CHANCELLOR COLLEGE

FACULTY OF LAW

RECOGNITION AND ENFORCEMENT OF CROSS-BORDER ONLINE ARBITRATION AND ARBITRAL AWARDS IN MALAWI

LLM (COMMERCIAL LAW) THESIS

By

BURTON CHIGONDONGO MHANGO

Submitted to the University of Malawi, Faculty of Law, Chancellor College in Partial fulfilment of requirement for the award of the Degree of Master of Laws in Commercial Law

July 2021

DECLARATION

I, the undersigned hereby do declare that this thesis is my original work which has not been submitted to any institution for similar purposes. Where other people's work has been used the same has been sufficiently and appropriately acknowledged.

BURTON CHIGONDONGO MHANGO

…….

Full Name

…….

Signature

……..

Date

TABLE OF CONTENTS

ABSTRACT

The study examines the suitability of the legal regime of Malawi arbitration for recognition and enforcement of cross-border e-arbitration and arbitral awards. Due to advancement of technology e-Arbitration is fast replacing the traditional means of arbitration as a form of alternative dispute settlement. In Malawi the legal framework for arbitration remains largely that of 1967 Arbitration Act. In this form it is assumed that the framework is not adapted to reflect the trends in e-commerce and that it creates obstacles that may stand in the way of the successful implementation of e-arbitration in Malawi. This study uses doctrinal approach and analyses the arbitration framework in Malawi to assess its ability for recognition and enforcement of cross border e-awards.

CERTIFICATE OF APPROVAL

The undersigned certify that this thesis represents the students own work and efforts and has been submitted with my approval.

Signed

……

GARTON KAMCHEDZERA

SUPERVISOR

July 2021

ACKNOWLEDGMENTS

This study would not have been possible without the guidance and support of my Supervisor **Associate Professor Garton Kamchedzera**. Also, thanks go to my wife **Daisy** and my children, **Untho** and **Ulunji** for their patience and understanding to give me time and space to complete this study. Thanks to the colleagues in LLM Commercial Law Cohort 7. I also acknowledge the encouragement of LLM Commercial Law Coordinator, Doctor Nghcimezile Mweso.

Finally, I owe everything to God.

DEDICATION

Dedicated to my late Dad Leston Mhango and late Mum Ridge Mzumara - RIP

ABBREVIATIONS

NYC	New York Convention
ICC	International Chamber of Commerce
ICAC	International Commercial Arbitration Court of Chamber of Commerce
MILEs	Model Law on Electronic Signatures
CISG	United Nations Convention on Contracts for the International Sale of Goods
ODR	Online Dispute Resolution
UNCITRAL	United Nations Commission on International Trade Law
ICCA	International Council for Commercial Arbitration
ETCSA	Electronic Transactions and Cyber Security Act

TABLE OF STATUTES

The Republic of Malawi Constitution, Chapter 1:01 of the Law of Malawi.

The Arbitration Act, Chapter 6:01 of the Laws of Malawi

Electronic Transactions and Cyber Security Act, Number 16 of 2016

General Interpretation Act, Chapter 1:02 of the Laws of Malawi

TABLE OF INTERNATIONAL INSTRUMENTS

Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971 available at www.hcch.net (4-8-2014)

SADC Treaty of 1992 available at http://www.sadc.int/documents-publications/show/865 (20-9-2014)

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention) available at www.unictral.org (8-10-2014)

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration

UNCITRAL Technical Notes on Online Dispute Resolution

United Nations Convention on Contracts for the International Sale of Goods (CISG)

TABLE OF CASES

CHAPTER ONE

BACKGROUND TO THE STUDY

1.0 Introduction

This study examines the suitability of the Malawi arbitration legal framework for the recognition and enforcement of cross-border online arbitration. It begins by giving the background to the study in chapter one. It then goes on to provide the aims and objectives, the methodology employed, the literature review and outline of the rest of the study. Chapter two of the study discusses concepts, theories and approaches to recognition and enforcement of online arbitral awards. Chapter three makes a comparable examination of the best practices in recognition and enforcement of online arbitral awards. In chapter four the study uses the findings to assess the suitability of the Malawi arbitration framework for effective recognition and enforcement of the online arbitration awards. In chapter five the study summarizes the implications of the findings and makes proposals for effective implementation of cross border online arbitration in Malawi.

1.1 Background

Arbitration is a form of alternative dispute resolution in which a private system of dispute adjudication, outside a judicial system, is used.[1] In most instances, arbitration involves a final and binding decision called award similar to a judgment or ruling of the court that is enforceable in a national court.[2] International treaty and local laws provide mechanisms or processes for the enforcement of such final awards.[3]

Due to advancement in the use of technology in international trade, traditional physical methods of arbitration are fast becoming unsuitable for e-commerce.[4] In their place there have emerged modern ways of conducting arbitration by use of the Internet and other

[1] Margaret Moses, The Principles and Practice of International Commercial Arbitration, 2nd edition, Cambridge
[2] Ibid
[3] Fawcett, J. J., Carruthers, J. M., North, P. M., & North, P. M. (2008) Private *international law*. Oxford, Oxford University Press.
[4] E. Katsh, 'Online Dispute Resolution: The Next Phase', (2002) 7(2) Lex Electronica;

online processes. Gabrielle Kaufmann-Kohler[5] comments that in just a few years since year 2000 the picture has changed dramatically. Each year close to a million disputes are resolved online and over a hundred online dispute resolution providers offer their services worldwide.[6] This kind of arbitration is what is now called online arbitration or e-arbitration.

Wahab[7] generally describes e-arbitration as any arbitration conducted through the Internet.[8] He contends that this form of arbitration is particularly convenient and efficient where the parties are located at a distance.[9] Hornle J[10] has argued that online arbitration is a great service in bridging distances and it breaks trade barriers.[11] He adds that most of the disputes in e- commerce take place between parties of different nationalities. Thus, the Internet helps settle disputes in the various geographically isolated areas without the need for physical meetings.[12]

However, the success of arbitration as a means of dispute settlement depends on the ability of the final award to be recognized and enforced in a foreign country. The same applies in online arbitration.[13] Recognition and enforcement of foreign judgment and wards have partly been justified on the basis of the theory of vested rights also known as the doctrine of obligation.[14] This theory posits that a foreign judgment creates an obligation on the defendant for which the defendant must comply unless the defendant shows a good reason why he should not be called upon to fulfil that obligation.[15] Prior to the development of the theory of obligation English courts recognized foreign judgment on the basis of the principles of reciprocity and comity which disregarded the principles of territoriality and sovereignty of state that restricted the power of the judgment to territorial boundaries.[16]

---

[5] Ibid
[6] Ibid
[7] Wahab, M. S. A. (2012). ODR and e- Arbitration-Trends & Challenges. Online Dispute Resolution Theory and Practice, *International Eleven Publishing.*
[8] ibid
[9] Ibid
[10] Hörnle, J. (2002). Online Dispute Resolution-The Emperor's New Clothes: Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration. ADR Online Monthly
[11] Ibid
[12] Ibid
[13] Ibid Note 7
[14] Ibid
[15] Ibid
[16] DICEY, A. V., MORRIS, J. H. C., & COLLINS, L. (2006). *Dicey, Morris, and Collins on the conflict of laws*. London, Sweet & Maxwell.

Considering that e-commerce and e-arbitration are fast replacing the traditional commerce and traditional arbitration, the principles on which foreign arbitral awards were recognized in the traditional arbitration such as doctrine of obligation, reciprocity and comity may no longer apply in the e-arbitration. Therefore, there is need to rethink and reposition the legal frameworks for recognition and enforcement of awards that are made from e-arbitration. National laws and international instruments need to evolve to include new principles on the basis of which the novel online arbitration processes can be recognized and enforced.

In Malawi though dispute resolution is largely litigation-based to the extent that where arbitration is provided in the contract often parties still attempt to take disputes to court[17]. This situation has been justified on the basis that in Malawi there are challenges to do with internet connectivity.[18] There are also perceptions of conservative culture not to open to swift changes and technical developments[19] and that the Malawi trader feels safer using hard copy documents or a face-to-face transaction, rather than conduct such businesses and activities virtually with no evidence.[20] Lately, Malawi has passed the law regulating E-signatures in the Electronic Transactions and Cyber Security Act (the ETCSA). It is however not known whether and how the provisions of the ETCSA regarding the recognition of electronic transactions, reconcile with the recognition and enforceability of arbitration awards made electronically in foreign jurisdictions.

1.2 Problem statement

The Malawi Arbitration legal framework is largely provided by the Arbitration Act of 1967. Section 36 of the Act provides procedure for recognition and enforcement of foreign arbitral awards. The Electronic Transactions and Cyber Security Act (ETCSA) seeks to recognize and legalize electronic contract and e- commerce in Malawi. Recently Malawi has also acceded to the NYC. Despite the foregoing it is unclear whether under current legal framework and principles, foreign awards emanating from online arbitration can be recognized and enforced in Malawi. It is therefore important to examine whether under the current regime for arbitration, recognition and enforcement of arbitral awards conducted

[17] *Industrias Metalurgicas Pescamona Sociedad Animana (IMPSA) v Heavy Engineering Limited* MSCA Civil Appeal No. 14 of 2000 (unreported) (judgment of 29 May 2002).
[18] NSO-MACRA, Survey on Access and Usage of ICT Services, 2014
[19] Ibid
[20] Ibid

via online forum can be successful in Malawi and where necessary, provide reform of the law and procedures of arbitration and adapt the same to achieve the goals of e-arbitration.

1.3 Aim and objectives of the study

The general aim and objective of the study is to examine how well the Malawi's arbitration regime facilitates the recognition and enforcement of cross-border e-arbitration. To achieve this general objective, this study considers the following specific objectives:

1.3.1 Examine the relevance of traditional principles for recognition and enforcement to e-arbitration.

1.3.2 Critically examine the legislation and treaty law that provide for recognition and enforcement of foreign arbitration awards in Malawi.

1.3.3 Analyse the formalities and procedures for recognition and enforcement of foreign arbitral awards in Malawi.

1.3.4 To propose new mechanism for recognition and enforcement of online awards.

1.4 Research questions

The study investigates this main question: How well does the law in Malawi facilitate the recognition and enforcement of an online award made in foreign jurisdiction. In doing so the study will consider the following questions.

1.4.1 What theoretical approaches can be the best ground for recognition and enforcement of cross border online arbitration?

1.4.2 How are various jurisdictions using the law to facilitate the legal recognition and enforcement of cross border online arbitration?

1.4.3 How well suited for recognition and enforcement is Malawi's law related to cross border online arbitration

1.4.4 How can Malawi's law on recognition and enforcement of across border arbitration be more amenable for effective online arbitration?

1.5 Hypothesis of the study

The assumption of this study is that if the current arbitration framework remains as per the 1967 Arbitration Act, then the current regime for arbitration in Malawi may not achieve recognition and enforcement of cross border online arbitral awards.

1.6 Literature Review

While there is much literature on traditional arbitration, e-arbitration is novel and not much has been written on the subject. This review considers the general link between arbitration and technology, the roles of courts in resolving online dispute, the need for special regulation and the general overview of the current status regarding the recognition and enforcement of online arbitration awards.

1.6.1 **Use of technology in arbitration**

Technology and Internet have introduced a new world for international arbitration. However, as Wolff[21] suggests the potential for technology in international arbitration does end where key legal instruments are denied legal recognition. Gabrielle Kaufmann-Kohler and Thomas Schultz,[22] agree with Wolf and identifies four key challenges to enforcement of technologically conducted arbitration namely; the validity of electronic arbitration agreements, the enforceability of arbitration agreements concluded online, obstacles arising out of the conduct of the arbitration procedures online and the issue of electronic authentication of the final award. Sodiq O. Omoola[23]and Umar A. Osening[24] also agree with Gabrielle Kaufmann-Kohler and Thomas Schultz arguments and go on to argue that even though many countries have adopted Alternative Dispute Resolution (ADR) mechanisms such as negotiation, mediation, conciliation and other hybrid processes to resolve disputes, such effective mechanisms could be daunting if there is no substantial recognition of the use of technology in their statues.

