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THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

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SIXTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

# THE INTERNATIONAL ARBITRATION REVIEW

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For further information please email  
[Nick.Barette@lbresearch.com](mailto:Nick.Barette@lbresearch.com)

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Sixth Edition

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JAMES H CARTER

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# EDITOR'S PREFACE

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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

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

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

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

**James H Carter**  
Wilmer Cutler Pickering Hale and Dorr LLP  
New York  
June 2015

## Chapter 28

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# KENYA

*Aisha Abdallah and Noella C Lubano*<sup>1</sup>

### I INTRODUCTION

#### i Overview of the legal framework for arbitration in Kenya

The first arbitration law in Kenya dates back to 1914 in the form of the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act of 1889. This ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya.<sup>2</sup>

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

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

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

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1 Aisha Abdallah is a partner and Noella C Lubano is a senior associate at Anjarwalla & Khanna.

2 *Nyutu Agrovet Limited v. Airtel Networks Limited*, Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].

3 Ibid.

and the Arbitration Rules were subsequently amended in 2009 by the passing of the Arbitration (Amendment) Act 2009.

## ii Structure of the Arbitration Act

The Arbitration Act is divided into eight parts: 1) Part I – preliminary matters; 2) Part II – general provisions; 3) Part III – the composition and jurisdiction of the arbitrator; 4) Part IV – the conduct of arbitral proceedings; 5) Part V – the arbitral award and termination of arbitral proceedings; 6) Part VI – recourse to the High Court against the arbitral award; 7) Part VII – recognition and enforcement of awards and; 8) Part VIII – miscellaneous provisions.

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

Similarly, in the case of *Anne Mumbi Hinga v. Victoria Njoki Gathara*<sup>6</sup> the Court of Appeal observed that ‘rule 11 of the Arbitration Rules, 1997 had not imported the Civil Procedure Rules, hook, line and sinker to regulate arbitrations under the Arbitration Act.’ It noted that ‘no application of the Civil Procedure Rules would be appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration.’<sup>7</sup>

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

## iii Finality of the arbitral award and party autonomy

The adoption of an UNCITRAL Model of arbitration laws had the effect of severely limiting the instances of court intervention in arbitration proceedings in Kenya. This was consistent with the concept of party autonomy and finality of arbitration awards, both of which were recurrent themes in the Arbitration Act.<sup>7</sup>

The Arbitration Act sought to promote the finality and binding nature of arbitral awards by carefully prescribing and limiting the instances when an arbitral award may be set aside;<sup>8</sup> permitting the courts to sever part of an award that is properly within the remit of the arbitrator from that which is not;<sup>9</sup> empowering the High Court to suspend proceedings that seek to set aside an arbitral award so as to provide the arbitrator with

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

5 See also section 11 of the Arbitration Rules.

6 Court of Appeal, Nairobi C.A. No. 285 of 2008 (UR 187/2008).

7 See section 10, 32A, and 36 of the Arbitration Act.

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

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

an opportunity to rectify any faults that would otherwise have justified intervention by the courts;<sup>10</sup> prescribing strict time frames within which applications seeking the intervention of the High Court in arbitral awards must be made;<sup>11</sup> upholding the finality of findings of fact by an arbitrator in relation to interim measures;<sup>12</sup> the right of the arbitrator to rule on his or her own jurisdiction;<sup>13</sup> and the absence of an express right of a party aggrieved by the decision of the High Court to appeal to the Court of Appeal except in very limited circumstances.

#### iv The distinction between international and domestic arbitration

The Arbitration Act applies to both domestic and international arbitration.<sup>14</sup> An arbitration is domestic if the arbitration agreement provides for arbitration in Kenya and if the following conditions exist: the parties are nationals of Kenya or habitually resident in Kenya; the parties are incorporated in Kenya or their management or control is exercised from Kenya; a substantial part of the obligations of the parties relationship are to be performed in Kenya; or the place with which the subject matter of the dispute is most closely connected is Kenya.<sup>15</sup>

On other hand, an arbitration is international if the following conditions exist, namely: the parties to the arbitration agreement have their places of business in different states; the juridical seat or the place where a substantial part of the contract is to be performed or the place where the subject matter is most closely connected is outside the state in which the parties have their places of business; or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

#### v Constitutional recognition of arbitration

The passing of the new Constitution of the Republic of Kenya in 2010 (the New Constitution) has had a considerable impact on the legal regime governing arbitration in Kenya. Of significance is the constitutional recognition of alternative dispute resolution mechanisms such as arbitration.<sup>16</sup> The effect of this is that the courts of Kenya now give greater importance to arbitration clauses and court mandated arbitration.<sup>17</sup>

The Court of Appeal has further clarified that the concept of finality of arbitration awards must not be seen to be in conflict with the constitutional right to access to the

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10 Section 35(4) of the Arbitration Act.

