treaty should lie as of right to the Court of Appeal and therefore the Court of Appeal had jurisdiction to deal with the matter under Article 163 (3) (a) of the Constitution;

¹⁵⁵Section 37 of the Act has been amended through Legal Notice No. 11 of 2009.

10. aside from the appeal raising a Constitutional issue it also raises matters of general public importance.

The cases of *Anne Mumbi Hinga –vs- Victoria Njoki Gathara and Attorney General of Kenya –vs-Anyang’ Nyong’o and 10 Others* were relied on in an effort to define public policy.¹⁵⁶ Appellant’s counsel submitted that public policy:

1. involves some element of illegality or something that is injurious to the public good; or
2. an act which is reprehensible, unconscionable or injurious to the public by being contrary to the Constitution of Kenya 2010 or Kenyan laws; or
3. being contrary to the interest of Kenya; or
4. being contrary to justice and morality.

The Court’s attention was drawn to the following decision as adopted in the case of *Kenya Shell Limited-vs-Kobil Petroleum Limited*¹⁵⁷:

although public policy is a most broad concept incapable of precise definition,... an award could be set aside under section 35(2) (b) (2) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was:

- 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 and morality¹⁵⁸

Counsel for the Appellant also faulted the learned judge for failing to give effect to Article 259(1) of the Constitution.

¹⁵⁶[2009] eKLR and [2010] eKLR respectively. These cases have been comprehensively discussed in the other chapters of this paper.

¹⁵⁷ [2006] eKLR

¹⁵⁸The test of justice and morality is yet another that has been argued to be wide and lacking of a precise definition. This would therefore also pose a challenge in the definition of public policy because it is also largely considered an undefined term.

The Respondent's case

In regard to the preliminary objection, counsel for the Respondent submitted that the appeal was misconceivable, incurably defective and incompetent for the following reasons:

- a) the court lacks jurisdiction to entertain, hear and determine the appeal by dint of section 37(1)(b) of the Act and Article 5(2)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the NYC);
- b) no leave was obtained by the Respondent to appeal against the ruling delivered on 15th August, 2013; and
- c) the court lacks jurisdiction to entertain the appeal by virtue of Article 36 (1)(b) of the Model Law.

On the issue of leave, counsel for the Respondent submitted that;

1. appeals lie only as a matter of right under section 75(1)(h) of the Civil Procedure Act and Order 43 rule (1) of the Civil Procedure Rules ;and
2. the order subject to appeal not being one listed under Order 43 rule 1 (1) of the Civil Procedure Rules 2010 or section 75(1)(h) of the Civil Procedure Act, the order could only be appealable with the leave of court;
3. no leave having been sought or obtained, the appeal was incompetent. Counsel relied on the case of *RamjiDevji Shah –vs-Joseph Oyula* where it was submitted that the failure to obtain leave was an incurable defect as it goes to the root of the appeal.¹⁵⁹

On the issue as to whether the Court of Appeal has jurisdiction to entertain an appeal arising from a determination made by the High Court under section 37 of the Act, counsel for the Respondent submitted that:

¹⁵⁹[2011]eKLR.

1. the award subject of the determination was an international arbitral award governed by international law;
2. specifically the recognition and enforcement of such award is governed under Article V(ii)(b) of the Model Law ; and section 37 (1)(b) of the Arbitration Act;
3. the competent authority with power to recognise and enforce an international arbitral award is defined under section 37(1)(b) of the Act as the High Court; and
4. in accordance with the New York Convention, there is only one such competent authority.

Counsel for the Respondent argued that although the Court of Appeal has general jurisdiction to hear appeals in all matters emanating from the High Court:

1. the jurisdiction must be prescribed by an Act of Parliament;
2. in the case of international arbitral awards, the Act does not make any provisions for an appeal to the Court of Appeal on recognition and enforcement of international arbitral awards;
3. sections 36 and 37 of the Act only gives the High Court the power to recognise and enforce international arbitral awards and no jurisdiction has been given to the Court of Appeal to deal with the decisions emanating from the High Court under section 37 of the Act; and
4. the court of Appeal therefore lacks jurisdiction to entertain the appeal.

With regards to the issue of public policy, Counsel for the Respondent submitted that the Respondent's major and formidable opposition to the appellants' application in the High Court for recognition and enforcement of the international arbitral award was that the award could not be recognised or enforced as it was contrary to public policy of Kenya.

Among other issues, counsel for the Respondent contended that the contract stated clearly that the law in interpretation of the contract is Tanzanian law. That in arriving at the decision, the two majority arbitrators blatantly ignored the clear intention of the parties and unfairly exposed the Respondent to financial loss contrary to justice and morality , that the award was

inconsistent with the Constitution or other written law as section 29(1) of the Act requires the arbitral tribunal to determine a dispute in accordance with the rules of law chosen by the parties; and that the intervention of the Court of Appeal was not warranted as the High Court exercised its discretion judiciously in determining whether or not the subject award was contrary to public policy.

