

UNIVERSITY OF RWANDA (UR)

College of Arts and Social Sciences

School of Law

Master's in Business Law

**ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS IN RWANDA**

Dissertation submitted in partial fulfilment for the requirements of the
award of Master's degree in Business Law

Presented by

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DECLARATION

I, MUTANGAMPUNDU Alice, declare that to the best of my knowledge this dissertation is original. It has never been presented anywhere at UNIVERSITY OF RWANDA (UR) or other universities and institutions. Where other individuals work has been used, References has been provided and in some cases quotation made. Therefore, I declare that the work presented is my own contribution to the fulfilment of a Master's degree.

Signature.....

Date...../...../.....

DEDICATION

I dedicate this work to:

Almighty God,

My family for their endless love, support and care,

All my friends.

ACKNOWLEDGEMENT

I am grateful to all those people who assisted me to complete this dissertation; it would not have been successful without them.

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Above all I thank my almighty God who gave me this gift of life that without it I would have not enjoyed the usufruct of this education. The Supreme Being has helped me in all my endeavours in life by working through different people in reaching these goals and what I will also achieve in future.

MUTANGAMPUNDU Alice

ABBREVIATIONS AND ACRONYMS

AC:	Amnesty Commission
CCCLAP:	Code of Commercial, Civil, Labour and Administrative Procedure
CHC:	Commercial High Court
CPA:	Concerned Parents Association
CSO:	Civil Society Organization
e.g.,:	For example
EC:	European Commission
<i>Id.</i> :	The same book, the same author and same different page
<i>Idem.</i> :	The same book, the same author and same page
ICC:	International Chamber of Commerce
KIAC	Kigali International Arbitration Centre
LACCM:	Law on arbitration and conciliation in commercial matters
N°:	Number
NYC:	New York Convention.
P:	Page
Para:	Paragraph
PP:	Pages
UN:	United Nations
UNCITRAL:	United Nations Commission on International Trade Law
UNSG:	United Nations' Secretary General
USAID:	United States Agency for International Development
Vol:	Volume
www:	World Wide Web
X:	Unknown Author

ABSTRACT

The law relating to arbitration, in Rwanda, is limited to commercial matters. Studies indicate that parties to a dispute choose arbitration, as opposed to the ordinary court system, because they are interested in a quick settlement and an easy procedure of enforcement of an arbitral award. Available literature indicates that as early as 1968, enforcement of foreign awards had been a matter of concern so much so that inter-state legal instruments relating to the matter had been put in place, especially in Europe. Establishing an international convention relating to enforcement and its coming into force in 1979, notwithstanding, “performance of awards” is still a matter settled in courts of law. A party against whose favour an arbitral award is decided, would not voluntarily welcome the enforcement of an “unwelcome” award unless some legal force looms on the horizon. A legal process denoted as *exequatur* – the enforcement formula – determined by a judge at the level of the Commercial High Court (CHC) in Rwanda is the central theme of this work. This judicial procedure however, is resorted to in the event of failure of enforcement through the legal, contractual established procedure of ‘amicable execution’ of a foreign arbitral award. In fact, *exequatur* ranks behind ‘amicable execution’ and ‘reciprocity’ as guarantees of enforcement. Otherwise, how would a research best explain the phenomena that the CHC heard only one case, in the period that greater than seven (7) years since the 25th of April 2008, yet KIAC has a record of 70% of the awards it rendered having been enforced? This work reveals that businesses, in Rwanda, ought to resort to arbitration, therefore, since *exequatur* is not widely used implying the success of “amicable enforcement” of foreign arbitral awards. Besides, ‘compulsory executions’ is either a second or third alternative to “amicable enforcement”.

TABLE OF CONTENTS

DECLARATION	I
DEDICATION	II
ACKNOWLEDGEMENT	III
ABBREVIATIONS AND ACRONYMS	IV
ABSTRACT	V
TABLE OF CONTENTS	VI
GENERAL INTRODUCTION	1
I. BACKGROUND.....	1
II. STATEMENT OF THE PROBLEM.....	3
III. RESEARCH QUESTIONS	3
IV. HYPOTHESIS	4
V. JUSTIFICATION OF THE STUDY	4
VI. OBJECTIVES OF RESEARCH	5
VI.1. GENERAL OBJECTIVE.....	5
VI.2. SPECIFIC OBJECTIVES	6
VII. METHODOLOGY.....	6
VII. SIGNIFICANCE OF STUDY.....	7
VIII. SCOPE AND LIMITATION OF THIS THESIS	7
IX. SUBDIVISION OF THE RESEARCH	7
CHAPTER I: OVERVIEW ON THE CONCEPTS OF ARBITRATION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.....	9
1.1. UNDERSTANDING ARBITRATION AND ITS KEY FEATURES	9
1.1.1. Arbitration.....	9
1.1.1.1. Definition of arbitration.....	10
1.1.1.2. An arbitration is consensual	11
1.1.1.3. Relationship between Arbitration, Mediation and Conciliation	14
1.1.1.4. Arbitration and obligations of the parties	15
1.1.1.5. Domestic arbitration and international arbitration.....	16
1.1.2. “Commercial”	17
1.2. LEGAL CHARACTER OF AN ARBITRAL AWARD.....	18
1.2.1. The ‘will’ of parties in the arbitration process.....	18
1.2.1.1. Choice and/or negotiated jurisdiction.....	19
1.2.1.2. Choice and/or negotiated enforcement	19

1.2.2. <i>The legal reinforcement of the ‘will’ of contracting parties</i>	21
1.2.2.1. International legal framework	21
1.2.2.2. Rwanda’s Accession to the New York Convention	22
1.3. ARBITRATION RULES	22
1.3.1. <i>Institutional arbitration rules</i>	23
1.3.2. <i>Ad hoc arbitration rules</i>	24
CHAPTER II: REQUIREMENTS FOR ENFORCEMENT OF AN ARBITRAL AWARD	26
2.1. LEGAL ENFORCEMENT-REQUIREMENTS UNDER RWANDAN LAW	26
2.1.1. <i>Requirements for enforcement of foreign arbitral awards</i>	26
2.1.2. <i>Rationale of exequatur</i>	28
2.2. PERFORMANCE OR EXECUTION OF AN AWARD	28
2.2.1. <i>An arbitral award in the context of the NY Convention</i>	29
2.2.2. <i>Arbitration as a successful mechanism of commercial dispute resolution</i>	30
2.2.3. <i>Enforcement of an arbitration agreement</i>	34
2.2.3.1. Procedure for enforcing foreign arbitral awards.....	35
2.2.3.2. Grounds for refusing the enforcement of foreign arbitral awards	36
CHAPTER III: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN RWANDA	41
3.1. INTRODUCING A COURT ACTION FOR ENFORCEMENT BEFORE THE COMMERCIAL HIGH COURT	41
3.2. CASE LAW ON ENFORCEMENT OF ARBITRAL FOREIGN AWARDS IN RWANDA	43
3.2.1. <i>The effect of the NY Convention on Rwandan law</i>	44
3.2.2. <i>Decided cases under Rwandan law</i>	46
3.2.3. <i>Legal conditions for the application of a court enforcement order</i>	48
3.3. OBSERVATIONS ON THE PRACTICE UNDER RWANDAN LAW	48
GENERAL CONCLUSION AND RECOMMENDATIONS	53
1. GENERAL CONCLUSION.....	53
2. RECOMMENDATIONS	56
BIBLIOGRAPHY	58

GENERAL INTRODUCTION

i. Background

Under this study, a presentation of a review of the history of arbitration and the processes set forth by arbitration rules on the international stage has been made. The work equally describes, analyses, and evaluates the legal framework and specific legal provisions applicable to the enforcement of foreign arbitral awards in Rwanda. A brief description of the process of initiating a court action for soliciting the enforcement (*exequatur*) formula, in legal parlance the civil procedure for making a court application, is also included in the discourse. A constant reference to the law N° 005/2008 of 14/02/2008 Law on arbitration and conciliation in commercial matters (hereinafter the LACCM),¹ has been made so as to emphasise the legal framework within the Rwanda territorial jurisdiction. According to Article 1 of LACCM, the scope of the law regards both domestic and international commercial arbitration and conciliation.²

This Law shall not prejudice enforcement of any other Rwandan laws by virtue of which certain disputes may not be submitted to arbitration. Without prejudice to the provisions of paragraph 4 of the said article, the Law applies to any basis of conciliation, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by Law, upon Law or upon request or suggestion of a court, an arbitral tribunal or a competent governmental entity.

Nothing in this Law negates or modifies an obligation that may be established pursuant to other legislation to engage in conciliation. Conciliation does not apply to cases submitted to a judge or to an arbitrator, in the course of judicial or arbitral proceedings in attempts to facilitate a settlement between the parties. Arbitration has traditionally been limited to commercial, business or trade relationships but with the increasing public malaise with the civil court system, arbitration has grown dramatically as an alternative dispute resolution measure.³ To stop the resolution of disputes to areas such as family law, the adjective ‘*commercial*’ has been added to arbitration. Some jurisdictions

¹ Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, *O.G. Special* n° of 06/03/2008.

² *Id.*, Article 1.

³ Berger K. P., *Arbitration Interactive*, London, 2002, p 52.

continue to name their arbitration statutes by the older name of, simply, arbitration act,⁴ and to then, just as with most commercial arbitration agreements, exclude family law disputes from the application of the statute, and to enact separate legislation in regards to labour or labour disputes.⁵

Jurisdictions also distinguish between commercial arbitration and international commercial arbitration, the former for disputes which are exclusively domestic in nature, and the latter in regards to commercial disputes with an element of international commerce (e.g., foreign trade).⁶ On 3rd November 2008, Rwanda acceded to the Convention on the recognition and enforcement of foreign arbitral awards, thus becoming the 143rd State Party to the Convention, also known as the New York Convention.⁷ The Convention requires courts of Contracting States to recognize and enforce arbitral awards made in other States.

Commenting on that Convention, the United Nations' Secretary - General Ban Ki-moon has described it as "a cornerstone of the rule of law in international trade relations." He said that the Convention had provided a basis for enforceable rights and commitments in international commercial agreements, and had given companies the confidence to invest in places which they might otherwise have avoided.⁸

It is recognised that arbitration is not part of the State system of courts. It is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfils the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment. Consequently, the State has an interest in the conduct of arbitration beyond the interest it has in the settlement of disputes by other procedures that are also alternatives to litigation. In the past, this led some countries to exercise strict control over arbitration. In many countries the close connection between arbitration and litigation is illustrated by the fact that the law of arbitration is found in the Code of Civil Procedure.⁹

⁴ Gary B., *International Commercial Arbitration Commentary and Materials* (2nd ed. Transnational Publishers/Kluwer Law International 2001).

⁵ *Ibid*, art 2.

⁶ Craig L. W., Park W. W. and Paulsson J., *Annotated Guide to the 1998 ICC Arbitration Rules with Commentary*, Oceana, 1998, p. 56.

⁷ The Convention entered into force for Rwanda on 29 January 2009.

⁸ <http://www.un.org/apps/news/story.asp>, accessed on 22nd 10/2015.

⁹ Craig L. W., Park W. W. and Paulsson J., *International Chamber of Commerce Arbitration*, 3rd ed., Oceana, 2000, p. 79.

In compliance with Article 16 of the New York Convention (hereinafter the Convention),¹⁰ the courts are able to assure that the proper procedure has been followed in the arbitration by their power to set aside an award or to refuse to recognize or enforce it.

ii. Statement of the problem

The LACCM requires that parties seek to enforce arbitration agreements and to recognise and enforce arbitral awards made in country. The law is widely recognised as a foundation instrument of state (Rwanda) arbitration and provides a significant contribution to facilitating Rwandese and foreign investment and trade.

According to Article 50 of LACCM, an arbitral award, irrespective of the country in which it was made, shall be recognised as binding. However, this shall not be respected if the country in which the award was issued does not respect the cases decided in Rwanda. As stated above, Rwanda ratified the Convention in 2008, becoming the 143rd State party to the Convention. The purpose of LACCM is to remove legal obstacles to national trade by progressively modernising and harmonising trade law. It envisages legal texts in a number of key areas such as national commercial dispute settlement, electronic commerce, and insolvency, international payments, sale of goods, transport law, procurement and infrastructure development.

iii. Research questions

According to the topic of the research, this study is premised on the following research questions:

1. How is enforcement of foreign arbitral awards carried out under the Rwandan jurisdiction given that Rwanda is a Contracting State to the Convention on the recognition and enforcement of foreign arbitral awards?
2. On which grounds an application seeking enforcement of a foreign arbitral award through a court procedure could not be granted?

¹⁰ New York Convention, Article V; Model Law, Articles 34 – 36. See also available at https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf, retrieved on 8th June 2015.

3. What is the practice of the Commercial High Court (hereinafter the CHC)¹¹ regarding the applications seeking enforcement of foreign arbitral awards on the Rwandan territory?

iv. Hypothesis

Following the research questions, the hypothesis of the study is premised on three assumptions. The first is that the legal framework provides the foundation for enforcement of foreign awards without whose approval the awards are non-enforceable. Being an alternative to a rather very wearisome and slow court process, the business community have seized the arbitration process as an answer to commercial disputes thereby often turning to the court procedures to seek redress for enforcement of foreign arbitral awards. A court application seeking for enforcement of a foreign award cannot be granted when certain legal or judicial standards are not met regardless of which country the award was delivered. The research hypothesis of this study states therefore, that the court execution formula is the only guaranteed process for enforcement (*exequatur*) of foreign arbitral awards.

v. Justification of the study

In light of economic reforms and development being realised today specially in Rwanda, in particular, and in the East African Community, in general, the circumstances on the ground really require a variety of alternatives to turn to; in solving commercial disputes if we are to maintain sustainable economic growth. Around the world, arbitration is becoming one of the best options for the business community to solve their commercial disputes. The advantages of using arbitration are enormous and seem to outweigh those using ordinary courts as the previous is: time effective, less costly, confidential, and more effective in using experts to resolve respective disputes.

It is in the above respect that the businessmen or foreign investors perceived arbitration as an international best practice as the way of dispute resolutions; once fully applied in Rwandan legal system, can help Rwanda to reduce caseloads accumulated in its ordinary courts as well as attracting investors. In order to be more effective, the investors need to know if the foreign arbitral award will be recognised and enforced in Rwanda and the procedure to be applied. Rwanda is aware of the importance of arbitration in commercial matters and further steps have been taken and this adopted

¹¹ See the O.L. N°06/2012/OL of 14/09/2012 determining the organisation, functioning and jurisdiction of Commercial Courts, O.G. n°45 of 05/11/2012.

