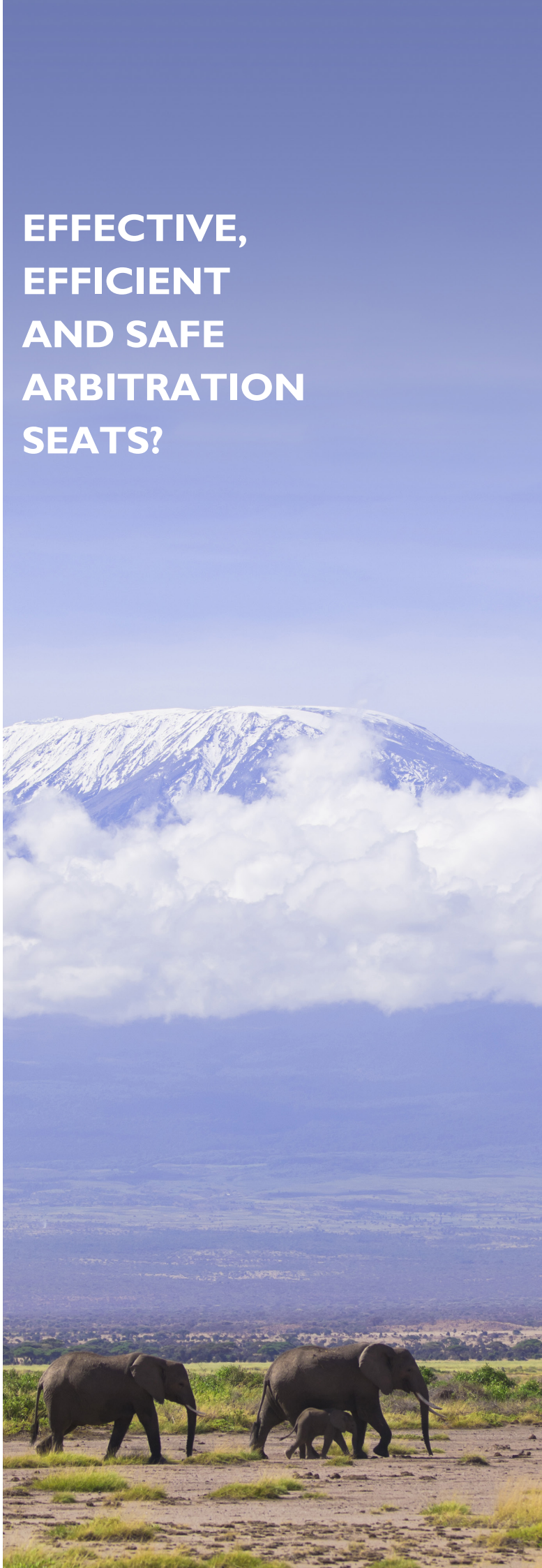
EAST AFRICAN STATES: EFFECTIVE, EFFICIENT AND SAFE ARBITRATION SEATS?

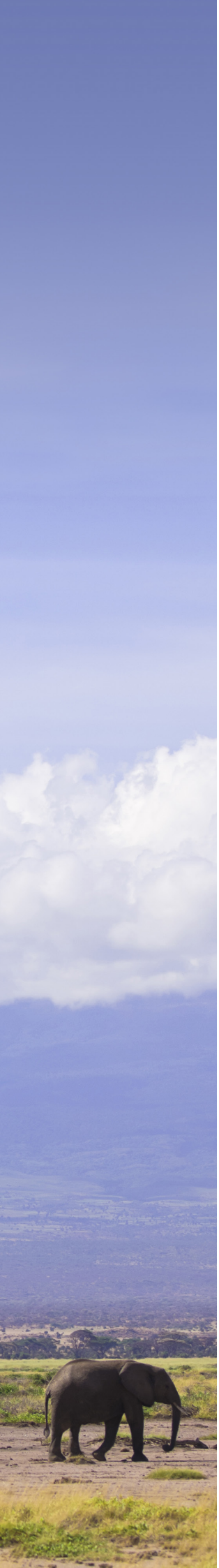
WilmerHale's Jane Rahman and **Kay Weinberg** examine the application of CIArb's London Centenary Principles to arbitral regimes in Kenya, Rwanda, Tanzania, and Mauritius



