International Commercial Arbitration in SADC Countries

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1. Summary

The outdated arbitration laws in the countries of the Southern African Development Community (SADC) require urgent legislative reform. Only four states have adopted arbitration laws based on the UNCITRAL Model Law[1] being Madagascar, Mauritius, Zambia and Zimbabwe[2], with two more, Angola and Mozambique, recently enacting legislation that borrows elements from the Model Law. The six common law countries in the region are Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland, which have arbitration legislation based primarily on the 1950 English Arbitration Act. Five Southern African states have not signed the New York Convention[3]: Angola, Malawi, Namibia, Swaziland[4], and Seychelles, and some that have done so impose grounds for refusing to enforce foreign awards not found in the Convention.[5] Although arbitration is the preferred method of resolving disputes internationally, there are quite a number of reservations within the SADC community regarding the appropriateness of arbitration as an equitable method for dispute resolution. No uniformly applied system or code exists within the SADC region, neither in applied protocols nor in legislation. This dissertation shall go into greater detail of international commercial arbitration, looking into the advantages and disadvantages thereof, the laws involved internationally and nationally in the SADC countries and the recognition and enforcement of arbitration awards in the SADC countries. In conjunction herewith, the mandate of the existing reconstituted SADC arbitration tribunal needs re-consideration and a need exists for the harmonisation of arbitration laws and the creation of a new arbitral institution within the SADC countries.

2. Introduction

The Southern African Development Community (SADC)[6] is an African international regional organisation[7] whose main purpose is the economic, social, cultural and political integration of

[1] UNCITRAL Model Law on International Commercial Arbitration 1994, as adopted by the United Nations Commission on International Trade Law on 21 June 1985.
[2] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 150.
[3] The New York Convention of 1958.
[4] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 146.
[5] http://www.africanlawbusiness.com/news/5068-africas-advance. (last accessed) 05-07-2015.
[6] SADC was established in terms of the Treaty of the Southern African Development Community signed at Windhoek, Namibia on 17 August 1992, and entered into force on 30 September 1993.
[7] Article 3 of the Treaty of the Southern African Development Community.

its 15 member states.[8] The Treaty of the Southern African Development Community constitutes the legal framework of SADC and sets out the status, principles and objectives of SADC.[9]

These principles[10] and objectives[11] and institutions[12] adopted and created by SADC as a regional economic organisation is to promote regional integration and development in the member states. In terms of Article 6(5) of the SADC Treaty, all member states have a duty to accord the SADC treaty the force of national law. Over and above the treaty, SADC also comprises non-binding legal instruments, such as model laws and memoranda of understanding.[13] SADC is dedicated to securing international understanding, support and cooperation between member states and observance of the principles of international law governing relations between states.[14]

SADC does not, however, create an overarching uniform system or process enforceable in the SADC countries. SADC primarily creates a platform for cooperation to achieve development. The Treaty does make provision for dispute resolution in that any dispute in relation to the interpretation and application of the Treaty which cannot be settled amicably must be referred to the SADC Tribunal.[15] The Treaty does not make provision for international arbitration of disputes which means that international commercial disputes will be subject to the domestic arbitration legislation, if any, of each SADC country.

The SADC members subsequently enacted the Finance and Investment Protocol[16] which provides for co-ordination of investment regimes and cooperation to create a favourable investment climate within the region.[17] The importance of this Protocol is the dispute settlement provisions contained in Annex 1 to the Protocol, which makes provision for a dispute to be submitted to international arbitration. Although this is only applicable to investment disputes that will be discussed in more detail later in this dissertation, it is an indication that SADC countries recognise international arbitration as a mechanism for dispute resolution.

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[8] The SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

[9] Free *The SADC Tribunal and the Judicial Settlement of International Disputes* (2010 Thesis SA) 9-10.

[10] Article 4.

[11] Article 5.

[12] Article 9.

[13] http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.htm. Zongwe *An - Introduction to the Law of the Southern African Development Community*. (last accessed 07-10-2014).

[14] Article 5.

[15] Article 32.

[16] Adopted on 18 August 2006.

[17] Article 3.

The most common advantages and reasons for choosing international arbitration are the flexibility of the procedure, the enforceability of awards, the privacy afforded by the arbitral process, and the ability of the parties to select arbitrators with the necessary skills and expertise, the possibility of avoiding specific legal systems and national courts and the neutrality of the arbitral venue.[18]

In developing countries, however, the perception is that the international arbitral process is a system which operates to the disadvantage of developing countries in a number of respects, which include the fact that venues of reputable arbitration institutions generally fall outside the jurisdictions of these countries, appointed arbitrators are generally foreigners, international arbitration is expensive and a wide range of reservations exist based on disparities between cultural, legal, economic and political developments.[19]

There is a need for effective and efficient dispute resolution mechanisms in the growing economy of the SADC countries. One of the SADC region's objectives is to mobilise the inflow of public and private resources into the region,[20] and making the region a more attractive investment destination by harmonising financial and investment policies of member states. This can only be achieved through harmonising international arbitration law with the legislative systems and procedures applicable in SADC countries pertaining to arbitration ensuring party autonomy and minimal judicial intervention.

The discussion in this dissertation will be based on an overview of arbitration and by briefly discussing the arbitral systems of some of the most prominent international arbitration institutions. The legislative position of arbitration in the various SADC countries will be discussed, the current SADC position relating to arbitration will be set out and an attempt will be made to suggest possible changes to be implemented for creating a system which can aid in speedy and efficient dispute resolution which will not only create confidence with international corporations, but also change perceptions of developing countries regarding the advantages and beneficial use of arbitration.

[18] http://www.sabar.co.za/law-journals/2009/august/2009-august-vol022-no2-pp31-33.pdf. (last accessed 05-07-2015).
[19] Asouzu *International Commercial Arbitration and African States* (2001) 1.
[20] Article 5(2)i.

3. Arbitration: - An Overview

Arbitration is a process whereby contracting parties by written agreement, refer a dispute to an independent tribunal for settlement.[21] The arbitration agreement is the cornerstone of arbitration and can be in the form of an arbitration clause, usually included in the underlying contract between the parties to cater for future disputes or a separate arbitration agreement for an arbitration submission that relates to an existing dispute.[22] The parties' arbitration agreement may make provision for the procedural rules, the number of arbitrators, the language of the arbitration, the applicable law and the seat or place of the arbitration.[23]

Arbitrators must resolve the dispute after receiving the parties' submissions. The arbitration award is final and the parties are barred from resorting to the courts on the merits of the dispute. The arbitration award is usually not subject to appeal and is enforceable against the other party. Although courts are not involved in arbitration, the enforcement of arbitration awards, however, largely depends on the support national courts lend to the arbitration process and the validity thereof as a means of dispute resolution.[24]

4. Types of Arbitration.

There are two main types of arbitration: *ad hoc* arbitration and institutional arbitration.[25] An *ad hoc* arbitration is organised by the parties themselves, without intervention of a permanent arbitral institution.[26] The parties are required to determine all administrative aspects of the arbitration themselves like appointing the arbitrator, payment of the arbitrator and the procedure for conducting the arbitration. The UNCITRAL Rules for Arbitration are often

[21] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 339. Butler and Finsen *Arbitration in South Africa – Law and Practice* (1993) 1, define arbitration as a procedure whereby the parties to a dispute refer the dispute to a third party, known as a arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties.

[22] *Zhongji Development Construction Engineering Company limited v Kamoto Copper Company Sarl* (421/2013) [2014] ZASCA 160 (1 October 2014) the Court confirmed the judgement in *Fili Shipping Co Ltd v Prenium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others v Primalov and others* [2007] UKHL 40; 2007 Bus LR wherein the court held that "an arbitration clause includes any dispute**".**

[23] http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses. (last accessed 04-05-2015).

[24] Cole "Botswana's Arbitration Legislation for future Reform: The Path for future reform reproduced" by Sabinet gateway under licence granted by the Publisher (dated 2009) 78.

[25] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 349.

[26] www.unctad.org/ United Nations Conference on Trade and Development, International Commercial Arbitration 2005 31 (last accessed 05-07-2015).

used in *ad hoc* arbitration as they are stable rules acceptable by parties in both Civil Law and Common Law jurisdictions.[27]

Most arbitrations, however, are institutional and the rules of the institution apply to the whole arbitral process.[28] The institution administers the case, including the appointment of arbitrators, the enforcement of arbitration time limits and the payment of the arbitrators. It is important to note that the institution itself does not conduct the arbitration. It is the arbitrators who arbitrate, the institution merely provides the structure and rules.[29] There are many arbitral institutions. The majority of arbitral institutions are national institutions and deal with domestic arbitration cases only. Many of them specialise in a certain trade such as oil, commodities, maritime, securities.[30]

International commercial arbitration in Africa exists through institutions such as Africa ADR which is the arbitral link between those who invest in Africa, and those who trade in Africa. Africa ADR's mandate is to foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce.[31]

5. Commercial Arbitration.

The 1961 European Convention on International Commercial Arbitration was the first international instrument to refer to International Commercial Arbitration.[32] International arbitration should be approached by taking cognisance of the concepts of a "narrow" and "wide" approach when dealing with the scope of commercial arbitration.

The "narrow" approach to commercial arbitration, originates from international instruments like the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958[33] which states that when signing, ratifying or acceding to the Convention, or notifying extensions under article X of the Convention, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state.[34] Such a state may also declare

[27] Roodt "Conflicts of procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" *Tulane European & Civil Law Forum* [vol.25 2010] 76.
[28] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 349.
[29] http://www.iccwbo.org/about-icc. (last accessed 05-07-2015).
[30] http://www.iccwbo.org/about-icc. (last accessed 05-07-2015).
[31] http://www.africaadr.com/. (last accessed 05-07-2015).
[32] www.unctad.org/ United Nations Conference on Trade and Development, International Commercial Arbitration. 2005 11. (last accessed 05-07-2015).
[33] Article 1(3).
[34] Article 1(3) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

that it will apply the Convention only to differences arising from legal relationships, whether contractual or not, which are considered as commercial under the law of the state making such a declaration.[35] This poses an obstacle to the enforcement of awards[36] when dealing with disputes between parties where one party is in a jurisdiction of a non-contracting state.