LACCM and the ratification of the Convention on the Recognition and Enforcement of Arbitral Awards.¹² In addition to it, Rwanda is a member of East African Community and an arbitral jurisdiction has been given to the East African Court of Justice, as the judicial organ of the Community.¹³

My choice and interest in the subject stems from the fact in today's world, business has become a central factor in determining the economic life of different countries. As such, there are a number of legal issues emanating from recognition and enforcement of foreign arbitral awards in Rwanda. This raised my interest to choose the topic as there is need to search deeply and find out the requirements for a foreign arbitral award to be recognised and enforced in Rwanda and the effect of international treaties ratified by Rwanda in domain of recognition and enforcement of international arbitration awards.

vi. Objectives of research

Conducting this research was based on both general objectives and specific objectives which were set out, at the commencement of the research, as outlined below.

vi.1. General objective

Illustrating the judicial procedure, both theoretical and practical, through which a party to a litigation through the arbitration procedure and process can secure an enforcement (exequatur) formula from the CHC for an enforcement of foreign arbitral awards, in commercial matters, on the territory of Rwanda.

¹² Presidential Order n° 60/01 of 31/12/2007 on the ratification of the United Nations convention on recognition and enforcement of foreign arbitral awards adopted in New York on June 10th, 1958, *OG*, n°08 of 15 April 2008. See also "Rwanda accedes to UN convention on commercial arbitration" Available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=&Cr1>, accessed 7 August 2015.

¹³See Article 32 of EAC Treaty and Arbitration rules of the East African Court of Justice, available on <http://www.eac.int>, accessed on August 6, 2015.

vi.2. Specific objectives

As stated by the general objective, both the theoretical and practical judicial procedures are the focus areas of this discourse. Accordingly, the research was conducted with the purpose of meeting the following specific objectives:

1. To explore whether or not arbitration as a means of dispute resolution between private parties in commercial transactions has been widely used since the promulgation and entry into force of LACCM in the 06th of March 2008.
2. To establish the extent to which LACCM has been instrumental in the enforcement of foreign arbitral awards on the Rwandan territory.
3. To establish a discourse for facilitating an awareness campaign for the business community to consider arbitration as a legal process which responds to the business needs and techniques of saving time.

vii. Methodology

The methodology through which this research was conducted combined various techniques and methods. The documentary technique, including the use of internet, was so widely relied upon in the literature review as central issue of this discourse is so much about the theoretical and practical procedures of enforcement of foreign arbitral awards. The exegetic interpretation covered up on the gaps left by the documentary technique in providing the sense of legal provisions.

An analysis of case law (decided cases) was an essential technique of methodical conducted by me as the jurisprudence indicates the so much sought practical judicial processes. This approach was so much relied upon in the effort to assess the way laws are implemented. In order to extend the line of thought, comparative case law from several countries was referred to in the effort to elaborate further the relationship between law and practice. Descriptive method was equally used to make analysis of the realities of practise which did not match the expected results of the legal provisions. The synthesis method will also be used in order to summarize our analysis.

vii. Significance of study

The purpose of the research is to promote the use of law as an appropriate dispute resolution mechanism while protecting the rights of the parties involved in the process which is very important to me and to the community generally. It strengthens the laws adopted by the State legislatures and the rules of judicial practice by introducing a legal privilege that allows the parties, the mediator and the other participants in the process to forbid that the information communicated during mediation be used in subsequent court procedures. It is said that this privilege will ensure the uniformity of solutions before the courts of the various States.

viii. Scope and limitation of this thesis

Covering theoretical legal and judicial notions of the legal framework, which provides for arbitration as an alternative judicial mechanism of dispute resolution, on the one hand, and the practice of the CHC in the enforcement of foreign arbitral awards on the territory of Rwanda, on the other hand, forms the scope of this study. Any reference to or specific mention of any information outside these themes has been done so as to make clear the discourse and to zero it down within the limits of this scope.

The limitation of this research was considered both in territorial coverage and duration of time. The consideration of territorial coverage is about the Rwandan territory. The consideration of the duration of time took into account the time at which the LACCM was promulgated and when it was published as well as when the law establishing the Commercial Courts was put in place. As a result, the limitation in time was established to be from March 2008 up to December 2015.

ix. Subdivision of the research

This research work is structured and therefore organised in four chapters. It begins with a general introduction in which the justification and the premises on which the study is based are articulated. It comprises Chapter one, which deals with the general view about 'enforcement' as a legal notion and a judicial process used in putting to end the judicial process which began from the contractually expressed consent of two or more parties. Under Chapter two, a lengthy discussion about the legal

requirements that set the ground for enforcement of an arbitral award, with specific attention to the Rwandan legal context, is presented. Under Chapter three, the practice of the CHC is explored and discussed at length with details of the case which has been received relating to a ‘foreign’ arbitral award. I make comments about the practice, the procedure and the possible scenarios under which the award might have been enforced after the withdrawal of the exequatur application by the applicant. The work has included Chapter Four in effort to present the conclusion and recommendations separately from the research findings. Under this last chapter, a reasoned conclusion and a wide range of recommendations as well as areas for further research are presented.

CHAPTER I: OVERVIEW ON THE CONCEPTS OF ARBITRATION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Particular attention has been focused on the notions which relate to or are commonly used in the process or together with the notion of arbitration. The discussion about the enforcement of an arbitral award has, out of necessity, attracted the attention to the legal character of arbitral award. Certainly, the action seeking enforcement of an arbitral award does not appear and operate in space. There are mechanisms of enforcement. This chapter envelops these actions in their context to arbitration and the enforcement of the result of the arbitration process – the arbitral award. The entire discussion has been premised on the understanding that the action of enforcement is a legal parameter which has to be based on an existing legal framework – which can be either natural (the will of parties) or formal – an existing body of law.

1.1. Understanding arbitration and its key features

This section is dealing with definition of keys concepts and generalities, which are relevant to the subject matter.

1.1.1. Arbitration

The New York Convention provides that “Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration” Nevertheless, the Convention does not define what arbitration is.¹⁴ The term is not even defined in the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law). The architects of this Model Law, in fact, went to the extreme of determining that the definition as being “unnecessary”, although a definition had been proposed by the Secretariat. It is not so clear that the definition of arbitration was unnecessary so much as that it would have been difficult to formulate.¹⁵

¹⁴ See UNCTAD, *Dispute Settlement – International Commercial Arbitration*, 2005, p. 4 citing Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, paras. 15-18, http://unctad.org/en/docs/edmmisc232add38_en.pdf, accessed on August 6, 2015.

¹⁵ *Ibidem*.

1.1.1.1. Definition of arbitration

Schaffer R. *et al.* affirmed that one of the most popular alternative dispute resolution mechanisms is arbitration.¹⁶ They even went further than recognising arbitration as indicated, and made an attempt at providing its definition as “the submission for determination of the disputed matter to private unofficial person(s) selected in a manner provided by law or agreement.” On his part, Gandhi also made a suggestion on the definition of arbitration which states that “arbitration is understood as a method of alternate dispute resolution across the world and recognised as the most effective method of solving commercial disputes, especially those of an international dimension.”¹⁷

In the attempt to seek more insight on what is arbitration, we have considered the definition provided by KIAC which states that “arbitration is a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.”¹⁸ Some of the elements used in this definition appear also in the definition given by R. Goode where he described arbitration as “a form of dispute resolution in which the parties agree to submit their differences to a third party or a tribunal for a binding decision.”¹⁹ In accordance with Rwandan Law, arbitration can also be defined as: “... a procedure applied by parties to the dispute requesting an arbitrator or a jury of arbitrators to settle a legal, contractual dispute or another related issue.”²⁰

From the three descriptive definitions of the term arbitration above, it is clear that the concept of arbitration is a mechanism designed to resolve commercial related disputes, in the context of this research, used by parties out of their free consent, which is supposed to function outside and independent of the ordinary judicial courts or systems. Accordingly, arbitration generally has the following characteristics: it is consensual (parties agree, by a written agreement or by a clause in the contract, to referring a dispute which shall arise in their commercial relations to an arbitration tribunal

¹⁶ Schaffer R. *et al.*, *International Business Law and its Environment*, 5th Ed., West Thomson Learning, St. Paul, MINN, 2002, p. 94.

¹⁷ See “India: Foreign Arbitral Award - Territorial Jurisdiction,” Last Updated on 26th June 2013, by Karan Gandhi, at <http://www.mondaq.com/india/x/247170/Arbitration+Dispute+Resolution/FOREIGN+ARBITRAL+AWARD+TERRITORIAL+JURISDICTION>, retrieved on 3rd May 2015

¹⁸ Bales A. R., *Compulsory Arbitration: The Grand Experiment in Employment*, Cornell University Press, London, 1997, p. 3, available at <http://www.Amazon.com/Compulsory-Arbitration-Grand-Experiment-Employment/dp/0801434467>, retrieved on 25th May 2016.

¹⁹ Goode R., *Commercial Law*, 3rd Ed., LexisNexis Butterworths, London, 2004, p. 1162.

²⁰ Article 3, para. 1, part 1^o, of LACCM, *Supra*, note 1.

or process); it is flexible (the rules on admissibility of evidence is more flexible); it is a mechanism of dispute resolution which runs parallel to the established judicial system of ordinary courts (a decision of an arbitral tribunal has the character of *res judicata* – an arbitration decision, especially a foreign arbitral award, is more enforceable than a court judgement); pre-trial discovery is more limited and less expensive in arbitration; arbitration proceedings are less adversarial than court; it is confidential (arbitration proceedings may be more private) and it is conducted with speed.²¹

1.1.1.2. An arbitration is consensual

On a number of forums, such as the World Intellectual Property Organisation (hereinafter WIPO)²² and in several academic works,²³ arbitration is credited for its inherent characteristics, which distinguish it from other dispute resolution mechanisms. Some of them, e.g., flexibility, independence from the courts (running parallel to the established judicial system of ordinary courts), taking a considerable short time, being less adversarial, and confidentiality have been underlined in the last paragraph of the preceding sub-section. In this work, the characteristic of being ‘consensual’²⁴ has been paid much attention out of the perspective of its close relation to the beginning of the arbitration process (the arbitration agreement) and the closing of the arbitration process (performing or enforcement²⁵ of the arbitral award). The discussion has been limited to this characteristic for the purposes of keeping the course of the discussion within the parameters of the work.

The assertion that “parties in the international commerce and businesses prefer arbitration as an amicable measure for resolving disputes ...”²⁶ is not at all farfetched. The authors retains the word “prefer” as key to the above assertion, to the extent that it highlights the element of the “will” of parties which is a foundation of contract law. By preference to arbitration, the parties establish a law

²¹ Schaffer R. *et al.*, *Supra*, note 16, p. 94.

²² See Brekoulakis S., “Principal characteristics of Arbitration” available at <http://www.wipo.int/amc/en/arbitration/what-is-arb.html>, retrieved on 15th June 2016.

²³ Goode R., *Supra*, note 19, p. 1174.

²⁴ “Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract. An existing dispute can be referred to arbitration by means of a submission agreement between the parties. In contrast to mediation, a party cannot unilaterally withdraw from arbitration.” See Brekoulakis S., *Supra*, note 22. See also Goode R., *Supra*, note 19, p. 1174.

²⁵ The end of enforcement is closely associated with the consensual characteristic of arbitration when the enforcement is voluntary.

²⁶ See “India: Foreign Arbitral Award - Territorial Jurisdiction,” *Supra*, note 17.

of resolving future disputes which might arise out of the commercial activities in which they are involved. It is generally an established principle that arbitration must be founded on the agreement of the parties.²⁷

It is important to underscore that the requirement of an “agreement in writing” which therefore, encompasses an agreement “under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them,” is articulately provided for under Article II, para. 1, of the New York Convention. It essentially reveals that the architects of the Convention took into consideration the perspective that the submission agreement (*acte de compromis*) by which an already existing dispute is referred to arbitration and the arbitration clause (*clause compromissoire*) by which a possible future dispute shall be submitted to arbitration ought to be treated at the same rank or in an equal manner.²⁸

The Convention maintains the importance of the notion of such an equal treatment throughout its text in the context of the use of the general term “arbitration agreement”.²⁹ Like in most domestic arbitration laws in which this equal treatment is nowadays accepted, which was different in 1958 at the time of signing the New York Convention,³⁰ the Rwanda law provides for “... an agreement by both parties to submit to arbitration all or certain disputes which *have arisen* or which *may arise* between them in respect of a defined legal relationship”³¹ The consensus of the parties may provide for referring a dispute to an arbitration tribunal regardless of the time of the realisation of the dispute, provided the agreement on arbitration has established the scope of the agreement.

At the time when the New York Convention was negotiated in 1958, the world economy was run by two distinct economic systems. The Soviet Union and other countries ran a State-trading system and had a system of compulsory arbitration. It became an issue of concern to the extent that the architects of the New York Convention questioned whether such a system would qualify to be denoted as arbitration or whether it was a special system of State adjudication. The consideration for this system of state involvement in the then considered arbitration process of the socialist system compelled the

²⁷ Article II, para. 1, of the New York Convention, *Supra*, note 10. See also Article 9, para. 2, of LACCM, *Supra*, note 1.

²⁸ See “The New York Convention of 1958: An Overview,” by Berg J. A., p. 6, at http://www.arbitration-icca.Org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf, retrieved on 11th May 2016.

²⁹ *Ibidem*.

³⁰ *Ibidem*.

³¹ Article 9, para. 1, of LACCM, *Supra*, note 1.

writers of the New York Convention to conceive the meaning of the term “arbitral award” as to include “... not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”³²

Although the New York Convention took into consideration the incorporation of the socialist or communist form of arbitration, the limitation set in the wording that “... awards made by ... permanent arbitral bodies to which the parties have submitted” provided the leeway for the parties to consent to referring their commercial disputes to either the arbitrators they have individually appointed or to an already existing arbitration tribunal, whether or not established by the state. The essence of choice by the parties as to which arbitrator and which rules of procedure was therefore secured by the provision of the New York Convention. “The arbitration tribunal ... is bound to effectuate the intentions of the parties.”³³

³² See Article I(2) of the New York Convention, *Supra*, note 10. See the “Arbitration Procedural Code of the Russian Federation, No. 95-FZ, July 24, 2002,” <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru072en.pdf>, retrieved on 12th August 2015. This code establishes various procedures such as Procedure in Case to Challenge an Arbitral Award or Obtain a Writ of Execution of an Arbitral Award (Chapter 30, Arts 230 to 240), and the Procedure in Case for Enforcement of Foreign Judgment or a Foreign Arbitral Award (Chapter 31, Arts 241 to 246).

³³ Schaffer R. *et al.*, *Supra*, note 16, p. 95.