The Court of Appeal's decision

On the issue of jurisdiction under section 37 of the Act, the Court of Appeal restated the provisions of section 37 of the Act that Section 37 (1) the recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused only at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that:

- i. a party to the arbitration agreement was under some incapacity; or
- ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
- iii. the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
- v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

- vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
- vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

a. if the High Court finds that—

the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.¹⁶⁰

The Court therefore held that the jurisdiction regarding the recognition and enforcement of arbitral awards is vested in the High Court. The Court of Appeal went ahead to note that Article 164(3) (a) of the Constitution gives the Court of Appeal jurisdiction to hear appeals from the High Court as follows:

(3) The Court of Appeal has jurisdiction to hear appeals from:

- b. the High Court; and
- c. any other court or tribunal as prescribed by an Act of Parliament.

The court held that this provision does not confer an automatic right to appeal to litigants such that any judgment, order or decree made by the High Court is appealable to the Court of Appeal.

¹⁶⁰Section 37 of the Act makes provisions in relation to the grounds for refusal of recognition or enforcement.

The court further stated that 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. The court goes on to illustrate that a right of appeal in regard to a civil proceedings from the High Court will be governed by the Civil Procedure Act and Rules as read with the Appellate Jurisdiction Act. Similarly, a right of Appeal in regard to criminal matters will be governed by the Criminal Procedure Code as read with the Appellate Jurisdiction Act.

With this regard, the Court therefore found that 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. In the case of international arbitrations, the general rules of international law, treaty or convention ratified by Kenya which form part of the laws of Kenya under Article 2(5) and (6) of the Constitution. The court further held that it is not disputed that 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 court held therefore that 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.

The court noted its examination of the UNCITRAL Model Law and stated that it shows that there was a clear and deliberate intention to limit court intervention in arbitration matters for the reason that:

Protecting the arbitral process from unpredictable or disruptive court interferences is essential to parties who choose arbitration, in particular foreign parties.

The court of Appeal noted Article 5 of the UNCITRAL Model Law which provides that:

In matters governed by this law, no court shall intervene except where so provide in this law.

The court noted that in respect to recognition and enforcement of international arbitral awards, 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.

The court noted the argument for the appellant that because of the application of the principles of International Law and Treaty on Conventions signed by Kenya, the invocation of Article 2(5) and 2(6) of the Constitution raises Constitutional issues and that the appellant therefore has an automatic right of appeal. The court rejected this argument. The court held that the invocation of a Constitutional provision does not necessarily give rise to a constitutional issue, particularly where neither the application of the constitutional provision nor the interpretation of the constitutional provision is in dispute, which the court held was the case in this appeal.

General public importance

The court noted the attempt by counsel for the appellant to draw a right of appeal from the subject of the appeal where it raises a matter ‘of general public importance’. The court held that there is not right of appeal to the Court of Appeal anchored on matters of ‘general importance’. The court further held that such a ground only arises under Article 163(4) (b) of the Constitution in this regard to appeals from the court of Appeal to the Supreme Court.

The court further held that a matter of public importance is one whose determination transcends the circumstances of the particular case, and has a significant bearing on the public policy interest. The court relied on the case of *Hermanus Ruscone* the court distinguished a matter of general public importance from public policy.¹⁶¹ The Court held that public policy has been described as an intermediate principle which fluctuates with the circumstances of the time. The court relied on the case of *Kenya Shell Limited –vs- Kobil Petroleum Limited*.¹⁶² The court cited the decision in the case of *Christ for all Nations -vs- Apollo Insurance Company Limited*¹⁶³ as instructive as follows with regards to arbitral awards:

¹⁶¹ [2012] eKLR.

¹⁶² Kenya Shell Limited –vs- Kobil Petroleum Limited [2006] eKLR

¹⁶³ Christ for all Nations -vs-Apollo Insurance Company Limited (2002) 2 EA 366 (Christ for all)

although public policy is a broad concept incapable of precise definition... an award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either:

- (a) inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or
- (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality”.¹⁶⁴

The court found that this appeal does not raise an issue of general public importance but raises an issue concerning the recognition and enforcement of an agreement between two individuals. The Court therefore upheld the objection raised that the appeal is incompetent and that the court lacks jurisdiction to entertain the appeal.

At this point the court cited the case of Owners of Motor Vessel “Lillian S” v. Caltex Oil Kenya Ltd at page 14, where the court stated:

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction”¹⁶⁵

and abandoned the substantive issues which were raised in the appeal.

Conclusion

There are certain benchmarks that come up each time a definition of public policy is required. These have been mentioned in most of the cases where this issue has come up, including the cases discussed in this paper.

