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Alternative Dispute Resolution is a journal of the Chartered Institute of Arbitrators (Kenya Branch).

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Typesetting by:
New Edge GS,
P.O. Box 60561 – 00200,
Tel: +254  721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366 839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

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Editor’s Note


The Journal is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

This is a special edition in commemoration of the 2022 CIArb Kenya international conference on the theme ‘*Innovations & Disruptions; ADR Today & Tomorrow*’ from 27th to 29th April 2022 in Nairobi, Kenya. Some of the papers in the Journal reflect the theme of the conference in addition to other pertinent issues in ADR including: *Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice; Analysis of The Efficacy of the Kenya Revenue Authority’s Alternative Dispute Resolution Framework; Locus in Treaty Arbitration: Critical Considerations Zhongshan Fucheng Industrial Investment Co. Ltd (Claimant) -and- The Federal Republic of Nigeria (Respondent); 12 Practical Ways to Expedite Arbitrations; The Zambian Public Procurement Act No. 8, 2020: The Dispute Resolution and Arbitration Provisions: Are they Fit for Purpose?; Understanding Dispute Settlement Mechanisms Under World Trade Organization; The End of Arbitration is the Beginning of Justice: A Plea to Set Time Frames for Completion of Arbitration Proceedings; Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies; Formalization of Mediation through Legislation in Kenya and Levelling the Playing Field: Institutionalizing Mediation in the Sports Arena.*

Papers submitted to the Journal undergo a critical, in depth and non-biased review by a team of highly qualified and competent reviewers to ensure adherence to the highest quality academic standards and validity of data.

The Editorial Board welcomes feedback from our readers across the globe to enable us continue improving the Journal.

The Editorial Board also welcomes and encourages submission of articles on emerging and pertinent issues in ADR for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article received but
does not guarantee publication. Submissions should be sent to the editor through admin@kmco.co.ke and copied to info@ciarbkenya.org.

CIArb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to continue publishing this Journal that continues to shape the discourse on ADR in Kenya and across the globe.

Dr. Kariuki Muigua, Ph.D; FCIarb; C.Arb
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Nairobi, April 2022.
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Abstract
The COVID-19 pandemic has destabilized the traditional ways through which many professions operated. One of the sectors that have seen rapid change than it has ever experienced before is the legal profession where the use of legal technology in accessing justice has been embraced by force. This has arguably marked the beginning of a trend worldwide that may only become faster even post the pandemic. Technology is revolutionizing the way businesses and various sectors operate and although it comes with its advantages and disadvantages, this paper argues that the legal profession has more to gain if they embrace technology. It explores the various ways in which the legal sector can utilise legal technology to not only enhance access to justice but also improve the efficiency of law firms, the Judiciary and even law schools.

1. Introduction
The Coronavirus disease (COVID-19) pandemic has unsettled not only the global economy but also many professions and they are all seeking to stay afloat during the pandemic. Due to the preventive measures recommended by the World Health Organisation which include social distancing among others, it has become almost impossible for professionals to operate from their traditional physical offices. The legal profession has not been spared either. The legal practice in many parts of the world including the African continent has been by way of physical attendance in courtrooms where the judges and magistrates, advocates and witnesses physically present their cases. The physical presence of employees in law firms has also become difficult. Court hearings are being

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conducted virtually via online platforms. Arguably, this has disrupted the profession in a way not experienced before.

Apart from the effects of pandemic, the changes in the legal sector have also been largely attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge. Technology has greatly impacted the way law and law firms are operating in this era as far as enhancing efficiency is concerned.

In this paper, ‘legal technology’ (Legal Tech) is used to mean the use of technology and software to provide and aid legal services. Legal Technology

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applies technology and software to assist Law Firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage.  

While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools.

This paper discusses these new developments and proceeds on the hypothesis that even though the profession may resume its normal traditional mode of operation, it is now time for the legal practitioners to consider adopting this way of doing things.

The paper specifically looks at legal practice in Kenya and explores recommendations on how best the legal practitioners in the country as well as the Judiciary can tap into technology to sustain virtual attendance of courts albeit alongside the traditional court attendance. The paper however approaches the subject of legal practice generally and does not make any attempt to look at the various disciplines of practice. It adopts a generalized approach to the term ‘legal practice’.

2. Use of Legal Technology within the Legal Profession in Kenya: Progressive or Conservative Profession?
A broad approach to the term “Legal profession” may be used to refer to all those who are in some capacity engaged in the working of the legal system, including judges, advocates, government lawyers, prosecutors, academics, academics, academics, academics.
paralegals and law reformers. All these persons play a crucial role in administration of justice and offering legal training for capacity building in the sector. They are therefore all relevant in the context of this paper as it deals with how all the stakeholders in the legal sector can embrace technology as a tool for enhancing accessing to justice for all.

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown. In Kenya especially, this was necessitated by the emergence of private ownership of property by the colonialists particularly the settlers, and there arose the need for protection of their rights to the property and also enforcing the same against others, especially the Africans who had been rendered landless. However, even after the colonialists left, there was no turning back as far as formal justice system was concerned.

The Government of Kenya continued to invest, albeit at an unsatisfactory pace, in ensuring that courts were put up across the country as the main system of access to justice. The legal profession has since played a major role in facilitating access to justice. However, it is not always easy for Kenyans to access justice due to a myriad of challenges. Some of the documented challenges facing access to justice over the years include but are not limited to: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges. Closely related to these are high court fees,
geographical location, complexity of rules and procedure and the use of legalese. These are challenges that directly impact on the general public’s ability to seek and access justice.

These domestic challenges are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially the lawyers. The changing times and the above listed challenges have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter. The legal profession is also facing competitive pressures from accountants, realtors, financial advisors, and others – enabled by the Internet which is making it easier for them to compete. The lawyers also face competition from global legal service providers, as the doors to transnational practice by lawyers widen by the World Trade Organization’s General Agreement on Trade in Services (GATS) and regional integration.

While lawyers have long been characterized as technology antagonists who are slow to change and wary of innovation, law practice has slowly but surely

moved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms. In addition, majority of clients’ documents are stored on hard drives or in the cloud, while layers of difficult-to-access “metadata” contain hidden information that could influence lawyers’ decisions. This development in technology has come with tremendous improvement in not only efficiency but has also enhanced the security of clients’ data. While this has been the trend worldwide, it is not difficult to find Kenyan law firms still struggling with the ‘outdated’ way of doing things around the office. Indeed, it is only recently that digital signatures and service of pleadings started taking root in the country.

It is still a concern on whether the Kenyan lawyers are ready to embrace technology to enhance efficiency and cut down on costs of doing business for the general public. In 2018, the Law Society of Kenya (LSK) went to court to oppose a decision by the Ministry of Lands and Physical Planning to digitize the land transactions processes at the land registry through the National Land Information Management System (NLIMS) arguing that the ministry had failed to consult the relevant stakeholders as required. The LSK also argued that the regulations establishing the legal framework for electronic conveyancing are

18 Ibid.
pending before Parliament.\textsuperscript{21} In addition, The LSK further argued that rural Kenya still faces huge electricity and power challenges and that many Kenyans with no access to internet and online portal and risk being dispossessed of their lands.\textsuperscript{22} While these arguments are certainly valid, and ones that may not be strictly interpreted to mean that LSK is opposed to the process, LSK must realise that the future of practice lies in embracing technology. The general public has been advocating for the digitization of land records to cut costs and for efficiency purposes.\textsuperscript{23} The need for digitization has been demonstrated by the COVID-19 pandemic which has necessitated the closure of all registries following an advisory by the National Emergency Response Committee on the management of Covid-19.\textsuperscript{24} The continued closure of registries negatively affected businesses with pending and anticipated land transactions.\textsuperscript{25} With the use of technology, such challenges may be overcome. Rwanda is considered to be one of the few African nations that have managed to move all their land records online and is considering introducing block chain.\textsuperscript{26}

In the sections below, this paper explores the various technological developments that the legal profession in Kenya can embrace and use to not only enhance access to justice but also enhance efficiency and productivity for increased business opportunities.

\textsuperscript{21} Ibid.
\textsuperscript{25} Ibid.
3. Legal Practice in the 21st Century: Challenges and Prospects

The COVID-19 pandemic has notably created an unprecedented state of affairs where lawyers and other law firm staff have left their offices and forced to work from their homes, where they now juggle their legal work with child care, household management and plenty of other obligations. This has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.

Some commentators in the legal field have reported that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now. These are some of the expected and unexpected effects of the COVID-19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models.

It has been observed that young lawyers are the set of lawyers that came into practise within the 21st century, so they face a unique set of challenges which older lawyers of the earlier generations never had to face. Some of the highlighted challenges facing them include: lack of job opportunities; lack of mentorship from older lawyers; lack of funding; lack of a firm structure;

29 Ibid.
location; personal branding; exposure; career projectory; resources; difficulty in getting new work; and limited networking.\(^{31}\) Despite this, the 21\(^{st}\) century lawyer is considered as one with ‘staggering prospects which has the potential to pay off mightily’.\(^{32}\) It has been argued that the strength of the 21\(^{st}\) century young lawyer lies in the understanding and use of Technology as a practice tool and area of core competence.\(^{33}\) This is because, it has been acknowledged, the current world has become tech-driven and information-powered, such that the entire spectrum of communications is available at the click of a button.\(^{34}\) The world is becoming more interconnected and smaller with the click of a button, and as such, the 21st century lawyer who is analytical savvy and business-smart enough to navigate through the technology maze is considered lucky as they have the capacity to cast their law practice net across a huge spread of the population.\(^{35}\) With increased knowledge and specialization as a result of the many areas that come with the growth and development of technology, the 21st century lawyer can use all this to shape the course of their practice. Client demands have become primary drivers of change within the legal profession.\(^{36}\)


\(^{32}\) Ibid, p. 9.


The next section looks at some of these opportunities and how modern lawyers can exploit them to their advantage in order to remain relevant in a fast changing world.