1.1.1.3. Relationship between Arbitration, Mediation and Conciliation

The Rwandan LACCM's purpose is spelt out to be the "... establishment of arbitration and conciliation procedure in commercial matters."³⁴ Even though part of the preceding provision establishes that the LACCM shall not in any way obstruct³⁵ the application of any other law under the Rwandan jurisdiction by virtue of which parties may submit to for the resolution of certain disputes other than arbitration, within the same provision the LACCM provides for its application to disputes on any basis of conciliation.³⁶ In fact, the LACCM establishes the procedure of conciliation under its Chapter III.³⁷ It is worth noting that, however, whereas conciliation is mentioned together with arbitration, KIAC has moved a step further to develop rules of mediation.³⁸

It is therefore worth assessing the relationship between these three ADR mechanisms so as to be able to understand arbitration without making confusion with the other two mechanisms. Some authors have argued that mediation and conciliation could be possible alternatives to international commercial arbitration.³⁹ It is said that these two terms are sometimes used interchangeably even though there is a distinction between them. While a mediator will make an effort to bring the parties together so that they, themselves, could reach an agreed settlement, a conciliator establishes a plan of what that settlement could be in the view of the conciliator. The procedure of conciliation functions on the basis of what has been proposed as "a fair compromise of a dispute".⁴⁰

It is argued that arbitration and mediation are similar in their inherent characteristic of being alternative mechanisms to traditional litigation. A similar characteristic shared by these two ADR is that there is a neutral third party meant to oversee the process. Whereas arbitration is often conducted with a panel of multiple arbitrators who take on a role like that of a judge, mediation is, on the other hand, generally conducted with a single mediator who does not judge the case but simply helps to facilitate discussion and eventual resolution of the dispute.⁴¹

³⁴ Article 1 of LACCM, *Supra*, note 1.

³⁵ Article 2, para. 2, of LACCM, *Id.*

³⁶ Article 2, para. 3, of LACCM, *Id.*

³⁷ Articles 53 – 63 of LACCM, *Supra*, note 1.

³⁸ KIAC Mediation Rules 2015, pp. 1-9.

³⁹ Redfern A. and Hunter M., *Law and Practice of International Commercial Arbitration, Superseded Ed.*, Sweet & Maxwell, London, 1999, p. 20.

⁴⁰ *Ibidem.*

⁴¹ McIlwrath M. and Savage J., *International Arbitration and Mediation: A practical Guide*, Kluwer Law International, New York, 2010, p. 19.

On the other hand, the conciliator is not empowered to directly resolve the dispute and render a decision. Instead, the parties of the dispute themselves do engage so as to achieve an agreement, which is attained thanks to the facilitation of the conciliator. It should be emphasised that whereas an arbitration award is final, the agreement achieved through conciliation is not binding⁴² on the parties. The relationship between the three ADR mechanisms is their status as legal mechanisms of settling disputes. Other than arbitration, where the award is legally binding, mediation and conciliation are ADR mechanisms which differ in the sense that they do not result in a binding or enforceable award. Mediation and conciliation are ADR mechanisms, in their own right, with which international commercial disputes can be resolved, but they are rarely used in the practice of dispute resolutions for international commercial disputes.⁴³ The effect of either arbitration, which is by far the major distinction from the other two ADR mechanisms, is that parties reach a settlement that is binding and therefore, if one party does not voluntarily implement the agreement, the other can institute court or arbitration proceedings.⁴⁴

1.1.1.4. Arbitration and obligations of the parties

Until this stage, the discourse on understanding arbitration has indicated that it is an ADR based on the existing international law, the domestic law and the law of the parties – the written agreement. In fact, even though primary interest of the New York Convention is encompassed in the recognition and enforcement of an already existing award, in its Article II, para. 3, it specifically requires enforcement of agreements to arbitrate. In particular, Article II (3) provides, *inter alia*:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”⁴⁵

⁴² This information contradicts the provision of Article 63 of LACCM, *Supra*, note 1, which provides that, the settlement agreement is binding and may be forcefully enforced if the parties conclude an agreement for settling a dispute under conciliation.

⁴³ Redfern A. and Hunter M., *Supra*, note 39, p. 21. See also McIlwrath M. and Savage J., *Supra*, note 41, p. 22.

⁴⁴ See <http://www.sblaw.vn/entry/what-is-the-difference-between-arbitration-and-conciliation#sthash.VUVGHJ9b.dpuf>, accessed on 19th May 2016.

⁴⁵ Bermann A. G., “Recognition and enforcement of foreign arbitral awards: the application of the New York Convention by national courts,” An Academic Paper presented at Columbia Law School on 2nd July 2014, p. 24, available at http://www.iacl2014congress.com/fileadmin/user_upload/k_iacl2014congress/General_reports/Bermann-General_Report_Recognition__Enforcement_of_Foreign_Awards_July_2_2014__2_.pdf, retrieved on 9th May 2016.

In most of the legal setting, an agreement is binding and therefore, like the arbitration rules such as the ICC Arbitration Rule 28(6), establish obligations for the parties to the agreement. It has to be underlined that a procedure that does not lead to a final and binding determination of the rights and obligations of the parties cannot be denoted as arbitration. Similarly, an agreement has to be binding upon the parties so as to facilitate the arbitration process. Otherwise, there would be no arbitration awards if the parties would be allowed to resort to litigation in the presence of an arbitration agreement which is not enforced. The requirement that courts refer the parties to arbitration may entail staying a court litigation process that has been brought in putative violation of an agreement to arbitrate. Alternatively, "... it may also entail issuance of an order compelling arbitration which, if issued to the Claimant, will require that party to pursue proceedings, if at all, in an arbitral forum, and if issued to the opposing party, may require that party to appear in the arbitration once instituted."⁴⁶

According to G. A. Bermann, in a very large majority of countries, there is a dominant view which appears to be that "agreements to arbitrate are subject, in regard to their validity and enforceability, to standard principles of contract law drawn from one jurisdiction or another, depending on applicable choice of law rules."⁴⁷ This view is often strengthened in the case of some countries by a presumption (often a powerful presumption) favouring the enforceability of agreements to arbitrate.⁴⁸ It is in that view that the obligations of the parties to refer to arbitration and, even when the award is rendered, to voluntarily enforce the award, are reiterated.

1.1.1.5. Domestic arbitration and international arbitration

The modern view is that arbitration is governed by the law of the place in which it takes place.⁴⁹ Every arbitration in that sense, therefore, taking place within a State is a domestic arbitration in that State. Many States draw a distinction however, between arbitrations that are considered to be domestic and those that are considered to be international. One of the consequences may be that the types of disputes that may be submitted to arbitration are different in an international arbitration. For

⁴⁶ *Idem*, p. 25.

⁴⁷ *Idem*, p. 26.

⁴⁸ *Ibidem*.

⁴⁹ New York Convention, Article V(1)(e), *Supra*, note 10.

example, in some States claims of anti-trust violation may be submitted in an international arbitration but not in a domestic arbitration.⁵⁰

Similarly, some States permit the State or State entities to enter into valid arbitration agreements only if the arbitration would be international. Finally, following the lead of the UNCITRAL Model Law, many States have different laws governing domestic and international arbitrations. It follows that the distinction between domestic and international arbitrations is a matter of national law. There is no generally accepted distinction and there does not need to be since the New York Convention applies to “foreign” awards.

1.1.2. “Commercial”

The word “commercial” is a derived adjective from the noun “commerce”. The preoccupations of commerce deal with the buying and selling of goods, the exchange of commodities and the distribution of the consumable products and services.⁵¹ This means that commerce is a system of business which is concerned with the exchange of goods and services and includes all those activities which directly or indirectly facilitate that exchange. The system and the activities included are best described as “commercial” activities.

When it is remarked that the New York Convention is not by itself limited to arbitration in respect of commercial disputes it implies that the Convention can be referred to in the settlement of non-commercial disputes. The limitation to commercial disputes applies only if a State makes the necessary declaration.⁵²

It has become common to speak of international “commercial” arbitration, but there is no clear concept of what is meant by “commercial”. As early as the 1923 Protocol on Arbitration Clauses,

⁵⁰ In the case *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (U.S. Supreme Court 1985), the Supreme Court of the United States held that anti-trust claims could be submitted to arbitration when they arose in an international dispute, “even assuming that a contrary result would be forthcoming in a domestic context,” see Schaffer R. *et al.*, *Supra*, note 16, p. 95.

⁵¹ Singh Y. K., *Teaching Practice: Lesson Planning*, Googlebooks, APH Publishing, p. 208, retrieved on 9th May 2016.

⁵² Until the time of writing this dissertation, only 44 of the current 156 Contracting States, have made a declaration limiting the Convention to commercial matters which those 44 States do consider as commercial under their national law. The official list of Contracting States to the New York Convention with any declarations or reservations they may have made can be found on the web site of the United Nations Treaty Section, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXXII/treaty1.asp>, accessed on 13th February, 2016.

Contracting States recognised the validity of an arbitration clause “by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration,” The Protocol then went on to say that “Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law.”⁵³

Moreover, in a footnote to the UNCITRAL Model on International Commercial Arbitration, it is stated that 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. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.⁵⁴

1.2. Legal character of an arbitral award

A legal basis for the enforcement of an arbitral award can be traced, primarily, from the foundations of the agreement establishing the commercial relationship between parties mentioned in the arbitral award. This section provides an insight into the basis for the legal quality of an award which stems from the commercial relationship between the parties.

1.2.1. The ‘will’ of parties in the arbitration process

The first sentence of paragraph one of Article 64 of the Law governing contracts⁵⁵ in Rwanda provides for a legal principle that “Contracts made in accordance with the law shall be binding between parties.” The law of the parties under the arbitration process is usually provided by arbitration agreement established either in a contract or in an agreement established separately from the contract.⁵⁶ Parties may choose international commercial arbitration to solve their disputes based

⁵³ Both the UNCITRAL Model Law on International Commercial Conciliation and the UNCITRAL Conciliation Rules can be found on the UNCITRAL website, <http://www.uncitral.org>.

⁵⁴ See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

⁵⁵ Law N° 45/2011 Of 25/11/2011 Governing Contracts, O.G. No 04bis of 23/01/2012.

⁵⁶ Article 9, para. 1 of LACCM, *Supra*, note 1.

on reasons which can be either applicable to arbitration in general or those that are applicable specifically to international arbitration.

1.2.1.1. Choice and/or negotiated jurisdiction

The most favourable situation for a party to a dispute in an international commercial transaction is to litigate in one's own courts or courts of one's own choosing. Even if the courts may be methodically unbiased, a particular party enjoys the privilege of litigating a dispute in a jurisdiction which was pre-meditated at the time of establishing the arbitration agreement given the advantages of either well known procedures or own domestic language.⁵⁷ This is a very big advantage viewed from the perspective of one party in the arbitration process which is of an international character. In order to ensure equality between the parties during the arbitration process, the legal framework has established rules of procedure which guarantee such equality. In fact, the rule regarding equal treatment is recognised to be on the same footing like the arbitration rule or principle regarding the autonomy of parties.⁵⁸

1.2.1.2. Choice and/or negotiated enforcement

International commercial arbitration has gained in popularity due to relative ease of enforcement of an arbitral award as compared to the enforcement of a judgment of a foreign court or a domestic arbitral award. There are a number of bilateral treaties for the enforcement of judgments. There is also a multilateral treaty relation to the enforcement of judgments, which exists only between the member States of the European Union.⁵⁹ Whereas the majority of international and bilateral agreements have specifically been put in place to regulate commercial matters, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (hereinafter the Hague Convention),⁶⁰ focuses on the regulation of either civil or commercial

⁵⁷ See Article III of the New York Convention, *Supra*, note 10.

⁵⁸ Redfern A. and Hunter M., *Supra*, note 39, p. 226.

⁵⁹ Brussels Convention of 1968, which has been replaced for all Member States of the EU except Denmark by Council Regulation (EC) No. 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001].

⁶⁰ See the Hague Convention on Foreign Judgments in Civil and Commercial Matters available at https://en.wikipedia.org/wiki/Hague_Convention_on_Foreign_Judgments_in_Civil_and_Commercial_Matters, retrieved on 24th May 2016.

matters.⁶¹ The inclusion of civil matters in the areas regulated by the the Hague Convention makes it an international legal framework through which matters relating to private disputes, regarding the area of civil relations or Private International Law, can be resolved.

Unlike the NY Convention, whose membership now is said to be 156 States,⁶² the Hague Convention is said to have, as of 2013, only five countries as signatories to the convention.⁶³ Despite the low number of signatory countries, the Hague Convention has been listed among thirteen conventions which entered into force in the year 1979.⁶⁴ While illuminating the issue of “performance of awards”, Redfern A. and Hunter M argued that here is such a thing like “voluntary” performance of awards. They reasoned that behind the apparent “voluntary” performances of awards there is, always, some element of pressure born on the losing party to perform the award. They categorised the elements of pressure as either commercial or ‘other’ pressures.⁶⁵ This assertion points to the end of the arbitration process which is no longer a matter of choice but an obligation. The losing party is unlikely to wholly, voluntarily perform an “unwelcome” arbitral award.⁶⁶ The obligation born out of the arbitration agreement as well as the existing legal framework determines the course of performance of awards.

The Hague Convention provides for the application of its provisions, according to Article 3 irrespective of the nationality of the parties to a commercial or civil agreement. It also provides for the rules that shall apply in relation to the status of the defendant.⁶⁷ In accordance with the provisions under Article 21, it shall take two States, which are parties to the Convention to conclude a Supplementary Agreement so that decisions rendered in a Contracting States can be recognised or enforced in accordance with the convention procedures established under Article. 13 to 19.⁶⁸ Besides, Article. 26 provides for as status of the provisions of the Convention as not prevailing over other Conventions to which the Contracting States are or may become Parties in special fields and which contain provisions for the recognition and enforcement of judgments although there is a status

⁶¹ Article. 1, paragraph 1, *Id.*

⁶² See http://www.newyorkconvention1958.org/index.php?lvl=cmspage&pageid=7&id_news=679, retrieved on 25th May 2016.

⁶³ See Category: Treaties entered into force in 1979 available at https://en.wikipedia.org/wiki/Category:Treaties_entered_into_force_in_1979, retrieved on 30th May 2016.

⁶⁴ *Ibidem.*

⁶⁵ Redfern A. and Hunter M., *Supra*, note 39, p. 315.

⁶⁶ *Ibidem.*

⁶⁷ Article 10, the Hague Convention, *Supra*, note 62.

⁶⁸ Article 21, *Id.*

contrary to this one as provided for under Articles 24⁶⁹ and 25.⁷⁰

While there are lingering problems with implementation of the NY Convention by the courts in some States, they are on the whole relatively minor ones compared to the implementation of the Hague Convention. Consequently, parties may choose to enter into an arbitration agreement with the intention that the enforcement of the arbitral award takes the form of respecting the reciprocity of the country in which the award was awarded. The states in which the award was rendered and the one in which enforcement is being sought might significantly affect the choice of the parties in choosing which arbitral rules given the provisions in the legal framework which regulate the status of the parties and the policies of the enforcing state.⁷¹

1.2.2. The legal reinforcement of the 'will' of contracting parties

1.2.2.1. International legal framework

The New York Convention forms the first international legal framework for reinforcing the will of parties to any one given dispute referred to arbitration. According to Albert Jan van den Berg, the USA adopted the Convention with the sole goal and principal purpose being "... to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."⁷² P. Sanders asserted that the Convention has become the centre piece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration

⁶⁹ This Convention shall not affect other Conventions relating to the recognition and enforcement of judgments to which the Contracting States are already Parties so long as those States have not concluded a Supplementary Agreement under the terms of Article 21.