I have had the opportunity to discuss the two main issues as set out above and the decision of the court in this matter with Mr. Joseph Munyithya advocate, counsel for the Appellant and his views. Mr. Munyithya takes the view that in its decision, the court failed to consider

¹⁶⁴Per Ringera J. in the case of Christ for all Nations -vs-Apollo Insurance Company Limited (2002) 2 EA 366 (Christ for all Nations).

¹⁶⁵Indicate full citation of this case and insert the relevant paragraph. Also include it in the literature review.

substantive issues on public policy. Due to the constraints of time, I have not been able to contact counsel for the Respondent for comments regarding this matter and decision.

Recommendation

In light of the discussion above, I suggest that a concise definition of what constitutes public policy under sections 36 and 37 of the Act be supplied. I recommend that this definition capture the essential issues emerging in these judicial decisions. I recommend that the definition should not be so wide as to dilute the possibility of enforcement.

The following is my proposed definition of public policy:

4.3. COMPARATIVE ANALYSIS: THE UK POSITION

In the case of *Honeywell International Middle East Ltd –vs- Meydan Group LLC (formerly known as Meydan LLC)*, the court considered when and how public policy will be applied in setting aside an international arbitral award.¹⁶⁶ The court held that ‘...the grounds on which a New York Convention award may not be recognised are limited as set out in s 103 of the Arbitration Act 199. Section 103(3) provides that ... enforcement of the award may be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.’

The court in this case cited Dicey, Morris and Collins that English law recognises an important public policy in the enforcement of arbitral awards and the courts will only refuse to do so under s 103 in a clear case.¹⁶⁷ Equally as stated in Redfern and Hunter ‘the intention of the New York Convention ... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.’¹⁶⁸ They then cite Van den Berg The New York Arbitration Convention of 1958 (1981) at pp 267 and 268 where he said: ‘As far as the grounds for refusal for enforcement of the award as enumerated in art V are concerned it

¹⁶⁶ Construction Law Reports/Volume 154 /Honeywell International Middle East Ltd -v-Meydan Group LLC (formerly known as Meydan LLC) - 154 ConLR 113 [2014] EWHC 1344 (TCC).

¹⁶⁷ at para 16-150

¹⁶⁸ Redfern and Hunter on International Arbitration at paragraph 11.60.

means that they have to be construed narrowly.' As made clear in *Rosseel NV –vs- Oriental Commercial & Shipping Co (UK) Ltd* enforcement may only be refused on the grounds set out in s 103 of the Act and are therefore exhaustive.¹⁶⁹ The burden of establishing the grounds under s 103(2) is upon Meydan, although the court can raise matters under s 103(3) of its own motion.

In the case of *Soleimany –v-Soleimany (the Soleimany case)*, the court considered the issue of whether an international award could be enforced in the event of an illegality as against the backdrop of public policy consideration.¹⁷⁰ The court held that 'where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it'.

Parties in the Soleimany case were a father and son of Iranian Jewish origin. In contravention of Iranian revenue laws and export controls, the son arranged for the export from Iran of carpets which were subsequently sold by his father in England and other countries. A dispute arose over the division of the proceeds of the scheme, and the parties referred the matter to binding arbitration by the Beth Din, a body which applied Jewish law. The Beth Din's award explicitly referred to the illegal nature of the enterprise, but nevertheless awarded a substantial sum to the son; under Jewish law the illegality of the enterprise did not affect the rights of the parties. The High Court granted the son leave to enforce the award, but the father applied for leave to be set aside, contending that it would be contrary to public policy to enforce an award founded on an illegal transaction. That application was dismissed by the judge, and the father appealed. On the appeal the son contended that, at the enforcement stage, the court should not examine the underlying transaction.

The court held that: It would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the parties to conceal, through the procurement of an arbitration that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process. Thus, where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim

¹⁶⁹ *Rosseel NV –vs- Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 at 629.

¹⁷⁰ All England Law Reports/1999/Volume 3 /*Soleimany v Soleimany* - [1999] 3 All ER 847.

from the illegality which gave rise to it. In the instant case, although the arbitration clause was valid, the award referred on its face to an enterprise with an illegal object which the English court viewed as contrary to public policy. Accordingly, the award would not be enforced, and the appeal would be allowed.

Not all challenges on the ground of public policy can be considered to be as clear cut as this. An attempt to define public policy is seen in the case of *Eco Swiss China Time Ltd v Benetton International NV (the Eco case)*.¹⁷¹ The court found that only if the terms of the award or its enforcement conflicted with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental.