[21]Assistant Professor at the University of Marburg (Germany) and Independent Arbitrator
[22]Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International 2004).
[23]Sodiq O. Omoola, Ph.D. Candidate, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia
[24] Ahmad Ibrahim Kulliyyah of Laws, Associate Professor International Islam,

One challenge identified by researches is the existence of requirements of "written" document in many jurisdictions which is normally not congruent with online or electronic methods.[25] This 'writing' requirement has been subject of much debate at national and international level. Aljandor Lopez[26] however argues that this debate is not necessary because the formality of writing is for evidentiary purposes only and not the validity of the transaction.[27]

In his article, On-line Arbitration: Issues and Solutions" Richard Hill[28] is of the view that arbitration agreements can be concluded by electronic means as long as appropriate precautions are taken within the framework of existing national laws and international treaties. His arguments were a reaction to an early analysis of the issues raised by Jack Goldsmith and Lawrence Lessig[29] in which they give an overview of electronic means appropriate for arbitration. They showed that an exchange of E-Mails satisfies the requirements of the NYC with respect to formation of an agreement to arbitrate, but argued that the use of E-Mail to conduct the proceedings might pose a problem with respect to the question of where the arbitration takes place. Richard Hill disputes the later argument and states that national laws and The New York Convention would have to be modified to allow e-arbitration.[30]

From the foregoing it seems the position is not clear regarding the recognition of unwritten arbitration processes and award conducted using the Internet. The issues of whether the form should be strictly adhered to is far from being settled. This research will therefore attempt to address this gap in as far as the Malawi jurisdiction is concerned.

1.6.2 **Use of courts to resolve online disputes**

[25]Bordone, R.C., Electronic Online Dispute Resolution: A Systems Approach: Potential, Problems and a Proposal, 1998, Harvard Negot. Law Review, 3/178, p. 192
[26] Alejandro López Ortiz, "Arbitration and IT" (2005) 21(3) *Arbitration International* 353.
[27]Ibid
[28] Hill & Associates, 6 ch. du Port-Noir, CH-1207 Geneva, Switzerland.
[29] Jack Goldsmith and Lawrence Lessig, "Grounding the Virtual Magistrate", *Electronic Dispute Resolution: an NCAIR Conference* (http://www.law.vill.edu/ncair/disres/groundvm.htm, 22 May 2019).
[30]FrankA.Cona,"Internet Arbitration of International Commercial Disputes" (http://www.ipwarehouse.com/IP_Librar /general articles/arb_art.htm, 1996)

The other issue that is critical is the consideration of the relevance and suitability of traditional courts system in the settlement of disputes and particularly disputes that occur in e-commerce. Since traditional arbitration is already recognized by many legal systems, there is debate as to the relevance of the online arbitration. The question is why should online arbitration be looked at differently while there is already traditional arbitration.

To begin with, in cross-border commercial transactions, the Internet is a major tool for both consumers and businesses, as businesses can use the Internet for marketing and selling their products, while consumers can shop and buy low-cost products online.[31] The Internet has stimulated small, medium, and large companies to contribute to free cross-border trade, and to secure places in global markets, including online markets.[32] Apart from that, the Internet helps parties, either businesses or consumers, settle any dispute that may arise out of or in connection with their commercial transactions online.[33] In this respect, traditional court system may not be suitable for online dispute settlement.

Alvaro J.A.G[34] also agrees that the system of courts is not a suitable system of online dispute resolution. He points out four major problems that can be identified about the use of court dispute settlement in this area.[35] He singles out the inadequate current private international law applied to delocalized online disputes, which he says creates difficulties in reconciling the concept of jurisdiction and the concept of choice of law.[36]

Strout, J[37] also agrees with Alvaro, and adds that the court system of dispute resolution lacks the specialization, speed, and flexibility necessary for resolution of online disputes. In other words, Strout argues that the connecting factors of the private international law do not count with cyberspace realities.[38] In the end they all conclude that the states and parties must be ready to embrace the immerging special regime on online dispute resolution.

[31] Gilliéron, P. (2007). From face-to-face to screen-to-screen: real hope or true fallacy. Ohio St. J. on Disp. Resol., 23, 301.
[32] ibid
[33] Maud Piers & Christian Aschauer, (Ed)*Arbitration in the Digital Age*, 2018; Cambridge University Press.
[34] Alvaro J.A.G., Online dispute resolution - Unchartered Territory, Vindobona Journal of International Commercial Law and Arbitration, 2003, No. 7/187, p. 1-5
[35] Ibid
[36] Ibid
[37] Strout, J.R., Online Arbitration: a Viable Solution for Resolving Disputes that Arise from Online Transactions, 1 Journal of American Arbitration, 2001, No. 75.
[38] Ibid

1.6.3 **Regulation of e-arbitration**

The concept and nature of online arbitration raises a debate about the dividing line between the online aspect and the tradition arbitration. Whether and how the online arbitration should have the special regulation depends of the conclusion of this debate. Thus, there is a need to know where the line should be drawn.

According to Jana Herboczkova,[39] online dispute resolution, has been developed as a new form of alternative dispute resolution mechanisms adapted to unique nature of cyber space and that use of computer technologies has influenced and simplified the arbitration process.[40] He argues that online arbitration processes are better suited for resolving of online disputes as they are better suited to deal with technically complex matters, can more readily answer to rapid developments and create better conditions for delocalized transactions.

Berger, K.P agrees with Jana Herboczkova and adds that for now there is a hybrid form of e- arbitration which combines the elements of traditional concept of arbitration as well as new set of rules that make this form of dispute resolution more independent.[41] On his part Sylvia Mercado[42] gives an overview of the legal framework of online arbitration and how it is carried out. The author justifies the urgent need for cyber arbitration to the growth of electronic commerce where by every industry is being affected by the Internet. The author also cautions against the risks involved in cyber-arbitration and advises on proper separate rules being put in place to minimize the risks of online arbitration.

Pablo Cortes[43] agrees with Sylvia Marcado on the need for special regulation but argues that the existing laws and arbitral principles do not prevent arbitration from taking place online. He supports his arguments by the fact that most arbitration providers have introduced some online dispute resolution tools into the arbitration process to take care of online arbitration.[44]

---

[39]Jana Herboczkova, "*Certain Aspects of Online Arbitration*" 2008, available at http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf (Accessed on 1st April 2019)
[40] Ibid
[41] Ibid
[42]Sylvia Mercado Kierkegaard, "Legal Conundrums in Cyber Arbitration" Article available on http://www.iadis.net/final-uploads/200406C016.pdf (Accessed on 4th April 2012)
[43] Ibid Note 51
[44] Ibid

This study while agreeing that e-arbitration can still take place under the laws of traditional arbitration, the study seeks to show that the existing laws do not comprehensively address novel issues that have come by because of the use of Internet in arbitration.

1.6.4 **Current position of recognition and enforcement of foreign arbitral awards**

Considering that in traditional arbitration a foreign judgment is on similar footing to a foreign court judgment the principles applicable to enforcement of the foreign judgment can also be applied in the enforcement of foreign arbitral awards.[45] For this reason legal scholars have recognized the need to harmonize and standardize rules and principles regulating various spheres of private international law in order to find a common thread in the principles of recognition and enforcement of the arbitral awards.[46] Hence, Mumba[47] argues that there is currently a trend on an international level that seems to lean towards the breaking of the legal barriers affecting the recognition and enforcement of foreign judgments to enable international trade and commerce to flourish in a unified, harmonized and standardized foreign judgments enforcement environment. The question of applicability of the traditional principles in the online arbitration has raised a debate among scholars.

Currently the most recognized principles of recognition and enforcement of foreign arbitral awards are as provide by the New York Convention.[48] According to Wetter[49], the convention is the single most important pillar on which the edifice of international arbitration rests. He urges that a party which seeks recognition and enforcement of an arbitral award must produce a written arbitral award and the agreement to arbitrate before the relevant court.[50] According to him the regime for recognition and enforcement offered by the NYC is not applicable to the online arbitration.

[45] Fawcett, J. J., Carruthers, J. M., North, P. M., & North, P. M. (2008). *Cheshire, North & Fawcett private international law*. Oxford, Oxford University Press.
[46] Ibid
[47] Mumba Alfred; *The recognition and enforcement of foreign judgments in Malawi*, LLM Thesis, University of Johannesburg South Africa, 2014
[48] Ibid
[49] Toby Landau; Requirement of written form for an arbitration agreement when written means Oral, the ICCA Congress Series No. 11 p 19
[50] Ibid Note 60

On the other hand, Ihab Amro[51] contends that the current regime for recognition as provided by the NYC is capable of recognition and enforcement of online arbitration. Amro however recognizes the need for improvements of the international legal framework of recognition and enforcement in order to face the new developments in international commercial transactions. Arsic[52] agrees with Amro and further adds that problems may arise with respect to arbitration proceedings conducted by electronic means because, according to him, there is no identifiable seat of arbitration.

This view has been disputed by Hill,[53] who shows that the physical place of hearings or other proceedings, or lack of a physical place of hearings or other proceedings, is irrelevant, since the seat of arbitration is either the seat chosen by the parties or the seat chosen by the arbitrators in accordance with applicable arbitration rules and law. Hence, he argues, the question of the seat in online arbitration is not important factor in the recognition and enforcement of the award.

On his part Asamsud Alsaiat[54] submits that online arbitration is subject to two types of legislative frameworks and legal systems and is not compatible with the traditional arbitration. Hence, he says recognition and enforcement of the online arbitral awards should not be the subject of the general law and legislation. He submits that this type of special framework is in the laws on electronic commerce such as in the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures (United Nations Commission on International Trade Law, 2007) and the United Nations Convention on the Use of Electronic Communications in International Contracts of 23 November 2005. Therefore, he says that the tradition principles emanating from the NYC should have no place in online arbitration.

1.6.5 **Current position in Malawi**

[51] Ihab Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice, A Comparative Study in Common Law and Civil Law Countries.*

52Jasna Arsic, "*International Commercial Arbitration on the Internet" Journal of International Arbitration (Vol. 14, no. 3, September 1997*), p. 219

[53] Ibid

[54] Asamsud Alsaiat, *The legal frameworks that govern electronic arbitration Processes and its role in resolvingg Dispute in International Commercial Contracts, 2008*

The current regime for recognition and enforcement of foreign arbitral awards in Malawi is both statutory and common law.[55] However, accordingly to Nzunda, there are many limitations in the statutory framework as the current Arbitration Act is considered outdated and not adapted to current international treaties.[56] This means that parties who seek to enforce foreign judgments in Malawi will generally have to choose the common law path. Lusungu Mtonga[57] also adds that the legislative regime on enforcement of foreign arbitral awards in Malawi is very archaic and that burden of proof placed on the enforcing party by the Arbitration Act is too much.

Kelious Mlenga[58] says that the major problem is that the current arbitration regime has not adopted the UNCITRAL Model law. He explains the difference as being the major shortfall in the current Malawi regime for recognition and enforcement of cross border arbitral awards. He argues that there are differences in the grounds for refusal to recognition and enforcement and that makes enforcement of foreign arbitral award rather tedious in Malawi. Further, Kandako Mhone[59] also stresses that the current regime for arbitration in Malawi has limitation. He argues that the Arbitration Act was primarily designed to cater for domestic commercial disputes and it was on this basis that the Act gave the High Court extensive supervisory powers. He says that the underlying principle behind these extensive powers is to safeguard fairness and procedural justice. In addition, he observes that a closer examination of the Act reveals that it is not possible for the parties to choose rules of arbitration or applicable law other than Malawian law.

Literature shows that there are new challenges that have come about using technology in cross border commercial transactions. Authors generally agree that these changes have brought the need for careful consideration of regimes for arbitration to find better model and basis of recognition and enforcement of the online arbitration. However, authors do not agree on the question as to which model should be the applicable basis for recognition and enforcement of e- arbitral awards.

