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The State of International Arbitration in Kenya

David Mwoni Ndolo and Margaret Liu*

Abstract

Kenya is often considered as one of the fastest growing economies in Africa. This is mainly as result of its open economy encouraging foreign investment and its strategic location of the Mombasa Sea Port in Kenya which is usually used as a gate way to conducting international trade with other landlocked countries in East and Central Africa. Indeed, it is for this reason that China has identified Mombasa as one of the key maritime ports in the Chinese 'One Belt One Road' project and as a result China has heavily invested in Kenya.[1]

The growth of international trade in Kenya has resulted to a rise international arbitration practice in Kenya to resolve commercial disputes. To this end, this article examines the state of international arbitration practice in Kenya. It does this by firstly examining the arbitration legal framework in Kenya. Then, it identifies the international arbitration practice in Kenya using results from a survey questionnaire administered to the key users and stakeholders of international arbitration in Kenya. The article also analyses the role of the Kenyan courts in the enforcement of international arbitration agreements by using stay of proceedings, anti-suit injunctions and judicial approach of arbitration of mandatory laws in Kenya. These issues are analysed comparatively throughout with mainly reference to English Law.

Legal Framework of International Arbitration in Kenya

The earliest arbitration law in Kenya was the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act of 1889. The Arbitration Ordinance 1914 was basically being used in resolution of commercial disputes as an alternative to litigation, which gave the Kenyan national courts ultimate control over the arbitration procedures.

However, with the development of trade and the acceleration of arbitration, there was a need to reform the law. Indeed, the first legislation of regulating arbitration in Kenya after its independence was the Arbitration Act 1968. This Act was modelled around the English Arbitration Act of 1950. The intention was to ensure that

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[1] For more on this see Herbling D and Li D 'China's Built a Railroad to Nowhere in Kenya' Bloomberg July 19 2019 available online at https://www.bloomberg.com/news/features/2019-07-19/china-s-belt-and-road-leaves-kenya-with-a-railroad-to-nowhere. Last accessed 03/10/2019.

arbitration proceedings were more insulated from court interventions that were afforded by the Arbitration Ordinance 1914, which was having effect on the effectiveness and efficiency on arbitration as alternative dispute resolution method.[2]

However, one of the main criticisms of the Arbitration Act 1968, was that it did not limit the extent to which the Kenyan national courts could intervene in the arbitration procedure. This affected the efficiency, expediency and effectiveness of arbitration because there were delays, additional procedures and costs in arbitration proceedings as references to made to national courts were frequent and often defeated the purpose of arbitration as alternative ADR mechanism.[3] The above assertion was highlighted at the Kenyan Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Ltd*[4] where Justice Karanja held that:

> 'The [Arbitration] Act [1958] provided too much intrusive powers to the courts to interfere with arbitral proceedings and the awards. This was contrary to the intention of the traders who intended that arbitration should be unfettered from the courts' intricate legal procedures which hampered efficiency in dispute resolution and resultantly slowed down growth in trade.'[5]

As a result, there was need to modernise the Kenyan laws on arbitration to keep up with international standards with a specific intention to reduce national court's influence in arbitration. To achieve this, Kenya in 1989 acceded to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (hereinafter New York Convention 1958). In addition to this Kenya then adopted the UNICITRAL Model arbitration law which led to the legal reforms repealing the Arbitration Act 1968 Act replacing it with the current legislation governing arbitration in Kenya, the Arbitration Act 1995 (hereinafter AA1995) and the Arbitration Rules 1997 (hereinafter AR1997) therein. In essence therefore, AA 1995 is based on the UNICITRAL Model which as mentioned above, was put in place with the aim of harmonizing national arbitration laws and to assist states in reforming and modernizing their national arbitration laws and procedure to ensure they apply the fundamental features and the requirements of international commercial arbitration, particularly on the limitation of the court interference with the arbitration proceedings. Currently, the AA 1995 and AR 1997 have been amended via the Arbitration (Amendment) Act 2010 which was assented to on 1st January 2010 (hereinafter the Amendment Act). The Amendment Act widens the scope of the AA 1995 beyond the UNICITRAL Model Law to reflect the modern international practices of arbitration, for instance, s. 16 and s. 32 of the Amendment Act amend the general duties of the parties to ensure proper and expeditious arbitration proceedings as well as amending the rules on cost and expenses of arbitration. It is worth mentioning that the Amendment Act 2010 only amends certain sections of the AA 1995 as illustrated in s. 16 and s. 32 of the Amendment Act. Therefore, the AA 1995 remains valid law.

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[2] Karega M and Abdallah A Kenya *The International Arbitration Review* (9th ed. Law Business Research 2018) at page 283.
[3] Githu Muigai & Jacqueline Kamau 'The Legal Framework of Arbitration in Kenya' at page 1 (chapter 1 of Muigai G *Arbitration Law and Practice in Kenya* (Law Africa, 2013)).
[4] Civil Appeal (Application) NO.61 of 2012: [2015] eKLR.
[5] Ibid.

The essence of the AA 1995 as amended by the Amendment Act is to govern all international or domestic arbitration in Kenya.[6] Therefore, to a large extend, the Act provides the default position in many respects of the arbitration process, for instance, if parties in an arbitration agreement have not provided the number of arbitrators, then the Act in s.11 provides that the presumption is that the parties intended for one arbitrator.[7] In doing this the Act gives liberty to decide for themselves in the arbitration agreement their desired arbitration process. In respect to the court's intervention in the arbitration s.10 of the AA 1995 (modelled from article 5 of the UNICITRAL Model law) limits the power of national courts to intervene in arbitration proceedings in matters governed by the Act except as provided in the Act such in granting stay in proceedings or recognition and enforcement of awards as discussed below.

In order to promote arbitration practice and attract international trade in Kenya, the new Kenyan Constitution 2010 was passed in which in Article 159(2)(c)[8] encourages the Kenya national courts to promote arbitration. The Kenyan Chief Justice David Maraga claims that "The 2010 Constitution provides for alternative forms of dispute resolution", which is "timely and cost-effective justice". He further states that "Article 159(2) provides that in solving disputes, our courts should now promote the use of ADR."[9] This assertion finds an echo in Gichuhi who put in "Article 159(2)(c) of the Constitution which requires courts to be guided by the need to promote arbitration and other alternative dispute resolution(ADR)."[10] The inclusion of this Article within the Kenyan Constitution is aimed at promoting arbitration in Kenya primarily because at the time, there was a significant backlog of cases within the Kenyan judiciary which affected the speed of dispute resolution in Kenya. In this way therefore arbitration is seen as a mechanism which gives a much needed offload of cases from the Kenyan courts thus improving the speed of dispute resolution.[11]

In light of this, the Nairobi Centre for International Arbitration Act 2013 (hereinafter NCIA 2013) was passed. The essence of the Act is to effectively establish an independent arbitration institution that is, the Nairobi Centre of International Arbitration and set out its governance structure, funding and its functions.[12] Under s.5 of the NCIA 2013, the NCIA is mandated to *inter alia;* promote, administer, facilitate and encourage the

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[6] S.2 AA 1995.
[7] S.11 AA 1995.
[8] Article 159(2)(c) states that "In exercising judicial authority, the courts and tribunals shall be guided by the following principles ….alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."
[9] Paul Wanga, "Mediation saves time and money", Columnists, 5 December 2017, available at the-star.co.ke/opinion/columnist/2017-12-04-mediation-sav4es-time-and-money> accessed 16 October 2019.
[10] John Gichuhu, "Revisiting Article 159(2)(C) of the Constitution of Kanya: How the judge sees it", available at https://www.academia.edu/37284075/John_Gichuhi_Revisiting_Article_159_2_c_of_the_Constitution_of_Kenya_How_the_judge_sees_it_ ,accessed 17 October 2019.
[11] Standard Media, 'Arbitration centre in Nairobi to Reduce case Backlog' (30th Sep 2014) available online https://www.standardmedia.co.ke/article/2000136635/arbitration-centre-in-nairobi-to-reduce-case-backlog/?pageNo=2. Last Accessed 17/10/19.
See also, Business Daily, 'Judiciary Moves to Cut Case Backlog Through Arbitrators' July 28, 2014 https://www.businessdailyafrica.com/Judiciary-moves-to-cut-case-backlog/-/539546/2400826/-/av3arqz/-/index.html. Last Accessed 17/10/19.
[12] s.4 NCIA 2013.

conduct of international commercial arbitration in Kenya in line with the Act.[13] Inevitably the NCIA is heavily influence by the experiences of the more established institutions such as the the London Court of International Arbitration (hereinafter LCIA). Indeed the NCIA Arbitration Rules 2015 rules[14] are very similar to the LCIA and its rules[15]

The establishment of NCIA indicates a recognition by the Kenyan government of the fact that hosting international arbitration is not only a means to attract business but also a way to build a jurisdiction's reputation as a modern, neutral and reliable place to do business and respecting the rule of law. For Kenya specifically, attracting international arbitration in this way would significantly benefit the local legal community that is, the Kenyan lawyers, arbitrators and the NCIA, by increasing demand for their services.[16] This is likely to lead to the development of Kenyan laws on arbitration as well as a much needed significant offload of cases from the Kenyan courts.[17]

Arbitration Practice in Kenya

In order to get better understanding of the arbitration practice in Kenya, the author conducted an empirical survey both online and self-administered from June to September 2018.

Methodology

The survey questionnaire used for conducting this survey was modelled around the on 2015 the White and Case and Queen Mary Survey 2015; International Arbitration Survey: Improvements and Innovations in International Arbitration (QMU survey 2015).[18] As a result, comparisons will be made throughout.

The sample for this survey consisted of lawyers in law firms with either arbitration knowledge or experience in Nairobi, Kenya listed in the Kenyan Yellow pages. This sample has chosen for three main reasons. Firstly, and perhaps most importantly, the survey questionnaire aimed at getting arbitration practice in Kenya and thus

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[13] s.5 NCIA 2013.

[14] NCIA Arbitration 2015 Rules available at https://ncia.or.ke/wp-content/uploads/2019/02/arbitration_rules_2016.pdf. Last accessed 23/10/19.

[15] Laura Lusiji, Patricia Njeru and John Miles 'The landscape of international arbitration in Kenya' (02 October 2018) available online at http://www.inhouselawyer.co.uk/legal-briefing/the-landscape-of-international-arbitration-in-kenya/. Last accessed 23/10/19.

[16] Ibid.