B, a company established in the Netherlands, entered into a licensing agreement with E Ltd, a Hong Kong based retailer, and another company, under which it granted E Ltd the right to manufacture and sell watches and clocks bearing its name for a period of eight years. Article 26A of the agreement, which also involved a market sharing arrangement, provided that disputes between the parties were to be settled by arbitration in accordance with Netherlands law. In 1991 B terminated the agreement, whereupon arbitration proceedings were instituted in the Netherlands resulting in interim and final awards being made against B. B contended that the awards were contrary to public policy on the ground that the licensing agreement was void under art 81 EC (ex art 85) of the EC Treaty and applied to the District Court for their annulment under art 1065(1)(e) of the Code of Civil Procedure, and also a stay of enforcement. The District Court dismissed the application, but on B's appeal the Regional Court of Appeal granted a stay of the final award, holding that art 81 EC was a provision of public policy within the meaning of art 1065(1)(e). E Ltd appealed by way of cassation proceedings to the Supreme Court, which held that an arbitration award was contrary to public policy within the meaning of art 1065(1)(e) only if its terms or enforcement conflicted with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental. The court, however, was unclear whether the position was the same where the provision in question was a rule of Community law and therefore stayed the

¹⁷¹ All England Commercial Cases/1999/Volume 2 /Eco Swiss China Time Ltd v Benetton International NV - [1999] 2 All ER (Comm) 44

proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling the question, inter alia, whether, in such circumstances, a national court to which application was made for annulment of an arbitration award had to grant it where, in its view, that award was contrary to art 81 EC.

The court held that Article 81 was a fundamental provision which was essential for the accomplishment of the tasks entrusted to the Community and in particular for the functioning of the internal market. Its provisions, therefore, might be regarded as a matter of public policy within the meaning of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958. Furthermore, Community law required that questions concerning the interpretation of the prohibition laid down in art 81(1) EC (ex art 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award. It followed that a national court to which application was made for annulment of an arbitration award had to grant that application if it considered that the award in question was contrary to art 81 EC, where its domestic rules of procedure required it to grant an application for annulment founded on failure to observe national rules of public policy.

The court in the case of *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* examined the issue of whose public policy should be considered in enforcement of international arbitral awards.¹⁷² The court held that an award will not be enforceable in the UK if it contravenes or effecting it clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights. The court noted that this limitation was discussed and applied in *Kuwait Airways v Iraqi Airways Co*, where Lord Nicholls said that the acceptability of a provision of foreign law must be judged by contemporary standards.¹⁷³

The court also noted the decision in the case of *Blathwayt v Lord Cawley* where the court held that conceptions of public policy should move with the times.¹⁷⁴ The court noted the decision in the case of *Oppenheimer v Cattermole (Inspector of Taxes)* that 'the courts of this

¹⁷² All England Law Reports/2013/Volume 1 /*Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* - [2013] 1 All ER 223

¹⁷³ [2002] 3 All ER 209, [2002] 2 AC 883

¹⁷⁴ [1975] 3 All ER 625 at 636, [1976] AC 397 at 426 per Lord Wilberforce.

country should give effect to clearly established rules of international law'. The court in this case noted held that this position is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important....International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law.¹⁷⁵

The court in this case further cited the decision in the Oppenheimer's case and held that:

A judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations.¹⁷⁶ This principle normally requires our courts to recognise the jurisdiction of the foreign state over all assets situated within its own territories.¹⁷⁷ A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.

The court further held that:

'The essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention, And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.'¹⁷⁸

¹⁷⁵ see the discussion in Oppenheim's International Law (9th edn, 1992) vol 1, pp 371-376, para 113

¹⁷⁶ Oppenheimer v Cattermole (Inspector of Taxes) [1975] 1 All ER 538 at 566-567, [1976] AC 249 at 277-278 per Lord Cross.

¹⁷⁷ See Oppenheimer v Cattermole (Inspector of Taxes) [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Salmon.

¹⁷⁸ See Oppenheimer v Cattermole (Inspector of Taxes) [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Hope

The court in this case held that ‘... there can be a still further distinction to be made between the act of state which cannot be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore can be challenged.’¹⁷⁹

The issue of whose public policy should be considered in enforcement of international arbitral awards was also examined by the court in the case of *Tamil Nadu Electricity Board v St-CMS Electric Company Private Ltd* (the Tamil Nadu case). The court in this case held that “public policy” means international public policy and differs from public policy in a domestic context.

The claimant was the state electricity board for the state of Tamil Nadu. Its principal objective was the generation and distribution of electrical power. The defendant was an Indian company incorporated by foreign investors from the United States, Switzerland and the Netherlands in 1993, for the purpose of the development and operation of a 250 MW lignite-fired power plant at Neyveli in Tamil Nadu. At the time of the defendant's incorporation, foreign companies were not permitted to construct or own power plants; hence an Indian company was formed. The parties concluded a long term supply agreement in 1993, which was subsequently restated and amended in November 1996 (the PPA). Under the PPA disputes were to be settled by ICC arbitration in London, governed by English laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; by contrast, the PPA itself was to be governed by Indian law. A dispute subsequently arose as to charging under the PPA, which the defendant referred to arbitration. It alleged that the claimant had used a computation methodology not provided for by the PPA and disregarded certain key terms of the PPA. It stated that the claimant had, inter alia, refused to give the complete benefit of the foreign exchange rate variation on the foreign currency elements of the actual capital cost, for which specific provision was made in the PPA. It sought an award declaring that the actual capital of cost was as it had calculated, and a direction that the claimant pays the sum claimed.