4. Enhancing Access to Justice through Embracing Technology in the Legal Practice

4.1 Artificial Intelligence for Enhanced Productivity

Artificial intelligence (AI) defined as “the science and engineering of making intelligent machines” that employ “cognitive computing” (enabling computers to learn, reason, perceive, infer, communicate, and make decisions like humans do), and it encompasses many branches such as machine learning (ML) including deep learning and predictive analytics, and natural language processing (NLP).37

It has been observed that while AI has made a transformative impact on every industry and profession, its potential for use in the legal profession has not been tapped adequately. This is because the legal services market remains ‘profoundly under digitized, tradition-bound, and slow to embrace novel technologies and tools’.38

However, Artificial Intelligence (AI) companies have continually developed and used technology that helps manage laborious tasks in different industries for better speed and accuracy, and the legal profession is no different as AI has already found its way into supporting lawyers and clients alike.39 Basically, AI

can and has indeed been used to: perform due diligence – litigators carry out due diligence with the help of AI tools to uncover background information; prediction technology – An AI software generates results that forecast litigation outcome; legal analytics – lawyers can use data points from past case law, win/loss rates and a judge’s history to be used for trends and patterns; document automation – law firms use software templates to create filled out documents based on data input; intellectual property – AI tools guide lawyers in analyzing large Intellectual Property (IP) portfolios and drawing insights from the content; and electronic billing – lawyers’ billable hours are computed automatically.\[40\] In addition to the foregoing, AI can and has been applied to save lawyers enormous amount of time while achieving efficiency in legal contracts review.\[41\] These are just examples of where AI technology may be used in enhancing legal practice in modern times going forward.

The legal profession needs to embrace AI, as it has a lot of potential to benefit from this technology in order to work more productively and spend less time on monotonous tasks, thus achieving convenience, freedom from mundane work, and saving more time for other aspects of the job such as analyses, counseling, negotiations, and court visits.\[42\]


There is a need for law schools to work with experts and professionals in the areas of Artificial Intelligence in order to equip their students with AI certifications at the law school as a first step towards preparing them for the future. Deloitte predicts at least 100,000 legal roles will be automated by 2036 and law firms will start using new talent strategies by 2020, a prediction that is already taking shape.43

The initial cost of investment in infrastructure may be very high but it may be worth it to make the learning institutions relevant and competitive. While experts and stakeholders in this area continue to explore the benefits and shortcomings of use of AI in the legal profession and ways of overcoming the same, lawyers will need to get ready to embrace the idea since it has already started being used and this will only increase with time.

4.2 Investing in Virtual Hearings Infrastructure

With the emergence of the COVID-19 pandemic, courts in many countries around the world were forced to rethink their approach to administration of justice both quickly and efficiently in order to ensure that, where possible, hearings can proceed.44 This has led them to adopt virtual hearings – conducting hearings remotely in order to minimise the risk of transmission of COVID-19 and ensure the health of all parties in attendance is maintained.45 While the pandemic will certainly pass, there is a need for both courts and law


45 Ibid,
practitioners to think about investing in virtual hearings post COVID-19. It is commendable that the Judiciary recently embarked on enhancing the use of technology in judicial proceedings in all courts, especially during the COVID-19 pandemic period, including the use of: (a) e-filing; (b) e-service of documents; (c) digital display devices; (d) real time transcript devices; (e) video and audio conferencing; (f) digital import devices; and (g) computers in the court. All that is required now is for continued use of the same post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently. This may also call for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals.

This technology will come in handy in not only saving time but also resources, which in many countries especially in Africa, are still limited. As for law firms, investing in virtual hearings infrastructure in their practice may lead to better administration of justice and also help reach out to a wider class of clients both within the country and across borders. It will also work for the benefit of their employees since it offers them the much needed work-life balance.

It has been suggested that while spending more time outside the office may become commonplace as law firms and legal departments adopt collaborative technologies and reduce real estate costs, easier-to-use video technologies similar to FaceTime may actually promote efficiency and job satisfaction by putting the human element back in business communications.

With increased globalisation, lawyers can tap into this infrastructure to serve clients from the comfort of their homes or offices regardless of the geographical

location or distance. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves.48 They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction.49

As it has rightly been pointed out, ‘the COVID-19 pandemic may prove a catalyst for Courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic. As such, developing good virtual hearing practices now is likely to pay significant dividends in the future’.50


49 Ibid, p. 34.

4.3 Safeguarding the Privacy of Data: Transfer, Processing and Storage of Data

Most modern businesses including law firms have increasingly found themselves bound by data privacy laws at the national and international levels, requiring companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and wrap tight controls around the processing, use, and transfer of such PII and PHI.\(^{51}\) The effect of this will become even more clearer as firms embrace technology due to the high risks and challenges posed by technology as far as such data is concerned.\(^{52}\) The challenge is especially great when it comes to legal processes that require extraordinary care in the identification and handling of PII and PHI on very tight turnaround times: data breach notification workflows, Data Subject Access Requests (DSARs), and cross-border e-discovery projects.\(^{53}\) Notably, law firms have started cross broader practice where firms in different jurisdictions collaborate either directly or through legal organisations to enable them serve clients in different countries.\(^{54}\) Data protection laws in one country may not be necessarily as advanced as those in another country hence the need for firms to invest heavily in this area to not only win the trust of clients and partners in another country but also to avoid the legal hurdles that may come with breach of such data privacy.\(^{55}\)

\(^{52}\) Ibid.
\(^{53}\) Ibid.
There is a need for local firms to make a conscious decision to invest in data protection infrastructure that will enable them to work efficiently and protect their clients’ data regardless of the status of the local data protection laws. As law firms and corporate legal departments look for cost-effective ways to enhance the delivery of legal services, they should seek paralegals and legal assistants with expertise in technology-driven systems who can help the firm operate more efficiently in order to not only facilitate efficiency but also guarantee privacy of data.\(^{56}\)

There may be a need for the policymakers to work closely with other stakeholders to relook into the existing laws on data protection in order to enhance their effectiveness.

Relevant law firm and Judiciary staff should also be equipped with the necessary skills and knowledge regarding data protection. Such skills and knowledge mainly include Information security management, which is a set of policies and procedural controls that Information Technology (IT) and business organizations implement to secure their informational assets against threats and vulnerabilities-information security.\(^{57}\) Such staff would be responsible for managing the institution/firm’s Information Security Management System (ISMS). ISMS is necessary for ensuring that any data is guaranteed confidentiality, integrity and it is easily available when required. Notably, whether the data collected is maintained in digital or physical format, the discipline of Information Security Management is still critical to protecting the data from unauthorized access or theft.\(^{58}\) This is because every technology-driven business process is exposed to security and privacy threats and the legal


\(^{58}\) Ibid.
profession is no different. The security controls can follow common security standards or be more focused on the industry.

4.4 Rolling out E-literacy Trainings/Education

With the expected increase in the uptake and use of technology within the legal profession, there is a need for sustained and enhanced e-literacy training on not only efficient use of technology but also the potential challenges that may come along and how to overcome them. The training should target lawyers, facilitated by LSK as well as judges and magistrates and all their support staff, facilitated by the Judiciary, in collaboration with the experts and professionals in ICT and other related areas.

As for lawyer students, law schools should come up with relevant courses to be included in their curricula in order to arm them with relevant skills. In order to equip the general public, there is a need for the Government, through the Ministry of Information Communication Technology in collaboration with the other relevant stakeholders to make it easy for the public to acquire the relevant skills in technology through tailored courses at all levels of the school curriculum as well as through other simplified courses available to those already out of school and not likely to benefit from job related trainings in the area. This will also make it easier for the public to interact meaningfully with the justice sector. This is especially important considering that the Judiciary is on course to incorporate the use of technology in dispensation of justice.

Empowering the disseminators/facilitators of justice while leaving out the consumers of justice will defeat the need for embracing justice-to facilitate efficient access to justice for all. Leaving them out will instead promote digital apartheid- systematic exclusion of certain communities from digital access and

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experience through political and business policies and practices. With the increased digitization of government services through such initiatives as the Huduma Center service delivery model- a Government of Kenya initiative aimed at advancing citizen-centred public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centres across the country, there is an urgent need to tackle digital illiteracy in order to enhance access by all. Virtual access to justice will benefit in the process. The Government can work with the Judiciary arm to set up Digital Villages Projects kind of structure across the country to ease access to services related to justice. However, such centres would focus on offering digital trainings and education specifically related to access to justice.

In addition, the Government should liaise with tech firms both national and international to roll out internet access services across the country for ease of access to all. They should also work with the local mobile service providers to ensure that mobile data is affordable for the majority of Kenyans. Furthermore, electricity should also be made more affordable for all. It is commendable that the Government of Kenya is already striving to ensure that all Kenyans have access to electricity through the Last Mile Electricity Connectivity Project.

4.5 Training, Regulation and Capacity Building: Role of Law and Legal Institutions

The recent amendments/enactments to enhance the use of technology in judicial proceedings in Kenyan courts are a step in the right direction. There is a need to ensure that even as we seek to invest in the physical infrastructure to enhance the use of technology in the administration of justice, legal and institutional frameworks are also put in place to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with the myriad of issues that will arise therefrom. There have been calls for the Kenyan law schools to ensure that in their curriculum they also take into account the changing dynamics in the legal world and design programmes that equip the future lawyers to deal with the changes. The modern lawyer ought to be well endowed with basic technological knowledge to enable them build on the same to fit in a fast growing globalized world where geographical boundaries and physical offices may no longer matter.

After qualification, lawyers should continually be subjected to technological knowledge and skills through the Continuing Professional Development (CPD) trainings which must be re-looked at to make them more receptive and richer. The CPD committee of the Law Society of Kenya should consider working

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65 Civil Procedure (Amendment) Rules, 2020 (26 February 2020); Electronic Case Management Practice Directions, 2020. The Law of Contract Act, Cap 23 of the Laws of Kenya was recently amended vide the Business Laws (Amendment) Act, No. 1 of 2020, (18 March 2020) to recognize use of advanced electronic signatures. Notably, Electronic signatures are not a new concept to Kenyan law, as they are already provided for under the Kenya Information and Communication Act No. 2 of 1998, as amended. The new amendments however sought to align the same with particular laws.

closely with Information communication technology and other relevant experts and professionals who may not necessarily be lawyers and invite them to CPD events in order to deliver more practical skills and knowledge on the area. It is not enough for lawyers to get theoretical talks on the area from fellow lawyers who are techno-legal savvy; the real professionals in the field must be involved as a way of impacting practical knowledge and skills. There is a need to actively involve the tech firms in and out of the country alongside other stakeholders.

