"I consider that whilst the use of the words 'final and binding', the reference to an expert and the requirement of a quick procedure limited to written submissions, are not sufficient to exclude an appeal, they are matters of great weight in deciding whether it is just and proper for the court to decide the question."

The following year Ramsey J. had to consider the issue again. In *London Underground Ltd v Citylink Telecommunications Ltd Rev 1*[63] Ramsey J. referred to the *DAC Report on the Arbitration Bill* (1996) and then went on to consider the "just and proper" test. London Underground Ltd had argued that there were three factors which should be considered in determining why it was not just and proper to grant leave to appeal. First, the dispute-resolution provisions were structured so that disputes went to management, adjudication and then arbitration without any reference to the courts to resolve the dispute. Secondly, the arbitrator was expressly nominated and was a distinguished construction silk. Thirdly, the contract made express provision that the award be final and binding. Ramsey J. stated[64] that there was much in those arguments and that he would need "compelling reasons to grant leave in the light of those considerations". Ramsey J. then went on to consider the grounds of appeal and concluded[65]:

"such questions of law as are raised do not satisfy the test under s. 69(3)(d) because I do not consider that it would be just and proper in all the circumstances for the Court to determine those questions of law".

## 3. Conclusion

It is only possible to obtain leave to appeal under the AA 1996 s.69 if the parties agree or in exceptional circumstances where the conditions of s.69(3) are met. This is because the courts are reluctant to interfere with the parties' agreement to resolve their dispute by arbitration. Speedy decisions, party autonomy and minimal court interference are fundamental principles of arbitration under the AA 1996 s.1. The benefit of arbitration is that if the parties want a final and binding decision this is what they will usually get. This is the clear message from the court but in these difficult economic times, despite numerous reported cases where applications for leave to appeal have been refused, many losing parties seem not to be easily deterred.

[63] [2007] EWHC 1749 (TCC); [2007] 2 All E.R. (Comm) 694.
[64] [2007] EWHC 1749 (TCC); [2007] 2 All E.R. (Comm) 694 at [234].
[65] [2007] EWHC 1749 (TCC); [2007] 2 All E.R. (Comm) 694 at [336].



# The Scope of Arbitrability under Kenyan Law

**Alfred Oseko Nyanchoka**

## 1. Introduction

There is no unified international concept of arbitrability.[1] In fact, no single international legal instrument on arbitration has given a succinct definition of this concept. The United Nations Convention on International Trade Law (UNCITRAL) in its 32nd session underscored the challenge of formulating universal guidelines on defining arbitrability.[2] In its report on the session, UNCITRAL acknowledged the uncertainty that exists about whether certain disputes are capable of settlement by arbitration. The report claimed that attaining uniformity on this issue would lead to inflexibility since the question of arbitrability is subject to constant development. This item was deferred as a topic for future work and was given low priority.

Loosely, the concept has been defined in a limited manner to mean "whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority".[3]

This definition is derived from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) arts II(1) and V(2). These provisions both guarantee the concept of party autonomy and limit it with the concept of arbitrability.

The New York Convention art.II(1) provides:

"Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

This provision means that party autonomy may be exercised in virtually all disputes except in situations where the subject matter is not capable of settlement by arbitration. Such situations can be inferred under the Convention art.V(2) as:

1. Where the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or
2. The recognition or enforcement of the award would be contrary to the public policy of that country.

These provisions recognise that the arbitrability of any subject matter will depend on the varying restrictions imposed by individual countries. Whereas the concept of party autonomy gives parties freedom to submit all or any dispute to arbitration, national laws impose limitations on what matters can be the subject of arbitration.

Therefore, the arbitrability of any subject matter depends on the choice of laws and herein lies the challenge of unifying the concept of arbitrability. National laws on the concept vary and attaining a uniform basis for evaluating arbitrability is a daunting task.

[1] Per Sundin and Erik Wernberg, "The Scope of Arbitrability under Swedish Law", available at *http://www.Globalarbitrationreview.com* [Accessed June 12, 2013].
[2] *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Second Session*, May 17–June 4, 1999; Supplement No.17 (A/54/17).
[3] Laurence Shore, "Defining Arbitrability: the United States Vs. the Rest of the World" (2009) *New York Law Journal*, Special section, June 15.

This article analyses the concept of arbitrability under Kenya's Arbitration Act and proposes guidelines on how parties, arbitrators and courts could evaluate and determine the arbitrability of particular disputes. Section 2 discusses the concept of arbitrability under the Laws of Kenya. Section 3 discusses how public policy affects arbitrability. Section 4 suggests a theoretical framework for evaluating arbitrability in particular disputes and the final section sets out some conclusions.