[17] Standard Media, 'Arbitration centre in Nairobi to Reduce case Backlog' (30th Sep 2014), available online https://www.standardmedia.co.ke/article/2000136635/arbitration-centre-in-nairobi-to-reduce-case-backlog/?pageNo=2. Last Accessed 17/10/19.
See also, Business Daily, 'Judiciary Moves to Cut Case Backlog Through Arbitrators' July 28, 2014 https://www.businessdailyafrica.com/Judiciary-moves-to-cut-case-backlog/-/539546/2400826/-/av3arqz/-/index.html. Last Accessed 17/10/19.

[18] Thanks to Rutger Metsch, Research Fellow in International Arbitration at White Case Law Firm and at Queen Mary University for supplying for providing the original questionnaire for the 2015, International Arbitration Survey on Improvements and Innovations in International Arbitration for which the set questions for that this survey questionnaires were used to create some of the questions for this survey. The findings of this survey is available online at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf. Last accessed 23/10/19.

the nature of questions asked involved required legal or arbitration experience knowledge and/or experience so as to provide reliable and credible responses.

Secondly, this sample is consistent with previous surveys. For instance, the respondents for QMU Survey 2015 were either, arbitrators, private practitioners, general counsel or heads of legal departments or counsel acting on the authority of the general counsel (lawyers).[19] For the World Intellectual Property Organization's 2013 Survey, the respondents were either self-employed or working at law firms or companies or research organizations or universities or government bodies.[20] For the Berwin Leighton Paisner Survey 2016, the respondents were arbitrators, corporate counsel, external lawyers, users of arbitration and those working at arbitral institutions.[21] Similarly, the Polish Arbitration survey 2016, respondents were lawyers working at law firms, business managers and in-house lawyers.[22] Therefore, the main consistent theme from the previous survey respondents is that they included respondents that have a legal background or/and in law firms.

Thirdly as explained below the samples takes into account the cost and time constrains. The author was conducting the online phase from 1st June 2018- 2nd September 2018 via online surveys and the self-administered questionnaires only on working days for period of just over calendar month that is, from late 24th July 2018 up until 2nd September 2018. In relation to cost, due to the allocated budget it would be impracticable to travel from Nairobi to other cities in Kenya. Therefore, the advantage of this sample is that it provides an opportunity to make the most of the large but manageable size of the respondents as well as the available time and budget.[23]

The majority of the questions for the survey questionnaires were closed ended questions and this were all in added to the survey online, via online survey which then analysed the data and produced the data graphs used below. For open ended questions were also used to illicit more information from the respondents and also give room for unusual responses including personal views which enrich the research findings. The responses given in the closed ended questions were coded and divided into similar themes and subthemes to compare and analyse them with main aim of mapping the main issues.

The choice of Nairobi, Kenya makes this project unique. This is because even though there are other previous surveys as mentioned above which focused on the views of a particular group of actors within international arbitration, this survey is the first to primarily focus on respondents based in Nairobi, Kenya on arbitration practices and their views on anti-suit injunctions in the arbitration context.

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[19] Ibid at at page 24.
[20] World Intellectual Property Organization Arbitration and Mediation Centre 'International Survey on Dispute Resolution in Technology Transactions' (2013) at Page 9 available online https://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf. Last accessed 29/10/2019.
[21] Burford 'Judgment Enforcement Survey' (2016) available online at http://www.burfordcapital.com/2016-judgment-enforcement-research-survey/(last accessed 23/10/2019) at page 1
[22] Kocur & Partners 'Polish Arbitration Survey' (2016) available online at http://kocurpartners.com/wp-content/uploads/2016/06/Polish-Arbitration-Survey-2016-eng-2.pdf (last accessed 23/10/2019)
[23] Etikan I, Abubakar S, Alkassim R.S. 'Comparison of Convenience Sampling and Purposive Sampling' (2016) 5(1) American Journal of Theoretical and Applied Statistics 1-4, at 2.

In relation to population representation, it should be noted that, a simple search for 'lawyers' on 1st June 2018, on the Yellow pages revealed 252 law firm results. A similar search on the same date but specifically for 'lawyers' in Nairobi, Kenya revealed 235 law firms results and this therefore formed the defined sample population.[24] From these results therefore, the defined sample population formed an overwhelming majority of the law firms in Kenya, 93.3%.

The typical response rate of a self-administered survey questionnaire is between 50-70 percent while that of an online survey is between 30-50 percent.[25] In order to gain the response rate for this survey questionnaire this project will use the following formula; (least variable percentage for self-administered questionnaire 50 plus the percentage of the least variable for the online survey 30) ÷ 2 = 40 percent.[26] Therefore, the targeted response rate for this questionnaire was at least 40 percent of 235 which is at least 94 respondents.

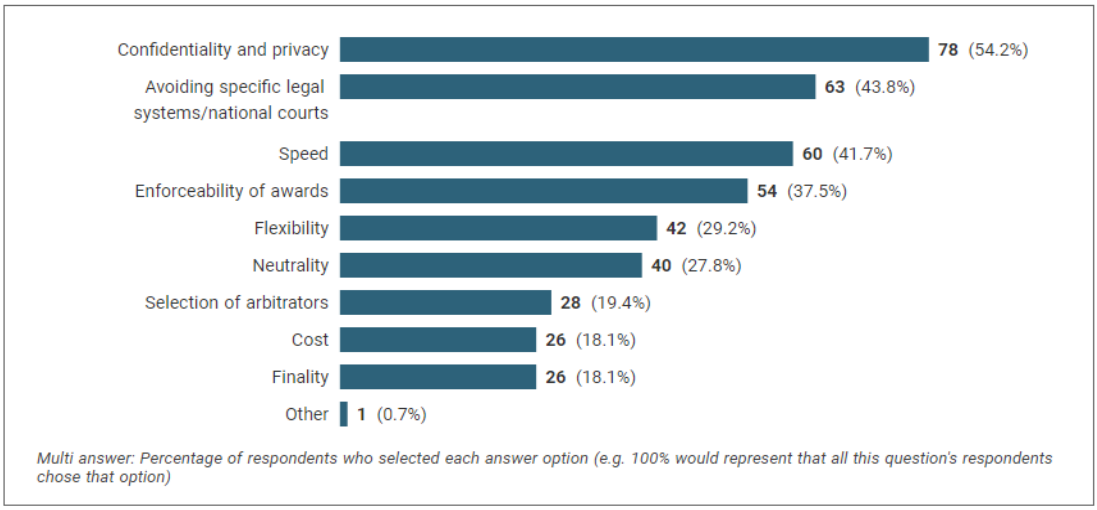
Incredibly, there were a total of **144 responses** which means these findings are from over 61% of targeted sample. **94%** of these respondents' primary role was legal while the other **6%** primary role varied including banking and health care.

Most favourable characteristic of arbitration in Kenya

In the survey questionnaire the respondents were asked to identify the most valuable characteristic of international arbitration. The survey question is captured on top with different aspects. The numbers in bold indicates number of respondents who chose that option while the percentage out of the 144 respondents is indicated in brackets.

[24] The relevant website is https://yellow.co.ke/search/?q=lawyer&l=nairobi&page=5.
[25] Bryman A *Business Research Methods* (2015) see also Ilieva J, Baron S and Healey N 'Online Surveys in Marketing Research: Pros and Cons' (2003) 44(3) International Journal of Market Research 361, at 364.
[26] Formula adopted from Bryman A *Social Research Methods* (5th ed. OUP 2016) at page 176.

7 In your view, what are the three most valuable characteristics of international arbitration? (Choose 3 Max)



7.a If you selected Other, please specify:

Showing 1 response	
Seeking win-win situations for the parties	337186-337178-36278014

The three most selected characteristics were: Firstly c*onfidentiality and privacy* 54.2%. Privacy in this context means that no third party can attend arbitral process while confidentiality means that parties have the advantage of non-disclosure of specific information about the dispute in public.[27] Therefore it is unsurprising that settling disputes via international arbitration is considered by many as an effective way to private business practices, trade secrets, industrial processes, intellectual property, as well as proceedings with a possible negative impact on the business, private and confidential.

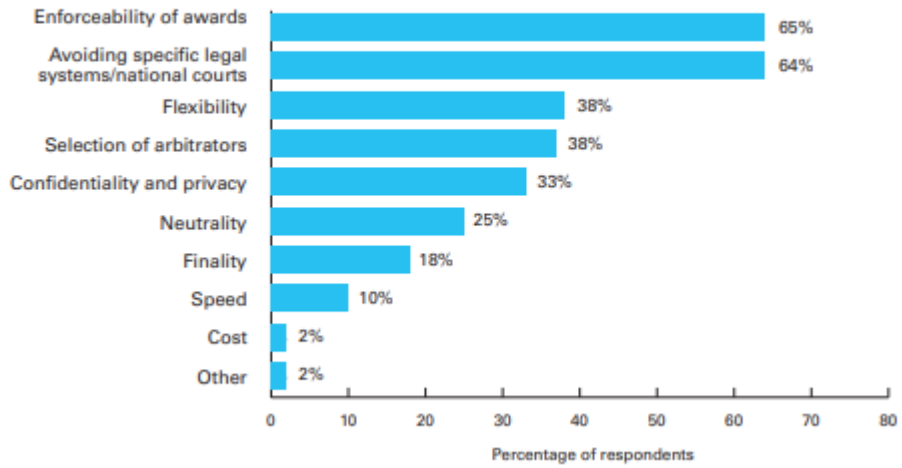
Secondly, *avoiding specific legal systems/national courts* 43.8% and thirdly *speed* 41.7%. This result reinforces the continued prodigious success of the New York Convention 1958 generally to which the main aim is to promote arbitration as alternative resolution mechanism and to promote enforceability of arbitral awards.

In comparison to the QMU 2015 survey, when the parties where asked the same question, the respondents indicated as below.[28]

[27] Barkett J.M, Cruz-Alvarez F, Pagliery S 'Perspectives on the New York Convention under the Laws of the United States Forum Non Convenience as a Stopper to Enforcement' (August 17, 2016) Kluwer Arbitration Blog. Available online at http://arbitrationblog.kluwerarbitration.com/2016/08/17/perspectives-new-york-convention-laws-united-states-forum-non-conveniens-stopper-enforcement/.Last accessed 23/10/2019.

[28] QMU 2015 survey, at page 6

Chart 2: What are the three most valuable characteristics of international arbitration?