⁷⁰ Whether or not they have concluded a Supplementary Agreement under Article 21, the Contracting States shall not conclude between themselves other Conventions relating to the recognition and enforcement of judgments within the scope of this Convention unless they consider it necessary, in particular, because of economic ties or of particular aspects of their legal systems.

⁷¹ Goode R. *et al.*, *Transnational Commercial Law: International Instruments and Commentary*, Oxford, New York, 2004, p. 945. See also Goode R., *Supra*, note 19, p. 1199.

⁷² This was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. See "Contracting States", by Berg J. A., available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp>, accessed on 13th February, 2016.

agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonised fashion.”⁷³

1.2.2.2. Rwanda’s Accession to the New York Convention

UNCITRAL announced on the 3rd of November 2008, that Rwanda has become the 143rd country to accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention entered into force for Rwanda on 29th January 2009. Under the treaty, courts of the States Parties are required “to enforce arbitration agreements and to recognise and enforce arbitral awards made in other States”.⁷⁴

Even where a country has ratified the New York Convention, it must implement it through national legislation and its courts must then properly apply that legislation.⁷⁵ As a result, Rwanda established the law on arbitration and conciliation in commercial matters, which is the domestic form of implementation of the New York Convention.⁷⁶

1.3. Arbitration rules

An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a clause calling for arbitration in State A and to the enforcement of any award that would result.

⁷³ See Sanders P., April 2011, at http://www.conversdill.com/publicationfiles/2014_10_Article_The_New_York_Convention, retrieved on 24th/11/2015.

⁷⁴ Available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention>, Accessed on 25th 10/2015.

⁷⁵ Mclaughlin T. J. and Genevro L., Berkeley Journal of International Law, *Enforcement of Arbitral Award under the New York Convention-Practice in US Courts*, Vol. 3, Issue 2 Winter Article2, p. 253.

⁷⁶ Article 51 of LACCM, *Supra*, note 1.

In some legal systems like, for instance under the Brazilian jurisdiction, the law does not distinguish between domestic and international arbitration⁷⁷ as is the case with Rwandan law.⁷⁸ The law does, however, set different mechanisms for parties to either seek for or resist enforcement of an arbitral award, depending on whether it is deemed domestic or foreign.

1.3.1. Institutional arbitration rules

It was noted above that all modern arbitration laws allow the parties to decide on the procedure to be followed in the arbitration. In most cases the parties exercise that right by choosing an arbitration institution in which the arbitration will take place. Any arbitration that takes place in the context of an institution will be conducted in accordance with the rules of that organization.⁷⁹ Therefore, the rules of the various arbitration institutions constitute the third level of legal rule governing international commercial arbitration. The rules set forth the procedures for the commencement of the arbitration, the appointment of the arbitrators, the conduct of the proceedings and the issuance of the award.

Although all of these matters may be in the arbitration law as well, the institutional rules may reflect the particular needs of the type of arbitrations that take place at that institution. Rules for arbitrations in the commodity trades need not be, and probably should not be, the same as those in the construction industry. Most arbitration organizations have only one set of arbitration rules. Differentiation in procedure arises out of the specialization of the organizations. However, some arbitration organizations have multiple rules for different types of disputes.⁸⁰

⁷⁷ See *Nuovo Pignone v. Petromec*, “The Definition of Domestic and Foreign Arbitral Awards in Brazil: A Critical Analysis of the Decision,” as of 26th March 2012, at <http://blogs.law.nyu.edu/transnational/2012/03/the-definition-of-domestic-and-foreign-arbitral-awards-in-brazil-a-critical-analysis-of-the-decision-in-nuovo-pignone-v-petromec/>, retrieved on 10th May 2016.

⁷⁸ Article 3, part 4^o, of LACCM, *Supra*, note 1, does provide for a distinction between an international arbitration as opposed to a national arbitration. The law does not provide for a different set of rules for either kind of arbitration. Conversely, the law provides for a different regime of enforcement when it comes to enforcement of foreign awards – see Article 204 of the Law on CCCLAP.

⁷⁹ Many arbitration organizations have indicated that they are willing to administer arbitrations where the parties have agreed on the use of the UNCITRAL Arbitration Rules.

⁸⁰ The American Arbitration Association lists on its web site 44 different sets of rules for use in particular types of disputes. <http://www.adr.org/RulesProcedures>, retrieved on 20th July 2015. Some of the rules are specific to particular states within the United States.

1.3.2. *Ad hoc arbitration rules*

Some arbitration takes place without any reference to an arbitration institution. They are referred to as *ad hoc* arbitrations. There are many reasons why two parties may decide to have an *ad hoc* arbitration rather than one in the context of an arbitration institution. One of the more prominent is that arbitration involving a limited amount of money and two parties in agreement that they wish to arbitrate their dispute may be less expensive and cumbersome as an *ad hoc* arbitration than one in an institution. The parties may also choose *ad hoc* arbitration because they were not able to agree on an institution.

Difficulties inherent in an *ad hoc* arbitration have been largely overcome by the preparation of two sets of rules for *ad hoc* arbitrations, the ECE Arbitration Rules and the UNCITRAL Arbitration Rules. The parties can provide in the arbitration clause in their contract that any dispute they may have will be settled by arbitration in accordance with the Rules. If a dispute does arise that must be settled by arbitration, the rules of procedure have already been agreed upon and the arbitration can commence. While the ECE Arbitration Rules have been widely used on the continent of Europe, they have been eclipsed by far by the UNCITRAL Arbitration Rules.⁸¹

The least involvement of the institution comes from being named as the “appointing authority”. If the parties are unable to appoint the arbitrator or one or more of the arbitrators in a three member tribunal, the Rules authorize the appointing authority to do so.⁸² If a challenge is made to an arbitrator, the challenge will be heard by the appointing authority.⁸³ At its 1982 session in recognition that a number of arbitration institutions had used the Rules as the basis for their own institutional rules, UNCITRAL adopted “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules.”⁸⁴

Redfern A. and Hunter M, after putting forward a suggestion that “the term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial

⁸¹ **Id. Articles 10 – 12.**

⁸² **The Recommendations are available on the UNCITRAL web site, www.uncitral.org.**

⁸³ ***Ibidem***

⁸⁴ **It has been suggested that the 1999 “IBA Rules on the Taking of Evidence in International Commercial Arbitration” and the 2004 “IBA Guidelines on Conflicts of Interest in International Arbitration”, both products of the Arbitration Committee of the International Bar Association, represent such a developing consensus in their respective areas. See Goode R. *et al.*, *Supra*, note 71, p. 982.**

nature,” they have hastened to indicate a long list of examples of such matters that might arise from the relationships considered as commercial in nature.⁸⁵ These authors have acknowledged the fact that the list they provided is not, in any manner, exhaustive. For the purpose of more clarity, the term ‘commercial’ has been described as a generic term for almost all aspects of buying and selling.⁸⁶ By virtue of these references, the term ‘commercial’ in this work has been used to in the context of encompassing all aspects of international trade and business.⁸⁷

It is against this background that the discussion in this work will be centred on international commercial arbitration as is covered by the NY Convention and provided for by the LACCM.⁸⁸ The matter of enforcement of foreign arbitral awards is, hereby, discussed bearing in mind the international nature of commercial relationship and considering the aspects of whatever might be termed as foreign in the parameters of either international or domestic laws. This leads us to the discussion in the next chapter regarding the substantive and procedural requirements which are prerequisites to enforcement of a foreign arbitral award.

⁸⁵ Redfern A. and Hunter M., *Supra*, note 39, p. 16.

⁸⁶ Reisman W. M. *et. al.*, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes*, The Foundation Press Inc., New York, 1997, p. 1254.

⁸⁷ Redfern A. and Hunter M., *Supra*, note 39, p. 16.

⁸⁸ Article 3, part 4, of LACCM, *Supra*, note 1.

CHAPTER II: REQUIREMENTS FOR ENFORCEMENT OF AN ARBITRAL AWARD

Both domestic and international legal frameworks relating to enforcement of an arbitral award are covered in this chapter. Consideration have been made about the use and force of the Law N° 005/2008 of 14/02/2008 on LACCM,⁸⁹ in relation with the Law N° 21/2012 of 14/06/2012 Law relating to the Civil, Commercial, Labour and Administrative Procedure (hereinafter the Law on CCCLAP).⁹⁰ The discussion in this chapter also includes an examination of the legal framework within which the implementation of arbitration rules under the domestic law and the New York Convention is made practical. Other requirements, other than legal provisions, are also covered so as to elaborate the details of which necessities an award should exhibit in order to be enforced in Rwanda. We have laboured to illustrate the parameters under which an arbitral award can or cannot be enforced in Rwanda, when certain conditions are present or absent, respectively.

2.1. Legal enforcement-requirements under Rwandan law

An arbitral decision is foreign where the award was made in a state other than the state in which enforcement is being sought or where foreign procedural law was used.⁹¹ Under the New York Convention 1958, an award issued in a contracting State can generally be freely enforced in any other contracting State, only subject to certain, limited defences. Only foreign arbitration awards are enforced pursuant to the New York Convention in accordance with the status of the State in which the enforcement is being sought or in which the award was awarded given the 44 states that declared that New York Convention to apply to commercial matters only.⁹²

2.1.1. Requirements for enforcement of foreign arbitral awards

In accordance with Article 204 of the Law on CCCLAP, the procedure established by this law takes into consideration a mandatory legal procedure by which foreign deeds, issued by foreign officials, are only subject to execution in Rwanda. This procedure is referred to as *exequatur*.⁹³ The law provides that “The execution of ... acts are intended to provide their beneficiary with the privileges of

⁸⁹ *Supra*, note 1.

⁹⁰ Official Gazette n° 29 of 16/07/2012.

⁹¹ Article one of the New York Convention of 1958, *Supra*, note 10.

⁹² See Note 24.

⁹³ Article 204 of the Law on CCCLAP.

his/ her right, either in kind or the equivalent.”⁹⁴ It is on this basis that the same law provides for ‘*exequatur*’ – the party who is the beneficiary of the arbitral award ought to be provided with the privileges of the right stemming from the award.

Further than the parameters of the rights to be provided, the law provides for two mechanisms of enforcement – the voluntary execution⁹⁵ and compulsory execution.⁹⁶ It should be understood that under voluntary execution, the debtor party implements the arbitral award without the involvement of the court. This mechanism is permissible under this law of CCCLAP whether or not the award is foreign or not. For this matter a foreign arbitral award can be enforced in Rwanda, as an exception therefore, without necessarily being rendered enforceable under the procedure established by Article 204 of the Law on CCCLAP.

Provisions of Article 198 of the Law on CCCLAP do establish the requirements for execution – read enforcement – which falls within the ambit of both Article 196 and Article 197 mentioned in the previous paragraph. Note that “arbitral awards” are mentioned among the list of enforcement orders as are established by Article 198. This implies that, in accordance with paragraph one of Article 198, a foreign arbitral award is, by its legal status, an ‘enforcement order’. It is important to note that the requirement that the mentioned or listed orders must be “... containing clauses permitting creditors to sell mortgaged property without recourse to judicial proceedings,” is a legal framework which falls under the ambit of Article 196, since the mentioned or listed orders are mentioned regardless of whether they are domestic or foreign orders.

On the contrary, the requirement that the mentioned or listed orders must be “... bearing the *exequatur* formula by a competent Rwandan judicial authority” is a legal framework which specifically falls under the ambit of Article 197, since the mentioned or listed orders are reinforced by their legal character with the *exequatur* formula. Paragraph two of Article 198 affirms the assertion about the orders mentioned in the second legal framework falling under the ambit of Article 197. Under the ambit of Article 197, the orders which are reinforced with the *exequatur* formula are, therefore, enforced in Rwanda under the legal framework of Articles 199, 200 and 201 of the Law on CCCLAP.

⁹⁴ *Idem.*, Article 195.

⁹⁵ *Idem.*, Article 196.

⁹⁶ *Idem.*, Article 197.

2.1.2. Rationale of exequatur

An analysis of the necessity of the exequatur formula in the process of execution begins with the commercial relationship of the parties mentioned in an arbitral award, which is established by a written contract and the provisions of Article 196. The arbitral award originates from a private contract between parties, who might be two or more than two. At the beginning of a dispute that is subject to be settled by the arbitration process, parties at both sides of the dispute are still conforming to the contract. It is likely that when the award is finally reached and notified to the debtor, the party who becomes the debtor may not feel compelled to implement the decision of the award in accordance with Article 196 of the Law on CCCLAP.

As a result, the party in whose favour the arbitral award was decided will be compelled to seek for the restitution of its rights as provided for under Article 195 of the Law on CCCLAP. As a matter of course, the implementation of the arbitral award takes the course of the provisions of Article 197. Under these circumstances, the party in whose favour the arbitral award was decided will be subject to the procedures provided for under Articles 203 – 209. These procedures require the force of the exequatur formula as provided for under Article 198, para. 2. This assertion is equally true for Arts, 253 and 283 of the Law on CCCLAP. The exequatur formula is necessary, therefore, in the enforcement of a foreign arbitral award in circumstances where the debtor party has failed to honour its obligations to implement the arbitral award in an amicable manner.

2.2. Performance or execution of an award

A party in whose favour an arbitral award was rendered benefits from the award on two scenarios. Either the party against which the award was rendered voluntarily enforces the award, failure of which, the latter resorts to the scenario of forced enforcement through a court decision. In the circumstances of seeking a court enforcement order, the party is faced with technical decisions regarding the jurisdiction under which the decision will be enforced. It is obvious that under most of the circumstances, enforcement ought to “be sought in country where the losing party has property

available to meet the award.”⁹⁷ In case the party is faced with a choice where there is more than one such country, the proceeding question that is likely to preoccupy the party is about the likelihood of “the courts of a given country are to enforce a foreign arbitral award.”⁹⁸ Thus, like a party who might wish to enforce a foreign arbitral award in any of the States of the Cooperation Council for the Arab States of the Gulf (hereinafter the GCC States) may wish to know how its legal systems operate, it applies to any party who would like to seek the enforcement of a foreign award anywhere on the globe.⁹⁹

For instance, if a party is envisaging seeking for a court order enforcing an award in the United States, the party will need only to “supply the authenticated original award or a certified copy thereof, the original or certified copy of the arbitration agreement, and official or sworn translations if appropriate, within three years after the award.”¹⁰⁰ The enforcement of the award in the US is not dependent upon whether it was rendered by an institutional or ad hoc arbitration. The United States district courts are legally competent, by jurisdiction, to hear applications to confirm or challenge awards, which are then tried as motions without jury trial.¹⁰¹ The court may require the deposit of security if the award is challenged, and a judgment of confirmation has the same force and may be enforced as a judgment in an action.¹⁰²

2.2.1. An arbitral award in the context of the NY Convention

There are two basic methods of defining an international arbitration for the above-mentioned purposes. One is to consider the transaction; does it involve a transaction that is either in a State other than the place of arbitration or that takes place in two or more States. The other method is to consider the parties; do they come from different States. It is usually the case that two natural persons who are citizens of different States will be considered to be from different States. However, a long-term

⁹⁷ Abdullah Mubarak A. A., “An analytical study of Recognition and Enforcement of foreign Arbitral Awards in the GCC States,” A Thesis Submitted to the School of Law, University of Stirling for the Degree of Doctor of Philosophy (PhD), September 2010, p. 7, available at <https://dspace.stir.ac.uk/bitstream/1893/2943/1/Abdullah%20Thesis.pdf>, accessed on 14th April 2016.