Law schools in the future, like the legal profession itself, have been called to be more collaborative, diverse, international, technologically friendly, and entrepreneurial than they are today. In addition, tomorrow’s law school curriculum has been challenged to be more entrepreneurial to respond to the financial pressures on the legal profession and the opportunities wrought by innovation and globalization. Embracing technology will also enable law schools to widen their scope of students since students from abroad can either enroll for legal education in Kenya without the need to travel all the way or even have exchange programs and this would be beneficial to both students and the institutions.

4.6 Enhanced e-filing and service of Court Pleadings and Documents

The law amendments that allowed for e-filing and service of documents in Kenya could not have come at a better time. As has become the norm during

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68 Ibid.

The objectives of the Electronic Case Management Practice Directions are to guide the integration of Information Communication Technology (ICT) in judicial proceedings and in particular to provide for — (a) electronic filing and electronic service of court documents; (b) electronic diary; (c) electronic case search; (d) electronic case tracking system; (e) electronic payment and receipting; (f) electronic signature and electronic stamping; (g) exchange of electronic documents, including pleadings and statements;
the COVID-19 pandemic period, Kenyan courts should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

4.7 Amendment of Remuneration order to guide on Legal fees payment by clients

It has been argued that one of the biggest differences is how lawyers will practice in the future-how lawyers value and price what they sell.\(^\text{70}\) It is suggested that there is a need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination.\(^\text{71}\) This would all be facilitated by technology which allows one to serve clients without physically meeting clients or even attending court physically. This therefore creates a need to reconsider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

4.8 Licensing and Regulation of virtual law firms

Some scholars have rightly argued that competition to the Kenyan firms by global law firms requires a reconsideration of traditional organizational structures of law firms, ethical rules and regulation mechanisms for the legal


\(^{71}\) Ibid, p. 247.
profession and restructuring of how legal services are delivered.\textsuperscript{72} The argument is that in order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.\textsuperscript{73}

There is need for the law firms licensing stakeholders in Kenya to consider the idea of licensing virtual law firms, which will largely be conducting technology driven business. As a result of the COVID-19 which has forced many law firms across the world to allow employees to work from home, some firms abroad have already started reporting final decisions to close their physical offices and turning to virtual firms where their employees will permanently work from home.\textsuperscript{74} Slater and Gordon, a London-based law firm is set to have its staff working from home permanently from September 2020 onwards, after almost three months of working remotely under the COVID-19 lockdown.\textsuperscript{75} All its 200 London employees will work from home most of the time—though the firm is hoping to find a smaller office space which will be used to host meetings. The Staff are to be provided with multiple screens if they are needed and homes fitted with comfortable office equipment.\textsuperscript{76} The firm’s management rightly argued that this approach would improve the well-being and work life balance of their staff and provide flexibility to their customers.\textsuperscript{77}

\textsuperscript{73} Ibid, p. 243.
\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
Other United Kingdom based firms such as Baker McKenzie and DLA Piper have also been toying with the idea. The growth of virtual law firms will inevitably come with the challenge of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services.

### 4.9 A Possibility of Online Courts?

The Covid-19 pandemic has unintentionally fast-tracked courts’ adoption of technology since courts around the world have been forced to replace face-to-face hearings with video hearings, using phonelinks and platforms such as Zoom, Teams and Skype. Kenyan Judiciary has not been left behind in these latest developments.

Kenya still suffers from the challenge of physical accessibility to law courts due to geographical distance since some of the farthest regions still do not have physical court buildings. As a result, advocates and witnesses travel long distances in search of justice. While the Judiciary continues to invest in physical infrastructure, the stakeholders in the justice sector may also consider

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the idea of embracing online courts to deal with the problem. Considering that even where the Judiciary puts up courts, lawyers may still be unavailable to the litigants either due to costs or general shortage, some scholars have argued that putting online courts may come in handy in overcoming some of the challenges faced by litigants who represent themselves, Pro Se Litigation. They argue that in most jurisdictions, including the United States of America, to date, the use of online technology to support legal self-representation has been confined primarily to the provision of educational and informational materials, such as “how-to” websites and downloadable legal forms, available mostly in the pre-filing stage.

Arguably, the Judiciary can go further in embracing technology through instituting “online courts; judicial online dispute resolution systems, can improve the ability of self-represented litigants to effectively participate in proceedings, as well as the ability of courts to administer them fairly and efficiently. Where parties are in far-flung areas and they do not have access to legal representation, it has been suggested that they can benefit from self-representation in online courts where they can handle all procedural and substantive aspects of their legal matters, including court appearances, without representation by counsel. This is because lay people who self-represent in judicial processes typically lack knowledge of legal procedure and substance, an inherent limitation which is consistently found to impede their access to justice and the legal system’s ability to deliver justice. This is a viable idea since representation through legal aid or pro bono programs may not always suffice.

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84 Ibid, p. 333.
85 Ibid, p. 333.
87 Ibid, p. 333.
While video-conference hearings may require documents to be filed physically and sometimes require physical presence of witnesses or parties, online courts would have every part of the process facilitated through some web-based platform from filing, payments and hearings without requiring any physical presence.\(^{88}\) The system may be akin to the United Kingdom’s Money Claim Online system, which is the online portal for starting simple court claims, allowing individuals and organizations to file online specified money claims for sums of up to GBP £100,000.\(^{89}\) It is a web-based service for issuing money claims and resolving fixed money disputes introduced in the judiciary of England and Wales in February 2002.\(^{90}\)

The Canadian District of British Columbia also set up the Civil Resolution Tribunal which started working in 2016 and it allows the public to resolve their condominium property and small claims disputes up to $5,000 fairly, quickly, and affordably where participants use all of negotiation, facilitation and, if necessary, adjudication services from a computer or mobile device at a time that is convenient for them, and for those who are unable or unwilling to use technology to resolve their dispute, the tribunal provides paper-based or telephone-based services.\(^{91}\) It has been observed that over 90 percent of parties

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\(^{88}\) Legg, Michael. "The future of dispute resolution: online ADR and online courts." Forthcoming–Australasian Dispute Resolution Journal (2016); Dame Hazel Genn, ‘Birkenhead Lecture2017: Online Courts and the Future of JusticeGray’s Inn,’ 16 October 2017


\(^{89}\) admin, ‘Money Claim Online - Learn What It Is, Where It Is And How To Use It’ (Small Claims Court Genie. Free hints, tips and news)


\(^{91}\) Shannon Salter, ‘Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal’ (2017) 34 Windsor Yearbook of Access to Justice/Recueil annuel de Windsor d’accès à la justice 112, p. 114; Office of Housing and
in British Columbia’s Small Claims Court are self-represented, and even if they could finance legal fees, many British Columbians in remote communities must travel great distances to a courthouse, burdening them with further costs. In addition, no matter where you live or who you are, navigating the civil justice system, even Small Claims Court, can be stressful and overwhelming, and there is little support available to help with the process. Thus, the online tribunal system comes in handy. Effective July 15, 2019, British Columbia’s Civil Resolution Tribunal (CRT) expanded its jurisdiction to include claims against societies incorporated under the Societies Act (British Columbia), changing the forum for dispute resolution for many types of claims made against a society or its directors.

Therefore, even though Kenya is in the process of putting up small claims courts, they may suffer the same setbacks. As a result, in future, Kenya may need to benchmark with the above countries, noting the strengths and weaknesses of this system and consider adopting the same. All the Government needs to do to facilitate is to Fast-track internet access across the country and promote setting up advanced computer centres where less fortunate members of the society can access internet. It is also encouraging that the use of smartphones is fast spreading in the country, a development that may enhance the use of online courts. Initially, the Judiciary may begin with smaller claims whose value may not be economically viable to travel long distances, spend too much or even wait in courts due to the huge backlog currently experienced in our courts.

Construction Standards, ‘The Civil Resolution Tribunal and Strata Disputes - Province of British Columbia’
<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal> accessed 5 June 2020.

92 Ibid, p. 119.
As for the fear of coaching of witnesses, the system can incorporate measures similar to proctoring programs for ensuring witnesses do not get coached, among other quality assurance software and measures. However, where possible, courts may also consider taking written submissions and evidence in proceedings, particularly in courts where affidavit evidence is not the ordinary procedure.95

4.10 Enhanced collaboration Between International Law Firms and Local Firms/ Globalization of Legal Services

Notably, some Kenyan firms are already ahead in this area by collaborating with East African law firms and some with even international firms beyond the region.96 Bowmans, a firm with nine offices (Cape Town, Dar es Salaam, Durban, Lilongwe, Lusaka, Johannesburg, Kampala, Moka and Nairobi) in seven African countries and over 400 specialist lawyers, for instance, has been extending its reach across the African continent.97 In all these countries (Kenya, Malawi, Mauritius, South Africa, Tanzania, Uganda and Zambia), they have alliance firms with which they work closely. They are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe, which gives them access to firms in each jurisdiction represented.98

There is a need for more local firms to consider the idea and possibly join the bandwagon as it may give them access to a wider clientele.

5. Conclusion
The COVID-19 has laid bare the direction that legal practice is headed. There is a need for lawyers to reconsider the issues of law firm structure and billing, law firm marketing, work-life balance and technology vis-à-vis the practice of law, cross border legal practice, educating and training new adaptable lawyers (Emphasis added). Law schools and the LSK should take this opportunity to equip lawyers with the requisite skills in order to prepare them for the fast changing legal practice the world over. Law firms should also invest in technological developments if they hope to remain relevant in the face of technological innovations and developments and globalisation. The Judiciary also needs to take up the challenge of adopting technology to facilitate remote access to justice for all.

We are moving into an era where many lawyers may find themselves working from home due to the desire to cut costs using technological investments and following clients’ needs which will lead firms to embrace technology. This is the time for them to invest wisely in these new technological areas and acquire the relevant skills and knowledge to enable them remain relevant. Arguably, automation technologies can make legal services more affordable and easily accessible to their clients. Additionally, law firms can leverage these technologies to develop and add alternative services, while reducing overheads and workload. While clients are putting law firms under intense pressure to deliver a higher level of service by making use of the latest technological advancements, all at a reduced cost, it has been argued that this generational shift in consumer expectation is an opportunity for legal service providers to

implement innovative digital products that meet next-generation clients’ demands while increasing productivity within their own staff. The future of legal practice is in embracing technology and the Kenyan legal practitioners and players in the justice sector must take up the challenge or be rendered irrelevant since legal practice is likely to become increasingly virtual. The journey into the future has already begun and there is no turning back.