11 Section 35(3) of the Arbitration Act.

12 Section 7(2) of the Arbitration Act.

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

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

15 Section 3(2) of the Arbitration Act.

16 Article 159(2) (c) of the Constitution.

17 See Order 46 Rule of the Civil Procedure Rules on Court Mandated Arbitration.

courts.<sup>18</sup> Rather it should be seen as reaffirming the constitutional obligation of the judiciary to promote alternative dispute resolution mechanisms.<sup>19</sup>

In any event, arbitration as a dispute resolution mechanism is not imposed on parties and the principle of party autonomy underpinning arbitration is based on the assumption that parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had.<sup>20</sup>

**vi The structure of the courts in Kenya**

The courts in Kenya are organised in the following way:

- a* the resident magistrates' courts, which have original civil and criminal jurisdiction and a limited pecuniary and territorial jurisdiction (the Khadhi's courts, the courts martial and other courts and tribunals established by an act of Parliament have the status of a resident magistrates' court);
- b* the High Court of Kenya, which has unlimited original and appellate jurisdiction in both civil and criminal matters (the Employment and Labour Relations Court, and the Environmental and Land Court, which are specialised courts established under the new Constitution, have the same status as the High Court);
- c* the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and
- d* the Supreme Court of Kenya, whose jurisdiction is limited to disputes relating to presidential elections, county governments, interpretation and application of the Constitution and matters of general public importance.

Disputes that are subject to arbitration will normally end up in the High Court and on very rare occasions in the Court of Appeal. Such disputes are, however, unlikely to reach the Supreme Court due to the very limited jurisdiction of this court. As stated above, an appeal may lie from the Court of Appeal to the Supreme Court only if the appeal involves a matter of general public importance.<sup>21</sup> A matter of general public importance has been defined as one 'whose determination transcends the circumstances of a particular case and has a significant bearing on the public interest'.<sup>22</sup> It is considered that commercial disputes are unlikely to meet this test.

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18 Article 50 of the Constitution of Kenya, 2010.

19 *Nyutu Agrovet Limited v. Airtel Networks Limited*, Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].

20 *Kenya Oil Company Limited & Another v. Kenya Pipeline Company*, Civil Appeal No. 102 of 2012.

21 Article 163(4) of the Constitution.

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

**vii Local arbitration institutions**

There are various local arbitration institutions in Kenya with the main ones being; the Chartered Institute of Arbitrators; the Nairobi International Arbitration Centre (NIAC); the Strathmore Dispute Resolution Centre; and the proposed Law Society Arbitration Centre.

Of particular interest is NIAC, which is state-sponsored and is established under the Nairobi Centre for International Arbitration Act No. 26 of 2013 (the NIAC Act). NIAC has the objective of facilitating and administering arbitrations, training and accrediting arbitrators; fostering and developing investment; and advocacy and networking with other arbitrations institutions and stakeholders. NIAC's rules are currently in the process of being amended with a view to increasing its independence from the national government. NIAC will have an arbitral court that will have exclusive original jurisdiction and appellate jurisdiction to hear and determine all disputes referred to it under the NIAC Act.