¹⁷⁹ See *Oppenheimer v Cattermole* (Inspector of Taxes) [1975] 1 All ER 538 at 571, [1976] AC 249 at 282 per Lord Hope

The claimant applied to the court under s 72 of the Arbitration Act 1996 for declarations that the matters submitted to arbitration were not within the scope of any arbitration agreement between the parties. Two contractual exceptions existed to the application of the arbitration clause: the first related to a dispute about an acceptance test, which was to be resolved by an independent engineer, and secondly in the event of a 'buy-out', the price was to be determined ultimately by an independent appraiser absent agreement. The claimant also submitted that by virtue of the choice of Indian law as the governing law of the PPA, there was a further exception to the jurisdiction of the arbitrator, namely the compulsorily applicable principles of Indian law. Those principles, it submitted, required determination of the tariff to be charged by the statutory Indian body, which had to be recognised as a matter of English conflicts principles. It further argued that the defendant was estopped from denying that the pricing had to be determined by the Indian authorities and not by arbitration.

Whether or not there might be a defence to enforcement in India under Article V.2 (b) of the New York Convention, as a matter of the public policy of India, is neither here nor there for these purposes, but in the context of an international treaty, “public policy” means international public policy and differs from public policy in a domestic context. The courts of many parties to the Convention have expressly recognised this - see *The New York Arbitration Convention of 1958 - towards a Uniform Judicial Interpretation* by van den Berg at pages 359-368, illustrated in the decision of Hobhouse J (as he then was) in the *Marques de Bolarques* [1984] 1 WLR 642 at 658-659.

Furthermore, on the evidence of ST-CMS' expert on Indian law this distinction is clearly recognised in the law of India. In his second affidavit, Mr Jaitley referred to the decision of the Supreme Court of India in *Renusagar Power Company Ltd v General Electric Co.*, AIR 1994 SC 860. There, when looking at Article V(2)(b) of the New York Convention and the section of the Foreign Awards Act which enacted it in India, it was held that the expression “public policy” in the Act must necessarily be construed in the sense that the doctrine of public policy is applied in the field of private international law. Consequently, “it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law or (ii) the interests of India or (iii) justice or morality.” In order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. In an earlier decision, the Supreme Court, in *Murlidhar Aggarwal*

v State of Uttar Pradesh (1974) 2 SCC 472, it was held at paragraph 28, by reference to English law authorities, that the expression “public policy” had an entirely different meaning from “the policy of the law” and depended upon “customary morality” and “social consequences” with regard to the “current needs of the community”.

The court ruled: On the true construction of the PPA, the Indian law clause and related provisions did not equate to provisions requiring a dispute resolution other than arbitration, so as to render the dispute out with the arbitration clause. There was no principle of English private international law, nor any public policy basis, for not adopting the construction of the arbitration clause under English law, on which basis the claimant's argument had to fail. In any event, on the evidence as to Indian law, there was nothing which impinged on the right to arbitrate. Nor had the claimant established any estoppel: it had not acted on any shared or agreed assumption with the defendant that the Indian authorities would make a final and binding decision on the relevant matters to the exclusion of any jurisdiction of the arbitrators. The claimant's applications would be dismissed and the defendants would be entitled to declarations as to the validity of the arbitration

The questions of definition of public policy as well as whose public policy should be considered was also examined in the case of *R –v- V*.¹⁸⁰ The court held that:

‘Previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well.

The claim had been brought under the terms of a consultant agreement of March 2002. The defendant was beneficially owned by F, whose personal services as a consultant were being retained by the claimant. The recitals to the agreement recorded that the defendant had expertise in Libya concerning the oil industry (F had been retained by the claimant and others for some years as a consultant in that field).

¹⁸⁰ [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep 97

The agreement provided for F to use his influence and information, concerning, inter alia, negotiations with Government officials and state and private corporations, to assist the claimant in connection with the promotion of its interests in Libya. Subsequently the claimant took the view that the agreement was unenforceable on three grounds: (i) lack of consideration; (ii) that F was in breach of his fiduciary duty and was precluded from obtaining any personal benefit from the agreement; and (iii) the agreement was illegal under Libyan law and contrary to English public policy in regard to influence peddling. The dispute was referred to arbitration in London under the auspices of the ICC. By an award of December 2007, the tribunal rejected the claimant's contentions and upheld the defendant's claim for immediate payment of \$US3m and substantial further payments due on the achievement of specified oil production figures. The claimant applied to challenge the award under (i) s 68(2)(g) of the Arbitration Act 1996 on the ground that it was contrary to English public policy; and (ii) s 81(1)(c) of the Act on the ground that it was contrary to public policy at common law.