## 2. Arbitrability under Kenyan Legislation

Both international and national arbitrations in Kenya are governed by the Arbitration Act No.4 of 1995 as amended by the Arbitration (Amendment) Act 1999.[4] The Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration (Model Law). Like the Model Law, the Act does not define arbitrability or list disputes that are or are not arbitrable. On the contrary, s.3 of the Act treats all contractual and non-contractual disputes as appropriate subjects of arbitration:

> "Parties may submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

This definition is wide enough to infer that any dispute between parties is arbitrable regardless of its nature. However, there are limitations to the wide powers granted to arbitration by this definition. The Arbitration Act ss.35(2)(b) and 37(1)(b) specify the limitations on what may be handled by arbitration. These two provisions underlie the concept of arbitrability in Kenya. They duplicate the New York Convention arts II(1) and V(2).[5] Section 35(2)(b) provides that the High Court may set aside an arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under the Laws of Kenya and the award is in conflict with the public policy of Kenya. The same provision is replicated in s.37(1)(b) under the grounds for refusal of recognition or enforcement of arbitral awards. Those involved in an arbitration, namely the parties, arbitrators and the court, have to consider whether the subject matter of their dispute is arbitrable, as inferred from these two provisions. Before entering into any arbitration agreement the parties should determine if the subject matter is arbitrable. No party should enter into an arbitration agreement knowing that the arbitral award may later be set aside; or that recognition or enforcement may be refused by the courts on account of inarbitrability.

The arbitrators must first consider the nature of the dispute before them and determine whether it is arbitrable as they have no jurisdiction if a dispute before them is inarbitrable. The two provisions, of course, specifically address the exercise of jurisdiction by the courts. If the court considers an award as emanating from an inarbitrable dispute, the court must set aside the award or refuse to recognise or enforce it.

The challenge is demarcating the scope of arbitrability under these two provisions. To resolve the challenge, the following two questions must be answered:

1. What is not capable of settlement by arbitration under the Laws of Kenya?
2. What is contrary to public policy in Kenya?

The first question involves an analysis of all existing substantive legislation in Kenya to establish what has been expressly or impliedly provided as not being capable of settlement by arbitration. Such analysis would be an enormous exercise, which this paper does not attempt to undertake. The advocates of arbitration have argued that even when national

[5] The Constitution of Kenya art.159(2)(c) has also recognised the role of arbitration in dispute



laws appear to make certain disputes inarbitrable, their intention should be considered facilitative as opposed to prohibitive.

Kellor has captured the spirit of arbitration and outlined the role of national laws on arbitrability:

> "Arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.
>
> Accordingly, with the exceptions of arbitrability and public policy which are reserved for the lex fori, the lex fori has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of arbitration."[6]

Therefore, in answering the first question, those involved must be mindful of the fact that the provisions in Kenyan law are meant to be facilitative rather than prohibitive. Nevertheless, the following examples may be considered as rendering certain matters not capable of settlement by arbitration:

1. Statutes that expressly rule out arbitration on certain matters: the Industrial Court Act No.20 of 2011 bestows upon the Industrial Court exclusive original and appellate jurisdiction to determine disputes arising from employment and labour relationships. In light of this provision, parties may not enter into arbitration agreements on employment and labour relationship matters since these matters are inarbitrable unless the Industrial Court of its own volition or at the request of a party refers the dispute to some method of alternative dispute resolution.[7]
2. Statutes that provide for a statutory remedy for the aggrieved party: these are mainly statutes which provide for criminal sanctions for acts of a criminal nature. An example is the Penal Code.
3. Statutory provisions under Kenyan law providing for an agreement to be preceded by a formal decision or requiring official permission. If a statute provides that a certain permission has to be obtained before parties enter into an agreement, then any dispute that arises out of an agreement which has not received that permission may be declared inarbitrable. An example is the Energy Act, No.12 of 2006, s.43(1), which provides that all contracts for the sale of electrical energy or of transmission or distribution services, between and among licensees, and between licensees and large retail consumers, shall be submitted to the Energy Regulatory Commission for approval before execution. The approval of the Commission is a prerequisite for ensuring the validity of contracts for the sale of electrical energy. Failure to obtain such approval may make any dispute submitted for arbitration, inarbitrable.
4. Arbitrations conducted outside the limitation of actions are not arbitrable: the Limitation of Actions Act, Ch.22, Laws of Kenya, s.34 applies (together with any other written law relating to the limitation of actions) to arbitrations as well as to actions. For example, the Limitation of Actions Act s.4 provides that actions founded on contract may not be brought after the end of six years

[6] Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (New York:

> from the date on which the cause of action accrued. This means that a cause of action that is brought after its limitation of time is not arbitrable.