Legal practice must venture into new frontiers: embracing technology for enhanced efficiency and Access to Justice is an idea whose time has come.

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Analysis of The Efficacy of the Kenya Revenue Authority’s
Alternative Dispute Resolution Framework

By: Kenneth Wyne Mutuma*

Abstract
This paper seeks to examine how Kenya’s taxing authority; the Kenya Revenue Authority (KRA) goes about addressing tax disputes in terms of the rules and procedures applied. Most importantly, the paper seeks to shed light on the efficacy of the use of Alternative Dispute Resolution Mechanisms therein. The paper will take a look at the mandate of KRA and the current tax system in Kenya. It will go ahead to analyse the nature of tax disputes with a focus on the example of the possible disputes that may arise as a result of taxation. The paper further examines the mechanisms which are employed by the Kenya Revenue Authority towards the resolution of tax disputes, both in the historical context as well as the current regime for the same. Further on, the paper analyses the KRA mediation programme, which entails the application of mediation specifically as a tool for tax dispute resolution. Lastly, the paper will delve into the challenges inherent to the application of mediation and proffer possible recommendations towards the betterment of this approach.

1.0 Introduction
What does taxation entail and why impose taxes? Tax can be defined as any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other names.¹ The Oxford Dictionary has a broad definition of tax describing it as a compulsory contribution to state

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revenue, levied by the government on workers' income and business profits, or added to the cost of some goods, services, and transactions.

The following is a list of taxes paid in Kenya as well as their regulatory framework:²

i. Income tax is a tax charged for each year of income, upon all the income of a person whether resident or non-resident, which is accrued in or was derived from Kenya and is charged on e.g., business, rent, pension and employment income. It is paid in form of corporate tax, Pay as You Earn (PAYE), Withholding Tax and Installment Tax. Provided for and regulated under the Income Tax Act Cap 470 of the Laws of Kenya.

ii. Rental Income Tax- This is a tax charged on rental income received from renting out property under the Income Tax Act Cap 470 of the Laws of Kenya.

iii. Value Added Tax- Value Added Tax is charged on the supply of taxable goods or services made or provided in Kenya and on importation of taxable goods or services into Kenya. It is regulated by the Value Added Tax Act No. 35 of 2013.

iv. Excise Duty-This is a duty of excise imposed on; goods manufactured in Kenya, or imported into Kenya and specified in the 1st schedule to Excise Duty Act No. 23 of 2015.

v. Custom Duty-This is a tax imposed on the importation or exportation of goods. It is regulated by the Customs & Excise Act Cap 472 of the Laws of Kenya and the East African Community Customs Management Act of 2004

vi. Capital Gains Tax (CGT)-This is a tax chargeable on the whole of a gain that accrues to a company or an individual upon transfer of property situated in Kenya, whether or not the property was acquired before 1st January 2015. Regulated under the Income Tax Act Cap 470 of the Laws of Kenya

vii. Agency Revenue-This is a type of payment that KRA collects on behalf of various revenue collection agencies in Kenya. Stamp duty is an example of agency revenue and is charged on the transfer of properties, shares and stock and regulated by the Stamp Duty Act Cap 480 Laws of Kenya

viii. Betting Tax-This is chargeable on the gross gaming revenue (GGR) of a bookmaker at the rate of 15% as provided by Section 29A of the Betting, Lotteries and Gaming Act, 1966

Taxation is necessary, to power the economy of any nation and this cannot be gainsaid. In Kenya, the tax system has mainly concentrated on taxing individual income (Personal Income Tax-PIT), profits (Corporate Income Tax-CIT) and goods and services (VAT, excise duties).³

2.0 Principles of a Good Tax System
The government imposes taxes, and they create burdens to taxpayers. However, the same taxes are used for the welfare of all citizens. An optimum or a good tax system is defined as one which helps to achieve the maximum possible number of principles of taxation.
The principles of good taxation were formulated many years ago. In The Wealth of Nations (1776), Adam Smith argued that taxation should follow the four principles of fairness, certainty, convenience and efficiency.⁴ Fairness, in that taxation, should be compatible with taxpayers’ conditions, including their ability to pay in line with personal and family needs. Certainty should mean

that taxpayers are informed about why and how taxes are levied. Convenience relates to the ease of compliance for the taxpayers: how simple is the process for collecting or paying taxes? Finally, efficiency touches on the collection of taxes: basically, the administration of tax collection should not negatively affect the allocation and use of resources in the economy, and certainly shouldn’t cost more than the taxes themselves.\(^5\)

Additional principles of taxation applied in Kenya include: economical in terms of tax collection, convenient in the mode of payment, productivity, flexibility in being able to adapt to the economical demands of the time, elasticity, simplicity, diversity in different taxes to cater for different aspects of the economy.\(^6\) The application of these principles comes with its fair share of troubles when it comes to compliance and thus results in various tax disputes between the taxpayer and the taxing authority.

3.0 Kenya’s Taxing Master; The Mandate of Kenya Revenue Authority (KRA)
The Kenya Revenue Authority (herein referred to as “The Authority”) is established under Section 3 of the Kenya Revenue Authority Act as a body corporate with perpetual succession and a common seal.\(^7\) It is a government agency vested with the mandate of assessing, collecting and accounting for all revenues in accordance with relevant laws; advising the government on matters relating to the administration and collection of revenues and any other functions which the Cabinet Secretary may deem lawfully necessary.\(^8\)

Before the establishment of the Authority in 1995, the government’s revenue collection function was distributed among some five ministries and departments, leading to inefficiency and low accountability, since the work of

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\(^8\) Kenya Revenue Authority Act Cap 469 Laws of Kenya, Section 5.
these agencies was not coordinated. The Authority was, therefore, established to enhance efficiency, transparency and accountability in revenue collection and handling of arising disputes by bringing the various agencies under one umbrella.

A critical analysis of the current tax system is to the effect that the Authority operates a self-assessment system for the administration of income tax and Value Added Tax (VAT). It has been doing so since 1995 when Kenya began modernizing its tax system. Prior to this, the government operated a provisional assessment system, by which it would issue assessments based on information provided by taxpayers.

Under the self-assessment system, individuals determine their tax liability directly, without any intervention from the Authority and submit tax returns and payments. The self-assessment model is based on voluntary compliance, and tax administrators generally accept the tax return and payment in the first instance without technical scrutiny. This system acknowledges that the taxpayer is in the best position to determine their tax liability as they have first-hand knowledge of their business affairs and financial transactions.

To ensure that taxpayers comply with the various tax requirements, the Authority has been empowered with the mandate of conducting tax audits. This means examining the taxpayer’s returns, to determine whether the taxpayer has

9 Kenya Revenue Authority, Write-up for the Research Project on Administrative Law and Governance in East Africa 2 (2014).
10 See Migai Aketch. “Administrative Law & Governance Project”, University of Nairobi, School of Law July 2015
11 Ibid.
12 Ibid.
14 A Okello, Managing income tax compliance through self-assessment, 11
15 Ibid.
correctly assessed and reported their tax liability and equally fulfilled their tax obligations.\textsuperscript{16} In doing this, the Commissioner, through a written notice, may time and again require that the taxpayer avails relevant documents such as books of accounts for examination by auditors from the Authority, to ascertain the accurateness or otherwise of their tax assessment.\textsuperscript{17}

Despite the importance that attaches to the process, the taxing power needs to be exercised judiciously, lest it threatens the very same individual liberties that the government is established to protect.\textsuperscript{18} With regard to the foregoing, it is, therefore, a fundamental need to set forth mechanisms for taxation disputes to be effectively and expeditiously resolved, to foster an environment of cooperation that permeates a mutually beneficial relationship between the tax authority and the taxpayer.

4.0 The Nature of Tax Disputes
No relationship can be said to be void of disputes, especially with the fact that more often than not, different interests are involved. To understand where these disputes emanate from, it is important to know what tax regime Kenya ascribes to, and thereafter assess how the same would result in tax disputes. Tax disputes are usually about \textit{‘Perceived Erroneous Applications of the Law’} (PEAL).\textsuperscript{19} The claims raised by the tax authority are based on their interpretation of the law provides-whether the law has been applied correctly by the taxpayer and whether the taxpayer has met their full obligations as set out in the law.\textsuperscript{20}

To persuade and convince the tax authority in a dispute involving a PEAL, the taxpayer would have to successfully advance legal arguments that show that in naming and claiming, the tax authority erroneously applied the law, either

\textsuperscript{17} Section 59 (1), Tax Procedure Act (Act No. 29 of 2015) and Organization for Economic Development, \textit{The changing tax compliance environment and the role of audit}, 2017, 58.
\textsuperscript{18}See Migai Aketch. “Administrative Law & Governance Project”, University of Nairobi, School of Law July 2015.
\textsuperscript{20}Ibid.
through a wrong interpretation or that the facts correspond to another provision.\(^{21}\) Disputes that begin with PEALs may at times become subsumed with disputes about a ‘Perceived Injurious Experience’ (PIE).\(^{22}\) A PEAL dispute may be subsumed where other interests, other than tax liability become immediately more prominent to the taxpayer, for example, their rights as enshrined under the bill of rights or procedural justice. The need to protect property rights has been cited as one of the reasons behind tax disputes.\(^{23}\) In addition to the above, there exist various broad categories of tax disputes.\(^{24}\)

They include:

1. Those involving assessments where the Commissioner and the taxpayer are not able to agree what amount should be assessed as tax;
2. Those relating to the treatment of expenses with regard to what should be allowed or disallowed;
3. Disputes relating to the imposition of penalties and interests as may be provided for by law and the refusal by the Commissioner or Cabinet Secretary to waive such penalties or interests where the taxpayer has made an application;
4. Collection proceedings to recover the tax due for example from banks in settlement of the taxpayer’s obligation;
5. Disputes relating to the Commissioner’s interpretation of the statute which is the “KRAs position or ruling that now becomes subject to the position of a court of law so that it pronounces itself on what interpretation should be adopted;

\(^{21}\)Ibid.
\(^{22}\) Ibid.
\(^{23}\) Y Xu, ‘Tax dispute resolution, judiciary independence and property rights’, 1.
vi. Disputes relating to Commissioner’s administrative action which arise where the taxpayer challenges the decision-making process of KRA;

vii. Disputes relating to the failure of persons to execute their mandate willfully through error or omission for example the failure of employers to remit statutory deductions.