The court held that previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well. There was no material distinction between that previous authority and the instant case, which accordingly had to fail. There was ample material before the tribunal that the contract was not illegal under Libyan law and the arbitrators had expressly so held. No new evidence to the contrary had been adduced by the claimant. The tribunal was composed of arbitrators who were highly commercially experienced and there was no suggestion of bad faith. Moreover, the claimant's challenge would in any event have failed on the merits. The applications were dismissed.

Another issue is that of people moving from one country to another because public policy has in most cases held to be relative to the specific country where enforcement is being sought.

The court in the case of *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* examined this.¹⁸¹ In particular the court examined a situation where there might be a conflict between rules of public policy; and, where issues of public policy were involved, whether the English court should decide any issue of public policy for itself, or be content to abide by the foreign courts' decisions, and, if so, which one.

International arbitration has become the most established method of determining international commercial disputes.¹⁸² In some jurisdictions, an enforcing court is required to examine the possibility the possibility of a public policy violation *ex officio*.¹⁸³ Under the New York Convention and the Model Law, contrary to the position in the Geneva Convention of 1927, the burden of proof is upon the party challenging the enforcement. Even if the grounds for refusal of recognition are proved to exist, the courts are not under any requirement to refuse enforcement.¹⁸⁴

In the English case of *MGM Productions Group Inc –vs- Aeroflot Russian Airlines*, Aeroflot sought to challenge a Stockholm award because it compensated the claimant for Aeroflot's non-performance of an agreement whose provisions allegedly violated the US Iranian Transactions Regulations adopted pursuant to the executive Order by the President of the United States under the International Emergency Economic Powers Act.¹⁸⁵ The second Circuit rejected the challenge, holding that 'the Courts construe the public Policy limitation in the Convention very narrowly and apply it only when the enforcement would violate the forum state's "most basic notions of morality and justice".' The court found that in this case, even if the agreement in operation did violate the Iranian Transactions Regulation, which the arbitral tribunal itself had found was not the case, the award would not violate the Public

¹⁸¹ All England Law Reports/2013/Volume 1 /Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2) - [2013] 1 All ER 223

¹⁸² Alan Redfern & Martin Hunter with Nigel BlackBaby & Constatine Partasides: *Law & Practice of International Commercial Arbitration*, Sweet & Maxwell (4edn), p. 1.

¹⁸³ See the decision of the *Cour De justice* of Geneva dated December 11, 1997 reported in Vol.XXIII(1998)*Yearbook Commercial Arbitration* 764.

¹⁸⁴ Article V of the NYC, paragraphs (1) and (2). See this interpretation seemingly accepted by several commentators including: Dicey & Morris, *The Conflict of Laws* (12 ED.,1993),P.624; Delaume, "Enforcement against a foreign state of an arbitral Award annulled in the foreign state"(1997) *Revue du droit international des affaires*, at 254 and the English Court's decision in *China Agribusiness Development Corporation –vs-Balli Trading* [1998]2 Lloyd's Rep. 76.

¹⁸⁵ *Productions Group Inc –vs- Aeroflot Russian Airlines* [2004] WL234871 (2nd Circ. (New York Convention))

Policy because “a violation of United States Foreign Policy does not contravene Public Policy as contemplated in Article V of the New York Convention”.

When reference is made to “Public Policy” in England, the words of the English Judge who said almost two centuries ago: “It is never argued at all but where other points fall.”¹⁸⁶ The national courts in England are reluctant to excuse an award from enforcement on grounds of public policy.¹⁸⁷ It has been suggested that the first time the Public Policy exception was allowed in the English Courts is in the case of *Soleimany-vs Soleimany*.¹⁸⁸ The Court refused to enforce an award giving effect to a contract between a man and his son. The contract involved smuggling of carpets out of Iran in breach of Iranian Revenue Laws and export controls. The man and son had, upon the voluntary mutual agreement submitted their dispute to Arbitration by the Beth Din, the Court of the Chief Rabi in London. The Chief Rabbi’s court applied Jewish Law which, provided that the illegal purpose of the contract had no effect on the rights of the parties. The Beth Din proceeded to make an award enforcing the contract. The English Court in declining to enforce the award however held that:

The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public Policy will not allow it.¹⁸⁹

Such exception on enforcement of award public policy has been sparingly applied, with the pro-enforcement bias being considered a matter of public policy.¹⁹⁰

This position was held in the English case of *Westacre Investments Inc. –vs-Jugoimport – SPDR Holding Holding Co. Ltd (Westacre)*.¹⁹¹ The dispute arose from a consultancy agreement for the procurement of contracts for the sale of military equipment in Kuwait. Westacre commenced arbitration claiming payment of its consultancy fee. Jugoimport

¹⁸⁶ Per Burrough J.in Richardson –vs-Mellish (1824)2 Bing,229 at 252

¹⁸⁷ Alan Redfern & Martin Hunter with Nigel BlackBaby & Constatine Partasides: Law & Practice of International Commercial Arbitration, Sweet & Maxwell (4edn), p. 456-457.