⁹⁸ *Ibidem.*

⁹⁹ *Ibidem.*

¹⁰⁰ McClendon J. S., Enforcement of Foreign Arbitral Awards in the United States, 4 Nw. J. Int'l L. & Bus. 58 (1982), p. 60, at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1113&context=njilb>, retrieved on 19th May, 2016.

¹⁰¹ *Ibidem.*

¹⁰² *Ibidem.*

resident of a State might be considered to be from that State for the purposes of determining whether arbitration is international even though he is a citizen of a different State.¹⁰³

Similarly, a juridical person would often be considered to be from the State under the law of which it was organized. However, if the juridical person in question is a wholly or substantially owned subsidiary of a foreign natural or juridical person, the subsidiary might be considered to have the nationality of its parent.¹⁰⁴ Appear at first glance to be excessive, it must be remembered that the modern doctrine is that the parties are free to choose the place of arbitration and that would itself effectively be a choice of the applicable arbitration law.

The Model Law is very broad in its definition as to what makes arbitration international. However, the definition in the Model Law should be taken in context. It is relevant only if a State adopts the Model Law with a scope of application restricted to international commercial arbitration.

2.2.2. Arbitration as a successful mechanism of commercial dispute resolution

From the perspective of the available vast literature about international commercial arbitration, arbitration has developed as a result of massive and complex commercial matters which occur out of economic investment. Looking back over the years, the first arbitration event is on record as having occurred in 1923. It should be noted that more often than not there occur developments at the international level which are implemented by States at different times. Some states adopt such developments sooner than others while other states do not adopt them at all. For instance, international commercial arbitration is still a work in progress which is regarded as having promises of making significant impact on the entire field of international trade, but the nature of such impact has not yet been clearly ascertained.¹⁰⁵

¹⁰³ Regarded separately, it could be argued that there is a particularly difficult matter in investment arbitrations. It is not uncommon for Bilateral Investment Treaties to provide that a company incorporated in the host State that is a subsidiary of an investor from the other State party to the treaty will be considered to be an entity of the host State and not, therefore, protected by the provisions of the treaty. However, that still leaves open the possibility that the investment in the stock of the subsidiary will be an investment covered by the treaty.

¹⁰⁴ Article 1 (4).

¹⁰⁵ United Nations Conference on Trade and Development, DISPUTE SETTLEMENT, International Commercial Arbitration, United Nations, New York and Geneva, 2005, p. 19, available at http://unctad.org/en/docs/edmmisc232add38_en.pdf, accessed on 29th May 2016.

There is a widely accepted view that various forms of adjudication inevitably emerged as a result of trade relations which began as a result of people living together. The resultant trend therefore, became independent adjudication to which individuals submitted disputes thereby creating a form of ordering human society. The desire to form mechanisms of resolving human conflicts has led to the development of arbitration as a means of alternative dispute resolution.¹⁰⁶ It has been asserted by scholars that arbitration has been in existence for many years now. From the origins of ancient dispute settlement used in Europe by the Greeks and Romans, arbitration was formulated into law as early as 1697 in England. Further developments occurred during the period of the French Revolution. Arbitration was considered a natural right (*droit naturel*) so much so that the Constitution of 1791 proclaimed the constitutional right of citizens to resort to arbitration. Against this back ground, arbitration was included in the Code of Civil Procedure in 1806.¹⁰⁷

As recently as 1986, writers who took interest in international arbitration recognised then that the system of international commercial arbitration only worked effectively because a complex of laws held the system in place. The existing laws at the time regulated both international and domestic arbitration. Besides, the laws were categorised into either procedure or substantive laws.¹⁰⁸ From the time of the adoption of the UNCITRAL Model law, the most recent developments in international law have been those recorded in the last decade of the 20th century. It has been recognised by a number of scholars that recent developments in international commercial arbitration have produced three set of rules governing this domain of dispute resolution. The first set of rules is said to be the UNCITRAL Arbitration rules of 1967. The second is said to be the ICC Rules of Arbitration, whose most current edition is of 1998. The third set is known as the rules of the International Centre for the Settlement of Investment Disputes (hereinafter the ICSID), which are said to be a product of the 1965 Washington Convention.¹⁰⁹

At the beginning of the 21st Century, some authors affirmed that a big number of commercial disputes are resolved through arbitration instead of litigation.¹¹⁰ It is alleged that while the business

¹⁰⁶ Noussia K., *Confidentiality in International Commercial Arbitration, A comparative Analysis of the Position under English, US, German and French Law*, XIII, 2010, p. 11, available at <http://www.springer.com/978-3-642-10223-3>, retrieved on 17th March 2016.

¹⁰⁷ Rees H., "A Seminar on International Commercial Arbitration," on 13 May 2010, p. 3, available at <http://www.39essex.com/docs/articles/internationalarbitrationseminarhr.pdf>, retrieved on the 14th of June 2016.

¹⁰⁸ Redfern A. and Hunter M., *Supra*, note 39, p. 1.

¹⁰⁹ Goode R. *et al.*, *Supra*, note 71 p. 944.

¹¹⁰ Goode R., *Supra*, note 19, p. 1163.

community prefers arbitration to litigation, their lawyers tend to prefer litigation to arbitration. Since 2004, the trends in commercial dispute resolution have shown that the choice of the business community is commonplace in international contracts although that choice cannot by any standards be said to be universal.¹¹¹ Born and Miles concur in the affirmation that “arbitration has been an enduringly popular choice for parties,” whether or not the dispute to be resolved is either between states or a commercial contract of parties, since the beginning of recorded history.¹¹² In fact, these co-writers acknowledged the increasing popularity of arbitration as the preferred means of resolving international commercial disputes as one of the most significant global trends.

As if to echo the assertions of Born and Miles, Freshfields Bruckhaus Deringer in its article “International arbitration: 10 trends in 2016,” reiterates the success story of international arbitration and rates this success by any measure.¹¹³ Such observations reinforce my observation about arbitration being a mechanism that facilitates international trade or commercial relations of parties. According to the 2012 Report by the Financier, there was, at that moment, “a rise in demand for specialised arbitrators, in particular in the construction sector, to deal with the highly technical and complex issues large-scale infrastructure projects often generate.”¹¹⁴ The report revealed that when viewed from a balance, it was easy then to see the “rise in demand for specialised arbitrators” move toward more specialisation, expanding from the infrastructure sector into other technical industries as well.¹¹⁵ The report went further to point out the factors that would explain such trends. “The increasing complexity of international business transactions and the related disputes, in some instances, may” observes the report, “direct parties to look for more specialised arbitrators.”¹¹⁶ Whereas such a trend may be witnessed in ‘small to mid-size disputes’ that may arise from highly specialised business transactions in a given particular sector, “complex commercial disputes, however, require seasoned arbitration specialists who, rather than being specialists in a narrow area of

¹¹¹ *Ibidem.*

¹¹² Born G. and Miles W., GLOBAL TRENDS IN INTERNATIONAL ARBITRATION, Wilmer Cutler Pickering Hale and Dorr LLP, London, 2016, p. 1. Also available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/GlobalTrends_InternationalArbitration.pdf, retrieved on 26th May 2016.

¹¹³ See Freshfields Bruckhaus Deringer, available at http://www.freshfields.com/en/global/who_we_are/, visited on 27th May 2016.

¹¹⁴ See the FINANCIER WORLDWIDE MAGAZINE, “SPECIAL REPORT: International Arbitration,” Financier Worldwide Limited, July 2012, available at https://www.skadden.com/sites/default/files/publications/FW_Recent_Trends_in_International%20Arbitration_July2012.pdf, retrieved on 27th May 2016.

¹¹⁵ *Ibidem.*

¹¹⁶ *Ibidem.*

the law or a particular industry, can combine the right sector or geographical experience with broad arbitration experience and availability.”¹¹⁷

Although Goode acknowledges that there is no such a thing like “innate superiority” for either arbitration or litigation over one another,¹¹⁸ the available literature indicates that arbitration is increasingly becoming the most preferred mechanism of international commercial dispute resolution. There are, certainly, limitations to arbitration despite the numerous advantages. The limitations begin with the principle that delimits the “freedom of contract” including the freedom to choose the mechanism of dispute resolution, which establishes that such freedom “is not absolute”.¹¹⁹ The limitations then extend to the nature of the contracts upon which the arbitration clause is based, which nature may fall ‘under’ or ‘out of’ the subject matters that are ‘arbitrable’ or ‘non-arbitrable’, respectively. The later aspect usually encompasses subject matters whose merits unavoidable relate to public law issues, thus affecting public rights.¹²⁰

Despite its limitations, Taylor K. David, makes a compelling case in favour of arbitration in his article “Arbitration vs. Litigation: The Great Debate” even when he so much focused on the “forms” commercial construction contracts. He first draws attention to the introduction, in the 90s, of the mechanism of arbitration in consumer and lending contracts, which mechanism “introduced an entirely different set of factors in evaluating arbitration.”¹²¹ He advises that “the decision to arbitrate should not be taken lightly,” because there are advantages and disadvantages and that “one size does not fit all”. He went further to make a particular case for the construction industry, which we find so compellingly adaptable to other commercial sectors. The inherent complexities of the existing legal system convince “any business that has been through a lawsuit” not to wish to go through the process again, even if the matter of contention was resolved in its favour. Among the factors which do cause the business community to regard litigation as loathsome are the cost of litigation, publicity and public filings, time and unpredictable results. This is true for all kinds of commercial contracts be they international or domestic, regardless of the sector of commerce.

¹¹⁷ *Ibidem.*

¹¹⁸ Goode R., *Supra*, note 19, p. 1163.

¹¹⁹ Reisman W. M. *et. al.*, *Supra*, note 86, p. 304.

¹²⁰ *Id.*, p. 307.

¹²¹ Taylor K. D., “Arbitration vs. Litigation: The Great Debate” available at Available at: https://www.buildsmartbradley.com/wp-content/uploads/sites/7/2016/04/Arbitration_vs_Litigation_The_Great_Debate.pdf, retrieved on 25th May 2016.

2.2.3. *Enforcement of an arbitration agreement*

If there is no dispute, there can be no arbitration. The issue arises most often when one party fails to pay a sum of money owed to the other, perhaps in the form of a negotiable instrument, and the debtor does not dispute the obligation. If there is an existing arbitration clause, the question arises whether the creditor can or must invoke the arbitration clause or, there being no dispute as to the existence of the obligation, the creditor can or must seek enforcement of the obligation by court action. This theoretical question can be of great practical importance if the debtor wishes to impede enforcement of the obligation and contests the appointment of the arbitral tribunal, if that is the route chosen by the claimant, or insists upon the arbitration clause, if the creditor chooses to enforce the obligation directly in the courts.¹²²

The question might also arise if it appears that the parties agreed to arbitration in order to secure an enforceable award that would permit payment in the face of exchange controls that would not have permitted payment of the amount in question, absent the award. While neither of the two examples cited above are such a problem as to have given rise to any general agreement as to how they should be handled, there is one common situation that has led to a generally agreed solution. Exchange of whichever form of written communication leads to the formation of a valid agreement to refer a dispute that may arise to an arbitral tribunal.¹²³

Once the parties reach an agreement to settle the dispute, regardless of the arbitration process going on, there is no longer any dispute for the arbitral tribunal to consider. Nevertheless, as provided in Article 30 of the Model Law, the arbitral tribunal shall state that “it is an award” and such an award shall have “the same status and effect as any other award on the merits of the case.”¹²⁴ That is a form of protection to the tribunal and to the arbitral process if the tribunal believes that an award would be improper under the circumstances. The arbitral tribunal has, nonetheless, the power to issue some many other types of arbitral awards. Besides an interim or a partial arbitral award to resolve certain aspects of its jurisdiction, and to resolve questions of liability or other issues, the arbitral tribunal has also the power to issue consent or agreed arbitral awards if the parties reach a settlement during the

¹²² Goode R., *Supra*, note 19, p. 1185.

¹²³ Reisman W. M. *et al.*, *Supra*, note 86, p. 131. See also Goode R. *et al.*, *Supra*, note 71 p. 949.

¹²⁴ Goode R. *et al.*, *Supra*, note 71 p. 977.

arbitration process.¹²⁵ The arbitral tribunal has, moreover, the power to issue a default arbitral award if one party, more often than not the respondent, fails or refuses to take part in the proceedings. The arbitral tribunal has, finally, the power to issue an additional arbitral award when one or more issues of the dispute are omitted from the final award.¹²⁶

International arbitration is an increasingly popular means of alternative dispute resolution for cross-border commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the world. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes, which arbitration awards are final and not ordinarily subject to appeal, the ability to choose flexible procedures for the arbitration and confidentiality.¹²⁷

Once a dispute between parties is settled, the winning party needs to collect the award or judgment. Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition of court judgments between the country where the judgment is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect.¹²⁸

2.2.3.1. Procedure for enforcing foreign arbitral awards

The law on arbitration and conciliation in commercial matters, which applies to domestic and international commercial arbitration and conciliation, establishes also the procedure of enforcing foreign arbitral awards.¹²⁹ According to Article 50, an arbitral award is binding irrespective of the country in which it was made. The exception to this legal procedure is the absence of reciprocity from the country in which the award was awarded relating to respecting the provisions of this Law, recognition and enforcement of arbitral awards decided in Rwanda.¹³⁰

¹²⁵ Daradkeh M. M. L., *Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)*, The University of Leeds, February 2005, p. 63, available at <http://etheses.whiterose.ac.uk/494/2/DX231171.pdf>, accessed on 16th March 2016.

¹²⁶ *Ibidem*.

¹²⁷ Goode R., *Supra*, note 19, p. 1163.

¹²⁸ Goode R. *et al.*, *Supra*, note 71 p. 977.

¹²⁹ See Article 1 & 2 of LACCM, *Supra*, note 1.

¹³⁰ See Article 50 of LACCM, *Id*.