[55] C. M. S. Nzunda *The Controversy on the Statutes of General Application in Malawi*, Published online by Cambridge University Press: 28 July 2009
[56] Ibid
[57] Analysis of the Law on Enforcement of Foreign Arbitral Awards In Malawi: A Call for The Ratification of The New York Convention,
[58] Kelious Mlenga, "*A Review of Selected Aspects Malawi's Arbitration Legal Framework In Light of the International Arbitration Regime*"(2014)(unpublished)
[59] Kandako Mahone; *Arbitration law In Malawi and its implications for the PT* A/SADCC, 1990

1.7 Justification of the study

Given the above background, online arbitration is fast becoming important mode of cross border dispute resolution replacing the traditional physical mode. However, literature shows that the current arbitration regime remains largely the 1967 Act. Therefore, there is need to expose the status quo of the legal framework in Malawi as far as its ability to recognize and enforce cross border online arbitral awards is concerned. The study aids policy and law makers to consider reviewing and adapting the law to catch up with the modern technology advancements.

1.8 Significance of the study

In an increasingly technology interdependent world, the importance of an effective legal framework for the facilitation of technologically driven commerce is widely acknowledged. Because modern e-commerce has a strong relation with e-arbitration this should mean that e-arbitration will grow steadily. The recognition and enforcement of such awards is vital for the e-commerce. Literature shows that currently it is not known how the current arbitration framework in Malawi would deal with the question of recognition and enforcement of cross border e-arbitration. Hence the study is an attempt to assess the efficacy of the current state of the law in Malawi in dealing with recognition and enforcement of the foreign arbitral award from online arbitral processes. In the end the study will inform the changes that should be made to the framework to adapt to e-commerce and e-arbitration.

1.9 Research approach

The study uses doctrinal research approach which has been described as a research, which provides an exposition of the rules governing a legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future development.[60] The research used inductive approach to test the hypotheses that the current legal framework of

[60]Roper, Christopher, 'Australian law schools: a discipline assessment for the Commonwealth Tertiary Education Commission' (1987)

arbitration in Malawi is not best suited for effective recognition and enforceability of online arbitral awards.

1.10 Methodology

1.10.1 Type of data and collection methods

The study is entirely desk-based and reviews both primary and secondary sources. Primary sources include legislation such as the current Arbitration Act, and treaty law including the New York Convention and UNCITRAL Model law. Case law and law reform reports from comparable jurisdictions was also consulted as primary sources. The primary sources informed the theoretical background of online arbitration as well the traditional arbitration.

The secondary sources consulted in this study includes journals, articles, theses, books, commentaries, and any other forms of scholarly literature from common law jurisdictions. As Keay and Murray observed, a comparison among common law jurisdictions with similar law regimes enables a focus on the differences in the respective laws without the impediment of having to consider differences in the structure of the respective legal systems.[61]

1.10.2 Data collection and analysis methods

This study entirely uses a qualitative data analysis method. It explores the theories of arbitration and online arbitration. This involves in-depth analysis of current international status of online arbitration to have insights, reasoning, and motivations for which legal regimes should adapt to new models and procedures to cater for online arbitration processes. It mainly employs legal analysis and comparative methods.

1.11 Limitation and Constraints of the study

Recognition and enforcement of e- arbitral awards is a broad area and covers many aspects. This study is not intended to be a comprehensive study on this area of the law. Further it does not purport to provide a detailed examination of all aspects of cross border

[61] Gill, Paul, et al, 'Methods of data collection in qualitative research: interviews and focus groups.' (2008) 204.6 *British dental journal* 291-295

e-arbitration. What the research merely focuses on is the investigation of the legal framework and broad principles upon which a court in Malawi will recognize and enforce cross border e-arbitral award. The study then identifies the gaps in the Arbitration Act of Malawi and makes proposal for reform in the legal framework to accommodate online arbitration.

Several constraints were encountered. Firstly, the study could not find sufficient materials on the Malawi arbitration system especially about online arbitration. As such the study consulted materials from outside jurisdiction. Again, the study did not come across case law that dealt with online arbitration in Malawi. Thus, the study considers comparable cases from England, India, Kenya, Uganda, United States of America, and France.

1.12 Conclusion

Literature shows that there are new challenges that have come about by the use technology in cross border commercial transactions. This has brought the need for careful transformation of regimes for arbitration to provide procedure and framework for recognition and enforcement of arbitration that has been done by use of modern technology. Many authors agree that there is need for municipal legislation to be reviewed so that they provide the procedure for electronic arbitration. This study therefore considers the Malawi framework along these finding and how the same can be adapted to provide the recognition and enforcement of arbitration conducted online. In the next chapter, the study sets out the theoretical framework of e-arbitration.

CHAPTER TWO

THEORETICAL APPROACHES TO RECOGNITION AND ENFORCEMENT OF ONLINE CROSS -BORDER ARBITRATION AND ARBITRATION AWARDS

2.0 Introduction

This chapter sets the theoretical framework of recognition and enforcement of online arbitral awards. It assesses theories of traditional arbitration regarding possible application to online arbitration. It also analyses principles that are applied in the recognition and enforcement of foreign arbitral awards and their relevance in online arbitration. The chapter further evaluates the concepts and functions of key elements of online arbitration in the perspective of the goals of online arbitration in international commercial law and e-commerce.

2.1 Nature and functions of arbitration

The suitability of a legal regime for online cross-border arbitration will depend on its facilitation of the functions of arbitration. The nature of arbitration has been described by various authors in different era to reflect the purpose or function of arbitration. According to Martin Donke,[62] arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal[63] Mark Huleatt James and Nicholas Gould[64] define arbitration as a private system of solving disputes. Avtar Singh on the other hand describes arbitration as the submission by two or more parties of their dispute to the judgment of the third person called arbitrator and who is to decide the controversy in a judicial manner.[65] In other words arbitration can be said to be

[62]Huleatt Mark & Gould Nicholas, *International Commercial Arbitration Handbook:* (London, LLP Limited & Business Legal Publishing Division, 1996).
[63] Ibid
[64] ibid
[65] Avtar Singh, *Law of Arbitration and Conciliationl 11 Edition*, Reprinted With Supplement (2021)

amicable way of solving dispute between the parties whereby the parties agree in advance that the decision will be final and legally binding. Arbitration as opposed to court ligation is characterized by neutrality and confidentiality that is to say is a non-state involvement process of solving dispute.[66]

The development of Arbitration as field in international commercial law began in Europe in 1920s as compromise to the parties in a dispute in connection to the contract.[67] Subsequently, various instruments such as the Geneva Protocol on arbitration,[68] the Rules of International Chamber of and the New York Convention of 1958 were developped and expanded almost all over the world. However most rapid changes in international commercial arbitration have been noticed since the globalization regime in the twentieth century whereby greater integration of economies all the world has been taking place.[69]

The fundamental reason for commercial arbitration gaining great momentum is because it has been perceived as a means to obtain a truly neutral decision, confidential and to some extent speedy and cost effective as opposed to litigation.[70] Furthermore, the increase of international agreements, treaties and conventions such as the New York Convention of 1958, UNCITRAL Model Law on International Commercial Arbitration of 1985 is considered to facilitate seamless recognition and enforcement of cross border arbitral awards. It therefore functions as a tool for facilitating international trade by simplifying the dispute resolution process in international trade.

However, in order for the arbitration to achieve its function and roles in international trade, the arbitral award be must one that is recognized and enforced by national laws. Hence, the concepts of cognition and enforcement are the most important elements of arbitration because without recognition or enforcement arbitration would be nugatory. The two terms have been defined by their difference which is simply in the fact that, "an award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized by the court which orders its enforcement.[71] Thus, an award-creditor in a

[66] Ibid
[67] Paper presented in United Nations Conference in Geneva and New York 2005 "Dispute Settlement: International Commercial Arbitration ", pg 20 (www.unctad.org).
[68] Ibid pg 22
[69] Nobert Horn, '*Arbitration and Electronic Communication: Public Policy' International Arbitration*, Nigeria Law Review 107. (2009)
[70] Ibid
[71] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration,* Third edition, London, Sweet & Maxwell, 1999 .

foreign arbitral award may seek only for its recognition or its recognition and enforcement.[72]

The purpose of recognition on its own is to act as a shield to block any attempt to initiate fresh proceedings on issues which have already been decided in the arbitration that gave rise to the award whose recognition is sought.[73] The recognition of an award by a court gives a *res judicata* effect thereto. Enforcement, however, goes a step further than recognition. As Redfern and Hunter noted, where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available.[74] Thus, the terms recognition and enforcement can be used together where the latter is the necessary follow-up of the former in judgments and awards which carry pecuniary obligations.

However, the nature and function of arbitration has significantly evolved in the 1990s due to the growth of use of technology in trade and dispute settlement.[75] The result has been that the traditional notations and principles that defined arbitration have been changing and have been rapidly bearing new nature and function.

2.2 E-Arbitration and the Diminished Relevance of Traditional Theories of Arbitration

Traditional theories for arbitration are increasingly having diminished relevance in the context of increasing online cross-border arbitration. Firstly, there is a *contractual theory* which posits that arbitration originates from a valid agreement between the parties.[76] According to this theory, arbitration should be carried as per the wishes of the parties as reflected in their arbitration agreement.[77] This theory denies any relationship between the arbitration proceedings and the law of the place where arbitration takes place.[78] Although most proponents of contractual theory such as Merlin[79], Foelix[80], Balladore-Pallieri[81]

[72] See also *ibid.*
[73] Ibid
[74] Ben-Shimsa, R. *Legal Framework for Electronic Arbitration "A Comparative Study*", An-Najah National University College of Graduate Studies, (2009).
[75] Ibid
[76] Ibid see note 70
[77] Ibid
[78] ibid
[79] Stone, A Paradox in the *Theory of Commercial Arbitration*, 21 ARB. J. 156, 182 (1966);

agree that arbitration agreements and proceedings may be influenced by the laws of a particular state, they maintain that arbitration has a contractual nature that emanates from the parties arbitration agreement.[82] The arbitration agreement is therefore taken as a contract between the parties involved.[83]

While contractual theory looks relevant to tradition arbitration, the theory fails to locate key elements and the goals of e-arbitration. This is so because the credibility of any agreement lies in the ability of the award to be recognized and enforced by state laws. Therefore, the relevance of the contract in e-arbitration must be considered in the light of the ability of such e-agreement to be recognized by the national laws.

Second, the *jurisdiction theory* supports the view that arbitration revolves around the authority of a state to regulate all arbitrations conducted within its jurisdiction.[84] It maintains that the validity of the arbitration agreement, the powers of the arbitrators and the enforcement of the arbitral awards all derive from a particular national legal system.[85] In this regard the jurisdictional theory appears to be directly opposing the contractual theory in that it locates arbitration within a particular legal system. In that way, it could be applied to justify the basis e-arbitration. This study will therefore rely on this theory to show the importance of jurisdictional theory in having a state come up with laws to regulate online arbitration.

Thirdly, the *autonomous theory,*[86] proposed by Rubellin Devichi, posts that arbitration should be viewed in a broad context rather than emphasizing the structure of the institution. The proponents argue that emphasis should be placed on its goals and objectives and that a complete picture of arbitration can only be presented by considering its use and purpose and the way in which it responds to the needs of the parties. This, it is argued, is the foundation of online arbitration whereas its main objective is to meet the needs of the parties involved. However, the success of arbitration as dispute resolution

---

[80] W. P. Gormley, *International Arbitration, Liber Amicorum for Martin Domke*. Pieter Sanders ed., 19 Buff. L. Rev.137 (1969)
[81] Ibid
[82] Emmanuel *Gaillard*, *Legal Theory of International Arbitration* (*Martinus Nijhoff*, Leiden, the Netherlands, *2010*)
[83] Ibid note 82
[84] ibid
[85] Ibid
[86] Francis A. Mann, *State Contracts and International Arbitration*, 42 BRIT.Y.B.INT'L L. 1, 10, 14, 16 (1967

mechanism depends of the ultimate recognition and enforcement of the final awards. The recognition and enforcement of the final award is dependent on the use or invocation of laws of a particular nation. This means that without using national laws recognition and enforcement is not possible. As such the autonomy theory cannot explain the basis of arbitration in absence of the national laws. Hence, while the study general agrees with autonomous theory the study will use it only to justify the basis of arbitration clause in international commercial agreement and not the entirety of the arbitration process up to recognition and enforcement.