5.0 Current Regulatory Framework Governing Tax Dispute Resolution
A tax dispute arises when a taxpayer holds a contrary view to that of the Commissioner with regard to the application of tax laws as well as the outcome of the tax audits. Since independence, the resolution of tax disputes has been adversarial, and it only provided for two avenues for resolving those disputes.²⁵ An aggrieved party could canvass the tax disputes before a court of law or tribunal, and they would be assessed through the objection procedures in tax statutes. The tax statutes in place provided an opportunity for taxpayers to agree on tax assessments with the revenue authority to reach an amicable settlement.²⁶ The tax dispute process was overhauled in 2015 through the enactment of a Tax Procedures Act, 2015 ("TPA"), which introduced fundamental changes to the tax dispute resolution process.²⁷ These included the merging of the various tax appeals processes in disparate tax legislation, in particular, the Customs and Excise Act, the Income Tax Act and the Value Added Tax Act, and the creation of a uniform administrative process for lodging tax appeals.²⁸

There currently exists a broad legal framework that governs the process of resolution of tax disputes. This is as discussed below.

5.1 The Tax Procedures Act, 2015 (TPA)
The TPA has consolidated and streamlined procedural rules for the administration of tax laws in Kenya that were previously scattered in various

²⁶ Ibid.
²⁸ Ibid.
Analysis of The Efficacy of the Kenya Revenue Authority’s Alternative Dispute Resolution Framework: Kenneth Wyne Mutuma

Part VIII of the Act is the most relevant to this discussion as it focuses on the issues around Tax Decisions, Objections and Appeals, which basically sections forth the procedure through which tax disputes are to be handled, as outlined below.

5.1.1 Lodging an Objection
Section 51 of the Act provides for the procedure of lodging an objection against the tax decision of the Commissioner. The taxpayer is required to do so within 30 days of being notified of the decision, stating the grounds for the objection, the amendments required to correct the decisions and the reason for the amendment. Where the objection has been validly lodged, the Commissioner must make an objection decision which is communicated to the taxpayer, if they fail to within 60 days after the objection was launched, then the object is automatically allowed.

5.1.2 Appeals
Section 52 of the Act stipulates that, if the taxpayer is dissatisfied with the decision of the Commissioner, they may appeal to the Tax Appeals Tribunal. If again dissatisfied by the decision of the Tribunal, they may appeal to the High Court of Kenya within 30 days and they may appeal against the decision of the High Court to the Court of Appeal too. The appeals must strictly be over matters of law, with the burden of proof inevitably lying on the taxpayer in line with the principles set out under the Evidence Act.

5.2 Tax Appeals Tribunal Act, 2013 (TATA)
This Act was essentially meant to consolidate all approaches towards tax appeals. The Act repealed Section 32 of the Value Added Tax Act of 1989 which established the Value Added Tax Tribunal; Sections 82 and 83 of the Income Tax

30 Ibid.
32 Section 53 of the Tax Procedures Act (Act No. 29 of 2015).
33 Section of the Evidence Act (Act No. 80 of 2008).
Act Cap 470 and did away with the Local Committee and Tribunal established under this act; Section 127E of the Customs and Excise Act as well and established for tax appeal purposes, the Tax Appeals Tribunal.34

The Tribunal consists of a chairman who must be qualified as a judge of the High Court of Kenya and not less than 15 and not more than 20 other members appointed by the Cabinet Secretary, 5 of them have to be Advocates of the High Court of Kenya. To monitor its efficiency and accountability, the Tribunal is required under the Act to submit an annual report to the Cabinet Secretary detailing its performance in the preceding year.35

5.2.1 Procedure of Appeals
The taxpayer is first supposed to lodge a notice of intention to appeal and pay a non-refundable fee of twenty thousand shillings. They are required to lodge a Memorandum of Appeal; Statement of Facts and the Tax Decision being appealed against within 14 days of lodging the Notice of Intention to Appeal. The Commissioner is thereafter required to respond within 30 days after service of the copy of the appeal and file their Statement of Facts, reasons for the tax decision and any other documents necessary for the appeal process.

The Tribunal is empowered to call witnesses, order for stay of execution, adjourn proceedings, award costs and direct them to be taxed by the scale applicable for High Court suits, issue summonses, order for production of books and documents and to make decisions that have a legal force.36 The Act stipulates that the Tribunal should render its decision within 90 days from the date which the appeal was filled. The decision can affirm the decision under review; vary or set aside the decision or refer the matter to the Commissioner.

35 Tax Procedures Act (Act No. 29 of 2015), Section 9(3).
with recommendations for reconsideration. If dissatisfied by the decision of the Tribunal, the taxpayer may appeal to the High Court.\textsuperscript{37}

5.3 Litigation: Pros and Cons
The above mechanisms of dispute resolution through litigation are advantageous in that they have been well codified in law and the procedures for the same are stipulated as well. Codification of these processes enhances transparency and accountability in the court process. The fact that there is recourse in terms of appeals if a party is aggrieved by a decision also enhances access to justice and allows the party aggrieved to continuously push for their matters to be taken into consideration and hopefully reach a satisfactory outcome.

Even with these being said, there are myriad of challenges that come with the litigation approach to dispute resolution. First, the backlog in the courts leads to delays in solving the disputes. Secondly, as a consequence of the delays, parties end up incurring excessive litigation costs. Thirdly, there are immense risks for parties with the approach of winner takes all that is often applied in litigation and this leads to damaged relationships between the parties.

6.0 The Application of Alternative Dispute Resolution Mechanisms in Tax Dispute Resolution
According to the Kenya Revenue Authority Sixth Corporate Plan 2015-2018, the majority of tax disputes in Kenya are resolved through some form of adversarial dispute resolution mechanism.\textsuperscript{38} Even with this reality in place, Kenya recognizes the application of ADR towards the settlement of tax disputes. This is provided through different pieces of legal provisions as espoused below. First and foremost, the Constitution of Kenya 2010. As one of the principles that govern decision making by the Courts and Tribunals, the Constitution espouses under Article 159 (2) (c) the application of alternative forms of dispute resolution. It is against this backdrop that the application of different forms of ADR such as mediation and arbitration are applied for tax disputes in Kenya.

\textsuperscript{37}The Tax Tribunals Act (Act No. 40 of 2013), Section 32.
\textsuperscript{38}Kenya Revenue Authority, Sixth corporate plan, 2015, 50, Kanyi, B. G. “Kenya’s tax dispute resolution system: A system design evaluation (Thesis, Strathmore University).
With the Constitution being the Grundnorm, it is definitely advantageous that it calls for the embracing of this aspect of dispute resolution.

Secondly, the Tax Procedures Act, 2015 (TPA). Section 55 of the TPA provides an opportunity for the application of ADR by stipulating that where a court or tribunal permits, parties may settle tax disputes out of court or tribunal. Thirdly, the Tax Appeals Tribunal Act, 2013 (TATA). Section 28 of the Tax Appeals Tribunal Act stipulates that any of the parties to the disputes may apply to the Tribunal to settle the matter out of the Tribunal on terms which the latter will stipulate. There is then a requirement that parties are to report the outcome of the settlement to the Tribunal. This section does not limit the settlement avenue the parties choose and therefore this creates an opportunity for them to explore the various ADR mechanisms applicable to the dispute.

6.1 The Kenya Revenue Authority Mediation Framework
The Kenya Revenue Authority published a pilot ADR Framework for application in tax disputes in 2015. Its preamble stated that the framework was put together to introduce ADR as an additional and/or alternative means of resolving tax disputes outside the judicial and quasi-judicial process. Below is an analysis of different aspects of the framework:

6.1.1 Mediation as a Voluntary Process
The framework is in the form of a voluntary and facilitated discussion between the taxpayer and the Commissioner (facilitated mediation) and not arbitration as envisaged in the Arbitration Act, Cap 49 of the Laws of Kenya. Either party can initiate the process. The final decision cannot, therefore, be imposed. Instead, the parties are facilitated to find a solution to the dispute. This is a move from the adversarial tax dispute system outlined previously that allows for a more amicable approach, which focuses on the interests of the parties involved. Parties are equally allowed to redirect the disputes lodged in the courts or tribunals to mediation.

39 The ADR Framework - KRA 2015.
40 Ibid Section 5.
Parties may be given an opportunity upon request to engage in ADR before an objection decision is issued.\textsuperscript{41} Under the TPA, the Commissioner in charge of tax dispute resolution is supposed to issue the decision within 60 days from the day the taxpayer lodged the objection for assessment. Under the East African Community Customs Management Act of 2004, the Commissioner must issue the decision within 30 days from the date the objection was lodged.\textsuperscript{42} The timelines applied to alternative dispute resolution as well must adhere to the above stipulations.

\textbf{6.1.2 Alternative Dispute Resolution for Cases Pending before the Tax Appeal Tribunal and Courts}

As mentioned beforehand, disputes already referred to the courts or tribunals can be redirected to ADR at the request of any party. Where these parties wish to engage in alternative dispute resolution and specifically mediation, they must do so within 90 days.\textsuperscript{43} They will then be expected to revert to the respective bodies within 90 days with the terms of the agreement reached and where no agreement will have been reached,\textsuperscript{44} the matter may proceed as guided by the respective bodies. The courts may direct or dictate the timelines within which the dispute before it may be negotiated under ADR.