By contrast, under the jurisdiction of the USA as reported by J.S. McClendon, lawsuits to confirm or set aside arbitral awards on grounds of enforceability are guided by different legal principles which give them a quality of preclusion. A combination of the New York Convention and the United States Arbitration Act do encompass a legal framework that has become the primary guiding force with respect to foreign arbitral award enforcement in the United States.¹³¹ Except as limited by a Contracting State, a foreign arbitral award must be recognised and enforced under the New York Convention unless it meets one of the enumerated grounds to deny recognition and enforcement.¹³²

According to S. B. DeWitt, upon motion of the party against whom enforcement is sought, a U.S. court can refuse recognition if: (a) the party shows that arbitration was not validly agreed to under the applicable law; (b) the party shows that it lacked notice or was not provided an opportunity to present its case; (c) the award exceeded the scope of the agreement to arbitrate; (d) the composition of the arbitral tribunal either was not in accord with the parties' agreement or the law of the place of arbitration; or (e) the award is not binding or has been set aside by or under the law of the seat of arbitration.¹³³

2.2.3.2. Grounds for refusing the enforcement of foreign arbitral awards

In *W. M. Reisman et. al.*, it was argued, while introducing Chapter 9 under the Title of “Control Mechanisms”, that controls are not only necessary for ensuring efficient operation, but also for guaranteeing that the involvement of government is rather limited in the private activities of individuals. In fact, he sums up his introduction by equating controls to liberty.¹³⁴ This was after asserting that arbitration is the form of power which is delegated and restricted in the context of making certain types of decisions in specific determined manner. He illuminated that controls are techniques or mechanisms, whether physical or social, designed to ensure that a certain apparatus functions in the specific form that it was designed to work.¹³⁵ Although it has been argued that the extent to which arbitration processes (form and procedure) and its results (awards and interim measures) should be subjected to judicial review (control mechanisms) is a question of some

¹³¹ McClendon J. S., *Supra*, note 100, p. 59.

¹³² *Id.*, pp. 60 – 70.

¹³³ DeWitt S. B., *A Judgement Without Merits: The Recognition and Enforcement of Foreign Judgements Confirming, Recognising, or Enforcing Arbitral Awards*, p. 498, available at <http://www.tilj.org/content/journal/50/16%20DEWITT%FINAL.pdf>, retrieved on 25th May 2016.

¹³⁴ Reisman W. M. *et. al.*, *Supra*, note 86, p. 965.

¹³⁵ *Ibidem.*

delicacy,¹³⁶ from the arguments advanced by W. M. Reisman *et. al*, it is convincingly clear that the controls are meant to ensure the proper functioning of the entire arbitration apparatus.

The control mechanisms referred to at this level are those regarding the “various overlapping, yet distinct, procedures through which judges may exercise control over an arbitration process” after an arbitration award has been rendered¹³⁷ as opposed to those exercised by the courts in respect to the initial stages or during the process of the arbitration. In particular, the control mechanisms discussed under this section are those concerned with court intervention in the context of rendering the award invalid thus non-enforceable. Some authors refer to these control mechanisms as “defences against enforcement”¹³⁸ whereas others refer to them as “grounds for refusal of enforcement”.¹³⁹ Some other authors call them “grounds of attack”¹⁴⁰ and they proceed to list the following: 1) an erroneous assumption or rejection of jurisdiction; 2) serious irregularity; and 3) in restricted circumstances, error of law.

On their part, W. M. Reisman *et. al*, qualified the defences against enforcement as “overseas”¹⁴¹ defences and listed the following: 1) public policy; 2) non-arbitrability; 3) inadequate opportunity to present defence; 4) arbitration in excess of jurisdiction; and 5) award in ‘manifest disregards’ of law. As for Redfern A. and Hunter M., they based their list on the NY Convention.¹⁴² The grounds listed include: 1) incapacity of the parties or invalidity of the arbitration agreement; 2) denial of a fair hearing; 3) excess of authority or lack of jurisdiction; 4) procedural irregularities; 5) invalid award; 6) arbitrability; and 7) public policy. Redfern A. and Hunter M., have argued that enforcement of an award may be refused basing on the first five of the listed grounds following a request of the party against whom enforcement is being sought. The other additional two, implying number 6 and 7 on the list, are grounds upon which enforcement may be refused following a motion of refusal raised by a relevant, competent court.¹⁴³ We discuss the grounds for refusing enforcement of a foreign award bearing that the grounds provided by different authors do overlap in many ways. For the purpose of

¹³⁶ Goode R., *Supra*, note 19, p. 1191.

¹³⁷ Reisman W. M. *et. al.*, *Supra*, note 86, p. 971.

¹³⁸ *Id.*, p. 139. See also Bishop R. D. and Martin E., *Enforcement of foreign arbitral awards*, available at <http://www.kslaw.com/library/pdf/bishop6.pdf>, accessed on 2nd May 2016, p. 12.

¹³⁹ Redfern A. and Hunter M., *Supra*, note 39, p. 347. See also Berg J. A., *Supra*, note 28, p. 13.

¹⁴⁰ Goode R., *Supra*, note 19, p. 1192.

¹⁴¹ Reisman W. M. *et. al.*, *Supra*, note 86, pp. 139 – 147.

¹⁴² Redfern A. and Hunter M., *Supra*, note 39, p. 346.

¹⁴³ *Id.*, p. 347.

clarity in this work, the work chooses to recommend the list provided by Redfern A. and Hunter M. since it is developed in accordance with Article V of the NY Convention.

For W. M. Reisman *et. al*, enforcement of an arbitral award may be refused at the request of the party against whom it is invoked only when the party invokes and convincingly proves to the court that, *inter alia*, the arbitration agreement was not valid, the award deals with a matter regarded as *extra petita* or *infra petita*, the matter is non-arbitrable, or yet “it would be contrary to public policy to enforce the award”.¹⁴⁴ Moreover, M. M. L Daradkeh opines that the enforcing court, in case of an application for enforcement of the arbitral award, plays the role of recognising and enforcing a foreign award once it has been seized by the party in whose favour the award was rendered. The court may opt for examining the merits of the award without violating the doctrine of the non-re-examination of the merits of an arbitral award, provided the court will look into the merits on the matters of procedure so as to ensure whether or not there are grounds of refusal as provided by the regime concerned. The court is under obligation therefore, to investigate the award in order to evaluate the allegation of this effect.¹⁴⁵

Some scholars have reiterated the provision of Article V of the NY Convention as the source of law and conduct to both challenge and, therefore, seek refusal to enforcement of a foreign arbitral award. The issue of capacity of the parties is the key ground, as is usually governed by the domestic law¹⁴⁶ of the state of the parties to arbitration process, to the action or respondent seeking refusal to enforcement. Other enumerated grounds include irregularities in the composition of the arbitral tribunal or in the procedures of arbitration and the award having been set aside or suspended by a competent court of the country where the award was rendered.¹⁴⁷

Other schools of thought regard the mechanism of ‘challenge of award’ as one other ground which paves the way for the other mentioned grounds for seeking refusal to enforcement. It has been argued therefore that a successful challenge to an award will have one of the following effects: 1) the award being set aside, and 2) frustrating the efforts of the winning party in having the award enforced.¹⁴⁸ It is important to underline the scenarios under which an award may be challenged. The first being the

¹⁴⁴ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1139.

¹⁴⁵ Daradkeh M. M. L., *Supra*, note 125, p. 76

¹⁴⁶ Goode R. *et al.*, *Supra*, note 71, p. 949.

¹⁴⁷ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1262.

¹⁴⁸ Redfern A. and Hunter M., *Supra*, note 39, p. 314.

challenge from the winning party who might be seeking an opportunity to return to arbitration or submitting the dispute to court¹⁴⁹ in case one considers that the court might adjudicate on the dispute in a more favourable manner. The second is the challenge from the losing party who may raise the question of failure to observe the law governing the arbitration process or be seeking simply the opportunity to frustrate the enforcement of an award of which one is not pleased to execute.¹⁵⁰

Redfern A. and Hunter M have indicated that a “challenge” is a legal mechanism, which is positive, initiated by the losing party on the validity of an international award. They argued that a challenge may take the form of an appeal to court either seeking the court to replace the award with a court decision or to order the arbitral tribunal to redo the arbitration once again.¹⁵¹ The interest of seeking the revision of the arbitration process or the replacement of the award by a court decision should not be considered to always being the initiative of the losing party. It has already been discussed, in the preceding paragraph that there are circumstances which might cause the winning party to resort to a challenge of an award.

Arguments for challenge of award and, therefore, resorting to seeking refusal of enforcement are party neutral – they do not favour either party to the arbitration process. From a different perspective, challenge of award may be construed to mean failure to honour the arbitration agreement, which establishes the parties’ law consenting to submitting their disputes to an arbitral tribunal and accepting that the award shall be final and binding. It is for the interest of seeking judicial control for the awards which might be against the law or which clearly are in violation of the law. Besides, it is meant to ensure consistency in arbitration decisions which are rendered by different arbitral tribunals.¹⁵²

From this discourse, it should be understood that the mention, either verbal or written, of arbitration, either the domestic or international jurisdiction is implied.¹⁵³ The absence of one or several “foreign elements” relating to the parties, the subject matter or the rules determined by the parties does not automatically spell a domestic jurisdiction. Conversely, the presence of one element denoted or recognised as foreign does not necessarily mean the arbitration process and, therefore by extension,

¹⁴⁹ *Ibidem.*

¹⁵⁰ *Ibidem.*

¹⁵¹ *Id.*, p. 321.

¹⁵² *Id.*, p. 317.

¹⁵³ Goode R., *Supra*, note 19, p. 1167.

its award, is international. The classification depends on the arbitration agreement by the parties, the law of a given country and an international convention to which countries of either origin of parties or their property are located have acceded to.¹⁵⁴ These determinant factors are as varied as the parties and the countries.

Similarly, these variations are reflected in the requirements for enforcing a foreign arbitral award. Some requirements are purely based on the substance of the award whereas others are based on the subject of law – jurisdiction and/or procedure – as well as some which are based on the question of policy.¹⁵⁵ The subject of requirements for enforcement should be understood therefore, as a crucial matter in the enforcement of foreign arbitral awards as there can be several depending on the parties, the applicable law, not only of the country where enforcement is being sought,¹⁵⁶ but also where the award was rendered.¹⁵⁷ The requirements based on the applicable law, more often than not, result into issues of reciprocity.¹⁵⁸ Enforcement is not automatic. The party seeking a court order to ensure enforcement has to fulfil the set standards in order to have a foreign award rendered meaningful to the winning party

¹⁵⁴ *Id.*, p. 1168.

¹⁵⁵ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1262. See also Goode R., *Supra*, note 19, p. 1199.

¹⁵⁶ Article 51 of LACCM, *Supra*, note 1. See also Redfern A. and Hunter M., *Supra*, note 39, p. 343.

¹⁵⁷ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1262. See also Article V(1)(e) of the NY Convention, *Supra*, note 10.

¹⁵⁸ Goode R., *Supra*, note 19, p. 1199.

CHAPTER III: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN RWANDA

This chapter will deal with the legal and procedural framework of the enforcement of a foreign arbitral award in Rwanda and the impact of the New York Convention on foreign award enforcement in the country.

3.1. Introducing a court action for enforcement before the Commercial High Court

The Rwanda law on CCCLAP dedicated, in 2012, Title VIII to the commercial procedure of settlement of disputes by arbitration.¹⁵⁹ This title is rather special in its presentation because it comprises only one article, i.e. Article 367. This provision specifically refers to a special law¹⁶⁰ that governs arbitration. By this provision, the CCCLAP amalgamates the procedure of arbitration into the civil procedure, but the application of the procedure of arbitration is done outside the judicial process of ordinary courts. In fact, the LACCM is structured in such a manner that Chapter II, from Article 5 to Article 52, is dedicated to the procedure of arbitration.

To ensure that the procedure of arbitration functions independent of the ordinary courts, the LACCM provides that all matters that it governs, “no court shall intervene except where” the same law permits such an intervention.¹⁶¹ Whereas the procedure of arbitration provided for a possible intervention by ordinary courts, in circumstance only provided by the LACCM, the civil procedure provides for the exclusivity of the LACCM in the governing of procedure of arbitration in Rwanda. It is evident that the CHC, in the context of the discourse on this work, is relevant to the procedure of arbitration in the extent to which the LACCM permits and provides for “... the competent court”.¹⁶²

According to Articles 91 and 92 O. L. n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts,¹⁶³ which is as modified and complemented to date by the O.L.

¹⁵⁹ *Supra*, note 51. See the text of the Law on CCCLAP, p. 246.

¹⁶⁰ See LACCM, *Supra*, note 1.

¹⁶¹ *Id.*, Article 7 of LACCM, *Supra*, note 1.

¹⁶² *Id.*, Article 51, para. 1, part 1^o, of LACCM, *Supra*, note 1.

¹⁶³ O.L. n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts O.G. Special n° of 10 September 2008.

No 02/2013/OL of 16/06/2013,¹⁶⁴ foreign arbitral awards relating to other matters, other than commercial matters, fall under the competence of the High Court. The law provides that “the High Court shall hear complaints which require execution of cases and decisions taken by foreign Courts.”¹⁶⁵ The law further provides for the “conditions required to be fulfilled in the execution of the authentic deeds written by foreign authorities.”¹⁶⁶

The LACCM intersects with the Organic Law No 06/2012/OL of 14/09/2012 on the Organisation, Functioning and Jurisdiction of Commercial Courts in Rwanda (hereinafter the OLFJC – Commercial Courts) as well from the context of Article 51, para. 1, part 1⁰.¹⁶⁷ The use of the wording “... the competent court” resonates with the jurisdiction of the CHC as provided for under Article 13.¹⁶⁸ The mention of the word *exequatur* under Article 13, para. 1, renders the CHC competent to make judicial decisions concerning ‘judgements’ handed down in foreign jurisdictions. Whereas the courts make ‘judgements’, arbitration tribunals make ‘awards’. The common characteristic of these two legal decisions is that they are both binding on the parties to the dispute from which they emanate. Consequently, a foreign arbitral award is enforced when it has been lent the executor force through the *exequatur* procedure provided for by the civil procedure.¹⁶⁹ It is important to note that Article 13, para. 1, is closely tied to Article 13, para. 2, because the latter sets the boundaries for the CHC within which the CHC has to exercise its judicial powers in relation to judgements handed down in foreign jurisdictions.

Under Article 13, para. 3, the CHC is rendered competent to preside over cases of appeal, handed down by arbitration tribunals.¹⁷⁰ The said provision makes it crystal clear that under legal framework of the OLFJC – Commercial Courts, the CHC is “... the competent court” that presides over appeal cases of regarding either the arbitral award or the procedure of arbitration. The gap relating to the boundaries established by this provision regarding the competence of the CHC in presiding over the court application seeking the enforcement of foreign arbitral awards is legally filled by Article 204 of the Law on CCCLAP, which equally provides for “... the competent court” that is in charge of

¹⁶⁴ O.L. No 02/2013/OL of 16/06/2013 modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts as modified and complemented to date, O.G., Special n° Bis of 16/06/2013.

¹⁶⁵ Article 91 of O.L. n° 51/2008 of 09/09/2008, *Supra*, note 163.

¹⁶⁶ Article 92, *Id.*

¹⁶⁷ *Ibidem.*

¹⁶⁸ *Supra*, note 11.

¹⁶⁹ See Article 204, *Supra*, note 55.