¹⁸⁸ [1999] Q.B.785.

¹⁸⁹ [1999] Q.B.785.p. 800

¹⁹⁰ Alan Redfern & Martin Hunter with Nigel BlackBaby & Constatine Partasides: Law & Practice of International Commercial Arbitration, Sweet & Maxwell (4edn), p. 457.

¹⁹¹

defended the claim on the ground that, in violation of the laws of Kuwait and public policy, the contract involved Westacre bribing various Kuwaitis to exert their influence in favour of entering sales contracts with Jugoimport. The agreement between Westacre and Jugoimport was governed by Swiss law. The award was first challenged in the Swiss Federal Court. The Swiss court rejected the challenge on the basis that the allegations of corruption had already been dealt with and rejected by the arbitral tribunal. Attempts to enforce the award were subsequently challenged in the English Courts, where Jugoimport filed new Affidavit evidence in support of its allegation of corruption. The English Court rejected the challenge to enforcement both at the first instance as well as in the Court of Appeal on the basis that the arbitral tribunal had already considered the allegations of bribery and found that they had not been substantiated. The court observed that, “lobbying” was not, as such, an illegal activity under the governing law chosen by the parties, and the Court was faced with international arbitration awards that had been upheld by the Swiss tribunal and therefore had to balance the public policy of discouraging international commercial corruption with the public policy of sustaining international arbitral awards.

4.3. CONCLUSION AND RECOMMENDATION

The discussion in this chapter was aimed at answering the third research question: what is the Kenyan and non-Kenyan judicial interpretation of public policy as a ground for setting aside an international arbitral award? The hypothesis was that neither the Kenyan courts, nor the non-Kenyan courts have set out a specific definition of public policy. There is a glaring uncertainty and discord in judicial interpretation of public policy. The chapter has explored this question by analyzing recent as well as previous court decisions within and outside Kenya. In particular, on the decisions in non-Kenyan jurisdictions, the chapter has analyzed cases in four countries: the United Kingdom (UK), because just like Kenya it is a member of the New York Convention as well as the fact that many Kenyan cases and texts have examined and refer to the UK position. The UK is however not a Model Law country. Decisions from Brazil, United States of America and Spain have also been examined for purposes of analysis. This is because the three are neither Model law countries nor party to the NYC. They are however key players in international trade with Kenya and there is a substantial amount of literature on the definition of public policy with regards to these jurisdictions.

Evidently, the lack of definition of public policy has led to uncertainty and a great disconnect in the international arbitration process. The definition varies from jurisdiction to jurisdiction and even within a jurisdiction, from a matter to another, as well as judicial officer to the other.

Chapters two and three have demonstrated that neither Kenyan nor domestic law define public policy. Both however expressly provide that public policy is one of the grounds upon which courts may refuse to enforce an international arbitral award. Chapter four has demonstrated that the courts have furthered the uncertainty by failing to define public policy and by further issuing non-uniform decisions on the definition and extent to which public policy will affect enforcement of international arbitral awards in Kenya. This presents a challenge to the various stakeholders in the process of international arbitration.

It is therefore necessary for the state and international law actors to explore and prescribe a concise definition of public policy as a ground for setting aside of international arbitral awards, in particular, Kenya's executive should look into this, in consultation with the various stakeholders such as lawyers and the international business community. Therefore, we recommend that a definition of public policy should be included in the NYC which can be adopted by the signatory countries.

The preceding chapters have demonstrated a murky climax to the international arbitral process where a party may have an award in their favour, but the court fails to enforce it on the ground of public policy. Because public policy is not specifically defined, the stakeholders in an arbitral process will not have the option of knowledgeably weighing the odds of the success of recovery because of this uncertainty.

In chapter 5, the findings in the preceding chapters will be summarized. The chapter will also propose a strategy towards addressing the problem of failure to have a definition on public policy in the enforcement of international arbitral awards.

CHAPTER FIVE

5.1. INTRODUCTION

This chapter sums up the discussions in the preceding chapters. The chapter makes a conclusion on the research problem, in light of the discussions. The hypotheses laid out at the beginning of the research, in chapter one, are then compared with the findings of the research; this either proves or disproves the hypotheses.