It is notable that the avoidance of the of the specific legal systems/national courts is highly ranked in both surveys. However, it is surprising to see that with speed was confidentially and privacy was highly ranked in the Kenya survey (54.2%) and not as much in the QMU (33%). But perhaps this neatly illustrates main differences on the purposes why parties seek arbitration in Kenya which includes confidentiality and privacy as discussed above and speed of dispute resolution. Speed of dispute resolution is a significant issue in Kenya because there is significant backlog of cases within the Kenyan Judiciary which slows down dispute resolution.[29] Indeed it is the main reasons why the Article 159 of the constitution of Kenya was introduced to mandate courts to promote arbitration and other ADR so as to offload of cases from the Kenyan courts and to increase the speed of dispute resolution in Kenya.

Most preferred seat of arbitration in Kenya

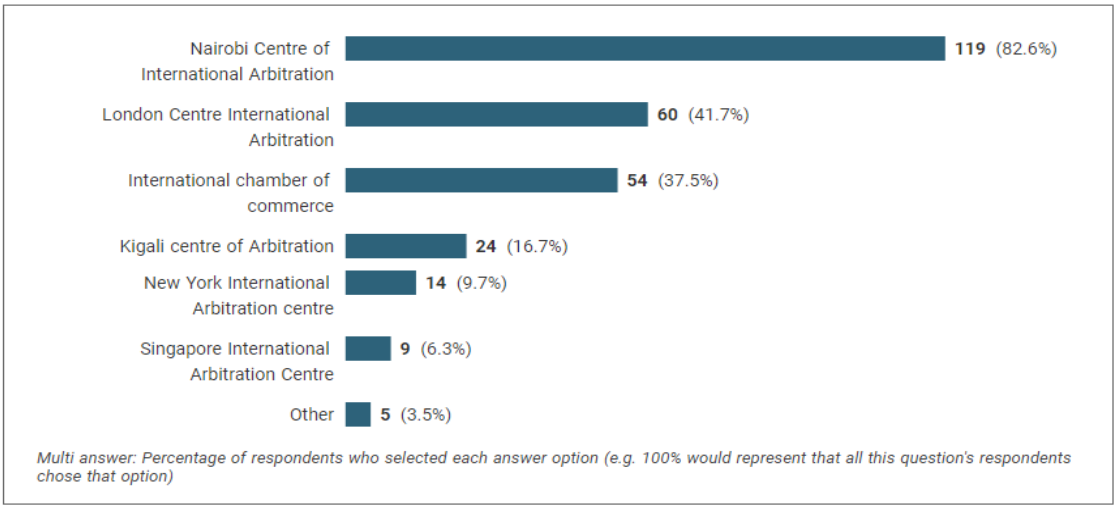
With regards to the most preferred arbitration institution, Nairobi Centre of the International Arbitration (NCIA) is the most preferred arbitration institution among the respondents to the survey (see below). However, since the NCIA was recently established, it can be inferred that NCIA was the most preferred seat in this survey because its geographical location is particular advantageous to the targeted respondents who were all based in Kenya. Indeed, majority of the respondents indicated that the NCIA needs to do more public awareness campaigns and advertisements of its services and of promoting arbitration in Kenya.

This is followed by the two of the most used arbitration institutions internationally, the London Centre of International Arbitration (Hereinafter LCIA) and the International Chamber of Commerce (hereinafter ICC). Usually preferences are given to these seats primarily because of their general reputation for neutrality and

[29] Standard Media, 'Arbitration centre in Nairobi to Reduce case Backlog' (30th Sep 2014) available online https://www.standardmedia.co.ke/article/2000136635/arbitration-centre-in-nairobi-to-reduce-case-backlog/?pageNo=2. Last Accessed 17/10/19.

impartiality of its national laws and legal system as well as the track record of their national courts of recognising and enforcing arbitration agreements and awards.[30]

9 What are your preferred arbitration seats? (Choose 3 max)



Multi answer: Percentage of respondents who selected each answer option (e.g. 100% would represent that all this question's respondents chose that option)

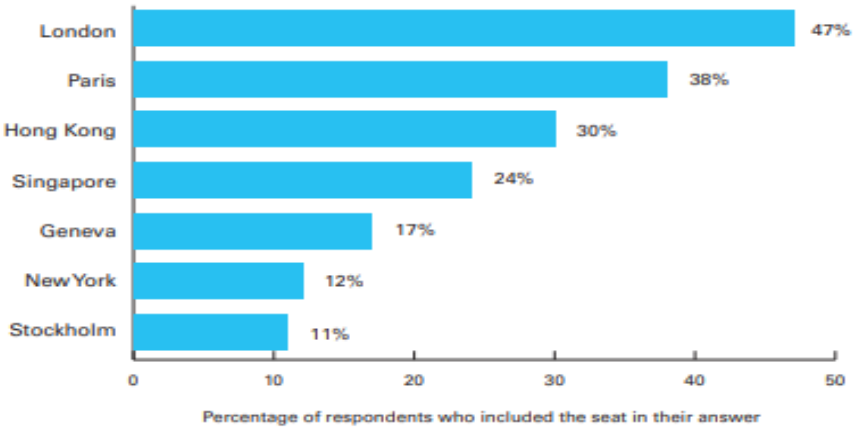
9.a If you selected Other, please specify:

Showing all 5 responses	
Mauritius International Arbitration Centre(MIAC)	337186-337178-34735456
Permanent Court of Arbitration, Hague MCCI in Mauritius	337186-337178-36006622
No preference	337186-337178-38448807
Dubai International centre of arbitration	337186-337178-38555439
local chapter of the institution of arbitrators	337186-337178-38738369

In comparison to the QMU 2015 survey, when the parties were asked the same question, the respondents indicated as below.[31]

[30] See Queen Mary University and White & Case *International Arbitration Survey: The Evolution of International Arbitration* 2018, at page 9.
[31] QMU 2015 survey at page 12.

Chart 8: What are your or your organisation's three preferred seats (if any)?



There appears to be a fairly similar result but on selection of seats with no surprise on LCIA and the ICC in Paris being highly ranked in both survey. From the QMU 2015 survey, reasons why the respondents selected these seats include neutrality and impartiality of the local legal system, the national arbitration law and judicial track record for enforcing agreements to arbitrate and arbitral awards.[32]

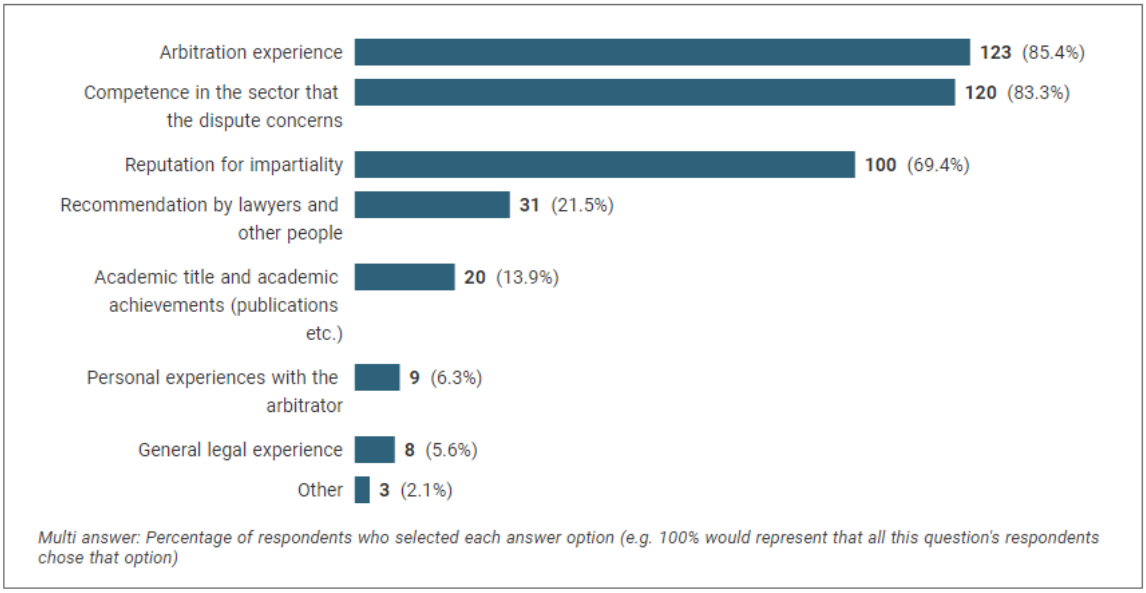
It can be inferred that NCIA was the most preferred seat in the Kenyan Survey, because its geographical location is particular advantageous (easily accessible and cost saving) and to the targeted respondent who were all based in Kenya. However, if this was the only reasoning the respondents used when selecting the NCIA then it should have followed that Kigali Centre of International Arbitration would have been among the most preferred arbitral institution in the Kenyan survey. In this regard therefore, further research should be conducted in order to understand why the parties choose these particular institutions

Selection of arbitrators in Kenya

In relation to the selection of arbitrators, arbitration experience and reputation of impartiality as well as the competence in the sector that dispute concerns are the three most important characteristics the respondents look for when appointing an arbitrator (see below). A significant number of respondents also indicated the arbitrator's cost is one of the main considerations when selecting an arbitrator. The least important characteristic that the respondents consider when selecting an arbitrator is the personal experience with the arbitrator (6.3%), the academic achievement and title (13.9%) as well as the general legal experience (5.6%) as demonstrated in the table below.

[32] QMU Survey 2015, at page 13.

8 Please indicate the three most important characteristics that you consider when appointing an arbitrator (Choose 3 Max)



Multi answer: Percentage of respondents who selected each answer option (e.g. 100% would represent that all this question's respondents chose that option)

8.a If you selected Other, please specify:

Showing all 3 responses	
costs	337186-337178-38448642
Appointyment of the local chapter of the institution of arbitrators	337186-337178-38738369
Cost	337186-337178-38759183

Role of the courts in Arbitration

As mentioned above, s. 10 of AA 1995 limits the power of Kenyan courts to interfere with the arbitration process unless provided for in the Act. The limited circumstances to which the Kenyan national courts can now interfere with arbitration via Arbitration Act 1995 is aimed at, supporting, complementing and supervising the arbitration process as well as protecting Kenyan public policy. So for instance, s.6 of the AA 1995 confers the High Court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration. Moreover, s.11 & 12 of the AA 1995 confers the High Court the power to determine the number of arbitrators and appoint them if the parties fail to do so. Section 28 of the AA 1995 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence. Importantly, s.35 AA 1995 gives the High Court power to set aside arbitration award where 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya' or the award is in 'conflict with the public policy of Kenya.'