The above examples demonstrate that some statutes have deliberately barred certain matters from being arbitrable. The statutes may not, however, deal with all conceivable situations that are inarbitrable. The "catch all" phrase of public policy is used to bring into the fold any other situation that is not capable of settlement by arbitration. But what is contrary to public policy? We turn to this question next.

## 3. Public Policy and Arbitrability

Besides the express or implied situations under Kenya's laws, there are numerous situations where a dispute is inarbitrable because it is contrary to public policy. There is no statutory definition of what amounts to public policy in the context of the arbitrability of disputes; hence answers can only be found in case law. The courts have not developed coherent jurisprudential guidelines for analysing the concept of arbitrability or public policy.[8] Whereas the written law may be express or may imply what is arbitrable or not, analysis of what is arbitrable under the heading of public policy is not straightforward.

*Black's Law Dictionary*[9] defines public policy as principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. This definition does not include situations that could be contrary to public policy. The courts have not specified how to analyse what constitutes public policy. The definition of public policy by the courts is handled on a case-by-case basis.

In *Gherulal Parakh v Mahadeodas Mayiyev*,[10] the Indian Supreme Court observed in relation to public policy:

> "The doctrine of public policy is only a branch of common law and … it was governed by precedents; its principles had been crystallized under different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of the stability of society."

In *Christ for all Nations v Apollo Insurance Co Ltd*,[11] Ringera J. (as he then was) observed:

> "Although public policy is a most broad concept incapable of precise definition … an award could be set aside under section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:
> (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or
> (b) inimical to the national interest of Kenya; or
> (c) contrary to justice and morality."

The learned judge stated that the first category was clear. In the second category he gave examples which included the interests of national defence and security, good diplomatic relations with friendly nations and the economic prosperity of Kenya. In the third category, he gave examples which included such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals. However, the judge was cautious and warned that the examples were not exhaustive.

[8] Edward M. Morgan, "Contract Theory and the Sources of the Rights: An Approach to the Arbitrability Question" (1986–1987) 60 *Southern California Law Review* 1059.



Ransley J. in *Mahican Investment v Giovanni Gaida*[12] adopted the definition of public policy in the above case and stated:

> "I would with respect agree that there is not an all embracing definition which exhaustively defines what public policy includes. Suffice it to say that what is contrary to public policy will be a matter to be determined by a judge in any case where it is alleged to have been infringed."

There is no exhaustive list of actions which would be considered as being against public policy, hence inarbitrable. Therefore, the demarcation between what is arbitrable and what is not under the heading of public policy is vague. What may be regarded as being against public policy in one country and at one time may not be the same in a different country at a different time. Thus there is a need for a theoretical framework for evaluating what is and is not arbitrable under the heading of public policy.

## 4. Theoretical Framework for Evaluating Arbitrability Based on Public Policy

The rationale for a theoretical framework for analysing arbitrability on public policy grounds by the courts is to ensure coherence and minimum standards for the analysis. The use of a theoretical framework for such analysis is only helpful where both legislation and the common law are silent on whether a certain situation is arbitrable on public policy grounds.

Arbitration as a procedure of dispute resolution is based on the principle of party autonomy. Lord Mustill emphasised this in the English case *Coppée-Lavalin v Ken-Ren Chemicals and Fertilisers Ltd*,[13] stating:

> "The first [concept] is 'party-autonomy', which emphasizes that arbitration is a consensual process, and that national courts should within very broad limits recognize and give effect to any agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted. This is now widely recognized as a first principle of arbitration law, and the English courts in common with those of other nations with developed systems of arbitration strive to give effect to it."

This concept is related to the concept of freedom of contract and privity of contracts which are founded on contract theory.[14] Contract theory is premised on the understanding that all persons capable of free and autonomous choice possess the moral right to be free.[15] This means that persons can freely choose to enter into contractual arrangements with others who are equally free, without coercion or intimidation. Contract theorists argue that parties have the freedom to decide the relevant issues concerning arbitration procedures and this freedom should generally not be interfered with by the powers of any states. Contract theory also underscores the point that only the parties to a contract are bound by its terms. Arbitration, being a creature of contract theory, only creates rights and obligations for the parties involved and does not bind third parties or limit collective rights. The legal structure of arbitration, which is a direct relationship between the persons involved, must reflect and elaborate personal autonomy.