Fourthly, the *hybrid theory* recognizes the dual influence that defines the nature of arbitration.[87] It is premised on the argument that although arbitration derives its effectiveness from the agreement of the parties as set out in the arbitration agreement, arbitration has a jurisdictional nature involving the application of the rules of procedure agreed upon by parties. [88] Hence there is hybrid combination of the contractual and jurisdiction theories to arbitration. The study will use this theory in showing how important it is to balance party autonomy and state regulation when it comes to recognition and enforcement of the online arbitration awards.

Finally, with the emergence of modern form of commerce, there has emerged a new theory called *delocalization theory* [89] proposed among others by Jan Paulson,[90] which asserts that if the arbitration award is issued by electronic means, domestic laws governing the e-commerce will decide the validity of the award.[91] It says that in the absence of some factors such a choice of law, under the traditional territorial approach, the online award will probably not be enforced. According to this theory however, parties can contract to free the arbitration from any procedural law for the sake of their interest.[92] Delocalization of the arbitral process and the final award would therefore mean that parties remain

[87] Hong-Lin-Yu "A Theoretical Overview of the Foundations of International Commercial Arbitration" http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_01_05%20pp%20255_Hong-%20Lin%20Yu.pdf (Accessed on 14th April 2012)
[88] Ibid
[89] Proposed by Jan Paulsson in Delocalization of International arbitration, when and why", Milton, Conus 1 249
[90] Ibid
[91] Ibid
[92] China Papers "Delocalization of International Commercial arbitration" article available at *http://mt.chinapapers.com/3/?p=55142 (*Accessed on 30th March 2012)

unaffected by unforeseen and undesired local procedural law, and do not face the risk that non-compliance with such law would render their award invalid or unenforceable.

However, the hostility towards delocalized arbitration is strong and is based on the premise that arbitration must always have a "seat" and be rooted in national law of its place. An English scholar, Mann argues that arbitration is a national system, that is to say, it is subject to a system of national law and that every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently be called the *lex arbitri*.[93]

Nonetheless, the study finds decolonization as coming closer to the justification of the online arbitration. It provides a stronger basis that people transacting business online are in control of their decisions and actions. However, the study does not agree on the aspect of freeing arbitration from state laws because evidence from literature suggest that the states laws play a critical function in the arbitration process. For recognition and enforcement of arbitral to be effective, state laws must be invoked. Therefore, without reference to state laws e-arbitration would not have any relevance. Hence, the study will partly use delocalization principle to explain the basis of international commercial agreement concluded using electronic methods.

2.3 Approaches to recognition and enforcement of cross border arbitral awards *versus* online arbitration

Like the theoretical perspectives, the various approaches employed in the recognition and enforcement of cross border arbitral awards are increasingly coming under challenge in the context of growing online cross-border arbitration.

2.3.1 E-Arbitration and Principles of recognition and enforcement

Historically, local laws were applied to foreigners and foreign judgments were denied any force beyond their territories.[94] By contrast, under the *ius commune*, no clear difference

[93] ibid note 87

[94] Radhi, H., *Judiciary and Arbitration in Bahrain: A Historical and Analytical Study*, (Kluwer Law International, 2003), p.104

was made between foreign and local judgments.[95] Foreign judgments were freely recognized and enforced.[96] This liberal attitude changed with the rise of doctrine of sovereignty.[97] A duty to enforce foreign judgments was rejected as an undue restraint of sovereignty.[98] In France, Art. 121 Code Michaud (1629) denied foreign sovereigns' judgments all effects. Other European countries adopted similarly restrictive positions.[99]

Once ideas of sovereignty limited the authority of judgments to State boundaries, the recognition of foreign judgments between sovereign States had to be based on new principles. Dutch authors, in particular Voet and Huber[100], developed two of principles of reciprocity and comity which are still relevant today in as far foreign judgments and traditional awards are concerned.[101]

a) Reciprocity principle and E-Arbitration

The doctrine of reciprocity proceeds on the idea that States should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized by the corresponding state.[102] The main justification for reciprocity is that it can be used to persuade other countries to enter conventions. Reciprocity principles are not principles of duty but of prudence and politeness. It proceeds on the basis that it is polite, as between sovereigns, to treat the judgments of foreign countries with respect and deference, and to enforce them. Moreover, it is prudent to enforce the judgments of foreign sovereigns in the hope that foreign sovereigns would in exchange enforce one's own judgments.[103]

The relevance and applicability of reciprocity to e-arbitration are problematic because reciprocity principles did not envisage electronically concluded judgment and awards and challenges brought by the use of Internet. Reciprocity focuses of the sovereignty in that sovereign state must act politely toward another sovereign. It therefore envisages that a

[95] Ibid
[96] Ibid Note 102
[97] Ibid
[98] ibid
[99] HE Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Harvard University Press Cambridge 1938).
100 Ibid
[101] Ibid
[102] Ibid note 60
[103] AT von Mehren 'Recognition and Enforcement of Foreign Judgments: General Theory and the Role of Jurisdictional Requirements' (1980) 167 RdC 9–112.

judgment or award must be related to a foreign state. However, when arbitration is conducted using internet, the process of the award is not liked to a particular state and hence there is no foreign state per se to which the other state has duty to act politely. Further in e-arbitration there are practical issues including security of the online proceedings, lack of face-to-face encounters while cross cultural issues include language barriers and cultural differences. Reciprocity principles assume cooperation in all aspect which may not be available when these practical issues are at play.

a) Principle of Comity and E-Arbitration

This is the practice among nations to recognize, within their territories, the legislative, executive, or judicial acts of other nations with due regard both to international duty and convenience, and to the rights of their own citizens or of other persons who are under the protection of the laws.[104] It is a principle based on the promotion of cooperation, reciprocity, and international courtesy.[105] Some commentators such as Mark Epstein,[106] argue that the relevance of comity to foreign e-arbitration arbitration awards is that in creating framework for online arbitration the laws must reflect the interplay with concepts of international comity and foreign affairs and the need for international cooperation. International cooperation would be entrenched when states are able to cooperate in the recognition and enforcement of foreign judgments and arbitral awards.[107] The relevance of comity in e-arbitration is that in recognition and enforcement of e-arbitral awards, states should seek to avoid interpretation that would create challenges in the recognition and enforcement but promote principles that foster cooperation in the international trade.

However, the English case of *Russel v Smyth and Williams,*[108] led to the changes in the approaches to the newly adopted doctrine of vested rights.[109]

2.3.2 Vested rights theory/Doctrine of obligation

[104] Marc P. Epstein, Comity Concerns Ar e No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption 82 Fordham L. Rev. 2317 (2014). 3
[105] Ayelet Ben-Ezer & Ariel L. Bendor, The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity, 29 N.C. J. INT'L L. & COM. REG. 1, 9–10 (2003).
[106] Ibid note 116
[107] ibid
[108] Russell u Snyth 1842) 9 M 6r,
[109] Ibid

The doctrine of vested rights is an English doctrine laid down in 1842 and it states that when a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay the sum becomes a legal obligation that may be enforced in England by an action of debts[110]. Once the judgment is proved, the burden lies on the defendant to show why he should not perform the obligation.[111] In other words, the theory suggests that a judgment creates new vested rights in the creditor and a new obligation imposed on the debtor at the instance of the foreign court. The doctrine of obligation has in turn been criticised because it fails to reveal the policy considerations underlying the rules on recognition and enforcement.

The doctrine can best be described as proceeding on the basis mutual consent. However, when it comes to online arbitration doctrine of obligation may not always be consensual, more so in cases where one party may have been indirectly forced to enter into arbitration agreement through use of online platforms.[112] The question then remains whether in the absence of mutual consent, parties can still have the sense of obligation to recognize and enforce the arbitral awards. Again, considering that in e-arbitration awards are not directly located in country, there would be no sense of duty owed by one country to enforce a ward that has not been linked to any country since e-arbitration take place in cyberspace. In essence this speaks to the delocalization in which arbitration award is not linked to any country.

2.4 A Blended approach, E- arbitration, and aspects of the arbitration process

The use of technology in arbitration makes the procedure completely different from conventional arbitration. In this context, many leading scholars have submitted the primary concerned should not be how arbitration is conducted but rather whether due process of law regardless is followed in a particular legal regime.[113] Due process of law has been defined as conducting all legal proceeding in accordance to the rules that have set forth for the respect for the parties' rights.[114] One basic is however agreed that in order to promote adherence to the due process of law in e-arbitration, the entire arbitral process must be

[110] Cheshire, North & Fawcett: Private International Law. Fifteenth Edition. Edited
[111] Ibid
[112]Ibid
[113] Kohler, G. K, Schultz, Thomas, *Online dispute resolution, challenges for contemporary justice*, Kluwer law international, (2004). p. 49.
[114]Ibid .

conducted through technological means. This means that the arbitral agreement, the hearing, and the ward making processes in arbitration should have some or all the elements conducted electronically.[115]

Therefore, the study proposes that recognition and enforcement of online cross border arbitration and wards should be approached from the perspective of the goals and relevance of having online arbitration in international law. This can be done by applying the approaches that blends or incorporates principles that recognize the uniqueness of the e-arbitration and the goals of online arbitration as opposed to tying to isolate a single model from the competing principles. What should motivate the need to recognize and enforce online arbitration awards by national courts should be the goals of online arbitration in the modern and technologically driven international commerce.

2.4.1 Validity of online arbitration agreement/clause

Considering that arbitration is dispute resolution by agreement of disputing parties, the validity of the agreement of parties is a key element for the effectiveness of the arbitration as a form of dispute resolution. The relevance of the agreement is in the fact that the agreement pre-determines the place or seat of arbitration, the law and the procedure of the arbitration.

In the online arbitration, the agreement is designed for e-commerce contracts, but it might also be used for other kinds of traditional commercial contracts where parties agree via e-mail exchanges to settle the dispute through arbitration.[116] The major distinguishing functional element of arbitration agreement in online arbitration is that it also determines the mode of arbitration-. i.e. the arbitration can take place online or using technology.[117]

Further, the importance of an e-arbitration agreement is related to its effect on the recognition and enforcement of the e-arbitral award. In accordance with Article II (l) of the NYC, to be valid and enforceable, an arbitration agreement must be in writing and signed by both parties. Paragraph (2) of the same Article provides that the term "agreement in

[115]Ibid 120

[116] Vikrant Sopan Yadav, "*Cyber Arbitration through Lenses of Indian Legal System: An Analysis*", International Journal of Law, vol. 2, no. 2, pp. 31-33, 2016.

[117] Ibid

writing" shall include an arbitral clause in a contract or an independent Arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.[118]

Some sources indicate that the interpretation of this provision has been broadened by national laws and national courts of most contracting States to include not only a document signed by the parties but also an exchange of letters (telex, telegram) or other means of telecommunications such as facsimile or electronic communications such as e-mail.[119] The need for liberal interpretation of the Article II is attributed to the fact that the NYC was promulgated in 1958 and the Internet did not exist at that time. Therefore, as Ihab Amro[120] argues it follows that the e-arbitration agreement may be deemed an extended concept of "in writing" as stipulated by the NYC.[121] For example, a court in a Germany construed the online agreement to be in writing.[122] The Court denied the respondent's contention and granted enforcement of an award based on the e-mails exchanged between the representatives of the parties. To this extent e- arbitration agreement can achieve the same purpose as traditional arbitration clause.