The UNCITRAL Model Law urges a "wide" interpretation of the term "commercial" as opposed to the "narrow" approach. In terms of the UNCITRAL Model Law, the term "*commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. In terms of the Model Law, relationships of a commercial nature include, but are not limited to, any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation and carriage of goods or passengers by air, sea, rail or road.*"[37]

In terms of the UNCITRAL provision, commercial arbitration is not limited to contractual matters only. Commercial disputes which arise mainly from activities of traders in the usual course of business are often governed by special codes of commercial law separate from the general law of obligations. In some countries only commercial disputes can be submitted to arbitration and in others, like South Africa, certain matters are excluded from arbitration, such as matrimonial and status matters.[38]

6. International Arbitration.

There are two tests used to determine whether arbitration is international. The first test concerns the nature of the dispute and the second the territoriality of the parties involved. In terms of the first test, arbitration is considered as international if it involves the interest of international trade and in terms of the second test, arbitration is considered international where the places of residence of the parties are in different countries.[39]

The Model Law embraces both tests and describes arbitration as international if the places of business of the parties are in different states. Where their places of business are situated in the

[35] Article 1(3) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
[36] *India Organic Chemicals Ltd v Chemtex Fibres Inc* 1978 AIR 108.
[37] Second footnote of the UNCITRAL Model law.
[38] Section 2 of the Arbitration Act 42 of 1965.
[39] Article 1(3)(a).

same state, the arbitration will be international if the seat of the arbitration or the place where a substantial part of the contract is to be performed is in a country different from the country of residence of the parties.[40]

The Model Law states that arbitration will be international if the parties expressly agree that the subject matter of the arbitral agreement relates to more than one country.[41]

Where an effective choice exists for both parties between the national courts and the domestic tribunals in the context of international commercial disputes, international arbitration is generally favoured and international arbitration has become an extremely popular method of resolving disputes under the ever increasing number of bilateral investment treaties. [42]

6.1. Advantages of International Arbitration

The two main considerations that explain the success of international arbitration are neutrality and efficiency.[43] Further advantages are the relative ease of enforcement internationally under the New York Convention[44] and the minimal involvement of the local or domestic body of law.[45]

International arbitration provides a structure that allows the parties to achieve the neutrality of the decision making process to be followed. It allows the parties to appoint an independent person or persons who may serve as a sole arbitrator or as part of a tribunal comprised of multiple arbitrators.[46] The place or seat of arbitration can be in a neutral third country and the parties can choose the law applicable to the substance of the dispute without any limitations.[47] The parties can, and should, furthermore dictate the language of the proceedings.[48]

In addition, the proceedings need not be governed by any national law on procedure.[49] International arbitration, like domestic arbitration, offers procedural flexibility so that the procedural rules can match the different legal traditions of the parties involved.[50]

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[40] Article 1(3)(b). Bagshaw "Arbitration as a tool for strengthening cross-border deals: making a case for the harmonisation of arbitration laws in the SADC region" (2013) 2.

[41] Article 1(3) (c).

[42] Tselentis "International commercial Arbitration and the Southern African Development Community" August 2009 *Advocate* 31.

[43] http://www.globallegalpost.com/global-view/international-arbitration Africa style. (last accessed 28/10/2014).

[44] http://www.globallegalpost.com/global-view/international-arbitration Africa style. (last accessed 28/10/2014).

[45] Roodt "Reflections on finality in arbitration*"* 2012 De Jure 506.

[46] Cole "Botswana's Arbitration Legislation: The Path for Future Reform*"* University of Botswana Law Journal, June 2007 89.

[47] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 340. Tselentis "International commercial Arbitration and the Southern African Development Community" August 2009 *Advocate* 31.

[48] Article 4(h); www.iccwbo.org/ADR Rules (last accessed 05-07-2015).

[49] Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) 22.

Arbitral tribunals are seen as a more neutral option to consider for dispute resolution over and above national courts in the eyes of foreign commercial parties who may perceive, sometimes rightly so, that national courts are biased towards the commercial party located in the state of the specific court especially when the state is a party to the dispute.[51] Unlike judgments that may carry nationality of the parties, awards are seen as neutral.[52] Neutrality is also observed through the fact that the parties are free to select an arbitrator of choice as this gives confidence to the parties that the issue of discrimination against foreigners will not arise.[53]

The second main consideration that explains the success of international arbitration is its efficiency. Enforcing an award internationally is considerably easier than trying to enforce the judgment of a state court.[54] A foreign judgment is the act of a foreign authority, and attempting to enforce a judgment in a foreign state may raise problems of sovereignty.[55] No such issue of sovereignty arises with international arbitration as an award is subsequent to an agreement of one or several private persons. In the event of the parties dealing with each other from states that have ratified conventions or treaties relating to arbitration, enforcement of awards are further simplified. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by 143 states,[56] which confirms the support for structured international arbitration.

6.2. Disadvantages of International Arbitration.

In practice, arbitration can be even more costly than litigation.[57] Parties usually pay the arbitrator's fees and established arbitration bodies charge hefty administration fees. The fact that preferred venues for resolving international disputes involving developing nations, are predominantly located outside the jurisdictions of the developing nations, may be especially challenging for parties from the developing world.[58]

[50] www.iccwbo.org/ADR Rules, Article 4(h) (last accessed 05-07-2015); Tselentis "International commercial Arbitration and the Southern African Development Community" August 2009 *Advocate* 31.
[51] United Nations Conference on Trade and Development- Dispute Settlement *International Commercial Arbitration* (2005) 16.
[52] Williams "International Commercial Arbitration" 1999 New Zealand Law Journal 381.
[53] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" University of Botswana Law Journal, June 2007 80.
[54] United Nations Conference on Trade and Development- Dispute Settlement *International Commercial Arbitration* (2005) 16.
[55] Ibid.
[56] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 143.
[57] Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) 23.
[58] Tselentis "International commercial Arbitration and the Southern African Development Community" August 2009 *Advocate* 31.

Flexibility of arbitration makes it easier for the defendant party to delay proceedings particularly if the timetable is not strictly controlled by the arbitrator.[59]

Another shortfall in the arbitration process is that it is not possible to bring multi-party disputes together in a single arbitral proceeding.[60] Generally arbitral tribunals have no powers to consolidate actions; however, some states have taken the step to include these powers in legislation pertaining to arbitration.[61]

7. Arbitration Institutions

There are a number of specialised and non-specialised international arbitral institutions.

The International Centre for the Settlement of Investment Disputes (Washington Convention 1965) is a specialised institution for arbitration disputes and non-specialised arbitration institutions are, amongst others, the International Court of Arbitration of the International Chamber of Commerce (ICC).[62]The ICC Court of Arbitration and the ICSID will be briefly discussed herein, as the majority of international arbitrations are ICC arbitrations.

7.1 The International Court of Arbitration of the International Chamber of Commerce

The International Court of Arbitration of the International Chamber of Commerce (ICC) is the world´s leading arbitral institution for resolving international disputes.[63] The Court has 125 members from more than 85 countries.[64]

The ICC Court is an administrative body with the duty to organise and conduct arbitration procedures pursuant to the ICC Rules.[65] The National Committees play a role both in

[59] Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) 21.

[60] Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) 23.

[61] http://www.tamimi.com/en/magazine/law-update/section-7/march-6/threes-a-crowd.html (last accessed 6/07/2015); http://www.oecd.org/investment/internationalinvestmentagreements/40079691.pdf (last accesed 6-07-2015); http://kluwerarbitrationblog.com/blog/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation (last accessed 14-10-2014).

[62] Other non-specialised arbitration institutions are: the American Arbitration Association (AAA), China International Economic and Trade Commission (CIETAC), Hong Kong International Arbitration Center (HKIAC), Cairo Regional Center for International Commercial Arbitration (CRCICA), Chamber of National and International Arbitration of Milan, Netherlands Arbitration Institute (NAI), Singapore International Arbitration Centre (SIAC), Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

[63] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 145.

[64] www.iccwbo.org (last accessed 05-07-2015).

[65] Article 1 of the ICC Arbitration Rules. Introductory provisions.

proposing court members and providing an administrative support in the selection of competent arbitrators.[66] The ICC Rules outline the function of the ICC Court.

The first set of accepted ICC Rules of Arbitration were published in 1922 and have undergone a number of revisions since that time to reflect evolving international practice. The ICC Arbitration Rules have been drafted to reflect and promote best practice in arbitration and dispute resolution generally. Best practice respects party autonomy, yet also empowers the tribunal to meet the practical needs of international business and states, ensuring fairness and encouraging efficiency.[67]

The latest revision of the ICC Rules of Arbitration came into force in 2012 and incorporates important changes that are intended to facilitate more complex arbitrations. In particular, they clarify if and when claims under multiple contracts can be brought in a single arbitration,[68] they provide for the joinder of additional parties[69] and for the consolidation of arbitrations.[70] The revised rules allow the court to directly appoint sole arbitrators[71] and tribunal presidents in certain circumstances.[72] Most importantly, they now incorporate an emergency arbitrator scheme.[73] The scheme is designed to obviate the need for parties to seek protective measures from state courts prior to the commencement of arbitration proceedings.

The Rules are designed for institutional arbitration and arbitration under the ICC Rules is open to members and non-members of the ICC.[74] The ICC Rules do not limit the parties' free choice relating to the governing law of the contract, the place of the arbitration and the language of the arbitration.[75] The arbitration clause in the contract should stipulate the law to govern the arbitration process, the number of arbitrators and the place and language of the arbitration.[76]

In order to initiate ICC arbitration, a request must be submitted to the ICC Secretariat at any of its offices.[77] The Rules clearly provide the procedure for instituting the arbitration proceedings.[78] The Rules set out all the aspects to be taken into account by the arbitration

[66] Article 1(2).
[67] www.iccwbo.org/ ICC Arbitration and Arbitration and ADR Rules (last accessed 05-07-2015).
[68] Article 9.
[69] Article 7.
[70] Article 10.
[71] Article 12(3).
[72] Article 12(8).
[73] Article 29, Appendix V: Emergency Arbitrator Rules.
[74] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 350.
[75] Article 4(h).
[76] Article 6.
[77] Article 4 ICC Rules of Arbitration.
[78] Article 6.

tribunal.[79] The provisions in relation to arbitral proceedings[80] in particular provides that parties are free to agree upon the system of law to be applied by the arbitral tribunal to the merits of the dispute.[81] In the absence of any such agreement, the tribunal will apply the law which it determines to be appropriate.[82]

The ICC Rules provide that the arbitral awards must state the reasons upon which they are based.[83] All arbitral awards given by arbitrators under ICC Rules are first submitted in draft form to the Court of Arbitration. This is an important review function, the aim of which is to ensure the award is enforceable in the country where enforcement is sought. The award given under the ICC Rules are binding on the parties.[84]

One of the obstacles in the SADC countries for international commercial arbitration and the enforcement of ICC awards is the lack of ratification of the New York Convention by many of the SADC countries, and the non-enforcement of the New York Convention even if enacted.[85] But most of all, the domestic laws relating to international arbitration, as the domestic law determines the right to access to justice, due process of law and the doctrine and practise of *competence-competence*.[86] Under Article 11(3) of the New York Convention, state courts are obliged to refer the parties, who entered into an arbitration agreement, to arbitration and to decline jurisdiction. The aim of the international duty imposed by the New York Convention is intended to prevent parties to an arbitration agreement from resorting to dilatory tactics in the form of court proceedings.[87]

7.2. The International Centre for Settlement of Investment Disputes (ICSID)

The International Centre for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention or Washington Convention).[88] The purpose of the ICSID is to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals from other contracting states.[89] Thus offering protection to investors in

[79] Articles 7 to 12.
[80] Article 19.
[81] Article 21.
[82] Article 13.
[83] Article 31(2)
[84] Article 27.
[85] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 147.
[86] Roodt "Reflections on Finality in Arbitration" 2012 De Jure 485-486.
[87] Roodt "Reflections on Finality in Arbitration" 2012 De Jure 506-509.
[88] The Convention entered into force on October 14, 1966.
[89] Article 1 (2).

particular ensuring payment of compensation in the event of expropriation, fair and equitable treatment, security and protection from discriminatory treatment.[90] The Convention has been signed by 159 states.[91]

In terms of the Convention, the jurisdiction[92] of the ICSID shall extend to any legal dispute arising directly from an investment between a contracting state and a national of another contracting state, which the parties to the dispute consent to submit in writing to the ICSID.[93]

Any contracting state or any national of a contracting state wishing to institute arbitration proceedings shall address a request to that effect in writing to the secretary-general who shall send a copy of the request to the other party.[94]

The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance to the rules of procedure for the institution of conciliation and arbitration proceedings.[95] The consent of a party to the dispute is required in order for the Arbitral Tribunal (hereafter called the Tribunal) to have jurisdiction to arbitrate the dispute.[96] The Tribunal shall be constituted as soon as possible after registration of a request.[97] The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed and as agreed upon by the parties.[98]

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties.[99] In the absence of such an agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[100] The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention.[101] Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of the

[90] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 153.
[91] https://icsid.worldbank.org/ICSID/list of contracting states and other signatories of the convention (as of April 11, 2014) (last accessed 05-07-2015).
[92] Article 25.
[93] Cole "Botswana's Arbitration Legislation for future Reform: The Path for future reform" reproduced by Sabinet gateway under licence granted by the Publisher (dated 2009) 85-86.
[94] Article 36 (1).
[95] Article 36 (2).
[96] Article 63.
[97] Article 37.
[98] Article 37(2)(a).
[99] Article 42 (1)
[100] Article 42.
[101] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 153.