This role of the courts of complementing, supporting and supervising arbitration was confirmed in *Sadrudin Kurji & another v Shalimar Limited & 2 others*[33] where the court held:

> *'arbitration process as provided by the Arbitration Act (1995) is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This, however, does not mean that the Courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors.'*[34]

Enforcement of Arbitration Agreements

An agreement to arbitrate is the founding stone of international arbitration as it records the parties consent to arbitrate in a binding manner that mandates the arbitrator or the arbitral tribunal to decide the dispute that is covered in that agreement.[35] In addition to this arbitration agreement will usually include *inter alia*, the scope of the agreement, the arbitral seat, choice of law, arbitration rules and number of arbitrators.[36] There are two types of arbitration agreements, the arbitration clause and the submission agreement. The arbitration clause relates to an agreement between the parties which is usually in form of the clause in the underlying contract to submit future disputes to arbitration.[37] The submission agreement refers to an agreement which the parties agree to submit an existing dispute to arbitration.[38] In Kenya, s.3 of the AA 1995 defines an arbitration agreement as an agreement '*by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*' Therefore an arbitration agreement as enshrined in section 3 is a binding undertaking by which the parties agree to settle disputes by way of arbitration rather than proceedings in court.[39]

With regards to the formality s.4(2) of the AA 1995 requires an arbitration agreement to be 'in writing.' This requirement is satisfied if an arbitration agreement is contained in either a document signed by the parties or an exchange of letters, telex, telegram, fax, electronic mail or other areas of telecommunications which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.[40] This means therefore, an agreement can either be in the form of a clause within the underlying contract or in separate document.[41]

With regards to the recognition and enforcement of arbitration agreements the Kenya courts have a developed positive attitude promoting arbitration in Kenya particularly following the Constitutional

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[33] [2006] eKLR.
[34] Ibid.
[35] Blackaby N, Partrasides C, Redfern A and Hunter M *Redfern and Hunter on International Arbitration* (6th ed. OUP 2015), at page 92.
[36] Born G *International Arbitration Law and Practice* (2nd ed. Wolters Kluwer 2016), at page 35.
[37] Redfern *& Hunter on International Arbitration,* OUP, p 72.
[38] Ibid.
[39] *William Lonana Shena v. HJE Medical Research International Inc* Case No. 1096 of 2010.
[40] S.4(3) AA 1995.
[41] S.4(1) AA 1995.

underpinnings under Article 159 of the Constitution of Kenya discussed above. This is confirmed by Judge Gikoyo in *Bellevue Development Company Limited v Vinayak Builders Limited & another*[42] in the Kenya High Court where he held that:

> *'Article 159 of the Constitution of Kenya enjoins the Courts and all tribunals to support and encourage parties to promote Alternative Dispute Resolution Mechanisms (ADR) including Arbitration. This Court is thereby enjoined to breathe life into an Arbitration agreement to give effect to the intentions of the contracting parties who freely choose the said mode of dispute resolution in a private contract so as to take advantage of the trilogy of benefits which are said to be attendant to Arbitration.'*[43]

Doctrine of Separability

As mentioned above the separability of the arbitration agreement is fundamental to the arbitration process in a way that the arbitration clause or contract is treated as separate from the underlying contract.

The doctrine of separability operates in a way to ensure that the arbitration agreement although contained and closely related to the underlying contract is separable or severable from the underlying contract. In this way therefore, the arbitration agreement is a separate and autonomous contract.[44]

This doctrine is recognised internationally. In the UK **s.7** of the Arbitration Act 1996 states that unless otherwise agreed by the parties,' *an arbitration agreement which forms or was intended to form part of another agreement whether or not in writing… shall be treated as a distinct agreement*.' This has also been recognised in the UK courts as Lord Steyn held in *Lesotho Highlands Development Authority v Impregilo SpA*[45]

> *'It is part of the very alphabet of arbitration law, as… spelled out in section 7 of the Act (AA 1996), that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract.'*[46]

In the US, although it is not expressly mentioned in the Federal Arbitration Act 1925 (hereinafter FAA 1925), the US Supreme Court has interpreted s.4 of the FAA 1925 which mandates US courts to enforce arbitration agreement to include the separability doctrine.[47] The US Supreme in *Prima Paint Corp. v Flood & Conklin*[48] held that:

> 'Arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a

[42] Civil Case No. 571 of 2011, [2014] eKLR.
[43] Ibid., para 29.
[44] Chaturvedi S and Agrawal C 'Jurisdiction to Determine Jurisdiction' (2011) 77(2) Arbitration 201-210, at 202
[45] [2005] UKHL 43.
[46] *Ibid.* Lord Steyn, at para 21.
[47] *Prima Paint Corp. v Flood & Conklin Mfg. Co.,* [1967] 395 US 388.
[48] Ibid.

broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.'[49]

The main practical purpose of the separability doctrine is to protect the parties' chosen dispute resolution method and arbitrator's jurisdiction even if it is alleged that the underlying contract may be invalid.[50] For instance, in *Fiona Trust & Holding Corp v Privalov*[51] Fiona had purported to rescind the underlying contract on the basis it believed to have been procured through bribery and it argued as result of this the arbitration clause contained in it was not binding. The UK House of Lords held that, the arbitration agreement had to be treated as a distinct agreement and could be void or voidable only on grounds which related directly to it. Therefore, Fiona's argument was dismissed because the arbitration agreement was valid and thus it was for the arbitrators to determine if the underlying contract was void as a result of bribery.

In Kenya the separability of the arbitration agreement is captured in s.17 of the AA 1995 which states that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the (underlying) contract is null and void shall not itself invalidate the arbitration clause.[52]

Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa[53] is a case in point where, the principle of separability of an arbitration agreement was given a 'judicial stamp of approval' and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself.[54]

The Kenyan courts approach therefore, reflects the international standards of interpretation of the doctrine of separability in such a way any challenges to the underlying contract does not invalidate the arbitration agreement.

Doctrine of competence-competence

The Kenyan courts recognise the principle of competence-competence that is the arbitrator's or arbitral tribunal's jurisdiction to decide disputes over its own jurisdiction.[55] The competence-competence principle was reinforced in *Adopt the Light v Magnate Venture Ltd and 3 others*[56] where R.S.C. Omolo of the Kenyan Court of Appeal held that:

[49] *ibid.,* at 402.
[50] Redfern *& Hunter on International Arbitration,* OUP, p 106.
[51] [2007] UKHL 40.
[52] s.17(1)(a)&(b) AA 1995.
[53] [2010] eKLR.
[54] Kimaru L in *Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa* [2010] eKLR.
[55] See 17 of the AA 1995.
[56] (Civil Application 159 of 2009) [2009] eKLR.

> *'It is clear under the Section (S.17 AA 1995) that an arbitrator has the power to rule on the issue of his own jurisdiction and the validity or otherwise of the agreement, the subject of the arbitration and may even rule that contract is null and void.'*[57]

Interestingly, Nyamu J.A. held in the Kenyan Court of Appeal *in Safaricom Limited v Ocean View Beach Hotel Limited*[58] that:

> *'The Section (s.17 AA 1995) gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national Court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under Section 17 (6) of the Arbitration Act.'*[59]

The Kenyan court's broad approach on competence-competence is consistent with English courts approach such that the very existence of arbitration agreement is enough to give the arbitrator's power to rule their own jurisdiction. In deed the UK courts in *HC Trading Malta Ltd v Tradeland Commodities SL*[60] held that,

> *'disputes as to the existence or scope of the arbitration agreement should be determined by the detailed provisions of the Act (AA 1996), and in particular, as a starting point, (by doctrine of competence-competence under) s.30 (of the AA 1996).'*[61]

This broad approach adopted by the Kenyan court and English courts can be compared to the narrow approach adopted by the USA courts.[62] The US courts will only recognise the doctrine of competence-competence where there is *'clear and unmistakable evidence'* that the parties agreed that arbitrators should determine arbitrability.[63] It follows therefore an arbitration agreement is not enough there must be clear evidence that parties agreed that the arbitrator's should decide arbitrability. For instance in *First Options of Chicago, Inc. v. Kaplan*[64] despite an arbitration agreement, the US Supreme court held that Kaplan

> *'did not clearly agree to submit the question of arbitrability to arbitration… (and thus) it was subject to independent review by the courts.*[65]The US Supreme court justified this approach on the grounds that without such a requirement the US courts *'might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.'*[66]

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[57] Ibid.
[58] [2010] eKLR.
[59] Ibid.
[60] *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] 1 W.L.R. 3120..
[61] *Ibid* [2016] 1 W.L.R. 3120, at 3126-7.
[62] Ryan RC 'The Limits of the Competence-Competence Doctrine in United States Courts' (2011) 5(1) Dispute Resolution International 5, at 7.
[63] Justice Breyer in *First Options of Chicago, Inc. v. Kaplan* [1995] 514 U.S. 938, at 944 although this case relates to domestic arbitration this approach was approved in case involving international arbitration in *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corporation, Appellant* [2003] 274 F.3d 334.
[64] [1995] 514 U.S. 938.
[65] Ibid at 947.
[66] Justice Breyer in *First Options of Chicago, Inc. v. Kaplan* [1995] 514 U.S. 945.

This means therefore in the USA where there are questions as to the validity of the arbitration agreement it should be resolved first by the courts unless there is clear unmistakeable evidence of an agreement to submit the arbitrability question to arbitration.[67]

In this way therefore, in relation to the doctrine of competence-competence the Kenyan courts have taken a broad approach which similar to that taken by the English courts in contrast to the narrow approach taken by the USA courts. This approach by the Kenyan courts is promotes arbitration as it seeks to allow flexibility in arbitration practice and give the arbitrators in Kenya more freedom to rule on their own jurisdiction.

Stay of proceedings in Kenya

Where a party to an arbitration agreement commences court proceedings in breach of the arbitration agreement, the defendant can apply for the arbitration proceedings to be stayed via s.6 AA 1995. This is one of the main ways in which the Kenyan courts support arbitration. Through granting this remedy Kenyan courts recognise and apply the *Scott v Avery*[68] principle that is, where there is a valid arbitration agreement, the parties are not at liberty to go to court unless they firstly go to arbitration (arbitration is a condition precedent).[69] The rationale of this remedy is not only to enforce the voluntarily agreed forum of dispute resolution but also to prevent concurrent court and arbitration proceedings. Indeed, in *Niazsons (K) Ltd v China Road and Bridge Corporation Kenya*,[70] Bosire J.A. held that: 'the policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved.'

Specifically, Section 6 of the Arbitration Act 1995 provides that:

'(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regards to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.'