In April this year, 150 dispute resolution practitioners, academics, and delegates from the private sector gathered in Dar Es Salaam, Tanzania, for the East African International Arbitration Conference. The conference, 'Improving capacity and highlighting dispute resolution capabilities in the region', focused on the five jurisdictions within the East African Community – the regional intergovernmental organisation of Burundi, Uganda, Rwanda, Kenya and Tanzania – with specific presentations on the arbitral framework in Kenya, Rwanda, Tanzania and also Mauritius.

The East Africa conference preceded another significant arbitration event, the July 2015 **Chartered Institute of Arbitrators** London Centenary Conference. At this event, which explored the opportunities for arbitration in the next century, the CIArb launched its London Centenary Principles (Principles), which recognise key characteristics that the organisation has identified as "necessary for an effective, efficient and 'safe' seat, for the conduct of international arbitration" (See box opposite).

Notwithstanding their name, the Principles are intended to have a global impact in helping to identify what makes arbitration really work.



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This article considers the extent to which Kenya, Rwanda, Tanzania and Mauritius – the four jurisdictions that had specific presentations at the Conference in respect of their arbitration framework – are effective, efficient and safe arbitral seats in accordance to the Principles.

The arbitration framework

Perhaps unsurprisingly, the very first of the Principles deals with the arbitration law of a seat, requiring it to be "a clear effective, modern International Arbitration law which shall recognise and respect the parties' choice of arbitration as the method for settlement of their disputes". The prominence given to this factor reflects its undoubted importance. The seat's arbitration legislation will, among other things, affect the procedure of the arbitration and determine the powers that courts have to interfere in an arbitration. It will also determine whether arbitral awards may be enforced within the jurisdiction.

As Principle 1 highlights, an arbitration law should "provide the necessary framework for facilitating fair and just resolution of disputes through the arbitration process" and limit court intervention in arbitral proceedings. In adopting the UNCITRAL Model Law, each of Kenya (the Arbitration Act 1995, as amended by the Arbitration (Amendment) Act No. 11 2009), Rwanda (Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters) and Mauritius (the International Arbitration Act 2008) have arbitration legislation that reflects the importance of these factors and practitioners can, as a result, be confident that the arbitration law in these jurisdictions is clear and modern.

Tanzania, however, maintains outdated arbitration legislation that raises significant concerns as to its suitability as a seat. The legislation (the Arbitration Act 2002) (Tanzanian Act) is based on the English Arbitration Act of 1889 and was last substantively amended in 1971. As a result, some of its provisions do not accord with modern approaches to arbitration. For example, section 27 of the Tanzanian Act, which relates to the requirement of domestic courts to uphold and give effect to arbitration agreements, gives the Tanzanian courts much broader powers than the equivalent provision in the UNCITRAL Model Law.

Thus, where Article 8 of the UNCITRAL Model Law obligates courts to refer parties to arbitration unless their arbitration agreement is "null and void, inoperative or incapable of being performed", Section 27 of the Tanzanian Act permits the courts to also assess whether "there is not in fact any dispute between the parties with regard to the matter agreed to be referred". This gives courts heightened power to retain jurisdiction over a dispute, rather than uphold the parties' choice of arbitration. The resultant uncertainty for parties undermines Tanzania's ability to position itself as a 'safe' arbitral seat.