2.4.2 The relevance of a seat or place in online arbitration

In traditional Arbitration the place or the seat of arbitration is procedural concept and not geographic.[123] That is, the proceedings may take place in one country whereas an award is supposed to have effect in another country. On that basis, the place of arbitration is a legal concept that links the arbitration proceedings to a specific legal system irrespective of where the proceedings take place.[124] This legal concept of the place of arbitration has been adopted by some national laws, including the English Arbitration Act of 1996[125]

[118] Article II(2) NYC
[119] Khvalei, Vladimir and G. Zukova), "*ICC Arbitration from a CIS Perspective: If Not Faster and Cheaper, Why Choose It?"* International Arbitration Under Review | Essays in Honour of John Beechey - ICC Publication No. 772E, 2015
[120] Ibid
[121] Ibid
[122] Licensor (Finland) v. Licensor (Germany), available at: <http://www.disarb.de>, (Accessed 16.05.2018), citecl itt YB, Vol. XXXIII-2008, (Germany, no. I 2, sub I 5-20), at pp. 524-33.
[123] Ibid
[124] Ibid
[125]The English Arbitration Act of 1996, 93,

The place of arbitration is necessary for making and signing of an arbitral award.[126] In this regard, parties require setting a specific geographical location to conduct the arbitration process and this location must also be mentioned in the award.[127]

In the case of online arbitration, the physical location of arbitration is irrelevant because arbitration procedures can be conducted with parties located at different places of the world. Therefore, practically, the location requirement, that is a rule in traditional arbitration, is not applicable in online arbitrations.[128]

However, considering that absence of a seat or place of arbitration may potentially cause challenges in the recognition and enforcement of the award in a foreign jurisdiction some commentators suggest adopting the principle of delocalisation of international arbitration.[129] It is however argued by other commentators such as Pablo Cortés [130] that this suggestion would encounter several legal problems, including the applicability of mandatory rules and principles of *lex fori*, issues of arbitrability, validity, and the extent of intervention by national courts.[131]

2.4.3 The validity of arbitration hearing conducted electronically

In traditional arbitration, parties may likewise agree to hold hearings online insofar that is permitted, either by national laws or by the rules of the arbitral institution. For instance, the 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC") provide under Article 30(6) that either party has the right to request to participate in the hearing by means of videoconferencing, i.e. e-hearing.[132] The arbitral tribunal will bear in mind the circumstances of the case, the parties' position, and its technical feasibility when deciding such request.

[126] Nappert, Sophie, and Cohen, Paul, "Case Study: The Practitioner's Perspective" in Piers, Maud, and Aschauer, Christian, Arbitration in the Digital Age:
[127] Ibid
[128] ibid
[129] Ibid
[130] Pablo Cortés Professor of Civil Justice, University of Leicester and Tony Cole Reader in Investment Law and Arbitration, University of Leicesterr
[131] Ihab Amro, Online Arbitration in Theory and Practice. A Contemporary Study of Cross Borders Commercial Transaction in Common Law and Civil Counties, 2018
[132] Ibid

In e-arbitration, the arbitral process, including the hearing, is entirely conducted online or virtually. For the purposes of such process, an electronic file for each commercial dispute is created and administered by the online service provider or tribunal. This online-file includes all notifications and communications between the parties and the arbitrator as well as the documents submitted by the parties.[133] The hearings, which include examination and cross-examination of witnesses, are conducted virtually via email, chat conference, teleconference or video conference. Hence the online process can achieve similar function as the physical process in the tradition arbitration.

2.4.4 The validity of the award making process in the online forum

In traditional arbitration there is a mandatory requirement of law for making traditional arbitral awards, including the requirement that reason must be given for the decision[134]. It is also a requirement by the Model Law that an arbitral decision or award should be written and signed by arbitrators.[135] These requirements might be problematic for online arbitration because the parties will not be in a position to physically present the award and the award will be in electronic form.

However, signatory states might choose to interpret the Model Law and the NYC in a manner that will validate the use of digital documents as well as electronic signatures in an arbitral decision or award.[136] The need to make such an interpretation will however be decided by different courts and will depend on domestic legislation.[137] Hence the validity of the process that are undertake in virtual space may depend on the interpretation of courts of a particular jurisdiction.

2.5 Conclusion

The chapter has discussed nature and functions from the perspective of key elements that underpin online arbitration. It is noted that arbitration is justified based on contractual theory, jurisdictional theory, hybrid theory and autonomous theory. The study noted that

[133] Sandoval, L. Ricardo, explaining online dispute resolution under the dispute resolution system of NIC Chile in an ODR Colloquium, entitled "A Fresh Look at Online Dispute Resolution (ODR) and Global E-Commerce:
[134] Ibid
[135] Ibid
[136] Ibid
[137] Ibid

the relevance of these traditional theories to e-arbitration is diminished. The chapter also discussed the applicable principles of recognition and enforcement and how they can apply in recognition and enforcement of online arbitration. The study notes that online arbitration has important role in the modern international trade. However, the study noted that the principles of recognition and enforcement applicable in traditional arbitration cannot effectively apply to the online arbitration due to the unique nature of online processes. Hence the study proposed that there should move away from traditional principles to a blended model that should be formulated based on the needs and goals of e-arbitration.

CHAPTER THREE

A COMPARATIVE ANALYSIS OF BEST PRACTICES IN RECOGNITION AND ENFORCEMENT OF CROSS BORDER ONLINE ARBITRATION AWARDS

3.0 Introduction

In chapter two the study analysed the approaches to recognition and enforcement of foreign arbitral award for both traditional arbitration and online arbitration. Findings from the analysis suggest that there is no universal model in which online arbitration can fit for online arbitration to achieve its role in the international law and trade. In this chapter the study examines the practices of recognition and enforcement under NYC and under selected common law and civil jurisdiction as the study searches for the best practices in recognition and enforcement of cross border E-arbitration awards.

3.1 Assessment of practices on Recognition and enforcement of online cross border arbitral award based on the NYC

Dealing with e-arbitration will not be fruitful if an arbitral award cannot be enforced under the NYC because the NYC provides the international legal mechanism governing recognition and enforcement of foreign arbitral awards.[138] The question that will always be raise is whether an arbitral award made and signed electronically meets the conditions for the enforcement set out in the NYC, especially under articles III and V (l)(e), which state that only binding arbitral awards can be recognised and enforced in national courts of the Contracting States. Apart from that, Article IV of the NYC that deals with the formality issues may raise many questions when online awards are at issue, as the study notes below.

[138] Ahab Amro, "*Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries*" Cambridge Scholars Publishing, (2019)

3.1.1 The status and scope of NYC

More than 167 nations have adopted the NYC.[139] This gives this Convention the international status compared to other treaties which have restricted regional application such as Inter American Convention on International Commercial Arbitration[140] and the European Convention on International Commercial Arbitration.[141] Malawi acceded to the convention on 4th March 2021 but is yet to put in place appropriate legislation to domestic the Convention.[142]

3.1.2 Obstacles to the reliance on NYC in recognition and enforcement of online awards

This part discusses the possible obstacles that could undermine the recognition and enforcement of cross border arbitration awards under the NYC convection which is the principle international treaty that seeks to standardize the principles for recognition and enforcement of foreign arbitral awards.

a) The writing requirement under the NYC

A study of traditional principles of recognition and enforcement of arbitral show that the tradition principles are not suitable for e-arbitration. Hence the study has proposed that the recognition should be approached based on the blended model that incorporates delocalization principles. In this regard the study notes that the validity of e-arbitration would be questioned under the NYC. This is because Articles III and V (l)(e) of the NYC states that only binding arbitral awards can be recognised and enforced in national courts of the Contracting States. Apart from that, Article II and IV of the NYC sets out the formalities to be met for the foreign arbitral awards to be enforced. In the light of the formalities provided under article IV, questions are raised as to whether the online agreement or awards are valid processes. This is partly because according to IT experts, the requirement for an original cannot be met by the presentation of a computer file, since

[139]The list of contracting parties to the New York Convention is available http://www.newyorkconvention.org/contracting-states [accessed 25/09/12].
[140] Ibid note 136
[141]Ibid note 100
[142] Ibid note,136

there is no such thing as a copy or original for such files, and they are infinitely reproducible.[143]

Hence some jurisdictions maintain the strict interpretation of the writing requirement under Article II, which provides the requirement of written form.[144] In the USA case of *Mar, Inc v. Tiger Petroleum Corporation*[145] the court was called upon to decide the validated of arbitration clause and the arbitration ward. The first task was issue whether the requirement of writing under the NYC is applicable to both agreement and award or to agreement only. The court dismissed the assertion that unsigned arbitral agreement was valid under the USA Federal Law. It said that while the Act requires a written arbitration agreement, it does not define writing, but the Convention defines what will satisfy its writing requirement and that an arbitration clause is enforceable only if it is found in a written signed form or an exchange of letters.[146]

A similar approach was taken in the Italian supreme court decision of *Krauss Maffei Verfahrenstechnik GmbH (Germany) v. Bristol Myers Squibb (Italy),*[147] in which it was explained that Article II (2) requires both the arbitral clause and arbitration agreement to be signed or included in an exchange of letters or telegrams. The court is this appears to have strictly applied the traditional strict principles by adhering to the requirement of state laws and not having regard to regard to delocalization principles.

On the other hand, other authors have suggested that the writing requirement should be interpreted dynamically in the light of modern means of communication.[148] The Swiss Supreme Court followed this approach in *Tradax Export SA v Amoco Iran Oil Co*[149] in affirming that that general reference in the written communications to general conditions between parties is sufficient to facilitate the resolution of disputes through arbitration, taking particular account of the needs of international commerce."[150]

---

[143] Ibid
[144] Ibid
[145] Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F.Supp. 879, 882–83 (S.D.N.Y. 1999)
[146] See also 9 U.S.C. § 208 (1990); Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir.1985).
[147] Krauss Maffei Verfahrenstechnik GmbH et al. v. Bristol Myers Squibb S.p.A. / 58
[148] See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-89; Di Pietro, D. and Platte, M., op cit. p.158; Garnett, R., op cit. p.105.
[149] Tradax Export SA v Amoco Iran Oil Co (1986) XI YBCA (Federal Supreme Court, 7 February 1984),.
[150] Ibid

The foregoing approach has been termed by some commentators such as Ihab Amro[151] as flexible or most favorable interpretation of Article II. It is based on the functional equivalent approach promoted by the UNCITRAL Model Law on Electronic Commerce.[152] Article 8 of the UNCITRAL Model Law provides that a data message satisfies the requirements of an original when there is a reliable assurance of its integrity and when it is capable of being displayed to the person to whom it is to be presented and that data message should be considered in the same manner as original document.[153]

Although the foregoing analysis suggest that the obstacle of writing could be mere academic, courts in several different jurisdictions in which attempt to recognize online award has been sought have taken different approaches in interpreting Article II (2) and IV of the NYC. This buttresses the need to approach recognition and enforcement from the perceptive of blended model. This will actually solidify the basis of favourable interpretation of writing requirement under the NYC.

b) The absence of a physical place of arbitration

The absence of a physical place of arbitration may also be an obstacle facing the enforcement of an e-arbitral award in both common law and civil law jurisdictions, especially under Article I of the NYC.[154] This is because the place of arbitration may determine the procedural law of the arbitration, *lex arbitri*, including the validity of the arbitration agreement.[155]Apart from that, national courts of the place of arbitration often have jurisdiction to rule on issues relating to arbitration such as ruling on applications for interim measures, and applications for setting aside an arbitral award.[156] In addition, the NYC, which is a part of national law in most common law and civil law countries, provides in Article V (l) (e) that a national court has the right to refuse to recognise and enforce an arbitral award if it has not become binding under the law of the country in which the award was made. When arbitration takes place online, there would be no

[151] Ibid, note 136
[152] Article 8 of the UNCITRAL Model Law
[153] Hong-Lin Yu, 'Written arbitration agreements - what written arbitration agreements?' (2012) 32(1) *Civil Justice Quarterly.*
[154] Art 1 NYC
[155] Ibid
[156] Ibid

reference to country as provided under article V(1)(e) of NYC and this would be problematic and the recognition and enforcement may be challenged on that basis.

In order to avoid obstacles resulting from the absence of a physical place in online arbitration, parties may designate the country in which the e-arbitration institution is based as the place of arbitration, if institutional arbitration is applicable.[157] This approach in away confirms the blended approach because in absence of such designation, the arbitrator must designate the place of arbitration based on the need to have the e-arbitration achieve its purpose.