According to the framework, the facilitators are to provide guidance to the discussions and must not necessarily be experts in tax or law.\textsuperscript{45} Their role is to convene meetings, chair the meetings, attest to the signing of mediation documents and generally guide the parties in the discussions towards an amicable settlement.\textsuperscript{46} They should not be involved in tax audits or investigations or the disputed decision and must disclose to the parties any conflict of interest arising from the dispute at hand.\textsuperscript{47} In case any conflict is

\begin{itemize}
\item \textsuperscript{41} The ADR Framework – KRA 2015, Section 6.1.
\item \textsuperscript{42} See Section 229(4).
\item \textsuperscript{43} The ADR Framework – KRA 2015, Section 6.2.
\item \textsuperscript{44} Ibid Section 6.2 Para iv.
\item \textsuperscript{45} Ibid Section 9.
\item \textsuperscript{46} Ibid Section 9.1.
\item \textsuperscript{47} Ibid Section 10.
\end{itemize}
disclosed, they may be required to recuse themselves if the parties are not comfortable with the same and a new facilitator is appointed.

In the execution of the process, some rules have been set to guide the facilitators, with a view of ensuring that the process is as seamless as practicably possible. These rules are meant to ensure the simplicity and flexibility of the process;\(^{48}\) ensure each party can freely participate in the discussions; ensure the parties adhere to the timelines set in the TPA or by the court; remain neutral in the process and maintain the confidentiality of the information disclosed during the process.

The initial stage of the alternative dispute resolution process involves screening to assess whether the subject of the dispute is suitable for alternative dispute resolution engagement. The parameters that disqualify the matter are as listed below:\(^{49}\)

a) If the settlement would be contrary to the Constitution of Kenya 2010, Revenue laws or any other enabling laws;
b) If the matter borders on a technical interpretation of the law;
c) If it is in the public interest to have judicial interpretation;
d) If the pursuit of the matter through the Courts will significantly promote compliance;
e) If the parties have not complied with the provisions of any Act and there is evidence that the non-compliance is consistent or deliberate;
f) If one party is unwilling to engage in ADR discussions.

With regard to requirements (a) and (f), the dispute can still be handled under alternative dispute resolution, where there are valid reasons for such considerations, and where the parties have evaluated the said reasons and are agreeable that the dispute ought to be handled under alternative dispute resolution.\(^{50}\) In addition, the parties must provide the necessary documentation

\(^{48}\) Ibid Section 11.
\(^{49}\) Ibid Section 14.1.
\(^{50}\) The ADR Framework – KRA 2015, Section 14.1.
to support the dispute.\textsuperscript{51} These may include the relevant assessment, the notice of objection and all documents submitted to the Commissioner, the objection decision, a settlement proposal, a summary of the issues of the disputes and any other documentation as may be required during the alternative dispute resolution discussions. The documents are to be held confidentially and shall not be disclosed to 3rd parties without the consent of parties who own the document.

When it comes to the management and procedures in alternative dispute resolution proceedings,\textsuperscript{52} the parties to the dispute can choose to act on their behalf or be represented by a tax agent or a legal advisor. Parties are encouraged to be present during the process at all times to enhance the efficiency of the process. If necessary, the facilitator may require a party to use a witness. In matters involving investigations and enforcement, the Commissioner must be involved in the entire process.

It is important to note that the proceedings may be terminated. This may happen if:\textsuperscript{53}

\begin{itemize}
  \item[a)] either party opts to do so;
  \item[b)] through a unanimous agreement by the parties;
  \item[c)] where due to the unconscionable conduct of a party, the other is of the opinion that the dispute cannot be resolved through the alternative dispute resolution discussions;
  \item[d)] if a party does not attend the discussions without justifiable cause or where a party fails to carry out a request from the facilitator without justifiable cause.
\end{itemize}

\textsuperscript{51} Ibid Section 15.
\textsuperscript{52} Ibid Section 16.
\textsuperscript{53} Ibid Section 17.
Upon termination, the matter may be referred to the court or tribunal as if the matter had not been initiated. While the matter may be re-admitted to alternative dispute resolution, the parties must justify the re-admission. However, where the parties have reached an agreement, the said agreement must be in writing and signed by parties to the dispute and attested to by the facilitator. The agreement should set out; the background of the dispute, the agreed and non-agreed issues, the process and specific exercises during the alternative dispute resolution process; a record of meetings held by the parties in the absence of the alternative dispute resolution team; taxes payable and justifications; terms of settlement; undertakings given by each party and the payment plans where applicable. Parties must each retain a copy to serve as evidence of the discussions and outcome. The agreement is legally binding to both parties.

The KRA-ADR framework outlines the process as follows:

i. Applications and requests shall be addressed to the Tax Dispute Resolution Division and copied to the relevant Commissioner;

ii. Applications are to be made through the KRA website in the prescribed form and should be accompanied by all the relevant documents as guided by the checklist in the application form;

iii. The applicant shall receive an acknowledgement through e-mail;

iv. The dispute will be allocated a case manager and undergo the suitability test; and

v. The parties will be invited to the preliminary ADR meeting through written letters, e-mail and telephone correspondences

6.1.3 The Benefits of Mediation
Mediation is not only a cost-effective, timely, confidential, voluntary means of dispute resolution but will ensure ultimate efficiency in tax administration,

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54 The ADR Framework – KRA 2015, Section 17.2.
55 Ibid Section 18.2.
56 Ibid Section 19.1 Para a-h.
57 Ibid Annex 1.
increased tax compliance due to voluntary participation and high party satisfaction and also increased access to justice due to its cost-effectiveness thus affordability across a section of the taxpaying public.\textsuperscript{58} Further, ADR allows the taxpayers and tax administrators to come together to proactively seek resolution of the tax dispute. In jurisdictions where ADR has been used, the mechanism has enhanced the efficiency in tax administration and to a great extent reduced the quantum of cases leading to litigation.\textsuperscript{59} The Kenya Revenue Authority, in its 7\textsuperscript{th} Corporate Plan, has highlighted that they have been able to use ADR to resolve 38 per cent of all their disputes through ADR, with 62\% of the ADR disputes being resolved by end of June 2018, raising a total of Kshs 8 billion.\textsuperscript{60}

6.2 Inherent Challenges to the KRA-ADR Framework

Even with the Framework in place and the progress as detailed above, numerous challenges inhibit the successful implementation and the application of alternative dispute resolution for the resolution of tax disputes. Among them, the following are most notable.

First is the disclaimer on applicability. In the first instance, the framework sets out a disclaimer which is to the effect that it is only used for general guidance and, therefore, KRA would not take any responsibility or duty of care for any consequences suffered by parties that apply the guidelines.\textsuperscript{61} This, unfortunately, does not instil confidence of parties that may seek redress through this avenue. This is premised on the fact that the entire process lacks concrete legal backing. This leads to the second challenge regarding the

\textsuperscript{61} The ADR Framework – KRA 2015, Section 1.
restricted application of mediation as the only route. The framework espouses the application of facilitated discussions/mediation, as the recognized mode of alternative dispute resolution. This is notably restrictive because the Constitution of Kenya identifies other methods such as arbitration which would be equally suited for the task.

Even though this paper seeks to embellish the place of mediation within the tax disputes resolution regime, the paper is alive to the fact that mediation in itself has its drawbacks, and for its success to be encompassed, there must be room for exploration of alternative dispute resolution methods in contradistinction to mediation alone. This is inspired by the fact that if the parties do not prefer to ascribe to mediation, then they are subject to the arbitrary systems of the courts and tribunals, without allowing them to explore other alternative dispute resolution mechanisms such as arbitration. In as much as this paper seeks to inculcate and promote the place of mediation within the dispute resolution space, the paper is alive to the fact that mediation cannot be highly successful in isolation, and it needs the support of other modes of dispute resolution such as conciliation, negotiation or Med-Arb.

As a consequence, therefore, this paints the picture that ADR although very instrumental, is not given enough prominence in terms of dispute resolution. They are seen as alternatives other than avenues that can be the first point of contact for tax disputes. This could explain why the Framework does not have a statutory basis in terms of a substantive provision of the law or regulations. It is only promulgated as an internal non-binding framework within the Authority. The Framework even advises taxpayers to rely on the substantive law and other formal dispute resolution steps contained in the law. This serves to devalue the relevance of the Framework.62

Secondly, the statutory framework outlined herein as governing dispute resolution alludes to the fact that they permit parties to result to the various out

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of court or tribunal means of settlement available. However, the Framework clearly limits the application of ADR to the use of mediation alone.

Thirdly, the framework lacks a structure for accountability. As outlined beforehand, the party that wishes to refer the tax dispute to ADR for settlement is required to make an application to KRA who are then the very entity to approve or disapprove using a largely subjective suitability test. In addition to this, the framework does not include a reporting mechanism to tackle various administrative issues or to mitigate any other disagreements between the parties during the dispute resolution process. This inevitably would lead to accountability issues and discourage the use of the very mechanism the framework is set to establish.

7.0 Recommendations
The challenges above are an indication of an institution with a lot of potential to have a friendly environment for the resolution of tax disputes. As a result, therefore, there is a need for a comprehensive roadmap with which to achieve the best practices as applied in other jurisdictions in tax dispute resolution. Some of these recommendations are discussed below.

7.1 Establishment of a comprehensive reporting mechanism i.e., Independent Tax Ombudsman
With regard to issues around accountability, there should be a proper reporting mechanism to be included in the framework to safeguard the interests of the parties, which the Authority can adopt during an ADR settlement. The Authority should report not only how much tax has been forgone through tax dispute settlement, but this mechanism should allow parties to express their grievances about the ADR process and seek redress. Examples of matters that may require “supervision” by a separate entity include those about the conduct of Facilitators and breach of privacy issues. The KRA-led ADR initiative is designed to handle tax-related disputes arising in the course of tax administration. However, in some cases, tax disputes may

Tax Procedures Act 2015, Section 55(1).
deal with administrative or procedural issues that it would be difficult for a tax authority employee appointed as a mediator to seek resolution of. To overcome this challenge, a number of jurisdictions have created the position of Tax Ombudsman, notably South Africa in the African region.

In South Africa, an Office of the Tax Ombudsman was established in October 2013. The office works with taxpayers that have been unable to resolve a service, procedural or administrative complaint through the normal complaints management channels of the South African Revenue Service (SARS). In addition, the Tax Ombudsman may review, at the request of the Minister or at the initiative of the Tax Ombudsman, with the approval of the Commissioner, any systematic and emerging issues related to a service matter or the application of the provisions of the Tax Administrative Act, or any procedural or administrative provisions of a tax Act. The office is independent of, but funded through, SARS. The Tax Ombudsman is appointed by and reports directly to the Minister of Finance, and may only be removed by the Minister.