Edward M. Morgan has argued that in determining what issues are arbitrable, one has to make a distinction between those rights which flow naturally from one person's interaction with another and those which are imposed by the state in furtherance of the collective

[12] [2005] eKLR 7.
[13] [1994] 2 All E.R. 449 at 458.
[14] T. Kitagawa, in Pieter Sanders (ed.), *Contractual Autonomy, in International Commercial Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967), pp.133 and138.

interest.[16] By inference from Morgan's assertion, in order for rights to be a subject of interpersonal relations, they should not be rights created by the state for the collective benefit of its members or the protection of vulnerable parties.

If a right is created by the state for the collective benefit of its members or for the protection of vulnerable parties, then that right should not be a subject of arbitration. Kenya's laws have created collective rights and sought to protect vulnerable groups. For example, the Constitution of Kenya provides in Ch.5 for a Bill of Rights to be enjoyed by all Kenyans. Therefore these rights may not be the subject of arbitration between parties.

## 5. Conclusions

Arbitrability is a challenge that parties, arbitrators and the courts have to address before proceeding to determine issues concerning arbitration. It has the effect of nullifying arbitration agreements or affecting the jurisdiction of the arbitral tribunal. Further, it may be the basis for setting aside or refusing to recognise or enforce an arbitral award. Arbitrability is provided under Kenya's Arbitration Act and some laws have specifically provided for subject matters that may not be arbitrable. For example, some statutes expressly rule out arbitration on certain matters or provide for a statutory remedy for the aggrieved party; Kenyan law provides for an agreement to be preceded by a formal decision or to require official permission; and arbitrations conducted outside the limitation of actions are not arbitrable.

Public policy is another consideration in determining whether a subject matter is arbitrable or not. However, there is no coherent guidance on what constitutes public policy. Courts have given limited guidance on what may be considered to be contrary to public policy. Theoretically, in order to determine what is arbitrable and what is not, one has to distinguish between rights which flow naturally from one person's interaction with another and those which are imposed by the state in furtherance of the collective interest.

# A Regulatory Framework for Arbitrators and Increased Arbitral Accountability: Ideas to Reinvigorate Arbitration or Stifle It?

**CIArb Singapore Young Members 2013 Essay Competition Winning Essay***

**Harpreet Kaur Dhillon**

*"The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence."*[1]

## 1. Securing Confidence in Arbitration and the Unlikelihood of a "One Size Fits All" Solution

It is submitted that the imperatives of party autonomy and procedural flexibility infused into the process of international arbitration stem from a single fundamental challenge: how to secure the parties' confidence in the fairness and legitimacy of the arbitral process and resulting decision.

This in large part turns on the parties' confidence in those charged with deciding the claim.[2] The figurative tug of war in this respect is no longer between preserving as much party autonomy as possible versus developing a common regulatory framework to govern the powers exercised by arbitrators across all forms of international arbitration.[3] Instead, the crux of the issue now is what can practically be done to secure confidence in the arbitral process such that its users consider that the form of arbitration they wish to employ is effective when the world of international arbitration is more complex and diffused than ever before and seems ill-suited to regulation other than that which is most elementary.[4] In other words, is the state of international arbitration at present receptive to the application of a regulatory framework across its different forms in order to secure confidence in arbitrators and is such an initiative necessary?

The pressing nature of this question is attributable to the fact that arbitrators are increasingly being called upon to move from the private to the public law sphere.[5] While their role has evolved, there is some merit in the notion that the rules governing their conduct have not sufficiently evolved with it. This is particularly so in international investment arbitration where tribunals are called upon to apply international treaties to what are frequently public law disputes.[6] The direct and indirect effects of their decisions are potentially much more widespread and profound than is the case in "ordinary" international

* The original text has been revised, including accounting for developments as at the date of going to press. The views expressed in this essay, and any errors, are the author's alone.

[1] Professor Jan Paulsson, "Moral Hazard in International Dispute Resolution", lecture delivered at the University of Miami School of Law, April 29, 2010, p.8 (Paulsson, "Moral Hazard").

[2] Paulsson, "Moral Hazard", p.8.

[3] Alexis Mourre, "Are unilateral appointments defensible?", Kluwer Arbitration Blog, October 5, 2010, available at *http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/* (Mourre, "Unilateral appointments") [Accessed June 12, 2013].

[4] Philip Peters, "Can I do this?—Arbitrator's Ethics", Kluwer Arbitration Blog, November 9, 2010, available at *http://kluwerarbitrationblog.com/blog/2010/11/09/can-i-do-this-%E2%80%93-arbitrator%E2%80%99s-ethics/*