¹⁷⁰ Article 13, para. 2, part 2⁰, of LACCM, *Supra*, note 1.

presiding over court applications for exequatur. This provision is made particularly specific in reference to the CHC when it is read together with Article 13, para. 1, of the OLFJC – Commercial Courts.

A legal framework under which the CHC is empowered as “... the competent court”, in the context of Article 51, para. 1, part 1⁰, of LACCM, is what this section has focused on before extending the area of attention to the procedure of introducing a court application seeking the exequatur formula from this court. As for the latter area of focus, the civil procedure establishes the procedure of introducing the court application under Article 351 of the Law on CCCLAP. Since the court application for the exequatur formula is a civil action than it is a commercial action, the civil procedure is observed rather than the procedure of arbitration.

Following the discussion above, the legal framework is in place regarding the procedures of civil actions differently from the procedures of arbitration. The law has established the competent court to which the procedure of arbitration refers. From this perspective, the legal infrastructure for enforcement of a foreign arbitral award is fully established. It provides room to study the practice.

3.2. Case law on enforcement of arbitral foreign awards in Rwanda

Under this section, the discussion about case law takes into consideration both the reasons behind the legal practice and the realities of the practice. The existing legal framework establishes the grounds for the intervention of “... competent court” in the process of a procedure of arbitration. This is one of the reasons there is a practice that leads to case law by a competent court. The environment in which commercial activities are carried out is a brooding ground for commercial disputes. This might lead to either high or low indices of commercial disputes. Taking the two factors into consideration, the discourse turns to studying the practice of the CHC beginning with the relevance of the NY Convention under the Rwandan jurisdiction. The final composition of the discourse will focus on the case law as per the cases received and heard by the CHC since its establishment.

3.2.1. *The effect of the NY Convention on Rwandan law*

The New York convention has had a positive impact on recognition and enforcement of foreign arbitral awards in Rwanda. For instance, the mandatory obligation stated in its Article III, which is the obligation to recognise and enforce foreign awards,¹⁷¹ even though Article V lists some exceptions known as grounds for refusal of recognition and enforcement.¹⁷²

Another positive impact of the NY Convention is that it clearly allocates the burden of overcoming the presumptive enforceability of an award to the party resisting recognition and enforcement. The third positive impact of the convention is that the exceptions enumerated in Article V of the New York Convention are the exclusive grounds for denying recognition of a foreign award under the Convention.¹⁷³ Also there is no double *exequatur* requirement under the New York Convention. This is one of the central objectives of the Convention because double *exequatur* required confirmation of an award in the arbitral seat before it could be recognised abroad, and this process made the recognition and enforcement of international arbitral awards difficult, uncertain and agonisingly slow.¹⁷⁴

Seven months before acceding to the NY Convention, Rwanda promulgated the LACCM.¹⁷⁵ Under the said law, even though the words or terms ‘foreign’ or ‘international’ are not used anywhere, Articles 50 and 51, for the purposes of distinguishing between domestic and international arbitral awards, the first sentence of Article 50 refers to ‘an arbitral award’, the final outcome of an arbitration process, irrespective of the country in which it was rendered. The use of the clause ‘irrespective of the country’ indicated that “the award” referred is categorically a foreign award. Upon the accession to the NY Convention, Rwanda extended therefore the legal framework regulating the conduct of arbitration as a mechanism of dispute resolution in commercial matters as the name of the law suggests.

¹⁷¹ See Article III of the New York convention, *Supra*, note 10.

¹⁷² *Ibidem*

¹⁷³ *Ibidem*

¹⁷⁴ *Ibidem*

¹⁷⁵ See LACCM, *Supra*, note 1.

Whereas the NY Convention provides for reservations – the commercial and the reciprocity reservations – under Article I (3), which narrow the scope of application of the Convention,¹⁷⁶ Rwanda did not make any reservation at the time of acceding to the Convention.¹⁷⁷ Instead, the reservations are made effective by the provisions of Article 1; 2, para. 1; and 50 of LACCM.¹⁷⁸ According to Article I (1), the scope or purpose of the Convention is ‘recognition’ and ‘enforcement’ of arbitral awards.¹⁷⁹ On its part, the LACCM provides, in some certain provisions, for ‘recognition’ and ‘enforcement’,¹⁸⁰ while it also provides, in some other provisions, for ‘recognition’ or ‘enforcement’.¹⁸¹ It is not clear as to whether the Rwandan legislator made these differences with a specific intention. What is clear is that the law provides for the two forms of clauses, and differently from the provisions of the NY Convention. The difference between these two clauses is that there can occur or take place recognition without necessarily occurring or taking place enforcement. Conversely, however, whenever there is need for enforcement, recognition has to take place as a prerequisite for enforcement.¹⁸²

It is argued that the reservation concerning the ‘commercial’ domain of the Convention was adopted so as to be applied to international arbitration agreements, rather than to purely domestic arbitration agreements.¹⁸³ In fact, Rwanda being a signatory to the NY Convention has enabled arbitral awards rendered by arbitral tribunals in Rwanda to be enforceable in any other country signatory to the Convention or in Rwanda, itself, provided the awards in question are either foreign or comprise a foreign element, respectively.¹⁸⁴

Some authors have recognised the NY Convention as the “most remarkable example in history of international consensus as to common principles of commercial transactions.”¹⁸⁵ The most conspicuous aspect of the NY Convention, which has largely contributed to its success, is the character of covering a whole legal framework of enforcing, all over the world, decisions held by

¹⁷⁶ BECKER W, P., *The recognition and enforcement of international commercial arbitration awards in a South African context*, 2005 p. 8.

¹⁷⁷ See “Contracting States” at <http://www.newyorkconvention.org/countries>, retrieved on 8th November 2015.

¹⁷⁸ See LACCM, *Supra*, note 1.

¹⁷⁹ Goode R. *et al.*, *Supra*, note 71, p. 944.

¹⁸⁰ See Articles 21 (title); 22 (title); 22, para. 1, part 2, sub-part (b); 22, para. 2, and 50 (title) of LACCM, *Supra*, note 1.

¹⁸¹ See Articles 21, para. 2 and 3; 22, para. 1; and 51: para. 1; para. 1, part 1; para. 1, part 2, *Id.*

¹⁸² Redfern A. and Hunter M., *Supra*, note 39, p. 335.

¹⁸³ *Id.*, p. 46.

¹⁸⁴ See <http://www.kiac.org.rw/spip.php?rubrique20>, accessed on 01/11/2015.

¹⁸⁵ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1217. See also Goode R., *Supra*, note 19, p. 1199.

persons having no official judicial standing. This character has been facilitated by the clause of reciprocity provided for under Article 1(3). Discussing whether or not the LACCM was inspired by the NY Convention is not, in measure, the purpose of this section. What is worth mentioning here, however, is that the LACCM comprises clauses which are tailored in the same spirit as those of the NY Convention. A good example to provide, for the purpose of clarity, is Article 51 relating to “Grounds for refusing recognition or enforcement of the arbitral award.”¹⁸⁶

3.2.2. *Decided cases under Rwandan law*

According to the information available at the CHC, from 25th of April 2008 up to 5th of October 2015, the only case decided by the CHC was case No. R.Com 0003/15/CHC in which the Applicant sought the enforcement of the International Chamber of Commerce (ICC) – International Court of Arbitration arbitral award n^o 18175/VRO/AGF/ZF of 2nd Dec 2014. The decision of the court was rendered on 25th March 2015. In reference to the judgment; the party to the court process was *Joint Venture Thomas & Piron - Thomas & Piron Grands Lacs (JVTP-TPGL)*, who was the Applicant.¹⁸⁷ The subject of the claim was as spelt out in the preceding paragraph. When I consulted the case file, the available information indicated that the arbitral award was decided between *Société Nouvelle d'Assurance du Rwanda SA* (hereinafter SONARWA S.A.), as the Claimant, and the *Joint Venture Thomas & Piron - Thomas & Piron Grands Lacs (JVTP-TPGL)*, as the Defendant.¹⁸⁸

In reference to the award,¹⁸⁹ the arbitral tribunal to a large extent, decided in favour of the Defendant. Whereas the claim of the Claimant, amounting to 248,922,567.36 was rejected,¹⁹⁰ the claim of the Defendant worth 1,174,168,777 Rwf; 80% of (301,040 Rwf; 111,028 Euros; US \$ 6,585.94; and 258,936.80 Ksh) and US \$ 80,000 corresponding to 80% of the portion of the cost of arbitration incurred by the Respondent were granted.¹⁹¹ From the details of this case, I learnt that the dispute arose as a result of termination of a construction contract.¹⁹² The award indicates that it was rendered in Kigali on the 2nd of December 2014.¹⁹³ We consider this award to have been a foreign award in

¹⁸⁶ See Article 51, para. 1, part 1 and 2 of LACCM, *Supra*, note 1.

¹⁸⁷ See Judgement No. R.Com 0003/15/HCC of 25/03/2015, case file No. 691250.

¹⁸⁸ See the case file No. 691250, Court Application by the Defendant in the arbitration process, p. 3

¹⁸⁹ *Id.*, The AWARD by International Chamber of Commerce (ICC).

¹⁹⁰ Para. 548 of the AWARD by International Chamber of Commerce (ICC).

¹⁹¹ Paras. 549, 551, 553, 555 and 556 of the AWARD by International Chamber of Commerce (ICC).

¹⁹² Contract of 29th December 2006 – to build the Nobilis Hotel in 18th months at a cost of 2,456,552,932 Rwf.

¹⁹³ The AWARD by International Chamber of Commerce (ICC), p. 94.

the sense that it comprised certain foreign elements, namely being conducted under the ICC Rules¹⁹⁴ of arbitration and having been conducted by a foreign arbitrator.¹⁹⁵

According to the court application, the Applicant was seeking the exequatur or enforcement of the arbitral award. Further study of the case law indicates that later the Applicant withdrew the application. According to the copy of the court judgment, the court decided to accept the withdrawal of the application by the Applicant.¹⁹⁶

I was not in position to establish the reasons for the withdrawal of the application by the Applicant. It is only understandable when it is considered that there are two scenarios under which the Applicant could have withdrawn the application. Either the debtor of the award decided to voluntarily enforce the award in accordance with Article 196 of the Law on CCCLAP or the consideration that the court process would attract further damages to be awarded the Applicant forced the debtor of the award to concede to enforcement. Other than seeking the finality or possible logical conclusion of the case, the scope of the study limits me to the procedures and practice of the judicial mechanism of arbitration and the rendering of the award enforceable by establishing an exequatur formula.

We made an effort to access information at the High Court regarding the practice of the court in the enforcement of foreign arbitral awards which are not in the domain of commercial relations. The information provided by the services of the Office of the Registrar indicates that the High Court has never received later alone heard a case of arbitration in matters which are non-commercial. The available information shows that the court has dealt with a good number of cases regarding civil matters such as divorce – the family law. The court is yet to receive and preside over court proceedings requiring the enforcement of foreign arbitral awards in matters that are exclusively non-commercial.

¹⁹⁴ See the Title of the award: International Court of Arbitration arbitral award n^o 18175/VRO/AGF/ZF.

¹⁹⁵ See the list of KIAC Panel of International Arbitrators. List adopted on 7th November 2012, available at http://www.kiac.org.rw/IMG/pdf/final_list_of_international_arbitrators.pdf, accessed on the 3rd of May 2016. Mr. LE BARS BENOIT is listed as Arbitrator on number 18.

¹⁹⁶ See Judgement No. R.Com 0003/15/HCC of 25/03/2015, *Supra*, note 187, para. 6.

3.2.3. *Legal conditions for the application of a court enforcement order*

In reference to the provisions established by LACCM, the legal framework in Rwanda requires a party seeking enforcement to provide to the court the following: 1) a duly authenticated original award or its duly certified copy, and 2) a copy of the original arbitration agreement referred to in Article 9¹⁹⁷ of LACCM or its duly certified copy.¹⁹⁸ The practice indicated that the court is not strict with these requirements. Regardless of the importance of these requirements, we ventured into examining how significant their absence or the failure of the applicant to provide them to court have as an impact on the court process. Other than establishing that the provisions of LACCM, under discussion, are a replica of the provisions of Article IV of the NY Convention, we equally established that the court did not strictly require the application of a party seeking a court order to have these documents submitted to court in the manner in which they are described.

While searching for the case law on enforcement of foreign awards in Rwanda, a case¹⁹⁹ came up whereby the applicant had submitted to court a copy of the award, which was neither a duly authenticated original award nor a duly certified copy.

The application made a reference to Article 13 of the O.L No. 06/2012OL of 14/09/2012 relating to the Organisation, Functioning and Jurisdiction of Commercial Courts and Article 204 of CCCLAP. Interestingly, the application also referred to one decided case with reference No. R.Com 0019/13/HCC, *SUSMAN Robert vs MWANGACHUCHU HIZI Edouard – UMUBERA MWANGACHUCHU*, decided on the 17th of April 2014. The case mentioned relates to exequatur of a court judgement. It was self-evident that the application did not rely on LACCM, especially the provision of Article 50, para. 2.

3.3. Observations on the practice under Rwandan law

Available information indicate that there is a very large gap in the practice of court intervention in arbitration processes in Rwanda, even when it comes to arbitral awards that are either foreign or are considered as foreign because of bearing an international element. According to the Annual Report

¹⁹⁷ See Article 9, para. 2 of LACCM, *Supra*, note 1, which provides that “The arbitration agreement shall be in writing”.

¹⁹⁸ Article 50, para. 2, *Id.*

¹⁹⁹ See Case No. R.Com 0003/15/CHC.

of KIAC,²⁰⁰ 70% of the awards rendered under KIAC have been enforced. It is worth noting that the 70% rate of enforcement is reported in relation to the 28 total cases filed to KIAC since July 2012 until June 2015. It is worth noting as well that 18 cases out of the recorded 28 cases were the ones filed under KIAC rules. This could be interpreted that either 10 were filed under international arbitrational rules or under no established arbitration rules.²⁰¹ The scanty information that KIAC made available to me is that 6 of the 10 were filed under the KENYA Arbitration Centre, one was filed under the ICC Arbitration rules whereas the remaining three were filed under the Kuala Lumpur rules. The agent of KIAC could not make revelations of additional specifics of these cases given the confidentiality rule of KIAC Rules of Arbitration.

A closer scrutiny of the withdrawal of the court application by *JVTP-TPGL* induces the consideration that the party who lost the case made the effort to enforce the award devoid of the exequatur formula by the CHC. Under such a development, I observe that the will of the parties and the commitment to meet obligations under the arbitration agreement take precedence of the exequatur formula, provided that the award "... does not contradict public order and basic legal tenets of Rwandan public laws cases filed under."²⁰² There are commercial motivations for facilitating a voluntary enforcement rather than the party in whose favour the arbitral award was decided seeking the intervention of court. Further efforts to seek additional information regarding the process through which this case was settled were futile as SONARWA refused to provide this information.