**II THE YEAR IN REVIEW**

**i Arbitration developments in local courts**

As stated above, the principles of finality of the arbitration award and party autonomy are recurrent themes in the Arbitration Act. In practice, the courts in Kenya will strive to uphold and promote these principles as will be seen in the recent Court of Appeal decision of *Nyutu Agrovet Limited v. Airtel Networks Limited*.<sup>23</sup>

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

**ii Stay of court proceedings pending a reference to arbitration**

The courts in Kenya will, as a matter of course, stay any proceedings filed before them that are subject to an arbitration clause, unless the agreement is void or incapable of performance or if there is no dispute between the parties that is capable of being referred to arbitration.<sup>24</sup> An application to stay proceedings must be made before or at the point of entering appearance, before acknowledging the claim.<sup>25</sup>

In the case of *Niazsons Ltd (Niazsons) v. China Road & Bridge Corporation (CRB)*,<sup>26</sup> CRB entered an appearance in proceedings filed in the High Court by Niazsons but did not file a defence. CRB also applied to stay the High Court proceedings on grounds that the dispute was subject to arbitration. In turn, Niazsons applied for judgment against CRB on grounds that the latter had not filed a defence to the High Court proceedings

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

24 Section 6 of the Arbitration Act.

25 Ibid.

26 Court of Appeal, Civil Appeal No. 187 of 1999.

and further argued that the claim was not disputed. However, the Court of Appeal held that upon filing a stay application, CRB's obligation to file a defence was suspended and judgment would not be entered. Of particular significance, however, was a dissenting judgment of Mr Justice Tonui who was of the view that there was no dispute and a mere refusal to pay a claim does not necessarily give rise to a dispute calling for arbitration (he would have refused to stay the proceedings and entered judgment in favour of Niazsons).

### iii Interim measures of protection pending a reference to arbitration

The Arbitration Act allows a party to approach the High Court to obtain interim measures of protection pending arbitration.<sup>27</sup> Such measures include status quo orders, injunctions to halt an action that would cause irreparable loss or prejudice the arbitration process or orders to preserve assets or evidence, among others.

The test for the grant of interim measures of protection involves an analysis of the following factors: the existence of an arbitration agreement, whether the subject matter of the dispute is under threat, the appropriate measure of protection to be taken depending on the circumstance of the case, and the duration of the interim measure of protection so as to avoid encroaching on the arbitral tribunal's decision-making power.<sup>28</sup>

There are conflicting decisions regarding the High Court's jurisdiction to grant interim measures of protection where the arbitration agreement has a foreign seat of arbitration and as a result, this area of law is fairly uncertain. A case in point is that of *Skoda Export Limited (Skoda) v. Tamoil Limited East Africa Limited (Tamoil)*,<sup>29</sup> which concerned an agreement between the parties to tender a bid for the construction of an oil pipeline in Kenya. A dispute arose under the agreement and Skoda, which was a wholly owned company of the Czech Republic, approached the High Court in Kenya for interim measures of protection pending the reference of the dispute to arbitration. However, the High Court dismissed Skoda's application on grounds that the agreement between the parties provided that London would be the seat of the arbitration and any disputes between the parties would be governed by the English law and the English courts. Accordingly, the court was of the view that the High Court in Kenya had no jurisdiction to grant the interim measures of protection sought and the said orders ought to have been obtained from the courts in England.

The court's decision in *Skoda v. Tamoil* can be contrasted with that of *CMC Holdings Limited (CMC) & Another v. Jaguar Land Rover Exports Limited (Jaguar)*<sup>30</sup> where CMC had sought an interim measure of protection to stop Jaguar from terminating a franchise and distribution agreement concluded by the parties. As in the *Skoda v. Tamoil* case, the distribution agreement was subject to English law and the English courts and the seat of arbitration was London. Accordingly, Jaguar contended that the Arbitration Act was not applicable and the courts in Kenya did not have jurisdiction to deal with

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27 Section 7 of the Arbitration Act.

28 *Safaricom Limited v. Oceanview Beach Hotel*, Civil Application No. NAI. 327 of 2009 (UR 225/2009).

29 High Court (Milimani Commercial Courts) Civil Case No. 645 of 2007.

30 High Court Milimani Commercial Courts Civil Case Number 752 of 2012 [2013 eKLR].

the application for interim measures of protection. However, the court in rejecting this line of argument held that Article 1(5) of the Constitution provided that the general rules of international law shall form part of the laws of Kenya and as a result, conferred jurisdiction on the court to hear and determine the matter. Lady Justice Kamau was of the view that no contract could oust the jurisdiction of the Kenyan courts.