Convention.[102] Each contracting state shall recognise an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.[103] A contracting state with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.[104]

Any dispute arising between contracting states concerning the interpretation or application of the convention which is not settled by negotiation shall be referred to the International Court of Justice[105] through the application of any party to such a dispute, unless the states concerned agree to another method of settlement.[106]

The purpose of the Washington Convention is to encourage private investment in underdeveloped countries by providing a reliable mechanism for impartially resolving disputes between an investor and the country of investment. By creating this convention, the contracting states to this convention have made it possible for investors to approach this arbitration tribunal directly without the intervention or assistance of their home states. Before an investor may approach the ICSID, the following requirements must be met:

- the host state and home state of the investor must both be parties to the Washington Convention;
- the dispute must be a legal dispute arising directly out of an investment;
- the investor and the host state must both consent to ICSID jurisdiction in writing; and
- the investor must be a 'national of another contracting state'.[107]

ICSID arbitration does not take place under a national system of arbitration law and is not subject to the supervisory power of the courts in the country where the arbitration takes place and most importantly is not subject to the New York Convention on the recognition and enforcement of foreign arbitral awards.[108]

[102] Article 53.
[103] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 153.
[104] Article 54.
[105] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 154.
[106] Article 64.
[107] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" University of Botswana Law Journal, June 2007 86.
[108] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 155.

The effect of consenting to ICSID arbitration is that the parties agree to exclude all other remedies.[109] Therefore the case cannot be tried in a municipal or another international tribunal once it has been registered at the ICSID. The fact that dispute settlement provisions in international investment agreements provide for ICSID arbitration results in the relevant state parties being deemed to have given consent to the international arbitration. A party who has consented to the arbitration may not unilaterally withdraw from the proceedings.

In the SADC countries, only South Africa is not a party to the ICSID Convention.[110]

8. International Arbitration Laws and Conventions

8.1 The UNICITRAL Model Arbitration Law

The Model Law is a standard arbitration law adopted by the United Nations Commission on International Trade Law on 21 June 1985[111] The Model Law applies to international commercial arbitration, conducted in the territory of a state that has adopted it.[112]

The Model Law covers all stages of the arbitral process: the arbitration agreement,[113] the composition of the arbitral tribunal, [114]jurisdiction of the arbitral tribunal[115]and the arbitral proceedings. The procedure for arbitrators to conduct arbitration must be just and fair from the outset until conclusion.[116]

The Model Law ensures equality[117] and party autonomy as parties are free to agree on the place of arbitration, the language and the procedure for appointing arbitrators.[118]The arbitral tribunal shall decide the dispute in accordance with the law as agreed to by the parties.[119] The arbitral award shall be recognised as binding and enforceable.[120]

The UNCITRAL Model Law on International Commercial Arbitration has been enacted by 10 (ten) African States.[121]

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[109] Article 53(1).
[110] Oppong *Private International Law in Commonwealth Africa* (2013) 398.
[111] United Nations document A/40/17, annex 1.
[112] Chapter 1(1).
[113] Chapter II.
[114] Chapter III.
[115] Chapter IV.
[116] Chapter V.
[117] Article 18.
[118] Article 19.
[119] Chapter VI, Article 28.
[120] Chapter VIII, Article 35.
[121] http:www.globallegalpost.com/InternationalArbitrationAfricaStyle. (last accessed 05-07-2015). See UNICITRAL Model Law lists of contracting States, *available at*:

Moreover, the mandatory and non-mandatory provisions recommended by the Model Law carry no express binding obligation on states to enact these into national laws. The United Nations, through general assembly resolutions, nonetheless encourages member states to do so. The UNCITRAL Model Law contains many of the same provisions as the New York Convention, but it also supplements the regime of recognition and enforcement created by the New York Convention, e.g. with regard to the demarcation line drawn between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards.[122]

8.2. UNICITRAL Arbitration Rules.

The United Nations Commission on International Trade Law (UNICITRAL) adopted its Arbitration Rules for ad hoc arbitrations in 1976.[123]Many arbitral institutions and national chambers of commerce who act as appointed arbitral authorities under these rules, allow parties to employ the Rules in preference to, or in support of, their own rules in arbitrations administered by them.[124]

The UNICITRAL Arbitration Rules take into account the differences in procedural approach between common-law and civil-law jurisdictions, and do not have any national legal force, but may be adopted by the parties to a commercial transaction. The adoption of the rules must be in writing.[125]

The UNCITRAL Arbitration Rules provide a model arbitration clause for contracts,[126] set out the procedures for the appointment of arbitrators,[127]procedures for the conduct of arbitration proceedings and the requirements regarding the form,[128] effect and interpretation of an arbitration award.[129]

The UNCITRAL arbitration rules have been used to govern a broad range of procedures, including disputes between private commercial parties where no arbitral institution is

http://www.unicitral.org/unicitral/en/unicitral_texts/arbitration/1985Model_arbitration_status.html (last accessed 05-07-2015).

[122] Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration.

[123] http://www.lawschool.cornell.edu/library/WhatWeDo/ResearchGuides (last accessed 05-07-2015).

[124] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 352.

[125] Article 1.

[126] UNCITRAL Arbitration Rules, Annex.

[127] Article 8-10.

[128] Article 17.

[129] Article 34.

involved (ad hoc arbitration), disputes between states and foreign investors (investment arbitration) and disputes between two countries (State-to-State disputes).[130]

The UNCITRAL rules are also often used as guidelines, as they provide a procedural framework for arbitration proceedings that is not necessarily tied to a specific arbitral institution and that may provide greater flexibility.[131]

The problem with the UNCITRAL Model Law in the SADC countries is that very few SADC countries have adopted the model law. SADC countries which have adopted an UNCITRAL Model Law-based law are Mauritius, Madagascar, Zambia and Zimbabwe.[132]Article 8 of the Model Law reproduces the text of Article 2 of the New York Convention stating that when an action is brought before court which is subject to an arbitration agreement the court shall refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[133]

9. Recognition and Enforcement of International Arbitration Awards.

The two principal regimes for enforcing foreign arbitration awards in the SADC countries are the common law and statutory regimes.[134] The statutory regimes constitute awards made under the New York Convention, the ICSID Convention and awards from countries to which the statutory regimes for enforcing foreign judgements has been extended.[135]

The law for the enforcement of international arbitration awards in most SADC countries is based on the New York Convention, and has been adopted by most SADC countries except Namibia, Angola, Swaziland and Malawi.[136] The New York Convention confers a duty on states to "recognise arbitral awards as binding" in which case they can be enforced as domestic judgements.[137]

[130] Roodt "Conflicts of Procedure Between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tulane European & Civil Law Forum [Vol. 25 2010] 95-98.
[131] www.unctad.org/ United Nations Conference on Trade and Development: International Commercial Arbitration (last accessed 05-07-2015).
[132] Bagshaw "Arbitration As A Tool For Strengthening Cross-Border Deals: Making A Case for the Harmonization Of Arbitration Laws In the SADC Region" 2013 4.
[133] Ibid.
[134] Oppong *Private International Law in Commonwealth Africa* (2013) 397.
[135] Ibid.
[136] Bagshaw "Arbitration As A Tool For Strengthening Cross-Border Deals: Making A Case for the Harmonization Of Arbitration Laws In the SADC Region " (2013) 4.
[137] Roodt "Conflicts of Procedure Between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tulane European & Civil Law Forum [Vol. 25 2010] 71-72.

A foreign arbitration award can be enforced in terms of the common law as the provisions are found in the domestic arbitration statutes and it is therefore a discretionary procedure.[138] The award is enforced by bringing an action to court for the enforcement of the award. The requirements that must be met are that there must be an agreement that a dispute will be submitted to arbitration, the issues arbitrated on must be within the scope of the arbitration agreement, and the award should be final. South African courts have jurisdiction to enforce an arbitration award in terms of the South African common law.[139]

Recognition of foreign arbitration awards refers to the method by which a court accepts that an award was properly made and therefore enforceable within its jurisdiction. The effect of recognition is therefore to give the award legal standing in a particular jurisdiction. Recognition is important in that it can neutralize a losing party's attempt to obtain a new decision from the courts which may conflict with the award.[140] Recognition proceedings bring finality to arbitral proceedings as they ensure that the matter determined between the parties is final.

9.1. The New York Convention

The New York Convention[141] applies to the recognition and enforcement of arbitral awards. The New York Convention requires the courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states.[142] Under the Convention each contracting state undertakes to recognise and give effect to an arbitration agreement as long as the agreement is in writing and the dispute can be settled through arbitration.[143]

The New York Convention aims to promote uniformity in the principles and processes applying to enforcement, irrespective of the country in which enforcement is sought.

Each contracting state shall recognise the arbitral awards as binding and enforce them in terms of their own procedure.[144] In terms of Article IV, a party must apply to a state court that has enacted the New York Convention and supply the duly authenticated award and original agreement.[145]

[138] Oppong *Private International Law in Commonwealth Africa* (2013) 400.
[139] Ibid.
[140] Roodt "Reflections on finality in arbitration" 2012 De Jure 503.
[141] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[142] Article I(1).
[143] Article II (2).
[144] Article III.
[145] Article IV.

States are expected to adopt the pro-enforcement bias of the New York Convention, which allows limited grounds for non-recognition and non-enforcement of foreign arbitral awards. Recognition can be refused if the other party is able to show that the parties to the arbitration agreement did not have legal capacity under the applicable law as arbitration can only be conducted subsequent to a valid arbitration agreement under the applicable law to the agreement.[146] The so-called substantive defences of Article V do not focus on the merits of the arbitration award in terms of either the facts or the law, but on the integrity of the process and procedural fairness to the parties. Invalidity of the arbitration agreement under the law of the seat of the arbitration may give good ground for refusal of an award in other member states, but essentially the grounds are permissive and not mandatory.