It is noteworthy that just as s.9 of the English AA 1996 on stay of proceedings, the Kenyan s.6 AA 1995 is modelled from Article 8 of the UNICITRAL model law and therefore they are fairly similar as discussed below.

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[67] Born G *International Arbitration Law and Practice* (2nd ed. Wolters Kluwer 2016), at page at page 58.
[68] [1855] 5 HL Cas 811.
[69] See *Scott v Avery* [1855] 5 HL Cas 811.
[70] Civil Appeal 157 of 2000.

It is noted that s.6 AA1995 sets out conditions that must be satisfied for the Kenyan courts to grant a stay proceeding to refer a dispute to arbitration where a party has started court proceedings in breach of an arbitration agreement. These are, firstly the defendant should not acknowledge a court claim and should make an application to stay the proceedings at time of first court appearance. Secondly, there must be a valid arbitration agreement operative and capable to be performed. Thirdly, there must a dispute to between the parties that is covered by the arbitration agreement and capable to be resolved by arbitration. The Kenyan courts have held that the purpose of that condition is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution as well as ensuring justice.[71] This assertion was emphasized and upheld in *Eunice Soko Mlagui v Parmar & 4 others*[72] as stated below:

> 'The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.'[73]

It is noted that s.6 AA 1995 just as English s.9 AA 1995 is written with mandatory and/or commanding terms with particular emphasis on the use of the word 'shall' therein. In this way therefore, the section restricts the Kenyan court's discretion to decline or approve an application stay of proceedings in favour of arbitration based on whether the conditions set out are satisfied. Judge Numbuye at the Kenyan Court of Appeal in *Achells Kenya Limited v Phillips Medical Systems Nederland B.V. Diederik Zeven & another*[74] held that; 'having complied with that Section then what is left is for this court to follow the command in the said proceedings which is to stay the proceedings'.

S.6(1) Time of Application and Acknowledgement of court proceedings

In accordance with s.6(1) AA 1995 an application of a stay of proceedings by the defendant must be made no later than when the party enters an appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.[75] Similarly, under English Law s.9(3) of the AA 1995, the defendant, who does not admit the court claim, must, if he wishes to seek a stay, file an acknowledgment of service usually stating an

[71] See *Dioceses of Marsabit Registered Trustee –vrs Techno Trade Pavilion Ltd* [2013] HCCC No. 204 and see *Eunice Soko Mlagui v Parmar & 4 others* [2017] eKLR.
[72] 2017 eKLR.
[73] *Ibid* as cited by P.N. *Waki Mt. Kenya University v Step Up Holdfing (K) Ltd* [2018] eKLR.
[74] [2007] eKLR.
[75] S.6 AA 1995.

intention to challenge the jurisdiction of the court within 14 days.[76] The defendant must not take any other step in the proceedings, and the application for a stay form must state that he has not done so or otherwise demonstrate the same.[77] There under both English and Kenyan law, a defendant making a step in the proceedings is an act that both invokes the jurisdiction of the court and that demonstrates the defendant's election to allow the action to proceed.

The implication of this provision is that arbitration agreement does not automatically oust jurisdiction of the court over the matter. This is because just as the English courts, the Kenyan courts will not decline to assume jurisdiction over a matter merely because of the existence of an arbitration agreement. Therefore, in practice where party to the arbitration agreement objects to arbitration proceedings in national courts, the other party to the arbitration agreement must strictly only apply for a stay in proceedings for dispute to be sent to arbitration. A failure to do so no later than when the party enters appearance, would result to the party forfeiting their arbitration agreement.[78]

In Kenya, the *TM AM Construction Group Africa v The Attorney General*[79] case neatly illustrates this. In that case, the claimant commenced court proceedings against the Attorney General on the 21st February of 2001. The Attorney General entered appearance to those court proceedings on the 15th March 2001 however, made application via s.6 AA 1995 on the 25th April 2001 to stay the proceedings such that the dispute be referred to Arbitration. The court held that, since the Attorney General had made application 41 days after making appearance he had lost the right to rely on the arbitration agreement.

The Kenyan courts have strictly adopted the time limitations within the AA 1995 (including s. 6) and the rationale for this was given in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd,*[80] where the Judge J.M. Ngugi held that:

> *'...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act'.*[81]

s.6(1)(a) Arbitration agreement is valid operative and can be performed

Also in accordance with **s.6(1)(a) of the AA 1995** a party applying for stay of proceedings must satisfy the court that, the arbitration agreement is valid. Thus if the arbitration agreement is null and void the Kenyan courts would not have the jurisdiction to issue a stay of proceedings.

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[76] See *Patel v Patel* [1999] 1 All ER (Comm) 923.
[77] See Robert Merkin and Louis Flannery Arbitrtion Act 1996 (5th ed. Routledge 2014) at page 50-51.
[78] See Muigai G Arbitration Law and Practice in Kenya (Law Africa, 2013), at page 69.
[79] civ case 236 of 01 [2001] EKLR.
[80] *Nancy Nyamira & Another v Archer Dramond Morgan LTD* [2012]eKLR.
[81] Ibid.

This is similar to the s.9(4) of the English AA 1996 which manadates the English courts to grant a stay of proceedings unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. In *Downing v Al Tameer Establishment & Anor*[82] the English Court of Appeal Potter LJ held that 'The burden of proving that any of the grounds in s. 9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted'[83]

So it is clear therefore that Under English law, here the burden shifts to the claimant. In other words, the party seeking the stay of proceedings does not bear the burden of proof but only need to raise an arguable case in favour of validity for a to satisfy this section.[84]

In Kenya, as mentioned above s.3 & s.4 of the AA 1995 define an arbitration agreement and set out the formality respectively. Thus arbitration agreement would only be considered as valid if it complies with those sections. It has also been mentioned that separability of the arbitration agreement is vital to the arbitration process and thus it follows that the validity of arbitration agreement would only be considered separately and independently.

However, there are number of instances where the Kenyan courts have declared the arbitration agreement to be invalid. The rationale is that to stay proceeding where there is no valid arbitration agreement would otherwise amount to subjecting the parties to a forum of dispute resolution that they did not consent to. In practice, the applicant of the stay in proceedings will usually have already made advancements to initiate arbitration.[85]

Moreover, there are number of instances where the Kenyan courts have held although the arbitration agreement is valid it is inoperative or incapable of being performed. For instance in cases where, as discussed above a party has participated in court proceedings instead of applying for stay of arbitration proceeding as was in the case in *Peter Muema Kahoro & another v Benson Maina Githethuki.*[86] In that case, the court held that because the defendant had filled grounds of defence and actively taken other steps of defence in relation to court claim made by the defendant in breach of a valid arbitration agreement, the defendant had lost his right to rely on the arbitration agreement.

S.6(1)(b) AA1995: Is there an existing arbitrable dispute between the parties?

S.6(1)(b) AA 1995 requires there to be an existing dispute between the parties that is covered by the valid arbitration agreement before the courts to issue a stay in proceedings.

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[82] [2002] EWCA Civ 721.
[83]Ibid para 20.
[84] See Robert Merkin and Louis Flannery *Arbitrtion Act 1996 (*5th ed. Routledge 2014) at page 52.
[85] Muigai G *Arbitration Law and Practice in Kenya* (Law Africa, 2013)) at page 71-72.
[86] [2006] HCCC Nairobi No 1295 of 2005.

Here as is the case in English law to via s.9(1) AA 1995, the court has only to consider whether there is a dispute within the meaning of the arbitration agreement, not whether in fact there is a dispute between the parties.

The English courts have interpreted a dispute for the purposes s.9(1) AA 1996 broadly. For instance, under English law, the fact that there is no arguable defence to a claim does not mean that there is no dispute. Evidently Savile J held in *Hayter v. Nelson*[87] that:

> *'*Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist'.[88]

However, it should be noted that under English law, there is no dispute in this context if a claim is indisputable.[89] Notwithstanding, claims to which there is no good defence, or which the respondent has made no effort to answer at all, would still fall to be regarded as arbitration.[90] Interestingly, as per Langley J at the English High Court in *Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd* [91] dispute in this context also covers a situation where there is an admitted but unpaid claim.

In contrast, in Kenya courts have taken a narrow approach. In accordance with Githu Muigai, in order for the applicant of the stay of proceedings to establish this, they must satisfy the court that a '*genuine (arbitrable) controversy'* exists between the parties to which the parties intended to resolve by arbitration.[92] Thus following Mbaluto J ruling in *Tm Am Construction (Africa) Group vs Attorney General*[93] 'a party who is wholly unable to produce the minutest evidence to support an allegation of (an arbitrable) dispute in a contract has absolutely no right to … seek a stay of proceedings.'[94]

The contrast in approach in this context is neatly illustrated in the case of *UAP Provincial Insurance Company Ltd ('the Insurance Company') v Michael John Beckett*[95] where Mr. Beckett lodged a claim with the insurance company with which he had taken out a comprehensive insurance policy which had arbitration clause, following the loss of his vehicle. After negotiations the insurance company agreed (with Mr Beckett) to settle the claim by a payment of Kenya Shillings Six Million. However, after two years the payment had not been honoured. Thus, Mr Beckett launched a court claim against the insurance company for the settlement payment to which the Insurance Company filed an application to stay the proceedings in favour of arbitration

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[87] [1990] 2 Lloyd's Rep. 265.
[88] Ibid 268-9.
[89] *I*bid. See also *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 WLR 726.
[90] 'Stays under the English Arbitration Act 1996: "no dispute",' Practical Law, UK Practice Note 7-203-2246.
[91] [2006] EWHC 1090.
[92] Muigai G *Arbitration Law and Practice in Kenya* (Law Africa, 2013) at page 76.
[93] [2001] eKLR.
[94] Ibid.
[95] Civil Appeal 22 of 2007.

relying on s.6 AA 1995. Having established that there is a valid arbitration agreement between the parties covering all the disputes from the insurance policy, the legal question before the Kenyan court was whether there was an actual *dispute* between the parties. The court dismissed the application for the stay of proceedings on the basis that there was no dispute between the parties. The court held that:

> '….Where the parties have reached a settlement, there is nothing to be referred to arbitration. The parties in this case agreed to settle the claim for the specified sum of kshs 6 million. (Thus the differences, if any, were sorted out by the parties themselves). The upshot of all this is that I decline to stay the proceedings herein is there is nothing to be referred to arbitration. There is no dispute between the parties. All there is a plaintiff's right to be paid as per the agreement and that has nothing to do with the policy document.' [96]

Once it is established there is a dispute, there is a particular emphasis in Kenyan law for that dispute to be arbitrable. As there is no statutory provision on arbitrability, it is a matter decided on case to case basis. However it should be noted that most civil matters in Kenya are arbitrable but however there appears to be restrictive approach in towards the arbitration of mandatory laws as discussed below.