#### iv Setting aside of arbitral awards by the courts in Kenya

The Arbitration Act prescribes limited scope for the courts in Kenya to set aside an arbitral award. An arbitral award may only be set aside if one or more of the following grounds are proved, namely: incapacity of a party, invalidity of an agreement, insufficient notice of appointment of an arbitrator or of the arbitral proceedings, where an arbitrator exceeds the scope of his reference, where an award is induced or influenced by fraud or corruption, where the dispute is not capable of being resolved by arbitration or where the arbitral award is against public policy.<sup>31</sup>

Accordingly, the courts of Kenya will not set aside an arbitral award even if it is shown to be affected by an error of fact or an error of law (except where the error of law is apparent on the face of the record).<sup>32</sup> Further, an application to set aside an arbitral award must be made within three months from the date of delivery of the award, which timeline has been strictly enforced by the courts in Kenya.

In the case of *Hinga v. Gathara*,<sup>33</sup> Hinga applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, the court in rejecting the application to set aside the award held that a failure to notify Hinga of the delivery of the award was not one of the prescribed grounds under the Arbitration Act for setting aside. Further, the court held that a party cannot apply to set aside an award after three months of delivery of the award even if it was for a valid reason. The court observed that ‘in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for finality.’

The case of *Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (the Agency)*<sup>34</sup> concerned an application to set aside the award made by two of the three arbitrators appointed by the Stockholm Chamber of Commerce. The applicant had also appealed the award in Stockholm. The judge held that the application to set aside should have been made in Sweden, which had primary jurisdiction as the arbitral seat. He upheld a preliminary objection raised by the Agency on the basis that Kenya only had secondary jurisdiction under Section 37 as to recognition and enforcement.

There is a fairly wide scope for the courts in Kenya to interfere with an arbitral award on grounds of public policy due to its undefined nature. In the case of *Christ for All Nations v. Apollo Insurance Co Limited*<sup>35</sup> Mr Justice Ringera noted that ‘public policy is a most broad concept incapable of precise definition’ and he likened it to ‘an unruly horse’ that ‘once one got astride of it you never know where it will carry you’. The Court

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31 Section 35(2) of the Arbitration Act.

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

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

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

35 [2002] 2 EA 366.

was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).

#### v Enforcement and Recognition of Arbitral Awards

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

A party may make an application to the High Court to enforce an international or domestic arbitral award as a decree of the court if no party has filed an application to set aside the award within three months. An applicant seeking enforcement of an arbitral award will be required to provide the original arbitral award or a duly certified copy of it; the original arbitration agreement or a duly certified copy of it; and if the arbitral award or the arbitration agreement is not made in English language, a duly certified translation of it into the English language should be provided.<sup>36</sup>

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

The High Court will ordinarily recognise and enforce an arbitral award unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal set out in the Arbitration Act.<sup>38</sup> In the case of *Kenya Shell Limited (Shell) v. Kobil Petroleum Limited (Kobil)*<sup>39</sup> a dispute arose between the parties that was referred to arbitration and an award was delivered in favour of Kobil. Shell applied to the High Court to set it aside on the grounds that the arbitrator had dealt with matters outside the scope of his reference. The High Court dismissed Shell's application and Shell sought leave to appeal the High Court's decision. However, the Court of Appeal declined to grant Shell leave to appeal on grounds that the matter had been pending in court for a considerable period of time and that 'as a matter of public policy, it is in the public interest that there was an end to litigation'. The Court of Appeal noted that 'the Arbitration Act under which the proceedings which the matter was conducted underscores that policy.'

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36 Section 36 of the Arbitration Act.

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

38 See Section 37(1) of the Arbitration Act for a list of the grounds for refusal of enforcement of an award.

39 Court of Appeal of Nairobi, Civil Application No. 57 of 2006.

The fact that a party has failed to apply to set aside an award within the three-month period prescribed in the Arbitration Act does not preclude him or her from objecting to an application seeking to enforce the award. In the case of *National Oil Corporation of Kenya Limited (NOCK) v. Prisko Petroleum Network Limited (Prisko)*,<sup>40</sup> Prisko opposed an application by NOCK to recognise an award made against it in respect of an agreement for the supply of automotive gas oil. NOCK argued that Prisko was precluded from objecting to the enforcement of the award since it had failed to apply to set aside the award within the three-month limitation period prescribed in the Arbitration Act. The court held that the opportunity to be heard on an application for the enforcement of an award was not lost because the person against whom the award was to be enforced had not filed an application to set aside the award.

