The competitveness of kenya in international commercial arbitration law internati...

Law

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ABSTRACT

A new golden age of arbitration development has arisen with many countries looking to improve their arbitration infrastructure. Admittedly, many countries appreciate the importance of adopting international practices and norms in arbitration. It is thus critical for Kenya to establish a comprehensive, modern and internationally recognized legislative framework for international commercial arbitration. It is envisaged that the recently enacted Nairobi Centre for International Commercial Arbitration Act, 2012 will provide the foundation of establishing Kenya as an attractive jurisdiction for international commercial arbitration. The objective of this study is to investigate the factors that determine the competitiveness of Kenya in international commercial arbitration. The boundaries of arbitration and litigations practices are blurted and thus never so clear-cut. Hence, this research will be empirical (qualitative and quantitative-based). The data will be analysed statistically using the SPSS version 19 and R packages through tabulation, proportions and logit analysis. Specifically, this research will offer a detailed analysis of the theoretical and practical rationale of international commercial arbitration practice in Kenya through case law, legal text and a sample survey. Against this background, it is at least strongly arguable that

there is need for Kenya to have coherence in well-established principles of international commercial arbitration if it is to become an effective dispute resolution mechanism both locally and internationally. For these reasons I conclude that, the proposed research will be of value to professionals and practitioners from the fields of law, arbitration and policy users.

1. INTRODUCTION

Disputes will always occur in the ordinary day of any social community. A legal relationship of a contractual or non-contractual nature may give rise to certain disputes or future disputes.[1]Alternative dispute resolution is a modern technique of dispute resolution that presents an alternative to the judicial process (offers privacy as well as procedural flexibility to the parties). The rules of arbitration procedure and the place of arbitration are principally based upon agreement between the parties. The procedural law of the arbitration is normally based upon agreement between the parties. The procedural law of the arbitration is normally based on the agreed place of arbitration and the arbitral rules may be ad hoc or institutional.[2]

2. STATEMENT OF THE PROBLEM

2. 1 Purpose of the study

There is little debate that common themes of modern arbitration arising in the international realm of interaction ought to have legislation on the same level. Ultimately, there is need for an international convention in commercial arbitration to fill the void created by different legal cultures. The creation of arbitration mechanisms and respective legal frameworks and their continuous updating have been influenced by the practical demands of

international trade.[3]This research offers an investigation of the factors that determine the competitiveness of Kenya in international commercial arbitration.

2. 2 Justification for the study

The Arbitration Act No. 4 of 1995 governs the arbitration process in Kenya. Arbitration is also enshrined in Article 159 of the Constitution of Kenya 2010 and Section 59 of the Civil Procedure Act 2010. Section 3(3) of the Kenyan Arbitration Act stipulates that arbitration is international, if at the time of the conclusion of the arbitration agreement, the parties to the arbitration agreement have their places of business in different countries. [4]International arbitration practices have the added potential advantage of conducting arbitral proceedings with integrity in accordance with well-established arbitration laws and practices and enforcing the resulting arbitration award.[5]Adopted on 21st June 1985 and amended in 2006 by the United Nations Commission on International Trade Law (UNCITRAL), the UNCITRAL Model Law on International Commercial Arbitration (Model Law) is designed to assist States in modernizing and harmonizing national arbitration laws with international commercial arbitration practice.[6]While not entirely free from doubt, the promulgation of the UNCITRAL Model Law, which Kenya is a signatory to, is perceived as a further step forward in building a consistent and predictable dispute resolution framework. A cynic of course, might note that the UNCITRAL Model Law was never intended to be comprehensive (i. e. a touchstone in the realm of international commercial arbitration) and all-encompassing document.[7]An argument might be made as to whether Kenya’s arbitration legislation is sufficiently

modern and " arbitration friendly" to redress all the emerging spheres of dispute or whether Kenya should repeal its arbitration legislation in favour of the UNCITRAL Model Law.[8]Against this background, it is at least strongly arguable that there is need for Kenya to have coherence in well-established principles of international commercial arbitration if it is to become an effective dispute resolution mechanism both locally and internationally. For these reasons I conclude that, the proposed research will be of value to professionals and practitioners from the fields of law and arbitration and policy users.

2. 3 Research question

1. What are the critical factors necessary in establishing Kenya as an attractive jurisdiction for international commercial arbitration? 2. What are the practical steps that should be taken for Kenya to achieve international recognition as an international premier arbitration venue?

2. 4 Objective of the study

1. To investigate the factors that determines the competitiveness of Kenya in international commercial arbitration. 2. To analyse the extent to which Kenya should codify and consolidate local arbitration laws with developed systems of international arbitration.