The New York Convention applies to arbitral awards that were rendered in a state other than where enforcement is sought, or that are considered by the enforcing state to be foreign.[147] Its application can be limited by two kinds of reservations. Firstly, the reciprocity reservation aims to exclude its application to awards rendered in non-member states, whereas, secondly, the commercial reservation limits its application to foreign arbitral awards arising out of commercial relationships.[148]

Contracting States determine the commercial or non-commercial nature of legal relationships with reference to their own domestic law. If no reservation is entered into, the foreign arbitral award is recognised and enforced regardless of where it was rendered, subject only to certain limited defences against recognition and enforcement which the party against whom the award is invoked may rely on. The New York Convention provides a minimum threshold for the enforcement of arbitration agreements and awards, permitting more favourable rules where they are to be found, e.g. in a multilateral or bilateral treaty or in the law of the enforcing state.[149]

Once again, the New York Convention has only been enacted by some of the SADC countries which make the enforcement of international arbitration awards impossible in terms of the Convention. In terms of Article V (as discussed above) some of the defences that may be raised by a party resisting enforcement of an international arbitration award are the nonexistence of an arbitration agreement, alleged irregularity in the composition of the

[146] Article V.

[147] Roodt "Conflicts of Procedure Between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tulane European & Civil Law Forum [Vol. 25 2010] 72.

[148] Cole "Botswana's Arbitration Legislation: The Path for Future Reform*" University of Botswana Law Journal*, June 2007 84.

[149] Roodt "Conflicts of Procedure Between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tulane European & Civil Law Forum [Vol. 25 2010].p72.

arbitration panel, claim of breach of public policy, breach of adversarial principles, non arbitrability of a dispute and the arbitrators exceeding the scope of their authority.[150]

9.2. Recognition and Enforcement of ICSID Convention awards.

International conventions have played an important role in the recognition of international arbitral awards. Because domestic laws vary in many different aspects, international conventions create a common ground upon which countries can rely and which can build and support a system of uniformity in enforcement of arbitral awards. The purpose of ICSID is to provide a platform for the arbitration of investment disputes between contracting states and nationals of other contracting states. In terms of the Convention, member states undertake to recognise and enforce an ICSID award as if it were a final judgement of their own courts.[151]

9.3. Bilateral Investment Treaties

Bilateral Investment treaties provide substantive protection for foreign investors. The key protection offered by the majority of bilateral investment treaties is to allow for international arbitration in the event of an investment dispute, rather than force foreign investors to sue the host state in its own courts.[152]

The SADC Protocol on Finance and Investment, which came into force on 16 April 2010, contains international protections for foreign investors in the SADC region. The Protocol provides foreign investors the ability to initiate binding international arbitration proceedings directly against member states under the ICSID or UNCITRAL Rules, which may result in enforceable damages awards.[153]

The Finance and Investment Protocol (Finance Protocol) deals with financial cooperation and macroeconomic convergence and is the second most important area of SADC law. The Protocol obliges member states to co-ordinate their investment regimes and cooperate to create a favourable investment climate within SADC as outlined in the first annex to the Protocol (Investment Annex). An important portion of the Investment Annex is devoted to the protection of investments. Investments and investors must enjoy fair and equitable treatment in the territory of any member state, and that treatment must not be less favourable than that

[150] Kirtley "Bringing Claims and Enforcing International Arbitration Awards Against Sub-Saharan African States and Parties 2009 *The Law and Practice of International Courts and Tribunals* 147.

[151] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 85.

[152] http://www.internationalarbitrationlaw.com/investment-arbitration/ (last accessed 25/8/2014).

[153] Claypoole "The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa" October 2013, available at www.lathamwatkins.com (last accessed 15-10-2014).

granted an investor from a non-member state. Member states are forbidden to nationalise or expropriate except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.[154]

This provision protects foreign investors from political risks by restraining the right of member states to take or otherwise interfere with property and property rights.[155] It achieves that purpose by imposing requirements that lawful expropriation be for a public purpose, non-discriminatory and compensatory of the investors aggrieved by the taking.[156] It is, however, possible for member states to accord preferential treatment to qualifying investments and investors in order to fulfil national development objectives. In addition, member states must ensure that investors are able to repatriate investments and returns on investments.[157]

Foreign investors must have the right of access to the courts, judicial and administrative tribunals, and other competent authorities for the redress of their investment-related grievances, such as expropriation claims or differences over the determination of compensation for expropriation.[158]

A member state and foreign investor must settle investment disputes amicably and at any rate exhaust local remedies before they can submit their disputes to international arbitration if either the state or the investor so wishes.[159] Should either party choose to resort to international arbitration, they may refer the dispute to the SADC Tribunal, the International Centre for the Settlement of Investment Disputes (ICSID), an international arbitrator, or an *ad hoc* arbitral tribunal.[160] If parties cannot agree on any of those dispute settlements for six months after written notification of the claim, they must submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules).[161]

Investment arbitration, although it is arbitration, differs from commercial arbitration as commercial arbitration is based on an arbitration agreement, whereas investment arbitration may be based either on an investment treaty, either multi- or bilateral (BIT), the host state's

[154] Claypoole "The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa" October 2013 available at www.lathamwatkins.com (lastacessed15-10-2014).
[155] http://www.internationalarbitrationlaw.com/investment-arbitration/ (last accessed 25/8/2014).
[156] http://www.internationalarbitrationlaw.com/investment-arbitration/ (last accessed 25/8/2014).
[157] Article 6.
[158] http://www.internationalarbitrationlaw.com/investment-arbitration/ (last accessed 25/8/2014).
[159] Article 28.
[160] Article 28(2).
[161] Article 28(3).

national investment law, which often provides for protection of foreign investors, or, in certain circumstances, an investment agreement.[162]

In commercial arbitration, the arbitral tribunal adjudicates the dispute in relation to the contract between the parties, whilst in investment arbitration the arbitral tribunal adjudicates the host state's behaviour when exercising its sovereign rights as provided for either by law, treaty or contract, in light of customary international law.[163]

The South African Government published the controversial Draft Promotion and Protection of Investment Bill, which does not include an obligation on the South African Government to provide "fair and equitable treatment" to investors, and does not guarantee foreign investors 1the right to free repatriation of returns, conceptualises expropriation narrowly, and allows the Government to provide less than full market value compensation in cases of legitimate expropriation.[164]

Most importantly the Bill does not expressly provide recourse for investors to refer disputes against South Africa to international arbitration.[165] Instead, investors must bring their disputes either to the South African courts, to mediation facilitated by the Department of Trade and Industry, or to arbitration in accordance with South Africa's Arbitration Act of 1965, which provides that if parties fail to agree on an arbitrator, either party may apply to the South African courts for determination.[166]

These provisions fail to give recognition to the SADC Treaty and prevents the SADC countries from offering an effective regime for the enforcing of arbitral awards to promote investment.

10. Arbitration laws of SADC Countries

As indicated, SADC refers to the Southern African Development Community, a region comprising Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Although these countries are all signatories to the SADC Treaty, no

[162] http://www.internationalarbitrationlaw.com/investment-arbitration/ (last accessed 25/8/2014).
[163] Ibid.
[164] http://www.polity.org.za/article/the-new-promotion-and-protection-of-investment bill - an assessment of its implications for local and foreign investors in South Africa, 6 January 2014 (last accessed 25/8/2014).
[165] http.tralac.org/discussions/article/5358 (last accessed 25/8/2014).
[166] http://www.polity.org.za/article/the-new-promotion-and-protection-of-investment bill - an assessment of its implications for local and foreign investors in South Africa, 6 January 2014 (last accessed 25/8/2014).

uniformly applicable arbitration system is applicable to the signatories and currently each state resorts to its own arbitration laws for domestic and international arbitration.

The national courts may be involved in arbitration prior to commencement of the arbitration to uphold the arbitration agreement, during the arbitration proceedings to assist the parties and the arbitral tribunals and after publishing of the awards by the arbitrators by recognising and enforcing the final award.[167] The following section will concentrate on identifying the applicable legislation on arbitration in each of the SADC countries, the national courts attitude to international arbitration, the availability of viable and active arbitration institutions and arbitration associations within the SADC countries.

10.1 Angola

Arbitrations are governed by the Voluntary Arbitration Law (LVA), Law No. 16/03 dated 25 July 2003 and the Constitution of the Republic of Angola.[168]

The Voluntary Arbitration Law was inspired and modelled on the UNCITRAL Model Law and makes a distinction between domestic and international arbitration.[169] Arbitration is considered to be of an international nature when international trade interests are at stake, in particular when the parties to the arbitration agreement have business domiciles in different countries at the time of the agreement's execution,[170] the place of performance of a substantial part of the obligations resulting from the legal relationship from which the dispute arises is situated outside the countries where companies have their business, or when the parties have expressly agreed that the scope of the arbitration agreement is connected with more than one state.[171]

Judicial assistance by the provincial courts and the Supreme Court in arbitration proceedings to resolve specific issues in particular relating to the challenge of the arbitrators,[172] appointment of arbitrators,[173] assistance in taking evidence and any interim measures[174] are granted in terms of the LAV.

[167] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 78.
[168] Article 174.
[169] Carter *The International Arbitration Review* (5th edition) (2014) 40.
[170] Article 40 of the VAL.
[171] Carter *The International Arbitration Review* (5th edition) (2014) 40.
[172] Article 10.
[173] Article 14.
[174] Article 22.

Local Institutions

The Ministry of Justice has authorised the operation of five institutionalised arbitration centres in Angola, all of which have jurisdiction to settle disputes in general.[175]

Recognition and Enforcement of International Arbitration Awards

Angola is not a state signatory to any of the international laws and conventions relating to arbitration that is neither the New York Convention,[176] nor the 1965 Washington Convention (ICSID). The LAV however opts for the principle of autonomy on both the procedural applicable law and the seat of arbitration.[177] The parties in both domestic and international arbitration are free to designate their substantive law or rules of the law applicable to the merits of the case.[178]

In arbitrations where parties have chosen Angola as the seat of arbitration, or in the case of international arbitration cases, where the parties have not chosen another procedural applicable law should be considered as held in Angola. In other cases the arbitration award would be considered to be foreign and therefore unenforceable in Angola, without review and confirmation by the Supreme Court.[179] In international arbitration, there is no right of appeal against the final award unless this has been agreed to by the parties. However in terms of the LVA, the final award of the arbitration may be annulled by the judicial court on certain grounds.[180]

Investor – state disputes

Decree Law No. 20/11 guarantees the protection of the rights of both parties with access to Angolan courts. The Law makes provision for dispute resolution by arbitration as long as provision is made for the procedures of the arbitration in the agreement and that the arbitration must take place in Angola and the applicable law will be that of Angola. Bilateral investment treaties provide for the authorisation or consent of the Angolan state to arbitration and allows the foreign investor direct access to international arbitration.[181]

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[175] Carter *The International Arbitration Review* (5th edition) (2014) 40.
[176] Goncalves "Commercial Arbitration in Angola: Where are we now?" 2013 YAR – Young Arbitration Review 5.
[177] Articles 17 and 41 of the VAL.
[178] Carter *The International Arbitration Review* (5th edition) (2014) 43.
[179] Carter *The International Arbitration Review* (5th edition) (2014) 42.
[180] Carter *The International Arbitration Review* (5th edition) (2014) 45.
[181] Carter *The International Arbitration Review* (5th edition) (2014) 46.