This chapter then examines question three: How best can public policy be applied to the enforcement of international arbitral awards? It makes recommendations on how to ensure a system that gives a harmonized system of enforcement of transnational arbitral awards to give credence to such awards. In particular, the chapter recommends what can be done to the Kenyan system to make Kenya friendly to enforcement of arbitration, thereby promoting Kenya as the hub of arbitration.

The paper suggests that where parties have valid arbitral agreements, an award ought to be enforced regardless of domestic provisions unless the defaulting party can offer commensurate satisfaction of the award in another country without prejudicing the beneficiary. The preceding chapters confirm that there is indeed a pressing need to have a clear definition of public policy as a ground for setting aside an international arbitral award

5.2. CONCLUSIONS

Public policy is a wide concept. While domestic and international law have set it out as a ground for setting aside an international arbitral award, the definition of public policy has remained elusive. In the words of a popular text on the topic of the law and practice of international arbitration:

Public Policy is a very unruly horse, and once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail. The definition of the Public Policy exception is yet to be

clearly set out.¹⁹² If this is done, it will look to the broader public interest of honesty and fair dealing and create a high level of certainty in international commercial transactions.¹⁹³

Kenya has made great strides generally in providing a legislative and institutional framework in practice of international arbitration. However, the failure to define public policy which is a fundamental term in the arbitration process poses a key challenge to the practice of international arbitration. Judicial decisions which would otherwise fill in the gap of a lack of definition in the legislation instead introduces yet another challenge; inconsistency. This has created a murky situation where the enforcement of an arbitral award is uncertain and unpredictable.

5.3. RECOMMENDATIONS

As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss.¹⁹⁴

My recommendation is that to ensure that international arbitration becomes more attractive as a mode of resolution of international disputes, it is necessary to define public policy. I propose that public policy be defined by setting out a threshold. This is because as demonstrated in this paper, public policy is a wide concept. A brief definition of public policy may therefore prejudice the process further rather than remedying it. My proposal is to use the criminal law of the enforcement state as the threshold. I therefore suggest that both Kenyan as well as international legal instruments define public policy as follows:

an issue will be considered to be against public policy and the court shall refuse to enforce an international arbitral award if the issue is one that the court would find to contravene the criminal law of the enforcement state.

¹⁹² Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides: *Law & Practice of International Commercial Arbitration*, Sweet & Maxwell (4edn), p. 420

¹⁹³ Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides: *Law & Practice of International Commercial Arbitration*, Sweet & Maxwell (4edn), p. 420

¹⁹⁴ *Société Eram Shipping v Cie Internationale de Navigation* [2004] 1 AC 260 at [10]

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	2. Letter to the Commissioner of Mines and Geology, 7/6/2013	YES
	3. Letter from Nicholas Mining Industries to the Ministry of Mining 16/7/2010	YES
	4. Original Letter from Ministry of Mining to Nicholas Mining Industries, 5/5/11	YES
	5. Letter from the Ministry of Mining to Nicholas Mining Industries, dated '29 th March 28, 2011'	YES
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	7. Letter from Nicholas Mining Industries to Ministry of Mining, 11/11/10	YES
	8. Letter from the Ministry of Mining to Nicholas Mining Industries, 8/9/10	YES
	9. Letter from Nicholas Mining Industries to Kipsigis County Council, 30/10/10	YES
	10. Letter from Nicholas Mining Industries to the Ministry of Mining, 16/8/10	YES
	11. Letter from Nicholas Mining Industries to the Ministry of Mining, 28/11/2011	YES
	12. Letter from Nicholas Mining Industries to Kipsigis County Council, Undated	YES
	13. Letter from Nicholas Mining Industries to the Ministry of Mining, 6/9/2010	YES
	14. Letter from Nicholas Mining Industries to Ministry of Mining, 25/10/10,	YES
	15. Letter from Nicholas Mining Industries to Ministry of Mining 7/4/2011,	YES
	16. Letter from Nicholas Mining Industries to Ministry of Mining 6/4/2011	YES
	17. Letter from the Ministry of Mining to Nicholas Mining Industries, 15/2/2011,	YES
	18. Letter from the Ministry of Mining to	

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	<p>24.</p> <p>25. Single Business Permit No. 2013/55 County Council of Kipsigis</p> <p>26. Single Business Permit Bill No. Bp13-000066</p> <p>27. Original Receipt No. D0575345 Dated 12/9/14</p> <p>28. Registrar General Original Receipt - CR12 - A0571057 Dated 28/7/14</p> <p>29. KRA Paying in Slip for year 2013 received 14 October 2014</p> <p>30. Paying in Slip for year 2012 received 14 October 2014</p> <p>31. Paying in Slip for year 2013 received 14 October 2011</p> <p>32. Receipt No. 9954795 from the Commissioner of Mines And Geology 30/3/11</p>	<p><u>YES</u></p> <p><u>YES</u></p>
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