Commentators, however, have contested this suggestion on the grounds that this would encounter several legal problems, including the applicability of mandatory rules and principles of *lex fori*, issues of arbitrability, the validity of an arbitration agreement, and the extent of intervention and support by national courts.[158] However such views are not compatible with the needs and goals of e-arbitration and seems to conflict with the proposed blended model.

c) Challenges against online arbitral awards based on public policy- The case of England

To illustrate how English courts, approach public policy considerations in the recognition and enforcement of traditional arbitral awards, it is useful to consider *Soleimany v Soleimany*[159], *Honeywell International Middle East Limited v Meydan Group LLC*[160], and the relatively recent Supreme Court case of *Dallah Real Estate & Tourism Holding Co v Pakistan.*[161] These cases highlight judicial attitude on enforcement of foreign arbitral awards both pre and post-1996 English Arbitration Act. In doing so, they convey a degree of deference towards the enforcement of foreign arbitral awards. *Soleimany v Soleimany* provides a useful illustration of how the fact of a commercial practice conflicting with public policy can be used as a basis for the refusal of an arbitral award. The decision of the Court of Appeal in this case concerned a dispute between a father and son over the

[157] Ibid Arsic, Jasna, "International Commercial Arbitration on the Internet: Has the Future Come Too Early?", Journal of international Arbitration Vol. 14, Issue 311997 , at p.216.
[158] Schultz, Thomas, Information Technology and Arbitration: A Practitioner's Quide, supra fn 285, at p. 120
[159] Soleimany v Soleimany | [1999] QB 785 | England and Wales
[160] [2020] EWHC 952 (Comm)
[161] [2009] 1 All ER (Comm) 505

division of proceeds from the smuggling of carpets out of Iran, which came to £576,574. The carpets had been taken illegally in breach of Iranian revenue laws. After mediation had failed, the father and son, who were both Iranian Jews, agreed to arbitration by the Beth Din, a rabbinical court, with Jewish law as applicable law. When the son sought enforcement of the subsequent arbitral award, the father argued that his son's claim was void and unenforceable in an English court because it was founded on an illegal agreement.

This decision of the Court of Appeal illustrates the importance of public policy considerations where the recognition and enforcement of any award is sought. It highlights the importance of protecting the integrity of the process. The issue of integrity of the process is relevant to this discussion because of questions about the online space or cyber space which is said to be prone to attacks and hence not safe. Hence public policy consideration could be serious obstacle in the online arbitration processes.

3.2 Analysis of approaches to recognition and enforcement adopted by legislation from selected common law and civil jurisdictions.

In recognition of the development of E-commerce and in order to facilitate electronic contracts, the UNCITRAL Model Law on ecommerce (the Model Law on E-commerce) was promulgate to provide standardize model for modernizing the concept of writing and signatures and thus facilitating e-commerce.[162] Some states have attempted to create legislation that recognize and facilitates the electronic transactions.

3.2.1 **India: Conventional Arbitration Act/ Arbitration & Conciliation Act, 1996**

India appears to recognise the functions of e-arbitration in its arbitration legal regime. In India, the Conventional Arbitration Act, applicable to traditional arbitration other than online arbitration, requires application of Arbitration & Conciliation Act, 1996 while in the case of online Arbitration, assistance of technological related laws, particularly the Information Technology Act, 2000 of India is also required. The general rule and approach in Indian jurisdiction in both national and international law is that arbitration agreement

[162] See UNICITRAL Model Law on Electronic Commerce with Guide to Enactment, 1996, available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (Accessed on 3rd April 2019)

and award should be in writing.[163] Arbitration agreement can be in a document form or in a correspondence form. However, in this aspect the Supreme Court in the matters of *Shakti Bhog Case* [164] and *Trimax Case*[165] have upheld the validity of arbitration agreement entered into by exchange of emails though no formal agreement in writing signed by the parties had come into existence. In this regard India approaches e-commerce and contracts from perspective of blended approach which is proposed by the study. While the Conventional Arbitration Act requires written form, the application of Information Technology Act incorporate the elements of e-commerce and allows the court to follow approaches that recognize the needs of E-commerce.

3.2.2 Canada: The federal Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp)

In Canada, the Provincial statutes govern most arbitrations seated in Canada. The federal Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) applies only to arbitrations where the federal government is a party, or to maritime and admiralty matters. In addition, in all provinces but Québec, different legislation applies to international and domestic arbitrations.

The UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law) provides the basis for all international arbitration statutes, including the federal statute. Under both domestic and international arbitration statutes, Canadian courts uphold arbitration agreements between the parties by granting stays of proceedings where one party begins court proceedings in the face of a valid arbitration agreement. The UNCITRAL Model Law, on which Federal and Provincial international arbitration statutes are based, contains mandatory provisions from which parties cannot derogate. Article 18, which guarantees the equal treatment of the parties, is the prime example.[166] The provision gives parties' freedom to agree on procedure, or the tribunal's power to determine procedure where parties do not agree. In this way the parties can also agree to conduct their arbitral proceedings electronically and such proceeding should be recognized by the court. Hence, it would appears that Canadian jurisdiction does not follows strict requirement of traditional principles by is ready to follow the delocalization principles.

[163] Arbitration and Conciliation Act, 1996, U/S 7(4)
[164] Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., AIR 2009 SC 12
[165] Trimex International FZE Ltd. v. Vedanta Aluminium Ltd. (2010) 3 SCC 1
[166] Stated in the case of *Noble China Inc v Lei, [1998] O.J. No. 4677*.

3.2.3 France: French New Civil Procedure Code

France reflects the proposed blended model. In France, the French New Civil Procedure Code for International Arbitration does not specify any requirement of form, or even of evidence with regard recognition of the arbitration processes. French case law has however concluded that the existence and enforceability of the clause are assessed according to the mandatory regulations of French law and of international public order, in accordance with the common will of the parties, without the need to refer to a state law.[167] This ruling reflects flexible approach by the French jurisdiction recognition and enforcement. In these conditions, any act or material indicating acceptance of an electronic arbitration agreement constitutes sufficient expression of consent. It is not necessary to determine whether the electronic document should be considered a written document or not. This is compatible with the proposed blended model.

3.2.4 USA: United States Federal Arbitration Act

As in India, the USA legal regime on arbitration gives effect to the functions of e-arbitration. In United Sates, the United States *Federal Arbitration Act*, Article II requires that the arbitration agreement be stipulated in writing. However, in the USA arbitration law adopted in each state should also be adapted to the Uniform Arbitration Act. Article VI of the *Revised Uniform Arbitration Act* enshrines the validity of arbitration agreements, if they appear in a document. In the case of *Lieschke, Jackson & Simon vs. Realnetworks*[168] the court decided, however, that an arbitration agreement stipulated electronically did constitute an agreement in writing under Article II of the Federal Arbitration Act. Following this decision, Congress adopted a federal law concerning the validity of electronic documents.[169]

3.2.5 Kenya: The Arbitration Act, 1996 as amended 2009

[167] Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration*, 3rd ed., (London: Sweet and Maxwell) (1999),
[168] Case No. 1:99-Cv-07274
[169] Electronic Signatures in Global and National Commerce Act

In Kenya recognition and enforcement of foreign arbitral awards is largely regulated by the Arbitration Act and the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The Arbitration Act is based upon the UNCITRAL Model law and thus allows for the recognition of foreign arbitral awards. Sections 36 and 37 of the Arbitration Act of Kenya give equal treatment to foreign and domestic awards in terms of their recognition and enforcement. This is in line with Article III of the New York Convention. It appears there is no specific provision for e-arbitration under the Kenyan Arbitration law.

3.3 Conclusion

The chapter has analysed the practices in the recognition and enforcement of online arbitral award under the NYC convention and national legislation from selected jurisdictions. Notably, the NYC offers viable framework and guidance based on which national courts can recognize the electronic transaction including online Arbitration. The study of best practices to recognition and enforcement reveals that traditional notions of recognition and enforcement tend to conflict with aspects and elements of e-arbitration. Finally, the study findings show that currently there is no best practice that can adopted to the best basis for recognition and enforcement of e-awards.

CHAPTER FOUR

ASSESSING THE RECOGNITION AND ENFORCEMENT OF ONLINE CROSS-BORDER ARBITRATION AWARDS IN MALAWI

4.0 Introduction

In chapter three the study found that practices of recognition and enforcement of online cross border arbitration and award are varied. Most civil jurisdictions maintain tradition arbitration procedures that do not directly accommodate online arbitration. This chapter assess the recognition and enforcement of online arbitration in Malawi. It examines the legal issues at play in enforcing electronic arbitration agreements before the Malawi Court as they relate with the application of the provisions of the NYC and the blended model that this study advances.

4.1 The current state of arbitration law in Malawi *versus* online arbitration

In Malawi Arbitration is one of the Constitutional principles of peaceful settlement of disputes.[170] The legal framework is principally provided by three legislations namely; the British and Commonwealth Judgments Act of 1922, the Service of Process and Execution of Judgments Act of 1957 and the Arbitration Act number 26 of 19671. The principal

[170] Section 13(l) of the Constitution of the Republic of Malawi.

legislation is the Arbitration Act. (the '1967 Act').[171] The 1967 Act is partially modelled on the now-repealed English Arbitration Act 1950.[172] The 1967 Act remains the extant Arbitration Act in Malawi because it has not been amended since inception.[173] As literature showed, this state of the law confirms that this regime is archaic land and would not reflect the modern trends in the international trade.

4.2 E-arbitration and the basis of recognition of foreign arbitral awards in Malawi

Foreign arbitral awards in Malawi are recognizable and enforceable on the basis Part III of the Arbitration Act. In terms of section 36 of the Act this part applies to three situations namely; to any award made in pursuance of an agreement for arbitration to which the protocol set out in the Second Schedule applies. Secondly it applies to awards made between persons of whom one is subject to the jurisdiction. Further, this part applies to awards made in one of such territories as the Minister, being satisfied that reciprocal provisions have been made, may by notice published in the Gazette declare to be territories to which the said convention applies. The award must in this Part referred to as "a foreign award".[174]

4.3 E-arbitration and the basis of enforcing the foreign arbitral awards in Malawi

Enforcement of foreign arbitral awards is provided under Part II of the Arbitration Act. The Act says that an award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award. The Act further provides that any foreign award which would be enforceable under Part III shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Malawi.175

[171] Preamble to Arbitration and Mediation Bill, 2017.
[172] Arbitration Act 1967, s 35. Available at MalawiLii, 'Arbitration Act, 1967' <https:// malawilii.org/mw/legislation/act/1967/26> accessed 21 May 2019> accessed 10 July 2019.
[173] Ibid note 169
[174] Section 36 of Arbitration Act
[175] Ibid

4.4 Obstacles to recognition and enforcement of online cross-border arbitration awards in Malawi

The Arbitration Act[176] provide conditions which should be met in order that a foreign award may be enforcement in Malawi. These include; (a)the order should have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; (b) the award should have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties; (c)the award should have been made in conformity with the law governing the arbitration procedure;(d)the award must have become final in the country in which it was made and (e) the award must have made been in respect of a matter which may lawfully be referred to arbitration under the law of Malawi. The other condition is that the enforcement of the award must not be contrary to the public policy or the law of Malawi.[177]

It should be noted that the Arbitration Act was enacted in 1967 before the age of computers and virtual meetings and it does not anticipate the conduct of arbitration online or virtually. Hence under section 27 of the Act online arbitral awards would face validity challenges on the basis that online arbitral awards may not meet the conditions set out under this part.

On the other hand under the NYC the enforceability of an arbitration clause and a corresponding arbitral award is ultimately determined by either (1) the laws of the jurisdiction the parties to the contract, (2) the laws of the country where the judicial seat of arbitration is, or (3) the laws of the locality of the court establishing the validity of the arbitration agreement.[178] In this regard the recognition and enforceability of any foreign ward made online must have to be tested against the requirements under the Arbitration Act in its current form as provided under Party III.

Malawian law is based on English common law.[179] English common recognized the need for recognition and enforcement of any foreign judgments (including arbitral awards). However, the awards must satisfy the minimum conditions for recognition according to

[176] Section 36 of Arbitration Act
[177] Section 36 of Arbitration Act, Cap 601 of the Laws of Malawi
[178] Article 1 of the NYC
[179] Section 200 of the Constitution of the Republic of Malawi Act No 20 of 1994, has the continued application of the received law from English law.

English private international law rules. The High of Malawi has also held that the common law was applicable to Nyasaland (now Malawi) without any alteration or modification.[180]

It should further be noted however that where a statute has changed the common-law position, the statute supersedes the common law position.[181] At the moment, however, the Malawian parliament has not modified the common-law rules governing the recognition and enforcement of foreign judgments apart from acceding to and becoming a party to the NYC. Consequently, courts in Malawi apply common-law principles with full force.