Arbitration of mandatory laws in Kenya

There is no statutory limit within the Kenyan AA 1995 on the use of arbitration to a particular subject matter. However, it is general practice that, by reference to Article 159 of the Kenyan Constitution, that the ends of justice must be met in while promoting arbitration. Therefore in determination of a subject matter is arbitrable, the Kenyan courts will usually consider whether the law will be applied equally to all persons with due regard to all procedural technicalities without delayed while promoting all principles of the Kenyan Constitution.

Although the AA 1995 gives carte blanche to the application of arbitration the Kenyan Courts still have the power to challenge the arbitrability of a subject matter. Indeed in ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others***[97] Judge J.L. Onguto at the Kenyan High Court held that:

> 'Notwithstanding the principle of constitutional avoidance and settled dispute resolution forums, the court may, depending on how a dispute is framed, still decline to send the parties to another forum. It all depends on how the issue is laid before the court.'[98]

In that case, the court declined the arbitrability of constitutional issues in particular the court held that:

> 'Purely constitutional issues [are within] the court's jurisdiction rather than [an] agreed mode of dispute resolution. I … do not for a moment view it that the framers of our Constitution intended the

[96] Mutungi J as cited by Maraga, Ouko W Kairu SG in *UAP Provincial Insurance Company. Ltd v Michael John Beckett* [2013] eKLR, at para 32.
[97] [2016] eKLR.
[98] Ibid at 91.

> rights and obligations defined in our common law, in this regard, the right to freedom of contract, to be the only ones to continue to govern interpersonal relationships.'[99]

In *Nyamweya & another v. Riley Barasa Services Limited* [100] the arbitrability of an employment contract was challenged before the Industrial Court. However, it should be noted that in this case, the court held that the arbitrability of employment contracts are in accordance with employment laws in Kenya.

In Kenya there is also a general understanding that arbitration is not the appropriate medium for resolving criminal matters. This includes commercial disputes that may have been tainted by some criminal liability, for instance, where there are allegations of blatant corruption, fraud or bribery.[101]

Similarly, it is well settled that in English law that the arbitrators do not have the power to convict a person of a criminal offence. However, as confirmed recently by the English Court of Appeal, in *London Steam Ship Owners Mutual Insurance Association Ltd v Spain*[102], arbitrators have jurisdiction to find that a criminal offence has been committed for instance bribery or fraud. In that case Moore-Bick LJ held that:

> 'it was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed.'[103]

Such approach is controversial particularly because it is not clear such a criminal offence must be proved in arbitration proceedings. It is not clear what burden of proof would be applied, whether this would be the usual criminal standard beyond reasonable doubt or the civil standard on the balance of probabilities.[104] Also, due to privacy and confidentiality arbitration the arbitrator may not have all necessary in determining criminal liability as compared to the courts for instance, a jury or records of bad character.

In relation to the enforcements of Kenyan competition laws, The Competition Authority of Kenya (hereinafter CAK), is established under the s.7 of the Competition Act 2010.[105] The CAK's mandate is to enforce Kenyan competition laws with the objective of enhancing the welfare of businesses in Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.[106] There is yet to be arbitration of a competition law dispute issue in Kenya.

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[99] Ibid 101.
[100] [2013]eKLR.
[101] John Miles, Leah Njoroge-Kibe and Patricia Wangui Njeru, JMiles & Co 'Arbitration Procedures and Practice in Kenya: Overview' (1/12/2018) Practical Law. Available online at https://uk.practicallaw.thomsonreuters.com/5-633-8955?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1. Last accessed 03/10/2019.
[102] [2015] C.P. Rep. 31.
[103] Ibid at para 78.
[104] See Richard Davies 'England and Wales: Arbitrability of Claims which Involve Alleged Criminal Conduct' (May 5, 2015) Kluwer Arbitration Blog.
[105] No 12.
[106] See s.9 of Competition Act 2010.

In comparison in the UK and the USA some ~~competition~~ laws are arbitrable, particularly laws on the abuse of dominant position.[107] For instance in *ET Plus Sa v Welter* [108] Justice Gross at the UK High Court held that, 'there is no realistic doubt that competition laws… are arbitrable.' [109] Similarly, in *Mitsubishi*[110] Case, the USA Supreme court held that anti-trust (competition law) disputes could be resolved via arbitration as the parties agreed.[111] However, it should be noted that USA courts adopted a second look doctrine in such a way the arbitrators are expected resolve the dispute in a manner that will ensure that the US Supreme Court will be satisfied with the final award, for award to be effective.

In general, although as mentioned above there are no restrictions on AA 1995, in practice in Kenya there is a restrictive approach towards the arbitration of mandatory laws such as criminal, insolvency, bankruptcy, divorce and tax matters. The main issue with regards arbitration of such laws is that they are usually considered to fall outside the scope of an arbitration tribunal as they are considered to be matters of public policy. That is such laws are usually considered as involving sensitive issues of national interest which have a strong public policy for them to be applied uniformly and equally and thus must be settled by national courts as opposed to privately using arbitration.

As it is recognised and acknowledged in both the USA and the UK, public policy is an elusive concept which is very difficult to define exhaustively. The Kenyan courts have also accepted this assertion, as seen in *Anne Hinga v Victoria Gathara*[112] where it was held that:

> 'Public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.'[113]

It is clear therefore, as compared to other countries, there a restrictive approach in Kenya as to the arbitration of mandatory law. It follows therefore as Kenya is a signatory to the Article III New York Convention 1958, it is likely that the Kenyan courts would not recognise arbitration award on a subject matter to which is not arbitrable under Kenyan laws as being contrary to Kenyan Public policy via s.35 AA 1995.

With regards to the arbitration of mandatory laws the survey asked the respondents whether mandatory laws including competition laws should be arbitrable in Kenya.

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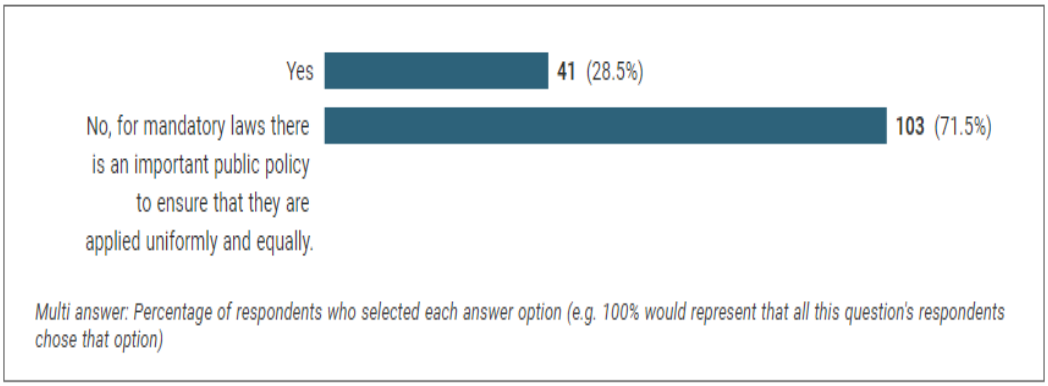
[107] See Ndolo D and Liu M 'Is the End? The effect of Brexit on the arbitration of Eu competition Laws in the UK' (2017) 38 ECLR 322.
[108] *ET Plus Sa v Welter* [2005] EWHC 2115 (Comm).
[109] Ibid at para 51.
[110] *Mitsubishi v Soler Chrysler Plymouth* [1985] 473 US 614 at 633.
[111] Ibid.
[112] Civil Appeal No. 8 of 2009.
[113] Ibid. *Justice Bosire, O'Kubasu and Nyamu.*

16 In your view, should disputes involving mandatory laws, for example, competition laws, be arbitrable?



71.5% of the respondents indicated that they should not be owing to that the fact that there is an important public policy in the enforcement of mandatory laws to ensure they applied equally and uniformly (see below). One of the respondents wrote that mandatory laws should not be arbitrated because they involve more than the contracting parties. Indeed, this is usually the case in mandatory laws such as competition laws where there is usually a class action and consumer interest or criminal law where there is general public interest of justice to be administered. Another respondent indicated that Kenya is not yet ready for the arbitration of complex mandatory laws. They wrote:

> 'Commercial arbitration has traditionally been in construction engineering projects and financial matters. Disputes involving mandatory laws such as a competition laws have inbuilt procedures for solving disputes. Given the fact that the Nairobi Centre of Arbitration is hardly 3 years old it is advisable to gain expertise in the traditional areas before delving into new areas.'

Whether the UK and USA jurisprudence will be adopted in Kenya is yet to be seen but for now as indicated by the survey results there appears to be no appetite for the arbitration of mandatory laws in Kenya.

Anti-suit injunctions in Kenya

Anti-suit injunctions are often sought in national courts to restrain foreign proceedings in favour of arbitration. As arbitration is increasingly becoming the preferred method of dispute resolution internationally, so is the issuance of anti-suit injunctions. For instance, despite there being very few anti-suit injunction cases in New Zealand, Robertson J in *Jonmer Inc v Maltexo Ltd*[114] held that that there was "no question that the [New Zealand] Court has the jurisdiction to make such an order".[115] In addition, the Canadian Supreme Court in *Amchem*[116] has acknowledged that Canadian courts have power to issue anti-suit injunctions but this should only be entertained when there is another more convenient and appropriate forum (*forum conveniens* test.)

[114] *Jonmer Inc v Maltexo Ltd [1996] 10 PRNZ 119.*
[115] *Jonmer* [1996] 10 PRNZ 119 at 120.
[116] *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897.

Most recently, in 2015, the Hong Kong Court of First Instance in *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi*[117] issued its first anti-suit injunction in favour of arbitration proceedings by preventing a Turkish party from pursuing foreign court proceedings.

Nevertheless, anti-suit injunctions are far from perfect. The central concern is the jurisdictional practicalities of issuing anti-suit injunctions. This is because although they are directed to the party in breach of the arbitration agreement, in practice it indirectly interference with the sovereignty and process of the foreign court.[118] Moreover, in practice it may be interpreted as the issuing court lacking of trust that the foreign court would submit the dispute to the appropriate forum.[119] As result, different jurisdictions have adopted different approaches towards the issuance of anti-suit injunctions. The aim is to promote reciprocal trust between the national courts and avoiding or minimising the indirect interference or sovereignty of the foreign court.