3. LITERATURE REVIEW

The history of statutory development of English arbitration law can be traced to the end of the seventeenth century with the enactment of the 1698 statute.[9]This is epitomised by the London Court of International Arbitration, which is the oldest of the major arbitration institutions.[10]The English model

is the most well-developed and sophisticated in international arbitration in meeting the contemporary demands of the commercial world.[11]More recently, the increased popularity of the Arbitration Act 1996 of the United Kingdom (hereinafter the Act or 1996 Act) as the preferred law in international arbitration justifies its overview. The 1996 Act has reacted to the demands of the modern international business community by borrowing several provisions of the Model Law and largely adopted its logical structure.[12]An argument might be made to the effect that the Act makes arbitration in England a more predictable and satisfactory experience by providing a modern and more accessible framework for arbitration in line with internationally recognised legal principles. The review of the progressive 1996 Act in comparison to the Arbitration Act, Act No. 4 of 1995, Laws of Kenya (hereinafter 1995 Act) will yield proposals for reforms.[13]The approach of the 1996 Act has been to treat international arbitration, as wholly domestic in character. In other words, international arbitration proceedings taking place in London are not multi-dimensional but similar to those taking place between two English parties.[14]The Act provides additional support and guidance where the UNCITRAL Model Law is silent. For example, the Act has a wider scope and is not restricted to commercial disputes. However, certain disputes remain the exclusive domain of the courts such as labour disputes. Accordingly, London is viewed as a popular international centre for commercial arbitration due to the Act and the support and recognition that the English courts have given to the Act.[15]In order to attract foreign investment and trade, governments in Asia have appreciated the importance of adopting or updating their arbitration laws in

conformity with international arbitration practices abet with some degree of modification.[16]A number of arbitration institutions or centres such as Singapore and Hong Kong have been at the forefront of encouraging Asian countries to adopt common practices in international commercial arbitration. [17]Singapore has seen a great increase in the number of international arbitrations due to its geographical location at the heart of Asia and is regarded as a hub for international commerce and world trade. However, the Kuala Lumpur Regional Centre for Arbitration, which provides a forum for the settlement of disputes by arbitration in trade, commerce and investment within the Asia-Pacific region, takes a different approach as the Amendment to the Malaysian Arbitration Act or any other written statute. Malaysia has not adopted the UNCITRAL Model Law. Nevertheless, Malaysia is a signatory to the 1958 New York Convention and thus convention awards are enforceable.

4. THEORETICAL FRAMEWORK

Arbitration is becoming the new language of international commercial society (which cannot be successful without the arbitration clause or separate arbitration agreements). However the main pattern which, characterise the international arbitration theories are created and governed by the applicable law, which is the creation of the contracting parties' determination. Thus, Kenya's legal framework has to be sufficiently modern and arbitration friendly if Kenya is to establish itself as an attractive jurisdiction for international commercial arbitration. The expression ' lex arbitri' simply put refers to the law governing the arbitration. Three

conceptual theories in arbitration would usually operate to determine what lex arbitri is or at least, generally accepted to be:

4. 1 The Seat Theory

The ‘ seat theory’ is well established in both the theory and framework of international arbitration. The selection of the seat theory is the juridical seat of the arbitration which binds the arbitrator to the mandatory norms of the country in which he sits. Thus, by implication, if the seat preferred for the arbitration is Nairobi, the arbitration process will be conducted within the framework of the national arbitration law of Kenya regardless of the procedural rules adopted, substantive law governing the arbitration contract and the subject matter of the dispute, or. In other words, the choice of seat is not a physical choice.

4. 2 The Delocalisation Theory

This theory emphasizes the freedom of parties to choose a lex arbitri, without completely detaching from the State or its legal system as the precursor of that right. Majority of legal systems and institutional rules provide for only a general framework, leaving the parties or the arbitral tribunal with so much leverage to draw up the details of the governing procedural rules. The approach of loosening the State’s overall control over international commercial arbitration conducted on its territory has led to the recreation of a new mechanism in the international arbitration (delocalisation theory), which gives higher freedom and priority to the contracting parties, to search for any other particular alternatives to solve any given conflict between themselves.

5. CONCEPTUAL FRAMEWORK

The main reason for the conflicts of law or the use of different theories is the autonomy of the contracting parties and the mechanisms they agree to use to control the international contract especially in relation to development contracts. These contracts are designed and controlled by new methods and traditions illustrating the reasons why it has been used in this way, away from the local jurisdiction and national courts.

5. 1 The Environment

It has been observed that changes in the environment have an impact on an international arbitration body. Arbitration bodies are environment-dependent and changes in the environment shape the opportunities and challenges facing an international arbitration body. Figure 1. 1 shows the relationship between key environmental variables and an arbitration body. The macro and micro-environment for Nairobi Centre for International Arbitration refers to all those conditions and forces that affect its strategic options and determines its competitive situation. At the same time, Nairobi Centre for International Arbitration‘ s success depends upon a relationship between business strategy and environment.

5. 1. 1 Macro Environmental Variables

Macro-Environmental or remote variables may be described as the economic, political/legal and physical and variables. The factors affect the provision arbitration services and the arbitration body. Thus identifying and evaluating external environmental opportunities and threats enable arbitration bodies to develop a clear mission, design strategies, and achieve

long term objectives and to develop policies to achieve annual objectives. Because the pace and uncertainty of such change vary by arbitration body, some appear to operate under relatively stable conditions while others operate under extreme turbulence. However, whichever the level of turbulence, what matters is the ability of the arbitration body to cope with the environmental constraints, challenges and threats.