4.4.1 The challenges based on writing requirement under the Malawi arbitration regime

Section 2 of the Arbitration requires arbitration agreement to be inwriting. Again Section 37 of the Arbitration Act provides that a party seeking to enforce a foreign award in Malawi must produce the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made or produced. It is therefore essential by virtue of section 37 that first, that the arbitration agreement and the award be in writing. On the other hand, section 2 of the General Interpretation Act (Cap 1:02 of the Law of Malawi, describes "*writing*" to include printing, photography, lithography, type-writing, and any other modes of representing or reproducing words in visible form.[182]

From the forgoing it appears there is strict requirement under the Malawi arbitration law for a written arbitration agreement and award. This view makes logical since the written form of an arbitration agreement is considered as a customary practice in the field of arbitration, and in Malawi, customary practice is a source of law after legislation in commercial transactions.[183]

It is therefore submitted that under Malawi's laws there is a requirement of a written agreement and award in Malawi. Although the study did not come across court judgment that deals with the question of the meaning of written requirement in relation to online

[180] In *Attorney General for Nyasaland v Jackson*70
[181] Nzunda CMS "*The controversy on the statutes of general application in Malawi*" *Journal of African Law* 1981
[182] Section 2, General Interpretation Act, Cap 1 of 1:02 of the Laws of Malawi
[183] Section 211 of the Constitution of the Republic of Malawi.

arbitral awards, the study is of view that in the light of the current framework online arbitration would face challenges basis on the absence of written form requirement.

4.4.2 The application of Electronic Transaction and Cyber Security Act to avoid the writing requirement

Section 7 of the Electronic Transactions and Cyber Security Act, 2016, says that where a law requires that certain information or any other matter be in writing, typewritten or printed form, the requirement shall be satisfied if the information or the matter is (*a*) rendered or made available in an electronic form; (*b*) accessible; and (*c*) capable of being retained for a subsequent reference. It is presumed that the term "in writing" under the under both Article II of the New York Convention and Part II of the Arbitration Act, would be complied with by any electronic communication such as email and telefax. This view is enshrined by the fact that ETCSA says that where a law requires that certain information or any other matter be in writing, typewritten or printed form, the requirement shall be satisfied if the information or the matter is (*a*) rendered or made available in an electronic form; (*b*) accessible; and (*c*) capable of being retained for a subsequent reference.[184] Therefore even though the current Arbitration Act has not incorporated the modern trends to suit the online arbitration, a party seeking to enforce the online arbitration award obtained from foreign jurisdiction would succeed by relying on the ETCSA and also by applying the favourable interpretation article VI of the NYC. This is because the Electronic Transaction and Cyber Security Act explicitly recognises the electronic communication and the Act offers a solution to the writing obstacle.

However, due to the lack of a clear definition of the term "in writing" from the perspective of online arbitration it is not certain how the High Court faced with objection against recognition and enforcement of foreign award on the ground of failure to pass the writing test would deal with the issue.

[184] Section 7 of the Electronic Transaction and Cyber Security Act.

4.4.3 Challenges based on the requirement of a physical seat in online and virtual arbitration under Malawi law.

As noted earlier the arbitral seat is the nation where an international arbitration has its legal domicile or juridical home. As a practical matter, in virtually all cases, the seat will be the state that the parties have specified in their agreement as the place or seat of the arbitration.[185] In tradition arbitration, the seat of Arbitration is normally determined in the arbitration clause but if not pre-determined the same is determined by the arbitration.[186]

In online arbitration, location is an obstacle to determine the place of arbitration.[187]This is because not only that the parties may be in different countries, but also arbitrators may attend and discuss from different countries.[188]

More importantly according to section 38(1)of the Arbitration Act, a 'convention foreign award' can only be enforced if it meets the following conditions: made in pursuance of an agreement for arbitration valid under the law governing it; made by a tribunal selected or agreed upon by the parties; made in conformity with the law governing the arbitration procedure; must have become final *in "the country"* it was made; must be in respect of a matter capable of being referred to arbitration under the Malawian law and the enforcement must not be contrary to public policy or the law of Malawi.[189] Failure to meet any of the above conditions can be a ground for resisting enforcement.

In online arbitration there would arguably be no "country" where arbitration would have been made. Accordingly, issues can be raised as regard whether condition is section 38 can be met in online arbitration. Prima facie, it seems difficult, or even impossible, to determine the place, or seat of the arbitration in online arbitration where parties meet in cyber space by use of video conference. It is difficult to ascertain the seat or place of arbitration which is online.[190]

However, recently the Chief Justice of Malawi came closest to dealing with conducting of hearing in cyber space in the case of *Admission Cause Number 32 and 33 of 2020, of*

[185] Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 105.
[186] Alan Redfern, et al (2004), Law and Practice Of International Commercial Arbitration Sweet & Maxwell, p159.
[187] Ibid
[188] Ibid
[189] Section 38(1) of the Arbitration Act
[190] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(03) *International and Comparative Law Quarterly* 517.

Dumisa Msebeza and Elizabeth Makanani Mbele. In this case the applicant made application for admission into the Malawi bar for practice in specific cause. During the hearing of the applicants were allowed to participate virtually from the Republic of South Africa. In allowing the hearing in cyber space the Chief Justice said

> "Surly we must be amenable to advancement in technology especially in the ever changing and challenging circumstances we find ourselves in time and again. It is evidently becoming more and more difficult with increasing litigation and workload for court and legal profession to insist on the conventional physical court room session…."

The admission was however not granted on the basis that the applicant was not physically present in Malawi to undergo procedures on admission such as signing on the list of legal practitioners.

Admittedly, from the foregoing the physical seat of arbitration can be foregone. However, that does not take way the potential challenge that the issue may cause in the recognition and enforcement of foreign arbitral awards. Hence the view of the study is that in absence of clear legislative framework guiding online arbitration the question of a seat of arbitration, there remains potential obstacle to the recognition and enforcement of online arbitration and award in Malawi.

4.4.4 The challenges based on defence of public policy

Section 38 of the Arbitration Act provides that foreign arbitral award will not be enforced if it is against the public policy. This condition is under the NYC.[191] The notorious nature of public policy is not an innovation of the modern age. It has been described as "v*ery unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail"*[192] It is not in line with e-commerce goals. The Arbitration Bill proposes condition too.[193]

Considering its wide application public policy is one of the most important weapons in the hands of the national court which allows it to refuse enforcement of an arbitral award

[191] Art 5, NYC
[192] Richardson v Mellish (1824) 2 Bingham 229 at 252.
[193] Art 64 of the Bill.

which is otherwise valid. It is particularly notorious since this defence is incapable of being precisely determined and is entirely dependent upon the laws of individual states for its application. As a result, it varies from one state to another. Adding to this is the fact that the New York Convention does not provide any guidance for national courts as to how the public policy defence should be interpreted.

By way of example in the case of *Auction Holdings Limited vs Fasta Civil Engineering Ltd*, the Court refused to set aside award based on claim of public policy breaches because the applicant has failed to prove the breaches.[194]

Hence, considering the nature of E-arbitration several issues may be raised based on the interpretation of what constitutes public policy. If for example the arbitrators failed to conduct according to the due process of the arbitration the respondent may raise public policy issues according to due process and the award might be set aside pursuant to Article V(2)(a) of the NYC. Furthermore, considering the supremacy of Constitution, online arbitration in Malawi may face several public policy issues regarding access to justice. For example, a defendant may raise objection on the issues that he was did not have full access to the arbitration due to -Internet connectivity.

In this regard the study considers the current arbitration law framework of Malawi does not provide safety guards against public policy challenges and hence not suitable for online arbitration.

4.5 The more *favourable interpretation* under NYC versus the Arbitration Act of Malawi

Since Malawi is a party to NYC it means that when faced with an application for registration and enforcement of an online arbitration award in Malawi under section 27 of the Arbitration Act the High Court is empowered to apply the principles under the NYC to scrutinise whether such online arbitral award meets the requirements for enforcement under the laws of Malawi primarily the Arbitration Act. In doing so, the High Court must consider holistically the interplay between the relevant framework such as the NYC, Arbitration Act arbitration, as well as other laws regulating online transactions in Malawi vis-avis the Electronic Transaction and Cyber Security Act, and international conventions and model laws.

[194] Auction Holding Ltd vs Fatsa Civil Engineering Ltd, Commercial case number 13 of 2011

To begin with it has been argued by some scholars that Article VII of NYC offer parties an easier and simpler procedural framework for the enforcement arbitral awards.[195] Under this article it is suggested, there is no requirements of strict compliance with the provision of Article II[196] and that many national laws in both common law and civil law countries have recognised the validity of arbitration agreements concluded and signed electronically by applying Article VII and thereby doing away with certain requirements.[197]

In the light of the NYC and section 27 of the Arbitration Act, High Court in Malawi is expected to deal in a liberal manner with requests for recognition and enforcement of online arbitral awards. In doing so, the High Court should not consider, as impediments facing the enforcement of an online award, the absence of a written arbitration agreement, the absence of an oral hearing, the absence of a physical place of arbitration, the absence of the written form of an award, and parties' inability to provide a duly certified copy of an agreement or an award. [198] That argument is attributed to the modern wide use of e-communications in cross-border commercial transactions nowadays which the High Court should consider.

While the flexible interpretation is viable option to recognition and enforcement of cross border online arbitral award under the current law in Malawi, it is submitted that with respect to the current Malawi Legal Framework, the best solution lies in the promulgation of appropriate law modelled on arbitration law and procures that are suitable for the e-commerce needs. The flexible interpretation of NYC is not the lasting solution to the obstacles.

Further, it is noted that the Arbitration Act of 1967 retains obsolete provisions which are unsuitable for modern commercial arbitration practice. For example, the Act still contains references to the appointment and role of umpires in arbitration proceedings, does not empower arbitrators to determine their jurisdiction, and does not provide for the doctrine

[195] Article VII NYC
[196] Article VII NYC
[197] Some of these Jurisdictions are jurisdictions which are Germany Arbitration Law, the Austrian Arbitration Law, and the Slovenian Arbitration Law.
[198] *Dumisa Msebeza case*

of separability of arbitration agreements.[199] These provisions are also incompatible with the most favourable principles of the NYC.

The study notes that there is a proposed Arbitration and Mediation Bill which aims at reviewing the 1967 to that it reflects the modern trends. However, apart from proposed section 8 of the proposed Bill dealing with the writing requirement, the bill falls short of recognizing the principles of e-commerce. On its part the proposed section 8 says that anything prescribed to be wwritten or in writing include its being recorded by any means, including electronic means. To this extent the Bill should be able to deals with obstacles relate to form requirement. However, it in its proposed form the bill is retaining the problematic obstacles e.g. the seat of arbitration and the public policy considerations.

4.6 Conclusion

This chapter has assessed the recognition and enforcement of arbitral award in Malawi in the light of the currently legislation and international instrument to which Malawi is party. Findings show that the Malawi arbitration regime predates the age of e-commerce and does not incorporate principles that identify with e-arbitration. The study concludes that process of recognition end enforcement of cross border e-arbitral awards in Malawi is muddled with potential obstacles such as the requirement of written form of arbitration, requirement of physical seat, and public policy challenges in online arbitration. In chapter five study the gives proposal that would improve arbitration framework so that e-arbitration is seamlessly recognized and enforced in Malawi.

[199] Ibid

CHAPTER FIVE

TOWARDS AN EFFECTIVE RECOGNITION AND ENFORCEMENT OF CROSS BORDER ONLINE ARBITRATION

5.0 Introduction

The aim of this study has been to examine the efficacy of the Malawian arbitration legal framework for recognition enforcement of cross border online arbitration and arbitral awards. Recognition and enforcement of arbitral awards is most important process for the success of international commercial arbitration because if an arbitral award has no effective enforcement mechanism, the value of international commercial arbitration would be significantly diminished.[200] The background to the study showed that the development of information technology has revolutionized arbitration in terms of traditional arbitral practices and procedures.

Literature shows that there is still debate on how well online regulation can be regulated. The major issue is whether online arbitration is a unique phenomenon which requires

[200] Harold Crowter, *Introduction to Arbitration*, (London: LLP Publishing, 1998), p 139.

separate regulation or that it is just a form of traditional arbitration that can be fully and effectively regulated with traditional rules on arbitration.