10.2 Botswana

Arbitration is governed by the Arbitration Act (Cap 06:01 of 1959), the Recognition and Enforcement of Foreign Arbitral Awards Act (Cap 06:02) and the Settlement of Investment Disputes (Convention) Act of 1970.[182] The Arbitration Act of Botswana is outdated and does not meet the requirements of international arbitration.[183] The Arbitration Act affords the court excessive powers of assistance and supervision in arbitration proceedings.[184] The court has jurisdiction to grant a number of forms of interlocutory relief in support of arbitration proceedings.[185]

Furthermore, in the event that any party to an arbitration agreement commences any legal proceedings in any court against any other party to the agreement, in respect of any matter within the scope of the agreement, parties to such legal proceedings may at any time apply to that court to stay the proceedings.[186] The court may make an order staying the proceedings, subject to such terms and conditions as are considered just. A Botswana court may also exercise its discretion and stay proceedings before it in favour of foreign proceedings on the basis of a plea of *lis alibi pendens*.[187]

Local Institutions

To date Botswana has not established any local arbitration institutions.

Recognition and Enforcement of International Arbitration Awards

Botswana is a signatory to the New York Convention 1958, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. Foreign arbitration in Botswana is recognized through the Recognition and Enforcement of Foreign Arbitral Award Act. This Act was created in 1971 and incorporates parts of the New York Convention into Botswana's domestic laws.[188] Botswana has entered the first reservation of the New York Convention in terms of which contracting states may limit the

[182] Oppong *Private International Law in Commonwealth Africa* (2013) 400 footnote 15, 405.
[183] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 87.
[184] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 87.
[185] Oppong *Private International Law in Commonwealth Africa* (2013) 91.
[186] Oppong *Private International Law in Commonwealth Africa* (2013) 92.
[187] Ibid.
[188] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 84.

application of the Convention to disputes that are considered as commercial under their law.[189]

Botswana has also adopted the following provision in their Recognition and Enforcement of Foreign Arbitral Awards Act in as much as that: *"no arbitral award made in a country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country"*

It should be noted that although the Arbitration Act provides for enforcement of international awards, it does not provide rules of procedure for enforcement or the conditions to be fulfilled by the party seeking enforcement in practice.[190]

Investor – state disputes

Botswana is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, which established the ICSID and member states undertake to submit to the ICSID's arbitration process and to recognise and enforce its awards as if it were a final judgment of their courts.[191]

10.3 Democratic Republic of Congo

The Democratic Republic of Congo arbitration are governed by the Organisation for the Harmonisation of Business Law in Africa ("OHADA") and the Uniform Act on Arbitration ("UAA").[192]

Local Institutions

The Common Court of Justice and Arbitration ('CCJA') was instituted by the 1993 OHADA Treaty, and is notably the OHADA dispute resolution institution.[193]

Other arbitration institutions in the DRC are the Congo Arbitration Centre ('CAC') and the National Centre for Arbitration, Conciliation and Mediation ('CENACOM').[194]

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[189] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 84.

[190] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 87.

[191] Cole "Botswana's Arbitration Legislation: The Path for Future Reform" *University of Botswana Law Journal*, June 2007 85.

[192] http://www.africanlawbusiness.com/publications/international-arbitration-/global-legal-insights---international-arbitration-1/congo-d-r/overview (last accessed 05-07-2015).

[193] Ibid.

[194] Ibid.

Recognition and Enforcement of International Arbitration Awards

On the 26th of June 2013, the President of the Democratic Republic of the Congo promulgated Law 13/023, authorising the accession of the DRC to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The DRC has recently ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which applies in the DRC from the 2 February 2015.[195]

The accession to the Convention is subject to four reservations. The first two reservations are that it will apply the Convention only on the basis of reciprocity to awards made in other member States and that the dispute must be considered "commercial" under the national law of the DRC. These reservation are uncontroversial and expressly provided for by Article I(3) of the Convention.

The other two reservations are not expressly authorized by the Convention. The first is that only arbitral awards made after the DRC's accession to the Convention may be enforced in the DRC. While the Convention does not mandate retrospective application, interpretative commentaries and the drafting history of the Convention suggest that retrospective application was intended. The final reservation states that the Convention does not apply to disputes related to immovable property situated in the territory of the DRC or rights related to such property, as defined under national law.[196]

Recognition and enforcement of arbitration awards within any OHADA contracting state is governed by article 25 of the UAA which recognises a valid award as final and binding and is accorded the same status as a judgement of a national court in all OHADA member states.[197] As the DRC is now also a party to the New York Convention it is for the enforcing party to choose in which legal regime he wishes to pursue enforcement.

Investor – State

The DRC is a party to the ICSID Convention and any awards rendered pursuant to ICSID arbitration will be enforceable in accordance with the exequatur procedures set out in the domestic law.[198]

[195] Ibid.

[196] http://www.mondaq.com/unitedstates: Accession Of the Democratic Republic Of Congo To The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (last accessed 05-07-2015).

[197] Roodt "Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tul. Eur. & Civ. L.F. 65 2010 74.

[198] http://www.africanlawbusiness.com/publications/international-arbitration-/global-legal-insights---international-arbitration-1/congo-d-r/overview (last accessed 05-07-2015).

10.4 Lesotho

The Lesotho legislative framework on arbitration comprises the Lesotho Arbitration Act 12 of 1980, the Reciprocal Enforcement of Judgments Act 1922 and the Arbitration International Investment (Disputes) Act 1974.

Local Institutions

Lesotho established the Directorate of Dispute Prevention and Resolution (DDPR).[199]

Recognition and Enforcement of International Arbitration awards

Lesotho's statutes on the enforcement of foreign judgments can be extended to the enforcement of arbitration awards from designated countries.[200] Lesotho is a state party to the New York Convention with the reservation that Lesotho will apply the Convention only in relation to the recognition and enforcement of awards made in the territory of another contracting state.[201]

Investor-state disputes

Lesotho is a signatory of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and also accepts ad hoc arbitration. Lesotho is a member of the International Centre for the Settlement of Investment Disputes (ICSID) and the Arbitration International Investment Disputes Act of 1974 commits Lesotho to accept binding international arbitration of investment disputes.[202]

10.5 Madagascar

Arbitration in Madagascar are governed by the Madagascar Arbitration Law NO 98-019 and the Civil Procedure Code (2003).[203] The Arbitration Act is based on the UNCITRAL Model Law. Most commercial disputes may be submitted to arbitration. However, domestic disputes involving the state, public authorities and public establishments cannot be submitted to arbitration. Arbitration agreements must be in writing. The parties are free to select arbitrators of any gender, nationality or professional qualifications in both domestic and international

[199] https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Lesotho+DDPR (last accessed 05-07-2015).
[200] Oppong *Private International Law in Commonwealth Africa* (2013) 419.
[201] Oppong *Private International Law in Commonwealth Africa* (2013) 398.
[202] http://www.state.gov/documents/organization/227355.pdf (last accessed 05-07-2015).
[203] Articles 439 to 464 govern domestic and international arbitrations in Madagascar.

arbitrations and foreign counsel may represent the parties in arbitration proceedings. Domestic courts have the power to declare an arbitral tribunal incompetent to settle a dispute.

Local Institutions

The Arbitration and Mediation Centre of Madagascar (CAMM) is a private organisation to promote and facilitate the use of arbitration to resolve commercial disputes.[204]

Enforcement and Recognition of International Arbitral Awards

Enforcement proceedings for domestic awards take place in the competent court of first instance, and enforcement proceedings pertaining to international awards, in the Court of Appeal of Antananarivo.[205] Madagascar is listed as a reciprocating state for the purpose of enforcing the New York Convention.[206]

Investor-state

Under the privatization laws the government of Madagascar accepts binding international arbitration of investment disputes between foreign investors and the state.[207]

10.6 Malawi

The applicable legislation in Malawi with regards to arbitration are the Arbitration Act (Cap p 6:03), The Investment Promotion Act 1991 and the Protocol on Arbitration clauses 1923.

International Arbitration

The Malawian Arbitration Act applies both to domestic and international arbitration,[208]and grants the High Court of Malawi extensive supervisory and interventionary powers[209] in the event that any party to an arbitration agreement commences any legal proceedings in any court against any other party to the agreement, in respect of any matter within the scope of the agreement. Parties to such legal proceedings may at any time apply to that court to stay the proceedings. In the case of a submission to arbitration made in terms of an agreement to

[204] http://iab.worldbank.org/Data/ExploreEconomies/madagascar?topic=arbitrating-commercial-disputes (last accessed 05-07-2015).
[205] http://iab.worldbank.org/Data/ExploreEconomies/madagascar?topic=arbitrating-commercial-disputes (last accessed 05-07-2015).
[206] Oppong *Private International Law in Commonwealth Africa* (2013) 407.
[207] Madagascar Country Study Guide.
[208] http://www.malawilii.org/files/mw/legislation/consolidated-act/6:03/arbitration_act_pdf_98735.pdf (last accessed 04-07-2015).
[209] Mhlone "Arbitration Law in Malawi and its implications for the PTS/SADCC organisation" XXIII CILSA 1990 236.

which the Protocol on Arbitration clauses of 1923 applies, the court shall stay the proceedings.[210]

Local Institutions

The Preferential Trade Area has set up a centre for Commercial Arbitration based in Djibouti.[211]

Recognition and Enforcement of International Arbitration Awards

Malawi is not a state party to the New York Convention. In terms of the Malawian Act on Enforceable Foreign Judgements, however, a foreign arbitration award will be enforceable if the award has reached the stage where it will be enforceable by the courts in the state that granted the award.[212] In terms of the Protocol on Arbitration clauses of 1923 any award made after 28 July 1924 in terms of an agreement of arbitration which is subject to the Protocol on Arbitration clauses of 1923, between persons whom are subject to the jurisdiction of a state designated by the Minister on a reciprocal basis as a party to the Convention on the Execution of Foreign Arbitral Awards of 1927. The foreign award will be enforceable in Malawi either by action of leave of the court.[213]

In terms of the Investment Promotion Act[214] parties have access to international arbitration as the act provides that parties to disputes may agree to pursue arbitration and to choose an appropriate forum, including international arbitration. The enforcement of arbitration awards can be refused if the conditions as set out in the Act are not complied with.[215]Malawi is not a party to the UNICITRAL Model Law on Commercial Arbitration. Foreign arbitral awards can be enforced with leave of the court.[216]

Investor-state disputes

Malawi is a member of the International Centre for the Settlement of Investment Disputes (ICSID).

[210] Oppong *Private International Law in Commonwealth Africa* (2013) 97.
[211] Mhlone "Arbitration Law in Malawi and its implications for the PTS/SADCC organisation" XXIII CILSA 1990 250.
[212] Oppong *Private International Law in Commonwealth Africa* (2013) 402.
[213] Oppong *Private International Law in Commonwealth Africa* (2013) 409.
[214] http://www.malawiconsulate.co.za/Forms/investment_promotion_act.pdf (last accessed 04-05-2015).
[215] Section 38(1) (a) to (c).
[216] Section 27 and 37(1).

10.7 Mauritius

The applicable legislation for arbitration in Mauritius is the Code de Procedure Civile of Mauritius, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001, and the International Arbitration Act 2008.

International Conventions

Mauritius is a signatory to the New York Convention of 1958.

International Arbitration

Mauritius has enacted the International Arbitration Act 2008 (the "Act") which is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL").The Act creates a clear regime for international arbitration and is distinct from the law applicable to domestic arbitration (the "Code de Procedure Civile of Mauritius").The main objective of the Act is to make Mauritius a recognized jurisdiction for all international arbitrations (whether arbitrations arising from ad hoc arbitration agreements or under institutional rules) and in particular, in the African context.