Principles 5 and 10, regarding party representation and arbitrator immunity, are both important elements of a seat's arbitral framework (parties do not want fetters on their choice of counsel, and arbitrators must be free to preside over disputes without fear of personal liability) and ▶

CIArb London Centenary Principles – a summary

1. **A clear effective, modern international arbitration law**
2. **An independent competent judiciary with expertise in international commercial arbitration and respectful of the parties' choice of international arbitration as their method for settlement of their disputes**
3. **An independent competent legal profession with expertise in international arbitration and international dispute resolution**
4. **Education regarding the character and autonomy of international arbitration**
5. **A right to representation of the parties' choice**
6. **Easy accessibility and adequate safety**
7. **Functional facilities**
8. **Ethical norms that embrace diverse legal and cultural traditions**
9. **Adherence to treaties and agreements for the recognition and enforcement of awards**
10. **A right to arbitrator immunity from civil liability**

the arbitration laws of each of Kenya, Mauritius, Rwanda and Tanzania reflect this.

In respect of representation, both Kenya and Mauritius enshrine the right to free choice of party representative within their arbitration laws. Rwanda's arbitration legislation is silent on the issue; while it provides no positive right to free choice, equally it does not restrict that right (and the rules of the **Kigali International Arbitration Centre** (KIAC) provide that parties may be represented by counsel of their choosing). Tanzania's law does not restrict who can be appointed as party representative although some commentary suggests that, in practice, Tanzanian arbitrators may insist that representatives hold local practising certificates. (See K. Deale 'Chapter 3.9: Tanzania' in Lise Bosman (ed.), *Arbitration in Africa: A Practitioner's Guide* (2013), at p. 241.)

Similarly, in Kenya and Mauritius, an arbitrator's immunity from civil liability for acts and omissions done by the arbitrator in good faith in his or her capacity as arbitrator is prescribed by law. In Rwanda, the arbitration legislation does not address the issue (although if parties adopt the KIAC Rules for an arbitration, Article 47 provides that the "Centre, including its officers or the arbitrators shall not be liable to any person for negligence, act or omission in connection with arbitration governed by these Rules"). Tanzania's legislation is also silent on this issue. Because of the lack of clarity and certainty as to the liabilities that arbitrators may face, those two jurisdictions may struggle to attract the best arbitrators to preside.

CIArb also identifies the need for a 'safe' seat to have a judiciary and lawyers who have expertise in international arbitration (Principles 2 and 3), ethical norms that embrace a diversity of legal and cultural traditions and which reflect the developing principles governing the behaviour of arbitrators and counsel in arbitrations (Principle 8) and a commitment to education in respect of arbitration (Principle 4).

Perceptions as to how Kenya, Rwanda, Tanzania and Mauritius fair in respect of these characteristics will likely vary. In practice, however, a legal community can only build expertise through experience, and as more arbitrations are seated in Kenya, Rwanda, Tanzania and Mauritius, perceptions as to the expertise of the legal communities will likely also develop.

The arbitral process

The Principles look beyond the domestic legal framework that a seat provides to also consider the very real practical issues associated with arbitration proceedings. As such, Principles 6 and 7 consider the accessibility and safety of a seat and its facilities, respectively. Kenya, Rwanda, Tanzania and Mauritius, do not appear to have difficulties in this regard.

None of the four states seem to place unreasonable constraints on entry, work and exit for parties, witnesses and counsel in international arbitration, and all seem to provide adequate safety and protection of the participants, their documentation and information.

Similarly, each state has functional facilities for the provision of at least basic services to arbitration proceedings; such that hearing rooms, accommodation for participants, basic document handling services and business facilities will likely be available. The presence of arbitral institutions – the KIAC in Rwanda, the **Nairobi Centre for International Arbitration** in Kenya, and Mauritius' **LCIA-MIAC Arbitration Centre** – may also go some way to ensure the logistical needs of parties are met.

Enforcement of Awards

Principle 9 requires that for a seat to be 'safe' the state must adhere "to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries".

On paper at least, this should not be an issue for Kenya, Rwanda, Tanzania and Mauritius as they are each party to the New York Convention 1958. As a result, those participating in arbitrations seated in these countries can have some confidence that any award they obtain will be enforceable in over 150 contracting states that have acceded to the Convention.