The LACCM establishes the principle of confidentiality under Chapter III, which concerns conciliation. The law establishes the said principle in as the extent of requiring that all information relating to the conciliation proceedings have to be kept confidential, except where disclosure is required under the Law or for the purposes of implementation or enforcement of a settlement agreement.²⁰³ It is interesting that KIAC has adopted this principle of confidentiality in arbitration procedures.²⁰⁴ This conduct of confidentiality in arbitration proceedings could perhaps be a valid explanation for the scarce information about international or foreign arbitral awards in the public

²⁰⁰ KIAC Annual Report, July 2014 – June 2015, p. 9.

²⁰¹ "An award that is regarded as 'a-national' in that it is not governed by any arbitration law." See Hanotiau & Albert Jan van den Berg, Brussels, Belgium. President, Netherlands Arbitration Institute, Rotterdam. Professor at law (arbitration), Erasmus University, Rotterdam. General Editor, *Yearbook: Commercial Arbitration*. Email: ajvandenbergh@hvdb.com.

²⁰² Article 13, para. 2, part 2^o, of the OLFJC – Commercial Courts

²⁰³ Article 58 of LACCM, *Supra*, note 1.

²⁰⁴ Article 48, KIAC Arbitration Rules 2012, p. 48.

domain of accessible information. An extension of this explanation might also provide the reason for accessing only one case of foreign arbitral award as the only available case law on enforcement of foreign arbitral awards on the Rwandan territory.

Under this research, the issue of foreign arbitral awards ought to be understood as either an award which was rendered outside the jurisdiction of the state in which enforcement is being sought or an award which is considered as foreign in the jurisdiction of the State in which enforcement is being sought. On this issue, we concur with A.G. Bermann who authoritatively made a compelling argument about the characteristics an award needs to have under a domestic law of a given country in order to be considered “foreign” and therefore subject to the NY Convention. To the question as to whether or not an award must be made abroad to qualify as ‘foreign’, or whether it is enough that an award have some feature that may be described as ‘foreign, the author argued that the New York Convention sheds light on this question by stating, in Article I (1), that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...” and then adding that “[i]t shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”²⁰⁵ He concluded that the last sentence suggests that States may consider as ‘foreign’ awards rendered on their own territory, rather than abroad, if they choose to consider those awards as ‘non-domestic’.²⁰⁶

By sharing the same reasoning and understanding of the application of the NY Convention as regards the enforcement of foreign arbitral awards, we associate Rwanda with the list of “distinct minority of States ... prepared to treat as ‘foreign’, awards rendered on their own territory where the case simply presents one or more ‘foreign’ elements.”²⁰⁷ G. A. Bermann listed countries which include China, Hungary, Indonesia, Romania, Uruguay and Vietnam. Whereas G. A. Bermann observes quite peculiar characteristics of considerations for enforcement of foreign arbitral awards in these countries, we have picked interest in the justification for the considerations of China and Uruguay. The former considers that an award is treated as foreign for Convention purposes apparently for the sole reason that it was rendered under aegis of the Court of Arbitration of the International Chamber

²⁰⁵ Bermann A. G., *Supra*, note 45, p. 15.

²⁰⁶ *Ibidem*.

²⁰⁷ *Id.*, p. 16.

of Commerce while the latter considers that an award rendered locally is foreign if issued within the framework of an international arbitral proceeding.²⁰⁸

As a matter of analysis, the arbitral award was rendered in Kigali in the case between *SONARWA S.A. vs JVTP-TPGL*, but later attracted the judicial process by the case No. R.Com 0003/15/CHC. This obviously points to the conclusion that Rwanda ought to be on the list of “distinct minority of States ...” which treat as ‘foreign’, awards rendered on their own territory where the case simply presents one or more ‘foreign’ elements. It is on this point that we agree with G. A. Bermann on what should be taken into consideration for enforcement of foreign arbitral awards in countries where the enforcement is sought.

In considering the arbitration clause, parties to a commercial contract and their lawyers should consider the option of dispute resolution beyond the mere mention of places out of geographical convenience. Other factors such as the forum on which the arbitral award shall be enforced, should there arise a dispute settled through arbitration. Closely linked to this factor is the idea of considering the place where the arbitral award might be rendered in relation to where it has to be enforced – which idea implicitly infers the legal element of reciprocity. Besides, the idea of the attitude of domestic courts should be considered right from the time of concluding the arbitration agreement. This challenges the parties in the context of considering countries whose judicial systems are not rigid in enforcing foreign awards as opposed to those which are hostile to such enforcements. In an equal measure of consideration, the parties should consider if the courts where enforcement shall be sought will favour a government or government agency against whom the award shall be enforced.²⁰⁹

In the case law referred to in this work, *SONARWA S.A. vs JVTP-TPGL*, the applicant to the arbitral tribunal was SONARWA. The final award, even though some aspects of it show that there are benefits that the applicant was awarded against the respondent, the overall award indicates that the award was decided in favour of JVTP-TPGL, which was the party that applied for the court order of enforcement (exequatur). I was at loss on learning that the applicant to the court process withdrew the case. Otherwise, the verdict would have helped in learning about the attitude²¹⁰ of the CHC in a

²⁰⁸ *Id.*, p. 17.

²⁰⁹ Redfern A. and Hunter M., *Supra*, note 39, p. 338. See also Reisman W. M. *et. al.*, *Supra*, note 86, p. 1216.

²¹⁰ *Ibidem.*

case where a government agency is a party and, at worst, the losing party against whom the enforcement was supposed to be executed.

GENERAL CONCLUSION AND RECOMMENDATIONS

1. General conclusion

More often than appropriate, the terms ‘recognition’ and ‘enforcement’ are used or referred to together unconsciously perhaps with the understanding that where enforcement is involved so must be recognition and vice versa. In this work, an observation about the use of these terms under Rwandan law was mentioned so as to highlight the peculiarity of Rwandan legislation from the NY Convention. Redfern and Hunter have observed that sometimes these two terms are used as if they are inseparably linked. These authors explain that when, on the one hand, ‘recognition’ is separated and viewed independently from ‘enforcement’, it becomes the means through which a party seeks, from a competent court, an order which excludes the matters already settled by an arbitral tribunal from being re-adjudicated by a court or another arbitral tribunal.²¹¹ Quite contrary to the views of the above mentioned authors that the mechanism of ‘recognition’ is used by the winning party,²¹² we argue that either party who feels that a concluded arbitration process settled certain aspects of the dispute satisfactorily will seek the ‘recognition’ of those aspects to have the *res judicata* effect so that they are not subjected to another judicial process of adjudication.

On the other hand, when ‘enforcement’ is separated and viewed independently from ‘recognition’, it becomes the means through which a party seeks, from a competent court, a practical meaning of the arbitral award which was decided in the favour of that party. In effect, the party seeks the intervention of state authority so that whatever rights that award accords the party should be realised thus making the arbitral award executable through a court order issued by a competent court.²¹³ The state authority, the judiciary and the court bailiff institutions cannot execute an order (an arbitral award) they do ‘recognise’ as valid and, for that matter, enforceable. It is self-evident therefore that ‘enforcement’ as a terminology used in the execution of arbitral awards does include recognition thus making it unnecessary to have the term ‘recognition’ attached to it always. It should be understood that enforcement begins with recognition, whether expressly or implicitly Recognition and enforcement are two different terms; there are not interchangeable!

²¹¹ Redfern A. and Hunter M., *Supra*, note 39, p. 335.

²¹² *Ibidem*.

²¹³ Redfern A. and Hunter M., *Supra*, note 39, p. 336.

Available information indicates that since the promulgation and entry into force of LACCM, on the 06th of March 2008, international arbitration is far from being a widely used alternative dispute resolution mechanism, between private parties in settling international commercial disputes in Rwanda. The fact that only one case (Check what is the state of play at the High Court) with an international character was received by the CHC since the time of its establishment is an indication that international arbitral awards are very rare in Rwanda. The statistics from KIIAC themselves cannot help to alter this assertion as less than thirty cases have been filed in the centre in three years.²¹⁴ Even when it may be conducted under the strict rule of confidentiality, the application for exequatur would have indicated that a substantial number of parties applied to before the CHC seeking enforcement of foreign awards.

Redfern and Hunter have convincingly observed that a “majority of awards are performed voluntarily”²¹⁵ and that “arbitration is essentially a private undertaking and procedure”.²¹⁶ For the reason of confidentiality implied in a private undertaking and procedure, the authors concluded that, “reliable statistics about most arbitral awards having been ... carried out voluntarily are not readily available.”²¹⁷ These observations are cited here so as to make the basis of the argument that it is similarly likely that LACCM has been instrumental in the enforcement of foreign arbitral awards on the Rwandan territory. The court application filed by *JVTP-TPGL vs SONARWA S.A.* indicates the contrary though. The applicant did not only submit an application that is devoid in reference to LACCM, but also was not fulfilling the requirements set by this law. Accordingly, LACCM cannot in any measure be said to have become a solid foundation and a practical tool in the process of enforcement of foreign arbitral awards in Rwanda.

This discourse has illuminated the judicial procedure, both theoretical and practical, through which a party, in whose favour a foreign arbitral award was rendered, can secure an enforcement (exequatur) formula from the CHC for an enforcement of a foreign arbitral award, in commercial matters, on the territory of Rwanda. Settlement of international commercial disputes, to the extent of enforcing the arbitral awards, decisions rendered by private individuals or non-judicial institutions, has been largely facilitated by the legal framework of international conventions and bi-lateral treaties. A very good

²¹⁴ Since July 2012 until June 2015.

²¹⁵ Redfern A. and Hunter M., *Supra*, note 39, p. 314.

²¹⁶ *Id.*, p. 313.

²¹⁷ *Ibidem.*

example of the legal framework is the NY Conventions which has been, counted together, ratified, acceded and succeeded to by 156 countries.²¹⁸ Enforcement of foreign arbitration awards has become a common place phenomenon because an award can be enforced in the remaining 155 countries taking into consideration that it has to be decided in one of the countries which is party to the Convention. This makes the enforcement of foreign arbitral awards much faster and effective than court judgments, which are hindered by territorial jurisdiction.²¹⁹

In order to secure their business and avoid any potential problems at the enforcement stage, business parties should pay a due care to the peculiarities of enforcement procedures in the respective jurisdictions from the very beginning of the contract negotiation and conclusion. It is advisable therefore, that if one decides to choose international commercial arbitration as a means of dispute settlement mechanism, one should make sure that the other party or parties are registered (business) or domiciled (individuals) in the jurisdictions that are parties to the New York Convention. Enforcement of arbitral awards rendered, for instance, in some countries, is rather straightforward, less time consuming, and shall cause no big problems. For instance in Turkey, an award is regarded as either domestic or foreign not so much on the basis of the place of arbitration, but rather on the basis of the applicable procedural framework governing the arbitration, in accordance with the “procedural law principle”. Consequently, an award rendered in Turkey on the basis of the arbitration framework of another State will be treated as “foreign” and therefore qualified for enforcement under the NY Convention through the exequatur and the consideration of reciprocity.²²⁰

If a national court of the state of either of the party to deal with any potential disputes is the preferred choice, it is highly advisable to check existence and operation (legal force) of bilateral agreements facilitating recognition and enforcement of foreign judgments in those countries. If there is a relevant applicable bilateral agreement for the reciprocal recognition and enforcement of foreign judgments court shall normally grant its decision on recognition and enforcement of a foreign judgment. If there is no such agreement or no agreement in force due to absence of ratification recognition and

²¹⁸ See the web site of the United Nations Treaty Section, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp>, accessed on 13th February, 2016, *Supra*, note 53. See also See “Contracting States” at <http://www.newyorkconvention.org/countries>, retrieved on 8th November 2015, *Supra*, note 152.

²¹⁹ Reisman W. M. *et. al.*, *Supra*, note 86, p. 1215.

²²⁰ Bermann A. G., *Supra*, note 45, p. 16.

enforcement shall still in principle be possible based on presumed reciprocity²²¹ since a majority of the state parties have made a reservation on reciprocity.²²²

Another option is to rely on *de facto* reciprocity between the countries, which works well in theory, although, may be less effective in practice. To a greater extent reciprocity depends on economic and political relations between the jurisdictions. If relations between the two countries are developing well, the reciprocity should not in principle be questioned, but rather shall be presumed unless proved (by the defendant) otherwise.²²³

The views discussed in this work are meant to facilitate an awareness campaign for the business community to consider arbitration as a legal process which responds to the business needs and techniques of saving time. The ideas and revelations illuminated in this work will be useful to the business community once the legal fraternity consider them for application in modifying existing laws and integrating them in commercial contracts. One such idea worth singling out here is the use and application of the ‘exclusion agreement’. This agreement practically and effectively excludes the court procedures from intervening in arbitral process or issues which were referred to arbitration by the parties.²²⁴ In essence, an exclusion agreement emphasises the autonomy of parties in choosing the arbitration tribunal and accepting the final award as binding.

2. Recommendations

In order to improve the enforcement of foreign arbitral awards in Rwanda, we deem it necessary to make the following recommendations.

There is need for all countries in the East African region to base their arbitration laws on the Model Law and to fully implement the New York Convention to which they are all signatories. Further, courts have a crucial role in upholding the finality of arbitral awards by recognizing and enforcing them as a matter of public interest. Courts, both national and international, hold the sway in promoting arbitration.

²²¹ Redfern A. and Hunter M., *Supra*, note 39, p. 340.

²²² For example, Argentina, China, Croatia, Georgia, Hong Kong, Hungary, India, Indonesia, Korea, Macau, Malaysia, Romania, Turkey, the United States, Venezuela, and Vietnam. See Bermann A. G., *Supra*, note 45, p. 12.

²²³ For example the United Kingdom. See Goode R., *Supra*, note 19, p. 1199.

²²⁴ Redfern A. and Hunter M., *Supra*, note 39, p. 317.

As we have pointed out earlier, courts must be international in outlook, commercial in skill and arbitration sympathetic. An international outlook requires an attitude or state of mind of judges, of court administrators and officers, and of practitioners to welcome and encourage foreign commercial parties to national courts when seeking enforcement of arbitral awards. .

The Court must be commercial in its focus, skills and approach. This requires that the judges handling arbitral proceedings (whether support, supervision or enforcement) understand the commerce involved in the substantive dispute. The court must understand arbitration in the sense of not merely knowing about arbitration law and practice but also understanding the perspective and approach that facilitates the smooth working of the arbitral system.

There should be a further research on the enforcement of foreign arbitral awards in comparison with the enforcement of commercial international or foreign court judgements. Such a study would illuminate the extent to which arbitration is used as mechanisms of dispute resolution vis-à-vis the classical judicial mechanism of litigation. This research could fill the gap left by this present research about the lack of information regarding the indices of cases submitted to arbitration process by either the Rwandan business community or foreign investors working in Rwanda or international business partners who otherwise may be using litigation whereas arbitration is applauded as an ADR that is on an upward trend to success instead. The research would definitely reveal whether or not arbitration is registering success like it has in developed countries.

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