The IAA 2008 applies to international arbitrations which have Mauritius as their juridical seat, save for a few provisions which apply whether the juridical seat is in Mauritius or not, these relate to (i) referrals to the Supreme Court of Mauritius from other courts to determine whether the parties ought to be referred to arbitration instead; (ii) applications to the Supreme Court to obtain interim measures in connection with international arbitration proceedings; and (iii) the recognition in Mauritius of interim measures granted by an arbitral tribunal.[217]

Local Institution

The association of the Mauritius International Arbitration Centre (MIAC) with the London Court of International Arbitration (LCIA) is vital, since LCIA is one of the leading international institutions for commercial dispute resolution.[218]

[217] http://www.africalegalnetwork.com/wp/content/uploads/2014/05/International_Arbitration_in_Mauritius.pdf (last accessed 04-05-2015).

[218] http://www.investmauritius.com/news-room/newsletters/newsletter-item-2.aspx (last accessed 04-05-2015).

Recognition and Enforcement of Arbitral Awards

Mauritius is state party to the New York Convention, and a final award delivered by a foreign arbitration tribunal is enforceable in Mauritius, in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001. Foreign awards are treated as though they have been made in the state itself.[219] The Supreme Court may set aside an arbitral award only where there is proof that a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or under Mauritian Law, a party to the arbitration agreement was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, the award deals with a dispute not contemplated by the scope of arbitration and also when the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties.

Investment-State disputes

Mauritius is a signatory of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 and a member of the ICSID.

The official signing ceremony for the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") was held in Mauritius on the 17th of March 2015.[220] The Convention was adopted by the United Nations General Assembly last December. Mauritius is a signatory to the Convention.

10.8 Mozambique

The Mozambican law on arbitration is the Law on Arbitration, Conciliation and Mediation (Law no 11/99 dated 8 July 1999) and the Mozambican Civil Procedure Code (CPC) concerning special acts arbitration (arts.1525 and 1526 of the CPC).[221]

International Conventions

Mozambique is a signatory of the New York Convention of 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

International Arbitration

[219] Section 3 (3) Cap 06;02.
[220] http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl214.html (last accessed 04-05-2015).
[221] http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/mozambique (last accessed 04-05-2015).

The Law of Arbitration, Conciliation and Mediation governs both domestic and international arbitration in Mozambique.[222] This is largely based on the UNCITRAL Model Law and provides that any interested parties may refer disputes to arbitration, provided that they have entered into an agreement which includes an arbitration clause or an arbitration agreement which is express, valid and enforceable.

The Arbitration Law confirms that, if expressly agreed between the parties, arbitration proceedings seated or taking place in Mozambique may be governed by laws of States other than Mozambique.

Local Institutions

The Arbitration Law allows for private entities to establish an ad hoc tribunal, which can choose the substantive laws applicable in the agreement. The Commercial Arbitration Conciliation and Mediation (CACM) is the only arbitration institute in the country as to date.[223]

Recognition and Enforcement of International arbitration awards.

The Arbitration Law expressly provides that arbitral awards rendered in Mozambique pursuant to the Arbitration Law should be treated and enforced in the same manner as a judgment made in the Mozambican courts. It should be noted however, that the enforcement of any foreign arbitral awards in Mozambique is subject to the subsequent consideration and recognition of the Mozambican Supreme Court. This review and recognition process does not, however entail a review of the merits of the arbitral award itself. Mozambique is also a member of the New York Convention on Recognition of Foreign Arbitral Awards and the procedure to have a foreign arbitration award recognised and enforced through the Mozambican courts is made in accordance with the 1958 New York Convention.[224]

Investor-State Disputes

Mozambique is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.[225]

[222] Law number 11/99 dated 8 July 1999.

[223] http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/mozambique (last accessed 04-05-2015).

[224] http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/mozambique (last accessed 03-05-2015).

[225] http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/mozambique (last accessed 03-05-2015).

10.9 Namibia

The Namibian legislation applicable to arbitration is the Arbitration Act 42 of 1965 and the Foreign Investment Act of 1990.

International Conventions

Namibia is not a Contracting State to the New York Convention.

International Arbitration

The Arbitration Act 42 of 1965, as amended in South Africa prior to Namibian Independence provides for the settlement of disputes by arbitration tribunals.

Recognition and Enforcement of International Arbitration Awards

Namibia is not a party to the New York Convention however during April 2013 Namibia became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.[226]

Investor-state disputes

Section 13 of the Foreign Investment Act of Namibia makes provision for settlement of investment disputes by international arbitration. This provision is only available to foreign nationals and the election of international arbitration in settlement of disputes must be made prior to the issuing of a certificate of status investment granted by the Minister. The international arbitration must be in accordance with the UNICITRAL Arbitration Rules.[227]

10.10 Seychelles

The Seychelles applicable laws to arbitration are the 2005 Investment Code and the Commercial Code of Seychelles.

International Conventions

The Seychelles is a signatory of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

[226] Oppong *Private International Law in Commonwealth Africa* (2013) 417.
[227] Article 13.

International Arbitration

Article 110 of the Commercial Code of Seychelles states that "any dispute which has arisen or may arise out of a specific legal relationship, and in respect of which it is permissible to resort to arbitration, may be subject to an arbitration agreement". The law also provides for particular circumstances which allow a party to refer a dispute to arbitration even if there is no arbitration agreement.

Recognition and Enforcement of international Arbitration Awards

In order for arbitration to be effective in Seychelles, in the sense of arbitral awards being legally binding on the parties to arbitration by being enforceable, it is necessary for the parties involved in arbitration to be aware of the issues that may render an arbitral award unenforceable. Section 207 of the Seychelles Code of Civil Procedure provides that an arbitral award may be set aside on any of the following grounds: (i) corruption or misconduct on the part of the arbitrator; or (ii) either party being found guilty of fraudulent concealment of any matter which ought to have been disclosed, or wilfully misleading or deceiving the arbitrator. In addition to the above, Article 134 of the Commercial Code lists numerous circumstances which may allow a party to apply to court to set aside an arbitral award. Some of the grounds are that the arbitral award is (i) contrary to public policy; (ii) the arbitral tribunal exceeded its jurisdiction or powers; (iii) the arbitral tribunal omitted to make an award on one of the points in dispute; (iv) the award was made by an irregularly constituted arbitral tribunal; (v) reasons for the award have not been stated; (vi) the award contains conflicting provisions; or (vi) if the award was obtained by fraud. This list is not exhaustive. Therefore, in order for arbitration to be effective in Seychelles, arbitrators must be aware of the grounds which may cause their arbitral award to be subject to attack.

International Conventions

Seychelles is not a contracting party to the New York Convention of 1958.

Investor-State Disputes

Seychelles is a Contracting State to the ICSID Convention. The 2005 Investment Code of the Seychelles Act provides that disputes which cannot be resolved by the parties themselves may be settled by an arbitration procedure whether local or international that is based on a previous agreement between the parties and by legal proceedings in accordance with the Law of Seychelles.

10.11 South Africa

The South African has the following legislation applicable to arbitration: the Arbitration Act 42 of 1965, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, and the Protection of Businesses Act 99 of 1978.

International Conventions

South Africa is a signatory of the New York Convention 1958.

International Arbitration

In terms of South African law, both domestic and international, arbitration is governed by the Arbitration Act.[228] In 1998, the South African Law Commission recommended that a draft International Arbitration Bill should be adopted to govern International Arbitration,[229] as South African arbitral law and the Arbitration Act 42 of 1965 are ill-suited for international commercial disputes.[230] In South African law, an arbitration clause does not exclude the jurisdiction of the court. The court has a discretion to stay the proceedings and refer the matter to arbitration.[231]

Local Institutions

The Arbitration Foundation of Southern Africa (AFSA) was founded in 1996, and is a joint venture between organised business, the legal and accounting professions in South Africa.[232]

The Recognition and Enforcement of International arbitral awards

The recognition and enforcement of foreign arbitral awards is currently governed by the Recognition and Enforcement of Foreign Arbitral Awards Act and was enacted to give effect to South Africa's accession to the New York Convention without reservation in 1976. The principles applicable to the enforcement of foreign judgments are also applicable to the enforcement of foreign arbitral awards.

Subject to the permission of the Minister of Trade and Industry in terms of the Protection of Businesses Act 99 of 1978 (as amended) being obtained, a judgment obtained in a competent court of a jurisdiction other than South Africa will be recognised and enforced. This will be

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[228] 42 of 1965.
[229] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 341.
[230] Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 342.
[231] Oppong *Private International Law in Commonwealth Africa* (2013) 102.
[232] www.arbitration.co.za (last accessed 03-05-2015).

done in accordance with ordinary procedures applicable under South African law for the enforcement of foreign judgments. Such a decision may not be so repugnant to the values of South African law that the decision will be excluded on grounds of public policy. The judgment had to be final and conclusive, and not obtained by fraud or in any manner opposed to natural justice or contrary to the international principles of due process and procedural fairness. The enforcement thereof may not be contrary to public policy. The foreign court in question had to have jurisdiction and competence according to the applicable rules on conflict of laws. The South African courts will not enforce foreign revenue or penal laws and the South African courts have, as a matter of public policy, generally not enforced awards for punitive damages.

South Africa has not enacted the UNICITRAL Model Law on International Arbitration.

The South African courts are supportive of arbitration and the Supreme Court of Appeal has affirmed the international principle that judicial intervention, when reviewing international commercial arbitration awards, is to be minimised.[233] South African courts have jurisdiction to enforce a foreign arbitration award at common law.[234] However, for a foreign arbitration award to be enforceable at common law there must be submission to arbitration, issues arbitrated must be in scope of the agreement and the award must be final and conclusive.[235]

In the matter of *Government of the Republic of Zimbabwe v Louis Karel Fick*[236] the South African Constitutional Court relied on common law to enforce a binding international judgment within the Republic.[237] The Constitutional Court of South Africa had to consider the enforcement of a binding judgment issued by the SADC Tribunal against Zimbabwe, which resulted from the *Campbell* case wherein the SADC Tribunal concluded that the expropriation of white farmers in Zimbabwe constituted discrimination based on race and found that Zimbabwe had to pay fair compensation.[238] The Constitutional Court confirmed that the *Enforcement of Foreign Civil Judgements Act* 32 of 1988 only applied to Magistrates Courts and could not be used in this instance, and had to look to the common law for enforcement of the SADC Tribunal's decision. In terms of the common law a foreign judgement had to comply with the following criteria namely that the court had jurisdiction to hear the matter, the judgement was final and conclusive, that enforcement would not be contrary to public

[233] *Telecordia Technologies v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
[234] Oppong *Private International Law in Commonwealth Africa* (2013) 399.
[235] Ibid.
[236] CCT 101/12, 2013 ZACC22.
[237] De Wet *The case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First step towards developing a doctrine of the status of international judgments within the domestic legal order* PELJ 2014 (17) 1.
[238] Ibid.

policy, the judgement was not obtained through fraudulent means and did not involve the enforcement of a penal or revenue law of the foreign state and that the enforcement of the judgement was not precluded by the provisions of the *Protection of Business Act* 99 of 1978. The Court further relied on the *Constitution* in particular clause 231 of the *Constitution* and stated that due to the fact that South Africa became a party to the SADC treaty and this had to give effect to the decisions of the SADC Tribunal and clause 34 the right to access to courts and Section 39 (1)(b) requires that South African courts consider international law. The Court confirmed that if the order of the SADC Tribunal were not enforced then the right to access to courts in terms of the Constitution would be denied.[239]

Future decisions of the African Court of Human and Peoples' Rights as well as the (currently suspended) SADC Tribunal will be enforceable in South Africa.