#### vi Appeals in relation to arbitration proceedings

There is very limited scope for the courts in Kenya to interfere with an arbitral award or proceeding by way of an appeal process. A right to appeal to the High Court only applies to domestic awards<sup>41</sup> and is prescribed for specific matters such as a challenge to the appointment of an arbitrator,<sup>42</sup> the termination, withdrawal and jurisdiction of the arbitral tribunal among others.<sup>43</sup>

The right of an appeal to High Court only exists by agreement of the parties and even then, only on points of law.<sup>44</sup> Similarly, appeals from the High Court to the Court of Appeal only lie on domestic awards by an agreement of the parties or with leave of the High Court or the Court of Appeal and on condition that the Court of Appeal is satisfied that the appeal raises a point of law of general importance that affects the rights of the parties. This position was reaffirmed in the case of *Hinga v. Gathara*, where the Court of Appeal held that there was no right to appeal a decision of the High Court refusing to set aside an arbitral award.

However, the decision in *Hinga v. Gathara* was in conflict with the Court of Appeal's decision in *Shell v. Kobil* where the question for determination was whether the Court of Appeal had jurisdiction to hear and determine an application for leave to appeal against an order made in the High Court on an application seeking to set aside an award under Section 35 of the Arbitration Act. The Court of Appeal held that 'Section 35 of the Arbitration Act had not taken away the jurisdiction of either the High Court or the Court of Appeal to grant a party leave to appeal from the decision of the High Court made under that Section.' It further observed that 'if that was the intention there was nothing that would have stopped Parliament from specifically providing in Section 35 that there would be no appeal from a decision made in the High Court under that Section.'<sup>45</sup>

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40 High Court (Milimani Commercial Courts) Civil Case No. 27 of 2014 [2014 eKLR].

41 *Tanzania National Roads Agency v. Kundan Singh Construction Limited*, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR).

42 Section 14(3) of the Arbitration Act.

43 Section 15(2) and 15(3) of the Arbitration Act.

44 Section 39(b) of the Arbitration Act.

45 See also the cases of *Gitonga Waruguongo v. Total Kenya Limited*, CA.No. 113 of 1998, *Dr. Joseph Karanja & Another v. Geoffrey Ngari Kuira*, CA No. 130 of 2002,

The issue appears to have been settled fairly recently in the landmark decision of the Court of Appeal in *Nyutu Agrovet Limited (Nyutu) v. Airtel Networks Limited (Airtel)*.<sup>46</sup> There the Court of Appeal expressly rejected the position in *Shell v. Kobil* and reaffirmed that of *Hinga v. Gathara*. The case of *Nyutu v. Airtel* concerned a distributorship agreement between the parties for the distribution of Airtel's telephony products. An award was made in favour of Nyutu and Airtel filed an application in the High Court to set aside the award on grounds that it dealt with matters outside the parties' agreement and the arbitrator's terms of reference. The application was allowed in the High Court and the award was set aside. Thereafter, Nyutu appealed to the Court of Appeal against the High Court's decision to set aside the award. In a majority decision, the Court of Appeal found that there was no right to appeal to the Court of Appeal against the High Court's decision to set aside the award. The Court of Appeal further noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties. We understand that Nyutu has applied to the Court of Appeal to certify the case as being of general public importance and thereby to obtain leave to appeal to the Supreme Court. This application is pending. If it is refused, Nyutu can apply afresh to the Supreme Court for certification. If leave to appeal is granted, then the Supreme Court will make a final and binding decision on this issue.

### vii Developments affecting international arbitration

#### *The New York Convention and other international instruments*

Section 37 of the Arbitration Act provides that an international award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>47</sup> or any other convention to which Kenya is a signatory and relating to arbitral awards.

Accordingly, an international award may also be enforced in Kenya in accordance with the provisions of the International Convention on the Settlement of Investment Disputes (ICSID), the Geneva Protocol on Arbitration Proceedings, 1923, and various bilateral investment treaties that have been signed by Kenya.<sup>48</sup>

Prior to the coming into force of the New Constitution, Kenya was a dualist state and this essentially meant that all conventions, treaties or other international

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*University of Nairobi v. NK Brothers Limited*, CA No. 308 of 2002 and *UAP Provincial Insurance Co Ltd v. Michael John Beckett*, CA No. 26 of 2007.