In the UK, the Senior courts have a "general power" to issue an anti-suit injunction under the UK s.37(1) Senior Courts Act 1981 in cases in which it appears to the court to be "convenient" to do so. However, they exercise this general power cautiously and "sensitively" in the arbitration context "with due regard for the scheme and terms" of the Arbitration Act 1996.

However, in a controversial and extensively analysed case, *West Tankers*[120] the Court of Justice of the European Union (CJEU) held that the anti-suit injunctions of this nature run counter to the principle of mutual trust among the EU member states as required by the Brussels I Regulation **(**replaced by the Brussels Recast Regulation on 2015**)**. As result, EU member state courts including the English courts, cannot issue an anti-suit injunction in favour of arbitration where a party starts foreign court proceedings in an EU state. However, with Brexit looming the ECJ will no longer have jurisdiction over UK courts and thus it is yet to be seen is whether the English courts will still favour this approach post-Brexit.[121]

It must be emphasised that the limitation on English court to grant anti-suit injunctions from the CJEU decision in *West Tankers case* is only limited to the jurisdiction of Brussels Recast, that is where the foreign court is governed and regulated by the Brussels Recast. This has been neatly illustrated in the *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*[122] case. In that case the UK Supreme Court issued an anti-suit injunction to prevent JSC from continuing with court proceedings in *Kazakistan* in

[117] *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246.
[118] G. Fisher, "Anti-suit Injunctions to Restrain Foreign Proceedings In Breach of An Arbitration Agreement" [2010] 22(1) Bond Law Review 1, 1.
[119] Ambrose, "Can Anti suit Injunctions Survive in European Community Law?" (2003) 52 I.C.L.Q. 401, 414.
[120] [(C-185/07) EU:C:2009:69 (ECJ (Grand Chamber)].
[121] *See* Ndolo D and Liu M 'Does the Will of the Parties Supersede the Sovereignty of the State? Anti-suit Injunctions in the UK post-Brexit' (2017) 83(3), Arbitration 254.
[122] [2013] UKSC 35.

breach of a valid arbitration agreement. In deed in this case court referred to West Tankers limitation as irrelevant in this context.

Notwithstanding, the civil law countries have adopted a similar approach to that of the CJEU in *West Tankers.* So for instance, German courts would neither issue an anti-suit injunction nor recognize nor serve foreign anti-suit injunctions. This is primarily because anti-suit injunctions 'indirectly' interfere with the foreign court jurisdiction. This is neatly illustrated in the *Re enforcement of the English anti-suit injunction*[123] where the Court of Appeal in Germany refused to serve an anti-suit injunction that UK High court had issued directed to a German party from proceeding with court proceeding in the German Courts. The German courts emphasised the fact that the anti-suit injunction are not directed directly to the German state or to the German courts is immaterial. This is because the anti-suit injunction has the effect of infringing the sovereignty of the German courts and thus refused to comply with the anti-suit injunction under Article 13 of the Hague Service Convention.[124] Similarly, a Belgium Civil Court held that an anti-suit injunction that was issued by an American court could not be recognised in Belgium because it was repugnant to Belgium public policy and contrary to the right to fair trial under Article 6 the European Convention on Human Rights.[125]

The US courts make reference to the principle of international comity. This binds the US courts to respect foreign court proceedings out of mutuality and respect. It creates an atmosphere of cooperation and reciprocity between the US and foreign courts in this modern era of economic interdependence.[126] Therefore just as anti-suit injunctions run counter to the principle of mutual trust in the EU context (see above), they also run counter to the principle of international comity. This principle, therefore, ordinarily requires US courts when determining whether to issue of anti-suit injunction, it dictates US courts to balance between the public policies of the domestic and foreign sovereigns. In doing this the US courts are split in three on the appropriate weight that should be placed on international comity.

The Fifth, Seventh, Ninth and Eleventh Circuits adopt a liberal approach and place more weight on the need to provide a remedy that avoids the inconveniences and inequities that simultaneous prosecution of the same action in foreign court may otherwise entail.[127] Although under this approach, anti-suit injunctions are granted 'sparingly'[128]it places an undesirable low weight on international comity.

The District of Columbia, Third, Sixth and Eighth Circuit adopt a conservative approach that accords more weight on non-interference with the sovereignty of the foreign court over the inconveniences of simultaneous

[123] Decision of 10 January 1996, file no. 3 VA 11/95, EuZW 1996, 351 as cited in Baker & McKenzie, Baker & McKenzie *International Arbitration Yearbook* 2012-2013 (6th ed. Juris Publishing Inc. 2013) at page 95.
[124] Ibid.
[125] Civ. Bruzelles, 18 dec 1989 R.W. 1990-1991, at 676.
[126] *Microsoft Corp. v Motorola Inc.* [2012] No. 12-35352 (9th Cir.), at 12113-12115.
[127] E&J Gallo Winery v Andina Licores [2009] 446 F3d 984 (9th Cir.).
[128] *I*bid at 18.

parallel proceedings.[129] This is because an anti-suit injunction may affect the economic relations between the two countries and/or the foreign court may in-turn refuse to give effect to the US court judgment.[130]

Thus, under this approach, an anti-suit injunction would only be granted if two conditions are met. First, where a foreign court proceeding would be evading important US public policies. For example, where a party seeks to elude a statute relating to the dispute.[131] Second, where a foreign court action threatens appropriate jurisdiction. Such a case would be, for example, where there is evidence that the court may issue an anti-arbitration injunction or not refer case towards arbitration. However, this approach is too rigid as anti-suit injunctions would be granted only where these two requirements are met.[132]

The first and the Second Circuit courts adopt an intermediate approach. Under this pragmatic approach, these courts adopt a rebuttable presumption against the issuance of issue anti-suit injunctions. This presumption can be rebutted evidence showing that the totality of the facts/circumstances, weighs in favour of issuing an anti-suit injunction.[133] The factors considered include, inter alia, the importance of the policies at stake in the litigation and the extent to which the foreign action has the potential to undermine the arbitration process.

In summary there are six distinct approaches towards the issuance of anti-suit injunctions as shown below:

UK courts – to parties in non-EU courts	**EU courts**	**Civil Law state courts**	**US – Restrictive approach**	**US - Liberal Approach**	**US – Intermediate approach**

[129] *PT Pertana v Kahara Bodas (PETITION)* **[2007] USSC No. 07**).
[130] (*Gau Shan v Bankers Trust [1992] 956 F.2d; at 1354).*
[131] *Lakers Airways v Sabena Belgian World Airlines* [1984] 909 F2d 731, at 931.
[132] *Quaak v KPMG Belgium* [2004] 361 F.3d 11 (1st Cir.)
[133] *Ibeto Petrochemical v Bryggen Shipping* [2007] 475 F.3d 56 (2nd Cir).

UK courts have adopted a positive attitude towards anti-suit injunctions The UK courts are ready to grant an anti-suit injunction in appropriate cases in support of arbitration.	The European court of justice has issued a ruling in **West Tankers** banning any granting of anti-suit injunctions between EU member state courts However, EU national courts can grant/ recognise anti-suit injunctions to other non-EU state courts EU state courts can also recognise anti-suit injunction from non-EU courts. (but see next column)	Civil law countries do no grant anti-suit injunctions. These countries do not recognise anti-suit injunctions from other countries.	US courts following this approach grant an anti- suit injunction only where foreign court proceedings either: Threaten appropriate jurisdiction of arbitrators. or Foreign proceedings elude important US public policies.	US courts following this approach are prepared to grant an anti-suit injunction to avoid duplication of proceedings. (similar to the UK approach)	The US courts following approach have adopt a presumption against issuing of anti-suit injunction. These can be rebutted if there is enough evidence to satisfy the court that there compelling reasons to issue the anti-suit injunction

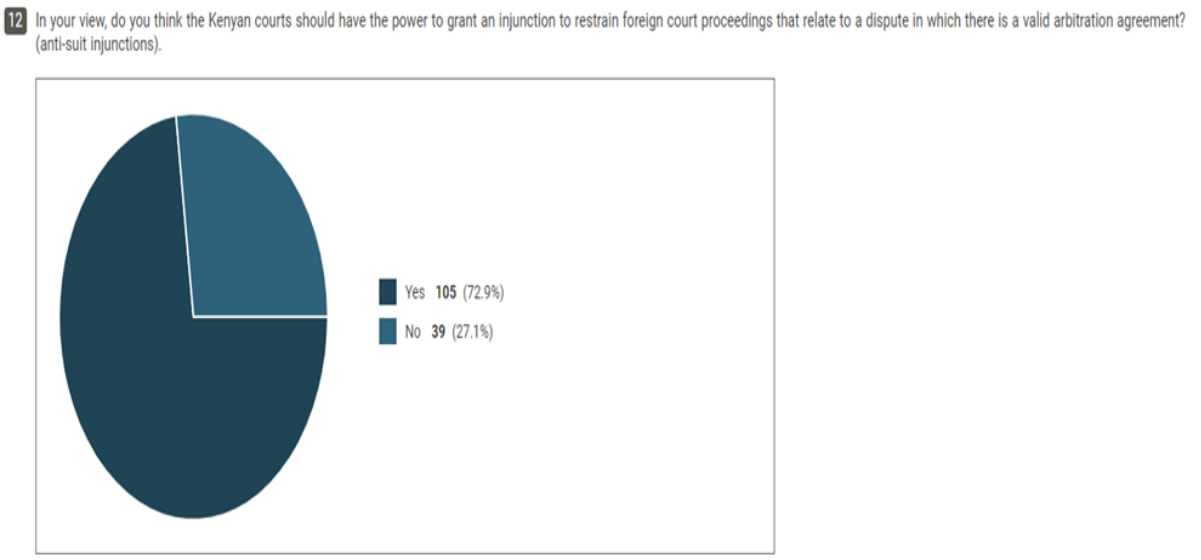
The Kenyan courts have not yet issued such an anti-suit injunction to restrict foreign courts from commencing proceedings in a foreign court. The most familiar remedy to anti-suit injunctions issued by the Kenyan courts with regards such circumstances where a party has breached the arbitration agreement by starting court proceedings, is stay of proceedings under s.6 of the AA 1995 (discussed above). However, as mentioned above stay of proceedings is different in nature and would not be available in such a situation because, it is only available as a defence remedy and can only be relied upon in the court which the court proceedings have been started.