Investor-State Disputes

South Africa has not signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).[240]

South Africa has published the new *Promotion and Protection of Investment Bill* which does not afford a foreign investor the right to refer disputes to international arbitration,[241] and must refer disputes to the South African courts, to mediation facilitated by the DTI, or arbitration in accordance with South Africa's Arbitration Act of 1965.[242]

10.12 Swaziland

The Swaziland applicable legislation for arbitration is the Reciprocal Enforcement of Judgements Act of 1922, Reciprocal Enforcement of Judgements Rules of 1923 and the Swaziland Investment Promotion Act of 1998.

International Conventions

Swaziland is a member of the International Centre for Settlement of Investment Disputes (ICSID).

[239] Ibid.

[240] http://www.africanlawbusiness.com/publications/international-arbitration-/international-arbitraPER/PELJ 2014 (17)1 tion-2014/south-africa (last accessed 03-05-2015).

[241] http:www.polity.org.za/article/the-new-promotion-and-protection-of-investment-bill (last accessed 03-05-2015).

[242] http://www.africanlawbusiness.com/news/4704-bits-and-pieces (last accessed 03-05-2015).

International Arbitration

Swaziland's traditional courts, with the King as the supreme authority, are available for dispute settlement. Official government intervention or arbitration is available upon request, but most investment disputes are addressed within the judicial system, usually via the Industrial Relations Court. In general, the Swazi legal system has effectively enforced property and contractual rights. Judgments of foreign courts are accepted and enforced.[243]

Local Institutions

Swaziland does not have any local institutions for commercial arbitration disputes.

Recognition and enforcement of International arbitration awards.

Swaziland is not a signatory of the UNCITRAL or the New York Convention of 1958. The statutory regime for enforcing foreign judgements as well as foreign arbitration awards is the Reciprocal Enforcement of Judgements Act of 1922, which empowers the Minister to extend its provisions to other Common Wealth countries.[244]

Investor-state disputes

Swaziland is a member of the International Centre for the Settlement of Investment Disputes (ICSID). There is no specific legislation providing for enforcement of international awards in Swaziland, but the government accepts binding international arbitration awards of investments disputes between foreign investors and the state.[245] Although the practice in Swaziland has shown that the government accepts binding international arbitrations, it would be important to have a binding provision in place to give legal certainty to foreign investors.[246]

10.13 United Republic of Tanzania

The Tanzanian legislative regime on arbitrations are the Arbitration Act, 1932,[247] the Arbitration Rules of Civil Procedure (Arbitration) Rules of 1957 amended by Government Notice No.422 of 1994, the Protocol on Arbitration Clauses 1923, the Tanzania Arbitration Institute Rules of 2008 and the National Construction Council Arbitration Rules of 2001.

[243] http://www.state.gov/e/eb/rls/othr/ics/2012/191241.htm (last accessed 03-05-2015).
[244] Oppong *Private International Law in Commonwealth Africa* (2013) 377.
[245] Article 21 (d) of the Swaziland Investment Promotion Act, 1998.
[246] http://www.state.gov/e/eb/rls/othr/ics/2012/191241.htm (last accessed 03-05-2015).
[247] Cap 15 of the laws of Tanzania (arbitration Ordinances).

International Conventions

Tanzania is a signatory of the New York Convention 1958.

International Arbitration

The Arbitration Act governs both domestic and international arbitration in Tanzania. Like the practice of other jurisdictions, agreements to arbitrate is a key requirement for arbitration in Tanzania and according to section 1 (2) of the Civil Procedure Arbitration Rules such an agreement must be in writing. According to section 2 of the Civil Procedure Arbitration Rules parties are free to appoint the arbitrators in manner agreed between them or subject to the Institution to which they are subjected.

Local Institution

In Tanzania dispute resolution by arbitration are administered either by institutions or ad hoc arbitration. Institutional arbitration is administered by two institutions namely; the Tanzania Institute of Arbitration and the National Construction Council.[248]

Recognition and Enforcement of International Arbitration Award

In order for a foreign arbitration award to be enforceable it must have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,[249] must have been made by the tribunal provided for in the agreement and also have become final in the country in which it was made. The Arbitration Act, although largely based on English law and not the UNICITRAL Model law, does recognize foreign arbitral awards to some extent. Arbitral awards are mainly enforceable in Tanzania under the general law governing contracts. An award however maybe enforced in an action to recover a contractual right or as a decree, if the award is filed at court without being set aside or sent back to the arbitrator for reconsideration.[250]Foreign awards, where Tanzania and the other country have a reciprocal enforcement of judgments or awards arrangement, can be enforced on a party residing in Tanzania.[251] The Protocol on Arbitration Clauses of 1923 binds contracting states, including Tanzania to recognize the validity of arbitration clauses agreed between parties

[248] http://globalarbitrationreview.com/reviews/67/sections/233/chapters/2709/tanzania (last accessed 03-05-2015).
[249] Section 30 of the Arbitration Act.
[250] Section 17 of the Arbitration Act.
[251] Section 29 of the Arbitration Act.

across national borders.[252] Tanzania is also a party to the New York Convention on the Enforcement of Foreign Arbitral Awards of 1958, therefore this also guarantees the enforcement of foreign awards.

Investor-state disputes

Tanzania is a contracting state to the ICSID[253]

10.14 Zambia

The Zambian law applicable to arbitration is the Arbitration Act No.19 of 2000.

International Conventions

Zambia is a signatory to the following international conventions, the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign Awards of 1923, the New York Convention of 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.[254]

International Arbitration

A court before which legal proceedings serve, relating to a matter which is the subject of an arbitration agreement, shall on the request of a party not withstanding any written law stay the proceedings and refer the parties to arbitration unless it finds that the agreement is null and void and incapable of being performed.[255]

Local Institutions

Zambia currently has no arbitration institutions.

Recognition and Enforcement of International Arbitration Awards

Zambia is state party to the New York Convention, the Geneva Protocol on Arbitration clauses, The Geneva Convention on the Execution of Foreign Arbitral Awards (1923) and the UNCITRAL Model law all of which have been adopted in the Arbitration Act No.19 of 2000.[256] An arbitration award, irrespective of the of the country in which it was made, shall be

[252] Schedule 3 to the Arbitration Act.
[253] http://www.oulj.net/index.php/ouljpath/article/view/52/43 (last accessed 03-05-2015).
[254] April 2013.
[255] Oppong *Private International Law in Commonwealth Africa* (2013) 105.
[256] Preamble of the Arbitration Act, 2000.

recognized as binding and upon application in writing to the competent court shall be enforced subject to the provisions of the Act.[257] Grounds upon which an award can be denied includes, some incapacity or the agreement not being valid under the law to which the parties have been subject to, if the party against which the award is invoked is not given proper notice of the appointment of an arbitrator or the arbitral proceedings or if a party is unable to present their case, if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration and if the award has not yet become binding on the parties or is set aside by a court of the country in which the award was made.

Investor-state arbitration

Zambia became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 during April 2013.

10.15 Zimbabwe

The Zimbabwean law on arbitration is the Arbitration Act of 1996.

International Conventions

Zimbabwe is a signatory to the New York Convention of 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (2013).

Local Institutions

The Arbitration law allows for ad hoc committees to be convened and there are quite a number of Arbitration Institutions in the country. For international matters, the arbitration laws in Zimbabwe allows for the SADC Tribunal to be approached, as was the case in the *Mike Campbell (PVT) LTD and Others v Republic of Zimbabwe*.[258]

Recognition and Enforcement of International Arbitration awards

Zimbabwe is party to the Convention on the Recognising and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and also the United Nations Model Law on

[257] Section 18.
[258] *Campbell & 78 others vs The Republic of Zimbabwe* (SADC (T) (Case No. 2/2007).

International Commercial Arbitrations. These conventions are adopted and therefore enforceable in its domestic laws through the Arbitration Act of 1996. An arbitration award, irrespective of the country in which it was made, shall be recognized as binding in Zimbabwe subsequent to an application being made to the High Court.[259] The procedure of recognition as provided for in the Act requires that an application is made in the High Court. The party relying on the award or applying for its enforcement shall supply the authenticated original award or a certified copy thereof together with the original agreement or certified copy. If the award or agreement is not made in English, the party shall supply a certified translation into English.[260]

Article 36 of Act 6 of 1996 provides a number of grounds upon which an award can be denied recognition or enforcement in Zimbabwe.[261] These includes, some incapacity or the agreement not valid under the law to which the parties have subjected to, if the party against which the award is invoked is not given proper notice of the appointment of an arbitrator or the arbitral proceedings or unable to present their case, if the award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, if the award has no yet become binding on the parties or is set aside by a court of the country in which the award was given. In Zimbabwe the Defence of public policy must prevail**.**

The Civil Matters (mutual Assistance) Act[262]governs the enforcement of foreign judgements, including judgements of international tribunals which also includes the SADC Tribunal. A person who obtained a foreign judgement must apply to the High Court for the registration and enforcement of the judgement.[263]The court shall register the judgement if the court is satisfied that it is just and convenient for the judgement to be enforced in Zimbabwe,[264] and all the grounds as stated in the Act has been satisfied.[265]

In the *Campbell* case the Zimbabwean High Court denied registration and enforcement of the SADC's Tribunal's decision, even though the High Court explicitly confirmed that Zimbabwe

[259] Article 35 (1) Arbitration Act 6 of 1996.
[260] Article 35 (2).
[261] Article 36.
[262] Chapter 8:02.
[263] Section 5 of the Act.
[264] Section 6(1).
[265] Section 6(2).

was bound under international law, but refused to register the decision on the basis that it would violate domestic public policy.[266]

Investment-state disputes

Zimbabwe became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 during April 2013.[267]

11. SADC TRIBUNAL

In terms of the SADC Treaty, the Tribunal is charged with the responsibility of adjudicating over disputes and the interpretation of the Treaty and subsidiary instruments. The Protocol on the SADC Tribunal provides that the Tribunal shall deal with disputes between States and between natural or legal persons and states.[268]

This was the status quo until the SADC Tribunal was suspended in August 2010 at the SADC Summit of Heads of State and Government in Namibia, following representations by Zimbabwe that the tribunal was not properly established and, as such, could not be legally recognised as an institution of SADC. The representations by Zimbabwe came after the tribunal made decisions regarding the Zimbabwe Fast-Track Land Reform Programme, with which the Zimbabwean government did not agree.

The suspension came after the Zimbabwean government failed to implement orders relating to the country's land reform programme in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe SADC* (T) (unreported case no 2/2007, 28-11-2008). In this matter, the tribunal had found that several farmers who had their land taken were not afforded the rights of access to the courts and to a fair hearing and had been discriminated against based on their race. It ordered the government to protect certain applicants from eviction and their land from redistribution and to compensate others for the dispossession of their land.