46 Civil Application No. 61 of 2012 [2015 eKLR]. See also the recent decision of *Tanzania National Roads Agency v. Kundan Singh Construction Limited*, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR) where the Court of Appeal held that there was no right of appeal to the Court of Appeal against the refusal of the High court to recognise an award.

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

48 See the UNCTAD website for a list of BITs that have been signed by Kenya.

instruments that Kenya had ratified only came into force in Kenya once they went through a domestication process and were recognised in an act of Parliament as part of the laws of Kenya.

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

### viii Investor–state disputes

There has been a significant increase in bilateral investments treaties in Africa and, as a result, an increase in foreign direct investment (FDI). Kenya was ranked as the fifth most suitable FDI destination in Africa and Nairobi was ranked as the fastest growing African city for FDI between 2009 and 2012. Kenya's ranking was informed by, among other things, investor confidence in settling potential disputes under arbitration.<sup>49</sup> The case of *World Duty Free Company Limited v. The Republic of Kenya* is one of the notable ICSID decisions that involved Kenya. It remains to be seen how an application for enforcement of the ICID award will be dealt with by the courts in Kenya.<sup>50</sup>

## III OUTLOOK AND CONCLUSION

It is evident that there is scope for growth in the area of domestic and international arbitration in Kenya. The constitutional recognition of alternative dispute resolution and development of a legal regime for mediation,<sup>51</sup> and the establishment of several local arbitration centres are all notable developments.

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

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49 [www.fdiintelligence.com/Locations/Middle-East-Africa/African-Countries-of-the-Future-2013-14](http://www.fdiintelligence.com/Locations/Middle-East-Africa/African-Countries-of-the-Future-2013-14).

50 There are also ongoing international arbitrations between Vanoil Energy Limited and Kenya, and between WelAm Ltd and Kenya.

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

## Appendix 1

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# ABOUT THE AUTHORS

### **AISHA ABDALLAH**

*Anjarwalla & Khanna*

Aisha is a partner and head of the litigation department at the firm's head office in Nairobi. Aisha's practice focuses on all aspects of commercial litigation, with a particular focus on land, environment and natural resources. She heads a team of nine lawyers.

Aisha has extensive specialist experience in a wide range of commercial and property disputes including contractual claims, competition issues, employment disputes, insolvency, fraudulent land transactions and landlord and tenant issues. Aisha is also experienced in alternative dispute resolution including arbitration, multiparty mediation and expert determination.

Aisha holds a LLM from King's College London, University of London and LLB Hons from the University of Bristol, England. She is a dual qualified as an advocate of the High Court of Kenya (2000) and solicitor of England and Wales (2004).

She joined Anjarwalla & Khanna in 2012 from Shoosmiths in the United Kingdom and has over 14 years of senior legal experience in commercial litigation, property litigation and contentious insolvency issues. In January 2013, Aisha became a partner and head of the Nairobi litigation department, which has grown in strength and size.

### **NOELLA C LUBANO**

*Anjarwalla & Khanna*

Noella Lubano is a senior associate in the litigation group of the firm's Nairobi office. Her practice focuses on a wide range of corporate commercial litigation as well as constitutional law matters. She has handled litigation matters involving oil and gas, public procurement, intellectual property, human rights, arbitration, employment, land and the capital markets. Noella holds a LLM in Constitutional and Administrative

Law from the University of Cape Town and LLB from University of Nairobi. She is an advocate of the High Court of Kenya and a member of the Law Society of Kenya.

**ANJARWALLA & KHANNA**

3rd Floor, The Oval, Junction of Ring Road Parklands & Jalaram Road  
Westlands

PO Box 200 00606

Nairobi

Kenya

Tel: +254 703 03 2000 / +254 203 64 0279 / +254 703 03 2279

[ncl@africalegalnetwork.com](mailto:ncl@africalegalnetwork.com)

[aa@africalegalnetwork.com](mailto:aa@africalegalnetwork.com)

[www.africalegalnetwork.com](http://www.africalegalnetwork.com)