In Kenya, there is an existing Commission on Administrative Justice which is also known as the Office of the Ombudsman.64 Being an office responsible for handling all public complaints, it may not be an ideal body to handle tax-related processes, and hence a separate Tax Ombudsman within the KRA would help to resolve some of the administrative and procedural issues faced by the KRA and focus the ADR process on more complex issues dealing with matters of interpretation of tax law, thus increasing the capacity of the ADR team within the KRA.65

7.2 Expand the Scope of Application of ADR
ADR does not only serve as a dispute resolution mechanism but should also be applied as a means of dispute prevention. In Kenya, parties use ADR after a dispute has occurred. Parties should be given an opportunity to settle the matter

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64 Mucheru, N. “The Adoption of Alternative Dispute Resolution in Kenyan Tax Disputes” (2019).
65 Ibid.
through ADR before the tax dispute is before the Appeal Tribunal.\textsuperscript{66} The justification of expanding the stages in which ADR can be used is the shortcoming of the appeal procedures which is costly, adversarial and lengthy.\textsuperscript{67}

7.3 Publicizing the use of ADR
The Framework albeit available and applied by the KRA is not well known and thus this restricts the application of ADR for tax dispute resolution by the citizenry. There is also the concern that the Tax Appeals Tribunal Act which provides a paradigm shift in dispute resolution has not been widely publicized. Therefore, the intended purpose and target of a cheaper and timely means of solving tax disputes may not be realized.\textsuperscript{68} It is therefore important that the Kenya Revenue Authority conducts regular seminars/webinars/events with taxpayers educating them of the Framework and its application. The Framework should be circulated widely and the staff in the institution should also be sensitized on its effective application.

7.4 Bipartisan Involvement in TDR
As discussed, the fact that the Framework is fully owned and driven by the KRA presents the issue of possible bias during the facilitated mediation. The Constitution of Kenya calls for public participation in policy-making thus the taxpayer should be allowed to contribute to the guidelines in the Framework. Consultation and input from stakeholders will encourage the use of the ADR system for the resolution of tax disputes. The issue of appointment of ADR practitioners who take part and determine tax disputes is one that also calls for bipartisan participation and regulation. For the ADR forum to be genuine, the practitioners must be appointed by the equal vote

\textsuperscript{67} Roger E. “Alternative Dispute Resolution in Civil Justice Systems”, 2020, p 21.
of the disputing parties. Currently, the tax practitioners are appointed by KRA and this inevitably results in an uncomfortable position of possible bias.

7.5 Minimize Costs
On the issue of cost, the ADR process should be free and the fees applicable should be minimal. In other jurisdictions, the ADR process in tax disputes is facilitated by the tax authority. This will encourage the use of the ADR system by taxpayers and also the less costly the system is, it promotes access to justice which is essentially the aim of the justice system.

There is an opportunity for the KRA to provide greater clarity to taxpayers at the onset of proceedings regarding the timelines for the resolution of ADR processes. For example, the South African Revenue Service (SARS) has issued dispute resolution rules under the Tax Administration Act 2011, under which once an ADR process is convened the facilitator is required to convene ADR proceedings within 20 days of their appointment, and if no facilitator has been appointed, the parties themselves must convene such proceedings within 30 days. Likewise, the ADR process must be concluded within 90 days after the commencement of the proceedings. Clarity regarding the ADR timelines would motivate more taxpayers to embrace ADR proceedings to resolve disputes.

8.0 Conclusion
As analysed in this paper it is clear that the application of ADR for tax dispute resolution is constitutionally and statutorily recognized. However, the reality is that these mechanisms still take a backseat and are considered actual alternatives to the often-arbitrary systems of the courts and the tribunals. There

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70 Ibid.
is clearly a need to bolster the legal framework around the application of ADR to tax disputes and streamline the structures meant to implement these mechanisms towards the achievement of access to justice.
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Locus in Treaty Arbitration: Critical Considerations
Zhongshan Fucheng Industrial Investment Co. Ltd (Claimant) – And - The Federal Republic of Nigeria (Respondent)

Place of Arbitration: London, United Kingdom.
Arbitral Tribunal: Mr. Rotimi Oguneso San, Co-Arbitrator Mr. Mathew Gearing Qc, Co-Arbitrator Lord Neuberger of Abbotsbury, Presiding Arbitrator

Date of The Award: 26th March, 2021
Date of Hearing: 9th To 13th November, 2020

By: Wilfred Mutubwa*

Facts
The Claimant, Zhongshan Fucheng Industrial Investment Co. Ltd (“Zhongshan”), contended that they are entitled to compensation from the Respondents, the Federal Republic of Nigeria (“Nigeria”), to be assessed by an Arbitral Tribunal, on claims that Nigeria, contrary to its international obligations, deprived Zhongshan of a substantial investment. The Claimants submitted that the Respondent’s actions were inconsistent with the provisions of articles 2,3 and/or 4 of the Bilateral Investment Treaty (“the Treaty”) between the People’s Republic of China (“the PRC”) and Nigeria. Zhongshan’s claims concerned rights in the Ogun Guangdong Free Trade Zone (“the Zone”), which was a substantial area of land in Nigeria owned by the Ogun State Government (“Ogun State”).

The history involved three companies in the Chinese-owned Zhuhai Zhongfu Industrial Group Co Ltd group of companies, namely Zhuhai Zhongfu Industrial Group Co Ltd ("Zhuhai"), Zhongfu International Investment (NIG) FZE (Zhongfu") and Zhongshan. Further, Zhuhai was Zhongshan's parent

company whereas Zhongfu was a Nigerian company and a wholly owned subsidiary of Zhongshan.

A Joint Venture Agreement had been entered on 28th June, 2007 between the Ogun State and Guangdong Xinguang International China-Africa Investment Ltd (also known as 'China-Africa Investment Ltd, and hereinafter "CAI"), and CCNC Group Ltd ("CCNC"). According to this agreement, development of the OGFTZ was to be carried out through Ogun Guangdong Free Trade Zone Company ("OGFTZ"), which was to be jointly owned by Ogun State, CCNC and (as to 60%) CAI, for a period of 99 years.

CAI ran short of funds after limited development had been carried out and as a result, Zhuhai was introduced to Ogun State as a potential alternative or additional developer and manager. It was later agreed by Ogun State and Zhuhai that Zhuhai would effectively take over the development and management of Fucheng Industrial Park ("Fucheng Park"), an area of 224 hectares within the 2,000 hectares the subject of the 2007 Certificate and enjoy some sort of priority rights over the rest of the Zone.

On 29th June 2010, Zhuhai and OGFTZ entered into a "Framework Agreement on Establishment of Fucheng Industrial Park in the Zone" ("the 2010 Framework Agreement"). According to this agreement, Zhuhai had the right to develop and operate Fucheng Park, within the Zone, which was described as "an area of 100 km² constructed and managed [OGFTZ] which is located in the southeast of Ogun State, Nigeria". Notably, CAI was not a party to the 2010 Framework Agreement.

Fifteen weeks after the 2010 Framework Agreement was entered into, another document dated 10th October 2010 ("the 2010 Deed") was entered into by Zhuhai, OGFTZ and Zhongshan. The 2010 Deed entitled Zhuhai to carry out its obligations under 2010 Framework Agreement through third parties namely, Zhongshan. Further, amid complaints, Ogun State wrote to CAI informing them that they were constrained to terminate their participation in the Zone in
accordance with the terms of the 2007 Joint Venture Agreement on various
grounds including, that the company had been adjudged bankrupt; as well as
illegality; fraudulent practices; failing to provide a business plan, a Master Plan,
or a Phased Design Plan and failure to contribute to the share capital of OGFTZ.
Meanwhile, on 15th January, 2013, Zhuhai assigned its interest in the 2010
Framework Agreement to Zhongfu.

On 28th September 2013, Ogun State, Zhongfu and Zenith Global Merchant
Limited ("Zenith") entered into a Joint Venture Agreement for the Development,
Management and Operation of the Zone ("the 2013 JVA"). The agreement
provided that "participation" of CAI in the Zone had been terminated by Ogun
State vide a letter dated 15th March 2012 and Zhongfu had been appointed as
the new manager of the Zone. Clause 3 of the 2013 JVA provided that OGFTZ
would be the joint venture company, and that it would be owned as to 60% by
Zhongfu, and 20% each by Ogun State and Zenith. Clause 4 was concerned with
the control and running of OGFTZ and Clauses 6 and 12 of the 2013 JVA
contained a number of obligations on the parties.

Notably, Clause 18 of the 2013 JVA included provisions for early termination by
one party if the other party was in breach, became insolvent, or ceased to carry
on business. Further, clause 27 provided that, in the event of any dispute arising
under the 2017 JVA, it should first be the subject of an attempt to settle, and if
that failed, either party could refer the dispute to arbitration under the
UNCITRAL Rules in Singapore under the aegis of the Singapore International
Arbitration Centre ("SIAC").

Over the period from 2010, Zhuhai and Zhongfu carried out significant work on
at Fucheng Park of developing infrastructure, marketing and letting sites in
Fucheng Park ("sites") for development to potential occupiers and managing
Fucheng Park as it was developed and occupied. A letter dated 28th April 2014
was sent by M.A. Banire and Associates ("Banires"), solicitors acting at that time
for OGFTZ, to the Managing Director of Zhongfu, which stated that Ogun State
had long terminated the interest of CAI in the Zone and referred to the letter to
CAI of 15th March 2012. The letter further asked Zhongfu to disregard any communication from or on behalf of CM as they had no authority or approval of Ogun State to act or do anything in respect of the Zone. Notably, at least until 2016, there appeared to have been no further intervention in the Zone from CAI or NSG.