Political / Legal Variables

Political factors define the legal, administrative and regulatory framework within which an arbitration body operates. Political/legal variables are state oriented and at both national and international level can affect an arbitration body's activities on a day to day basis through its laws, policies and authority. An enabling legal, administrative and regulatory environment is imperative for Nairobi's international arbitration centre to play an effective role as an engine for economic growth and employment creation. Despite significant achievements in reforming the legal and regulatory framework, a number of existing laws and regulations still remain cumbersome, out of step with current realities and hostile to the growth of the arbitration sector.

5. 1. 2 Micro environmental Variables

The key micro environmental variables are competition, client, and qualified members. Thus designing viable strategies for arbitration body requires a thorough understanding of these variables.

Competition

Competition is a micro environmental variable that is semi- controllable by the arbitration body. Strategies of competition are also highly

interdependent and so a competitor’s position is a crucial determinant of the choice of strategy. Effective competitor analysis requires systematic study of both existing and potential competitors. In this study the variables tested are administrative/legal and competition of international arbitration bodies. A conceptual framework of the study has been developed from the reviewed literature and the relevant research objectives (Figure 1. 1). The framework shows that the macro-environment (A) and micro-environment (B), influence the extent to which a contracting party chooses the seat of arbitration (C). The Macro-environment (A) is also expected to influence the adoption of the Decolonization approach (D). The seat of arbitration also influences the Decolonization approach (D). Finally, the competitive factors (B) influence the adoption of the Decolonization approach (D).

Independent variable

Macro-environment

Political/Legal factors

" A"

Dependent variable

Decolonization

Internationalization approach with less state control

" D"

Dependent variable

The seat of arbitration

Mandatory and non- mandatory rules/norms

" C"

Independent variable

Micro-environment

Competitive factors

" B"

Figure 1. 1 Conceptual framework of the relationship between the seat of arbitration and the decolonization of commercial arbitration

6. RESEARCH METHODOLOGY

6. 1 Research design

The boundaries of arbitration and litigations practices are blurted and thus never so clear-cut. Hence, this research will be empirical (qualitative and quantitative-based). Such a critically reflexive approach offers the researcher the advantage of seeking confirmations by testing practioneer hypothesis and text analysis of arbitration practices.[18]Specifically, this research will offer a detailed analysis of the theoretical and practical rationale of international commercial arbitration practices through case law, legal text and a sample survey.

6. 2 Target Population

Arbitration practice in Kenya is still a growing field in Kenya and as at January 2013, the Chartered Institute of Arbitrators (Kenya Branch) comprised 349 Associates, 169 Members, 30 Fellows and 18 Chartered Arbitrators.[19]International Commercial Arbitration in Kenya is mainly concentrated in major towns such as Nairobi. About two thirds of law firms

and construction companies are in Nairobi forming the majority of firms involved in international commercial arbitration in Kenya The population of this study will include 50 Kenyan based arbitration practioneers in Nairobi.

6. 3 Sample Size

There is a maximum and minimum practical sample size that applies to all surveys. Ordinarily a sample less than about 30 respondent provides too little certainty to be practical. Using the Chartered Institute of Arbitrators, Kenya Branch membership directory, , which is a comprehensive guide offering coverage of leading arbitration service providers, the sample size of the study will be a eighty (80) arbitration practioneers that are involved in commercial arbitration in Kenya. In general the larger the sample the better, but beyond a certain point increasing the sample size has smaller or no marginal benefits.

6. 4 Research instrument

To simplify somewhat, in the first year, I will hold meetings with academics, professionals and practioneers from the fields of law and arbitration, policy users and the wider political community in order to further understand which questions ought to be included in the questionnaire. A questionnaire will then be prepared taking into account the comparative work of academics and the opinion of interested user groups.

6. 5 Data collection techniques

The method of collecting data was through structured interviews. A questionnaire with open and closed ended questions was used and the responses recorded by interviewer. The interview for members of the

Chartered Institute of Arbitrators, Kenya Branch will be done in two stages. I or my research assistant will personally administer the questionnaire. The first stage will involve the respondent providing answers to questions contained in the questionnaires. The researcher in the second part prompts the respondents to talk freely about their organizations to bring out clearly certain information or clarity information filled in the questionnaire. In some cases, the respondent will request for the questionnaire to be left behind and collected later. It is worth noting that interview administered questionnaires have a usually higher response rate than self-administered questionnaires.

6. 6 Data analysis

This research will be empirical (qualitative and quantitative-based). The data will be analysed statistically using the SPSS version 19 and R packages through tabulation, proportions and logit analysis. The main limitation of the study is that the sample size will be confined to Nairobi which is not necessarily Kenya. However, because more than two thirds of commercial arbitrators are based in Nairobi, there would be no significant difference in results even if the study was carried out nationally.