At international level, the NYC is a key treaty that aims at facilitating the effectiveness of international arbitration by the standardizing the process of recognition and enforcement of the arbitral awards. Malawi acceded to the treaty in 2021. In the age of technology e-arbitration is relevant for effective e-commerce dispute settlement. Hence, the law, both at national and international level must adopt principles that aid and the supports the e-arbitration process.

The main question for the study was how well does the law in Malawi facilitate the recognition and enforcement of an online award made in foreign jurisdiction.? Four sub-questions were dealt with pertaining to the principles for recognition and enforcement of cross border e-arbitration awards. First, it discussed the question of theoretical approaches that can best form the basis for formulating the law for recognition and enforcement of cross border online arbitration. Secondly, it examined how various jurisdictions use the law to facilitate the legal recognition and enforcement of cross border online arbitration. Thirdly, the study examined the Malawi legal framework on arbitration to find out how well suited it is for for recognition and enforcement of cross border online arbitration. The fourth question seeks to consider how Malawi law can be made amendable to effective recognition and enforcement of cross border e-arbitration awards.

It was noted that the current arbitration law in Malawi predates the age of technology and did not envisage the usage of Internet in the arbitration processes. This, it is assumed, creates challenges in recognition and enforcement of arbitral awards from online arbitration and hence there is need for careful transformation of arbitration regime to provide procedure for effective recognition and enforcement of arbitration that has been done by use of modern technology.

The study proceeded on the assumption that if the Malawi's arbitration regime remains in the current state, it may not achieve effective recognition and enforcement of cross border e-arbitration and awards.

In order to test the study hypothesis, the study adopted and used the doctrinal research approach that critically examined and analyzed key statutes and treaties for arbitration to establish their interplay with approaches to recognition and enforcement of online arbitration awards. It critically examined traditional principles of recognition and enforcement foreign arbitral award in the online arbitration both at national level and international level.

5.1 Summary of chapter findings

In chapter two, the study discussed the theoretical basis of traditional arbitration and their applicability in online arbitration. The aims were to set out the essential elements, concepts and principles in recognition and enforcement of traditional arbitration awards that could be applied in the recognition and enforcement of e-arbitral awards. The question addressed in this chapter is regarding the principles that can be the best basis on which the law for recognition and enforcement of e-arbitral award can be formulated. Three principles were noted to be the basis for recognition and enforcement of traditional arbitral awards namely, reciprocity, comity and vested rights. Some of the principles based on which foreign arbitral award were recognized and enforcement are incorporated under NYC.

The analysis of these principles revealed that they are incompatible with the e-commerce and hence they cannot be the basis on which laws regulating recognition and enforcement of online award should be formulated. Considering the uniqueness of the online arbitration and its role in e-commerce, the study proposed that the law could be formulated around blended model that recognizes the uniqueness of on online arbitration and it goals in e-commerce.

In chapter three the study aimed at examining how various jurisdictions use the law to facilitate the legal recognition and enforcement of cross border online arbitration. Hence the study made a comparable analysis of the best practices of recognition and enforcing under selected jurisdictions and also under the New York Convention. The findings show that courts are not consistence in the approaches as various jurisdictions approach recognition and enforcement different.

The study of practices to recognition and enforcement reveals that traditional notions of recognition and enforcement tend to conflict with aspects and elements of e-arbitration. As result the study finds that there is no single best practice or model to be picked from comparable study. However, the most favorable interpretation approach provided under the article VII of the NYC convention seems to closely resembles the delocalization principles which the study finds to be partly compatible with the nature and goals of the e-arbitration.

In chapter four the study assessed the legal framework in Malawi. This was done to answer the question regarding the suitability of the Malawi arbitration law for recognition and enforcement of online cross border arbitral awards. Findings show that the Malawi arbitration regime, which predates the age of e-commerce, does not incorporate principles that identify with e-arbitration. The study shows that the process of recognition and enforcement of cross border e-arbitral awards in Malawi is muddled with potential obstacles. The basis of these obstacles is that the current state of law approaches recognition and enforcement based on the traditional notions of reciprocity, comity and vested right that emphasized on the role of the state laws in the conduct of arbitration proceedings. These are not in line with the use of e-arbitration which proceed on the cyberspace and in which the state has less control. The chapter further noted that the recognition and admissibility of the electronic signature depends on two main aspects: whether the applicable law recognizes and enforce the electronic signature; and whether the electronic signature fulfils the requirements of the applicable law, such as the capability for identification, attribution and proof of assent or intent of the signer. In this regard the study examined the applicability of Electronic Transaction and Cyber Security Act (ETCSA) and it was concluded that the Act can be applied in the authentication of electronic signatures. Hence ETCSA, can be used to avoid the strict requirements.

5.2 Implications of the findings on the hypothesis.

The study has shown that the two concepts of recognition and enforcement are important for the online arbitration to achieve their goals in the international trade. It has been revealed that that the current legal framework on arbitration in Malawi is not competent for recognition and enforcement of cross border e-arbitration awards mainly because the

principles and approaches under the current frame are not compatible with the principles obtaining in the modern form of trade and dispute settlement.

Firstly, the analysis of the main theoretical approaches to arbitration has exposed the complexities in the application of different traditional principles regarding the recognition and enforcement of foreign arbitral awards in cross border e-arbitration which can undermine the relevant regime's goal of facilitating the enforcement of foreign arbitral awards in cross border e-arbitration. The study finds that the different traditional norms are outdated and not attuned to the key elements and aspects of e-arbitration. The study proposes that there must be shift to blended model which suggest approving the recognition and enforcement from the perspective of the needs of the online arbitration in international trade as opposed to insistence on the traditional concepts. The main feature of this model is to delocalize online arbitration from the state control by providing framework that recognize the uniqueness of the online arbitration and its goals in the e-commerce.

Secondly, the comparative analysis of best practices to recognition and enforcement reveals that different jurisdictions approach recognition and enforcement differently. The common thread however is that there is undue insistence of form requirement which most legislation in common law and civil jurisdictions have. The NYC convention provides the most favorable interpretation, but its application depends on the interpretation employed by courts in each state.

Thirdly, the assessment of the recognition and enforcement of cross border online arbitration in Malawi has exposed that the regime is not suitable for recognition and enforcement of online cross border arbitration and arbitral awards. Evidence from literature of the study showed that Malawi has archaic laws on arbitration that do not envisage cyber space arbitration. Malawi courts have yet not dealt with the question of validity of the arbitration awards passed from online arbitration processes. A comparable study however predicts that if faced with such question, online arbitration awards in Malawi would face resistance based on approaches that insist on form requirement and public policy considerations.

Fourthly, considering that traditional approaches to arbitration cannot best inform the law for recognition and enforcement of e-arbitration, the study proposes that the recognition

and enforcement should be reviewed and employ the blended models which should incorporate various aspects and principles that focus on the needs to foster recognition and enforcement of the arbitral awards.

On legislation, the study notes that there is a proposed Arbitration and Mediation Bill which if passed into law would in away prove to be useful framework toward recognizing e-arbitration. However, the study is of the view the proposed bill itself should be revised further to reflect the latest trends in e-commerce.

5.3 Conclusion

The study concludes that at present, suitable principles for the recognition and enforcement of online cross border wards are scattered and are not easily indefinable. On best Practices, the study concludes that different jurisdictions approach recognition and enforcement of online cross border arbitral award differently. It was also noted that the current Malawi arbitral regime is not well suited to facilitate recognition and enforcement of cross-border online arbitral wards mainly because the arbitration laws were promulgated when e-commerce was not there and have not been adapted to align them with modern trends in e-commerce. In the end the study suggests that the arbitration law in Malawi should be reviewed and online arbitration should be specifically provided under the legislation.

BIBLIOGRAPHY

BOOKS

Amro, Ahab "Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries" Cambridge Scholars Publishing, (2019)

Cheshire GC, North PM and Fawcett JJ *Private International Law* Oxford University Press London (2008)

Margaret Moses, The Principles of International Commercial Arbitration, second edition, Cambridge University Press (1999)

Clarkson CMV and Hill J *The Conflict of Laws* Oxford University Press London (2011)

Collins (gen ed) *Dicey Morris and Collins on the Conflict of Laws* Vol 2 Sweet and Maxwell London (2006)

Gabrielle Kaufmann-Kohler and Thomas Schultz, Online dispute resolution: challenges for contemporary justice (Kluwer Law International (2004)

Maud Piers and Christian Aschauer, University of Graz Arbitration In The Digital Age The Brave New World Of Arbitration(2019)

Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International (1999)

Thomas Schultz; Information Technology and Arbitration: A Practitioner's Guide; Kluwer Law International, (2006)

Alvaro J.A.G., Online dispute resolution - Unchartered Territory, Vindobona Journal of International Commercial Law and Arbitration, (2003)

Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration*, 3rd ed., (London: Sweet and Maxwell), (1999),

ARTICLES

Böckstiegel, K 'The Role of Party Autonomy in International Arbitration' (1997) Dispute Resolution Journal: 24–30.

Bordone, R.C., Electronic Online Dispute Resolution: A Systems Approach: Potential, Problems and

E. Katsh, 'Online Dispute Resolution: The Next Phase', (2002) 7(2) Lex Electronica;

Gabrielle Kaufmann-Kohler and Thomas Schultz, Online dispute resolution: challenges for contemporary justice (Kluwer Law International 2004)

Nzunda "The controversy on the statutes of general application in Malawi" 1981 Journal of African Law 115 115.

Ortiz, A.L., Arbitration and IT, Arbitration International, 2005, No. 21/3, p. 352-355

Sodiq O. Omoola, Ph.D. Candidate, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia

Strout, J.R., Online Arbitration: a Viable Solution for Resolving Disputes that Arise from Online Transactions, 1 Journal of American Arbitration, 2001, No. 75

Toby Landau, Requirement of written form for an arbitration agreement when written means Oral, the ICCA Congress Series No. 11 p 19

Hong-Lin Yu, 'Written arbitration agreements - what written arbitration agreements?' (2012) 32(1) *Civil Justice Quarterly.*

Patocchi, P. M. (2016). UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. United Nations Publicatio

Mumba, Alfred, 'The recognition and enforcement of foreign judgments in Malawi' (LLM thesis, University of Johannesburg 2014

Schellekens (M.) (2011), Digital Watermarks as legal evidence, Digital Evidence and Electronic Signature Law Review, Vol. 8, p. 152.

Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(03) *International and Comparative Law Quarterly* 517

Jack Goldsmith and Lawrence Lessig, "Grounding the Virtual Magistrate", *Electronic Dispute Resolution: an NCAIR Conference* (http://www.law.vill.edu/ncair/disres/groundvm.htm, 22 May 1996). Jasna Arsic,

FrankA.Cona,"Internet Arbitration of International Commercial Disputes" (http://www.ipwarehouse.com/IP_Librar /general articles/arb_art.htm, 1996) and same author, "Application of Online Systems in Alternative Dispute Resolution

Adam Samuel, Jurisdictional Problems In International Commercial Arbitration: A Study Of Belgian, Dutch, English, French, Swedish, Swiss, Us And West German Law 63 (1989).

Frances Kellor, Arbitration In Action: A Code For Civil, Commercial And Industrial Arbitrations (1941), Quoted By Stone, *Supra* Note 34, At 182; Lew, *Supra* Note 22, At 55

Julian D. M. Lew, Applicable Law In International Commercial Arbitration: A Study In Commercial Arbitration Awards 53 (1978)

J. P. Ancel, French Judicial Attitudes towards International Arbitration, 9(2) ARB. INT'L 121

Gary Born, *International commercial arbitration* (Kluwer Law International The Hague, 2009), p. 105.

Steven Gatembu Kairu "The Conduct of the Arbitral Process" Arbitration Law & Practice in Kenya, (2011) Law Africa.

Sylvia Mercado Kierkegaard, "Legal Conundrums in Cyber Arbitration" Article available on http://www.iadis.net/final-uploads/200406C016.pdf

Talat Fatima(2011) Cyber Crimes, Eastern Book Company Luck Now .