After the Zimbabwean government refused to comply with the order and questioned the tribunal's mandate, jurisdiction and powers to enforce decisions, the tribunal consulted the SADC Summit of Heads of State and Government, which has a legal duty to take 'appropriate

[266] De Wet *The case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First step towards developing a doctrine of the status of international judgments within the domestic legal order* PELJ 2014(17)1.
[267] Oppong *Private International Law in Commonwealth Africa* (2013) 417.
[268] Article 15 Protocol.

action' against a recalcitrant party who fails to enforce a decision of the tribunal. However, the summit decided on the abovementioned review and moratorium.[269]

The importance of the *Campbell* case lies in the fact that the expansive interpretation of Article 4 of the SADC Treaty, adopted by the Tribunal, set a precedent for international investors that SADC member states could be sued in the Tribunal for violating the principles of human rights, democracy and the rule of law.[270] The judgment also confirmed that an investor from a non-SADC state could bring proceedings against a SADC member state in the Tribunal. This, however, was the position prior to the Tribunal being suspended.

The SADC summit held in Zimbabwe during August 2014 paved the way for the revival of the SADC tribunal and, the regional leaders have adopted a new protocol to reconstitute the tribunal, but with a diminished mandate. Currently the SADC Tribunal will be able to deal only with inter-state disputes and no longer with cases brought by individuals.[271] At the date of writing this article the new proposed protocol has not been made available for comment.

This development will bring the SADC Tribunal in line with the ICJ which can only resolve disputes between states and has jurisdiction to deal with legal disputes as opposed to political ones. It remains to be seen to what the exact extend of the new proposed Tribunal's dispute resolutions span will be. The ICJ has described a dispute as legal if it is "capable of being settled by the application of principles and rules of international law." What the effect of the newly reconstituted Tribunal will be remains to be seen as there are inherent difficulties with arbitration within the SADC region which will no doubt severely impact on the success of the Tribunal and, with its diminished mandate, still leave a huge void to be filled regarding "private" arbitrations.

12. Changes in the Political Will of relevant SADC Countries

There are lessons to be learned from the ECOWAS-OHADA States,[272] as the creation of OHADA sprang from a political will to strengthen the African legal system by enacting a secure legal framework for the conduct of business in Africa.[273]The ECOWAS Treaty[274]

[269] Makonese "The SADC Tribunal conundrum - lawyers look to the African Court for direction" DR, Jan/Feb 2013:24 [2013] De Rebus 13.

[270] Chokuda "International Investment Dispute Resolution: A Review of the Resolution of Investment Disputes Arising out of the Land Reform Programme in Zimbabwe" 2009 21 SA Merc LJ 753-772.

[271] http://www.bdlive.co.za/africa/africannews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases by Ray Ndlovu (last accessed 05-07-2015).

[272] Economic Community for West African States.

[273] Saurombe "The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis" SA Merc LJ 695-709 2009.

provides for the establishment of an enabling legal environment and OHADA has carried forward these objectives for the establishment of an Arbitration Tribunal,[275] namely the Common Court of Justice and Arbitration (CCJA). In the area of Arbitration, the CCJA exercises both an administrative and a jurisdictional function. The CCJA acts as an arbitration institution managing the development of the arbitration procedure according to its own rules of arbitration.[276] The OHADA Uniform Arbitration Act and the Rules facilitate the implementation of arbitral awards.[277] The Arbitration Act gives effect to party autonomy, and a valid arbitral award is final and binding on the parties and has the same effect as a judicial decision in the member states of OHADA. The only ground on which enforcement of the arbitral award can be refused is being "manifestly contrary to international public policy in the Member States" which refers to the regional public policy affecting all the member states of OHADA. SADC countries are free to adopt the OHADA Model Law on Arbitration and ensure regional uniformity for international commercial arbitration while allowing individual states to regulate their domestic arbitration.[278]

13. Recent Developments

The African Development Bank group has confirmed that Africa is now the world's fastest growing economy[279], and the region is expected to remain an attractive destination for foreign investment. Despite this positive reality, the SADC region is still without a credible arbitral institution and the developments and recent history in relation to the SADC Tribunal is in contrast to the developments in other African states as stated by Isdell, Co-Chair, *The Investment Climate Facility for Africa*; where he observes that "Tangible improvements to commercial justice systems by the Governments of Mali, Rwanda, Tanzania, Sierra Leone, Burkina Faso, Mauritius and Zambia, are grounds for significant optimism. In many cases, this reform is significant and already delivering direct benefits to businesses and investors."[280]

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[274] Treaty establishing the Economic Community of West African States, 28 May 1975.
[275] Arbitration Law (11 June 1999).
[276] Mancuso "Creating Mixed Jurisdictions: Legal Integration in the Southern African Development Community Region" 6 J. Comp.L. 146 2011.
[277] Roodt "Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization" Tul. Eur. & Civ. L.F. 65 2010 74.
[278] Roodt, "Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization." 25 Tul. Eur. & Civ. L.F. 65 2010 81.
[279] Claypoole "The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa" October 2013, www.lathamwatkins.com (last accessed 03-07-2015).
[280] http://thinkafricapress.com/economy/reforming-commercial-courts-making-business-easier (last accessed 03-07-2015).

The SADC tribunal should have taken a cue from these developments to become the primary overseeing authority for the region in all matters relating to arbitration, but that opportunity has been lost. In terms of its new reconstituted mandate it can in any event not be seen as a body that will be able to effectively adjudicate all natures of disputes between a wide range of commercial role players. Foreign investors in general are not state bodies and these investors will not be able to rely on the assistance of the SADC Tribunal. The void in respect of the non-existence of properly constituted and functioning arbitral institutions therefore remains at the current moment.

Further developments have also been made by individual states of SADC. Mauritius has transformed its legal framework so as to welcome and accommodate international arbitration. The launch of the Mauritius Mediation Centre, which is part of a two-year project supported by ICF and the Government of Mauritius aims to improve alternative dispute resolution in the country. Mauritius has adopted arbitration legislation based on the 2006 UNCITRAL Model Law, and is trying to use its offshore location and international business links to establish itself as the leading arbitration centre in Africa. The recent announcement that the International Council for Commercial Arbitration (ICCA) will hold its 2016 Congress in Mauritius is a boost to those ambitions and reflects international interest in developing an arbitration centre in Africa.

Some regional bodies are furthermore getting in touch with each other to establish an arbitral system for Africa. Lead by South African institutions, its corporate form is a non-profit regional partnership called "Africa ADR". "*The mechanisms now universally used for the resolution of international commercial disputes are arbitration, mediation and conciliation. These forms of dispute resolution work best when the process is administered by a neutral, credible arbitral authority. Africa ADR is to be the arbitral link between those who invest in Africa, and those who trade in Africa; between the business communities of Africa and abroad and between the international community. Africa ADR will foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce*."[281]

[281]http://www.arbitration.co.za/module_data/a/0Newsletter.pdf, Advocate Michael Kuper SC: Chairman of The Arbitration Foundation of Southern Africa (last accessed 05-07-2015).

14. Conclusion

The concept of arbitration as an alternative dispute resolution method other that litigation is not a foreign concept for any of the SADC countries. All of the SADC countries have, to a greater or lesser degree, some form of institutionalised arbitration system or legislation to resort to. However, the reality seems to be, that arbitration does not yet have the instilled confidence it should have, despite the growth in economic activity the region has experienced. The truth of this statement is evident through the fact that Malawi indicated during April 2014 that it wishes to cancel mediation of its dispute with Tanzania over Lake Malawi by SADC in favour of the International Court of Justice arbitration[282]. Malawi is claiming sovereignty over the entire lake, while Tanzania is claiming half of it. Under the 1890 Heligoland border treaty signed by the countries' former colonial masters, Britain and Germany, most of the lake belongs to Malawi. However, Tanzania has argued that according to the international law of the sea, the lake should be divided down the middle[283]. From the development of this dispute and the discussion of the various SADC arbitral laws, it is difficult to come to a conclusion other than that Africa remains without a regional arbitral system for Africa.

The arbitration laws of the SADC countries do have certain overlapping similarities, but it can by no means be concluded that a uniform body of laws exist in this regard. Some of the countries have adopted existing international conventions on arbitration and those which have done so have not necessarily adopted the same international arbitration enabling instrument as their proximate neighbours. This results in a situation where, even amongst entities in SADC countries, enforcement of arbitral awards in another SADC country remains challenging, if not impossible. This is even more so for a non-SADC foreign entity.

The SADC laws established various principles which may create a positive and stable economic and legal environment, but they seem to lack any real teeth. The South African Government published the controversial draft Promotion and Protection of Investment Bill, which does not include an obligation on the South African Government to provide "fair and equitable treatment' to investors, and does not guarantee foreign investors the right to free repatriation of returns, conceptualises expropriation narrowly, and allows the Government to provide less than full market value compensation in cases of legitimate expropriation.[284]

[282]http://www.bdlive.co.za/africa/africannews/2013/04/11/concern-over-malawis-decision-on-arbitration (last accessed 05-07-2015).

[283]http://www.bdlive.co.za/africa/africannews/2013/04/11/concern-over-malawis-decision-on-arbitration (last accessed 05-07-2015).

[284] See page 37 *supra.*

International corporations face various risks when considering whether African-based arbitration is an option. Some domestic arbitration laws indicate that an arbitral award cannot be executed against a state, that courts can overturn arbitration awards or delay their execution, that authorisation must first be requested through the local court system to execute an arbitral award or that, in some instances, the arbitral process must first be authorised by an appropriate Minister.

Apart from substantive legal challenges relating to arbitration, there are also very real practical challenges. The referral of African disputes to European arbitral authorities for settlement is prohibitively expensive and unsatisfactory. Not only is it prohibitively expensive, but legal, political, commercial and cultural differences furthermore prevent certain African parties from engaging in Arbitration.

From the SADC laws, domestic legislation and the applicable international instruments and existing bodies, which have been accepted by most SADC countries in one form or another, a body of substantive law, information relating to arbitral processes and the practical execution of arbitration already exists to which most SADC countries and SADC have access to from which new arbitral institution should be and can be created alternatively harmonization of arbitration laws in the SADC region should be effected. Some developments have been made, but they still seem to be individual, fragmented attempts.

The business and investment community stands to benefit from international commercial arbitration in Africa as it is a viable system offering a proper mechanism for the settlement of international and regional disputes. Such a system will be cost effective with venues in close proximity offering much needed convenience. International commercial arbitration in Africa should be seen as credible and efficient. The existence of such a system has the ability to boost cross-border trade and investment.

The creation of an international arbitral institution operating in the SADC region will be a positive response to the requirements of the international community and the perceptions relating to arbitration of the role players in the SADC community. In a world where it is a fact of life that international arbitration is the accepted method for resolving international business disputes, the creation of such an arbitral institution will not only address a clear need, but is in fact long overdue.[285] Such a body must have an "unobtrusive effectiveness" and supervisory jurisdiction along with neutrality and availability of legal services and expertise, which are seen as the three criteria which determine a party's choice of the status and governing law of

[285] Tselentis International commercial arbitration and the Southern African Community" *Advocate* (2009) 33.

international arbitration. [286] Such a new institution should furthermore be able to present itself as a body that offers arbitral facilities in countries which are up to speed in terms of domestic laws relating to international arbitration and, in particular, legislation which gives full effect to the twin pillars of modern international arbitration, the New York Convention and the UNCITRAL Model Law.[287]

[286] Ibid.
[287] Ibid.

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