Despite the fact the Kenyan courts have not yet issued an anti-suit injunction it is not inconceivable that the Kenyan courts would in the near future grant an anti-suit injunction in favour of arbitration. This is because in Kenya there is strong public policy in favour of enforcing arbitration agreements drawn from broad approach to doctrine of competence-competence and Kenyan signatory and commitment to uphold all principles of the

New York Convention 1958 and the Article 159 of the Kenyan Constitution 2010 which mandates and exhorts the Kenyan courts to encourage arbitration. Moreover, being a common law country with legal system heavily influenced by the UK and USA legal jurisprudence which their courts have a well-established framework of issuing and recognising anti-suit injunctions.

This being the case, the survey questionnaire (discussed above) asked respondents whether they would welcome this remedy. Out of the 144 respondents **73%** of the respondents indicated that the Kenyan national courts should have the power to issue anti-suit injunctions as illustrated in the pie chart below.

As a result the survey asked the Kenyan based respondents whether they would welcome this remedy, anti-suit injunctions.



73% of the respondents indicated that the Kenyan national courts should have the power to issue anti-suit injunctions. In support of this remedy one respondent wrote;

'Once parties voluntarily chose to enter into a valid arbitration agreement, they should be held to their bargain, irrespective of the jurisdiction.'

Others wrote, the Kenyan courts should have this power because it 'protects the sanctity of the arbitration agreement and is consistent with the parties' agreement at the point of contracting.'

In addition to this another respondent wrote,

'this equitable remedy should be availed to the aggrieved party and also to ensure that foreign courts recognize and respect the will of the parties expressed in the arbitration agreement.'

These views were shared among the majority of the respondents. They are pro-arbitration responses in that they focus on the impact of this remedy on international arbitration practice. They indicate that on the respondents' view an anti-suit injunction is an important remedy which has an effect of ensuring that the parties would be bound by their voluntary and consensual agreement to arbitrate the dispute. In this way therefore, it avoids a situation where the parties will abuse of justice in that parties reaching their voluntary and consensual arbitration agreement without any suitable remedy. In practice this is desirable because, creates certainty such that it gives reassurance to commercial parties that where there is a valid arbitration agreement the courts will bind the parties to that agreement. Other views advanced by the respondents in support of the remedy include:

1. 'Parties entered into contract with an arbitration clause for the express purposes of avoiding court proceedings. A court should not step in to determine rights of parties once they have agreed upon the method of settling disputes arising from the contract.'
2. 'This will encourage parties to respect their arbitration agreements and will reduce forum shopping'
3. 'If there is a valid arbitration agreement then proceedings should not commence in another jurisdiction as having two matters with the same parties simultaneously is repetitive and not in the interest of justice'
4. 'This will lead to the matter being heard and determined expeditiously'

The other **27%** of the respondents, who suggested that the Kenyan courts should not have the power of to grant anti-suit injunctions, were mainly concerned about the enforceability of such an injunction in the foreign court and that this remedy indirectly interferes with foreign court proceedings. Expressing this concern one of the respondents wrote that:

> 'there would be, serious enforceability concerns if such injunctions are issued. I do not see how the Kenyan issued court injunction could be enforced in the foreign court in which there foreign court proceedings. Such orders would also impinge on the sovereignty of states whose courts are hearing such matters.'

Others wrote:

1. 'I think that this would usurp the power of the foreign court. If a suit has been filed in a foreign court then it would be upon the Defendant to point to that foreign court that there is an arbitration clause in the agreement and that the matter should be referred to arbitration. Also it may be difficult to enforce such orders in foreign countries especially those in which Kenya has a strained relationship with.'

2. ‘There will be extreme difficulty in enforcing such injunctive orders upon a foreign Court. How will parties ensure compliance with the said orders?’

In order to respond to these concerns, it is important to understand the nature of such a remedy and how it has been justified in other jurisdictions with an already existing legal framework on anti-suit injunctions.

In the UK House of Lords, Lord Hobhouse in *Turner v Grovit*[134] explained that the term ‘anti-suit injunction’ is misleading because it gives the impression that it is directed towards the foreign court. Far from this, his lordship explain that, the injunction is not directed against the foreign court but rather, the order is directed against and binds the party who launches a wrongful claim in the foreign court.[135] This is the case because this is an equitable remedy which is granted in *personam* which means, the court granting an anti-suit injunction is not interfering with the jurisdiction of the foreign court, but rather, imposing restrictions on a party over who has commenced foreign proceedings in breach of a valid arbitration agreement. In practice, this can be evidenced by the fact that where a party does not comply with an anti-suit injunction, it will usually be considered a contempt of court under English law[136] for which fines may be imposed on the party or other punishments including, *inter alia*, seizure of assets or even imprisonment.[137] In this way, therefore, anti-suit injunctions can be seen as a personal remedy granted in respect of the arbitration agreement which has the effect of restraining a party to a contract from doing something that he has promised not to do. In this way therefore the claimant (the party seeking the anti-suit injunction) contractual right to have disputes settled by arbitration is enforced. This justification is also relied upon in other jurisdictions including by the Australian Court High Court in *CSR Ltd v Cigna Insurance Australia Ltd*[138] where Brennan CJ held that ‘the jurisdiction to issue an anti-suit injunction is not directed against the foreign court but against the party who would invoke that Court’s jurisdiction.’[139]

Being an equitable remedy it also means that for an anti-suit injunction to be effective it is only granted where the court granting the remedy has personal jurisdiction over the party starting foreign court proceedings. This is crucial because it ensures the issuing court can enforce of the anti-suit injunction. In practice, usually it is foreign party who commences foreign court proceedings in their own domestic courts. As per Lord Chief Justice Stone in *International Shoe v State of Washington*[140] in such instances in the USA, the USA courts will usually have personal jurisdiction over the foreign parties that have ‘minimum contacts’ with the US so that the court proceedings do not offend the due process standard of ‘traditional notions of fair play and substantial justice.’[141] Minimum Contact in this case refers to where the parties has established its physical or

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[134] Lord Hobhouse in *Turner v Grovit* [2001] UKHL 65, at para 23-25.
[135] Ibid.
[136] See Advocate General Opinion Kokott delivered on 4 September 2008 1(1) Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc *Case C-185/07,* at 15.
[137] S.14 of the Contempt of Court Act 1981 (UK).
[138] [1997] 146 ALR 402.
[139] *Ibid* at Section 2 (Anti-suit Injunctions), para 1.
[140] *International Shoe v State of Washington* [1945] 326 US 310, at pg 320.
[141] Ibid.

legal presence in the US or where it is an internet-based entity is actively conducting commercial activities in the US.[142]

As a matter of English law, once the court has jurisdiction over the substance of the case, it has personal jurisdiction to make ancillary orders, including anti-suit injunctions towards the parties.[143] In relation to having personal jurisdiction over the substance of the case, usually, the English Courts will have jurisdiction over a dispute relating to a contract if the obligation which is subject to the dispute was to be performed in the UK. So for instance, For instance in *U&M Mining Zambia Ltd (UCM) v Konkola Copper Mines Plc*[144] Blair J held that based on the facts of the case, the English court did not have jurisdiction to issue an anti-suit injunction because:

> "[The] dispute [is] between two Zambian companies. It concerns the operation of a copper mine in Zambia … The matter is of national as well as local importance since, as I have been told, the mine contributes a substantial proportion of Zambia's total GDP. So far as judicial assistance by way of interim measures pending the appointment of the arbitrators is required, in my view the natural forum for such proceedings is in Zambia, not in England."[145]

It well settled therefore, the court granting an anti-suit injunction in favour of arbitration proceedings, is not interfering with the jurisdiction of the foreign court, but rather, imposing restrictions on a party (which voluntarily agreed) to over whom the court had jurisdiction.

Conclusions

International arbitration practice in Kenya is on the rise. This is particularly as a result of increase of international trade in Kenya which led Kenya into making a commitment to exhort the practice of arbitration in Kenya. This commitment can evidently been seen through the Kenya becoming a signatory to the New York Convention 1958 and adopting the robust national AA 1995 which is modelled around the UNICITRAL model Laws, specifically limits the Kenyan court's interference of the arbitration process amended in 2010 to reflect modern arbitration practices. Moreover, for the first time in 2010 the Kenyan courts are now specifically mandated and exhorted by the Kenyan Constitution to promote alternative methods of dispute resolution including arbitration. Kenya's commitment to promote arbitration in Kenya is further demonstrated by the establishment of the NCIA.

In their role to support arbitration, the Kenyan courts will grant a stay of proceedings via s.6 AA 195 where a party has breached arbitration agreement by starting court proceedings in a Kenyan court. Although English Statutory law on stay of proceedings is also modelled from the Art. 8 of the UNICITRAL Model law, there

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[142] *Euromarkets Designs, Inc. v Crate & Barrel Ltd.* [2000] 96 F. Supp. 2d 824, at 837-838.
[143] Collins L.J. in *Masri v Consolidated Contractors International Company SAL* [2008] EWCA Civ 625, at para 59.
[144] *U&M Mining Zambia* [2013] EWHC 260 (Comm); [2013] 2 Lloyd's Rep. 218.
[145] Ibid, at 72.

appears to be difference in a way the laws are interpreted with the Kenyan courts taking a narrower approach for instance within the definition of a dispute in this context.

This restrictive approach is further evident in the arbitrability of matters within Kenyan laws. So for instance currently, constitutional, criminal, insolvency, bankruptcy and tax matters are not arbitrable. Indeed the survey findings show that, the status quo is that there appears to be no appetite to allow arbitration of mandatory laws in Kenya at this time.

Where a party starts foreign court proceedings in a foreign court in breach of arbitration agreement, it is not clear whether the Kenyan courts would grant an anti-suit injunction as they have not up to date. It is argued that it is likely that they would issue such a remedy in an appropriate case mainly because it is common law country which is heavily influenced by USA and UK jurisprudence. In deed majority of the survey respondents indicated that they would welcome it, because for it enjoins parties to their voluntary and consensual agreement to arbitrate.

With regards to arbitration practice in Kenya, there is unique interest in Kenya towards arbitration particularly due to the speed of the process. This unique as captures the backlog of cases of within the Kenyan courts which reduces the speed of dispute resolution. For the Kenyan arbitrators, it clear that arbitration practice is most valued characteristic for the parties when they are making their selection.

Overall, international arbitration practice in Kenya is on the rise. The legal arbitration framework and establishment of the NCIA and the development of NCIA rules sets a good platform for the further development of this. In addition to this, the Kenyan courts have mainly taken a positive attitude in support of arbitration, however, it will be interesting to see if the Kenyan courts will take a more liberal approach in the future.