Separately, however, East Africa struggles with a perception that it is difficult to enforce arbitral awards in the region. In certain jurisdictions this may be true; in others, perceptions are clouded because it is difficult to find out information about how enforcement is being dealt with. In any event, this is not an issue which clearer arbitration legislation would likely rectify.

The relevant arbitration legislation in Kenya, Rwanda, Tanzania (even though it has not adopted the UNCITRAL Model Law) and Mauritius expressly provides that all arbitral awards (foreign or domestic) are recognised as binding and enforceable.

Still, enforcing arbitral awards in these countries is seen to be difficult; practitioners want to see a proven track record of arbitral awards being enforced before they will trust that a jurisdiction is 'safe' in this respect. This is where the region struggles.

There have been relatively few recognition and enforcement applications made in East African jurisdictions and, as a result, building up a track-record is difficult and will take more time. Case law is limited, and what is available reveals a somewhat inconsistent approach to enforcement that does not help to build clarity and certainty.

Starting with a positive, it appears that in

Rwanda, as of 2013, there has been no known case in which the courts have refused enforcement of an award on any grounds. (See Didas M. Kayihura, 'Chapter 3.6: Rwanda' in Lise Bosman (ed.) Arbitration in Africa; A Practitioners Guide, Bosman (2013) at p. 227.)

In Mauritius case law is limited. It is promising, however, that the Mauritian Supreme Court has held that enforcement applications must be made to the court's arbitration branch (a specially constituted three-judge panel designed to create a single body with advanced expertise in international arbitration), even where the arbitration is not governed by Mauritius' 2008 arbitration legislation.

Case law in Kenya reflects mixed outcomes to enforcement applications. In *Kenya Shell v Kobil Petroleum* (2006) the Court of Appeal upheld the right to appeal in the context of enforcement proceedings on the basis that the domestic legislation does not prohibit a right of appeal or limit the supervisory jurisdiction of the courts. But the courts have also demonstrated a more pro-enforcement approach. In *Christ For All Nations v Apollo Insurance Co* (2002) the High Court set a high bar for refusal to enforce final arbitral decisions when it rejected a public policy defence, and held that parties to arbitrations should, in general, accept awards "warts and all".

The difficulties that arise in respect of enforcement in Tanzania are potentially more significant. Notwithstanding that the Tanzanian courts have enforced awards even in the face of political pressure (see e.g. *Tanzania Electric Supply Company v (1) Dowans Holdings and (2) Dowans Tanzania Limited (2011))*, the Tanzanian High Court decision in *Standard Chartered Bank v Tanzania Electric Supply Company* (2014 – unreported) to injunct the parties to an ICISD arbitration from "enforcing, complying with or operationalising" the ICSID tribunal's decision on jurisdiction and liability demonstrates the risks of relying on Tanzania to uphold its obligations under international treaties.

Clearly there are discrepancies within the region in respect of the approach to enforcement of arbitral awards. Until there is a larger and more consistent body of case law that provides clarity and certainty in respect of enforcement within the region, East African states will struggle to promote themselves as 'safe' arbitral seats.

Conclusion

CIArb's Principles provide an interesting prism through which to assess the effectiveness of Kenya, Rwanda, Tanzania and Mauritius as seats for arbitration. Rwanda and Mauritius' pro-arbitration legal infrastructure supports their emerging position as 'safe' seats for arbitration. Kenya too is well advanced in this respect, though its case law in regard to enforcement may be a cause for concern. Tanzania, however, currently lags behind in terms of its 'safety' as a seat. At a minimum its arbitration legislation needs to be updated and, linked to this, its approach to enforcement must be modernised.

However, the success of Kenya, Rwanda, Tanzania and Mauritius as arbitral seats depends, above all, on their use. Parties' confidence in whether the country is an effective, efficient and safe seat will not come without regular experience of conducting arbitral proceedings governed by the jurisdictions' arbitration legislation and institutional rules. With increased use, there is no reason that at least some jurisdictions in East Africa, notably Rwanda and Mauritius, should not come to be seen by international practitioners as 'safe' seats. ■

About the authors

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