On 20th January 2016, following discussions between Dr Han and a former MBA classmate of his, a Mr. Li, who had 30 years' experience in the pharmaceutical industry; Ogun State and OGFTZ entered into a memorandum of understanding ("the 2016 MoU") with an entity called Xi'an Industrial Delegation, and which related to the development of a pharmaceutical park ("the Pharmaceutical Park"). Further, on 20th April 2016 by a "Framework Agreement" (the 2016 Framework Agreement) between OGFTZ and an entity called Xi'an Ogun Construction and Development Limited Company. The Framework Agreement envisaged that, OGFTZ would provide the infrastructure outside the park necessary to support the Pharmaceutical Park, and that Xi'an would carry out the development of the park. The 2016 Framework Agreement also provided for a slightly different arrangement from the Fucheng Park underleases so far as level of rents and allocation of administrative fees were concerned.

Ogun State later on challenged Zhongfu's right to any interest in the Zone through OGFTZ. The challenge was communicated through the Economic and Commercial Section of the Consulate of the PRC in Lagos ("the Consulate") to Ogun State. The communication (Note 1601) stated that the Consulate had been officially notified by a PRC authority about the replacement of shareholdings owner of [CAI] to Guangdong New South Group, which, the Note said, "will legally lead to the replacement of the management rights of the OGFTZ which is now in the hands of Zhongfu to Guangdong New South Group. A certificate dated 9th July 2013 from the Guangzhou Notary Public Office had confirmed the fact that 51% of CAI had been acquired by NSG.
On 12th April 2016, Mr. Adeoluwa wrote a letter ("the April 2016 letter") to the Managing Director of OGFTZ. He reiterated the contents of Note 1601 and further stated that, "without prejudging the outcome of the investigation", "the implication" could be that “the agreement between Ogun State and Zhongfu was premised upon misrepresentation and concealment of facts, and therefore cannot be allowed to stand." Zhongfu was invited to "clarify the position and respond to the demand of the PRC government. On 14th June 2016, Banires, who were by then acting for Zhongfu, responded in a letter explaining that CAI's rights had been terminated by Ogun State by the first of the March 2012 letters, and Zhongfu had then been subsequently appointed and had entered into the 2013 JVA, and then stated that "the Chinese Consular misrepresented the facts to you" but that, if the Consulate wished to persist, CAI "should institute an action against Zhongfu". The letter ended by "urging your restraint" and "pleading for a convenient date for a meeting wherein this issue can be appropriately discussed".

On 14th July 2016, Ogun State informed NEPZA that it should "withdraw recognition and stop all dealings with Zhongfu with regard to any matter relating or connected to the Zone", and "implored ... all agencies to step in and fully investigate the activities of Zhongfu". Mr. Adeoluwa had also sent a text to Dr Han, which ended by saying that his advice to Dr Han "as a friend" was that he should "leave peacefully when there is opportunity to do so, and avoid forceful removal, complications and possible prosecution". On 19th July, 2016 Dr Han visited Mr. Odega of the NEPZA who told him that Ogun State would use security personnel to get Zhongfu out of Nigeria. Dr Han was informed by Mr. Onas in a telephone call, that if he did not hand over the Zone to Ogun State, his passport would be seized, and he would be put in jail.

Apparently, Mr. Onas, czhad on 21st July, 2016 visited Fucheng Park and informed the tenants that Zhongfu's appointment had been terminated, and that a handover to the new manager had been scheduled for the following day. On 22nd July, 2016 Mr. Onas again had attended at Fucheng Park, this time with a member of the Nigerian police ("the police") and introduced NSG as the new manager and caused some of Zhongfu's employees to be frightened. Further,
statements were made on behalf of Ogun State which amounted to threats to individuals working for Zhongfu, with the apparent aim of getting Zhongfu to vacate the Zone and its personnel to leave Nigeria.

For Instance, on 27th July, NEPZA wrote to the Nigerian Immigration Service asking it to collect the original form of immigration papers (in particular, work permits known as CERPACs) from all foreign staff, who would not have been able to work in Nigeria without such papers. The letter stated that the staff should only be allowed to leave with copies of the immigration papers. Secondly, on 4th August 2016, warrants citing "criminal breach of trust" were issued, apparently at the request of the police, for the arrest of Dr Han and Mr. Zhao. Thirdly, on 17th August, Mr. Zhao was arrested at gunpoint, and was then deprived initially of food and water, intimidated, physically beaten, and detained for a total of ten days, by the police. During his detention he was shown a copy of his warrant and the police repeatedly asked him about the whereabouts of Dr. Han. Mr. Zhao was eventually freed on bail.

On 18th August 2016, Zhongfu started proceedings at the Federal court proceedings ("Federal Court Proceedings") by way of a writ issued out of the Federal High Court in Abuja against NEPZA, the Attorney-General of Ogun State and Zenith seeking declaratory and injunctive relief, effectively seeking to be reinstated as manager of the Zone. Later on 9th September 2016, Zhongshan, started proceedings ("the State court proceedings") by way of a Statement of Claim issued out of Ogun State High Court against OGFTZ, Ogun State and the A-G of Ogun State, seeking possession of the Zone, an injunction, damages (in excess of USD 1 billion) and interest. On the same day, Mr. Zhao issued proceedings ("Mr. Zhao's proceedings") out of the Federal High Court in Abuja against the police, the Inspector General of Police, the Commissioner of Police for the Federal Capital Territory, Abuja and Wang Junxiong for damages in connection with his mistreatment.

In the Federal court proceedings Zhongshan essentially relied on the proposition that there had been breaches of Zhongfu's contractual rights as a
manager of the Zone appointed by the first of the March 2012 letters, as approved in NEPZA's letter of 10th April 2012 confirming the termination of CAI's rights, and Zhongfu's rights under a "tenancy" of Fucheng Park under the 2010 Framework Agreement. Whereas in the State court proceedings, the claim was based on Zhongfu's right to possession of Fucheng Park under the 2010 Framework Agreement.

Notably, nothing happened in the Federal court proceedings or the State court proceedings or in Mr. Zhao's proceedings for a substantial period, and that deadline imposed by court rules were not complied with by the defendants, apparently with impunity. Thus, in March and April 2018, the three proceedings were discontinued.

Consequently, Zhongfu began SIAC arbitration proceedings against Ogun State and Zenith pursuant to clause 27 of the 2013 JVC. However, on 5th January, 2017 Zenith applied in the Ogun State High Court for an anti-suit injunction restraining the arbitration. The application was heard by Justice Akinyemi, who gave judgment on 29th March, 2017 granting the injunction sought on a permanent basis, essentially on the grounds that Nigeria (not Singapore) had a substantially closer connection to the arbitration and was therefore the seat of arbitration, and that the issue of the Federal court proceedings operated a waiver of the right to arbitrate or otherwise rendered the arbitration abusive or oppressive. On 23 June 2017, Zhongfu appealed this decision, but that appeal was discontinued in 2018, together with the discontinuance of the Court proceedings.

**Issues**

The Tribunal had to consider the jurisdictional and preliminary points raised, then liability and quantum as it’s issues for determination. On the jurisdiction and the preliminary points raised, the Tribunal had to consider whether Zhongshan had made a valid claim against Nigeria? The Tribunal also had to consider whether Zhongshan held an investment in accordance with the Treaty so as to validate its claims; whether the Tribunal’s jurisdiction was barred by
lapse of time, whether the court proceedings could act as a bar to the Tribunal’s jurisdiction; whether Zhongshan’s claim could not be adjudicated in the absence of the China government and whether Zhongshan is barred for basing its claim on the court proceedings because of its failure to pursue an appeal?

Furthermore, the Tribunal had to consider whether Zhongshan was liable for misrepresentation and concealment? The Tribunal also sought to determine whether Zhongshan had established that Nigeria wrongfully deprived Zhongfu of its rights? Finally, the Tribunal had to determine the issue of quantum if they were to establish that Nigeria was liable.

Jurisdictional and Preliminary Issues
Nigeria raised points of principle some of which were jurisdictional in nature, as to why Zhongshan’s claim should fail. Firstly, Nigeria contended that Zhongshan has no valid claim against Nigeria on the grounds that none of the actions complained of were carried out by the Federal State apart from actions in connection with the Court proceedings and the anti-suit injunction. The Tribunal noted that, in as much as Zhongshan’s claim was mainly based on actions of Ogun State, actions of other entities, namely the police and NEPZA were also strongly relied on.

The Tribunal in relying on Articles 1, 4.1, 5 and 9.2 of the Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") adopted by the International Law Commission in August 2001, found that all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. The Tribunal considered arbitral awards where the principles in the above-mentioned articles were recognized and applied. For instance, the Tribunal considered the awards of Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka ICSID Case No ARB/09/2, Award, 31 October 2012, pg. 357; Flemingo DutyFree Shop Private Limited v Republic of Poland UNCITRAL Award, 12 August 2016, pg. 416 and Nissan Motor Co Ltd v Republic of India, PCA Case no. 2017-37 where a substantial part to actions of
the State Government of Tamil Nadu was attributable and engaged the responsibility of the Republic of India.

Nigeria relied on decisions where a breach of contract by a local authority could not be attributed to the state concerned. However, the Tribunal considered the decision in *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria* ICSID Case No ARB/13/20, *Decision on Preliminary Objections, 29 October 2014, pgs. 111 and 112* where the Tribunal stated that “the existence of contractual claims under the JVA does not preclude the Claimants for filing a separate set of claims pursuant to international law” because “the substantive claims are not for breach of the JVA per se”. The Tribunal likened the aforementioned decision to the one at hand.

Therefore, the Tribunal concluded that if and in so far as the 2016 Activities would otherwise amount to a breach of the Treaty, they can and should be attributed to Nigeria. Further, in its analysis the Tribunal considered clause 15.1 of the JVA where Ogun expresses the intention to strictly observe the terms of the Treaty, thus reflecting an apparent understanding that the actions of Ogun State would be subject to the terms of the Treaty.

Secondly, Nigeria contended that Zhongshan did not hold an investment. The Tribunal found this untenable and had to take into consideration article 1(1) of the Treaty which defined “investment” wide enough to cover either the shareholding in Zhongfu or Zhongfu’s interests. Nigeria also argued that Nigeria also argued that Zhongshan could not in any event contend that it held an investment because it had not invested its own money or other assets in the alleged investment. The Tribunal rejected this averment on the facts because the agreements were proof that Zhongshan paid money and Zhongfu undertook obligations, which were referable, indeed solely referable, to the acquisition and enjoyment of the rights which Zhongshan says that Zhongfu had. In addition, the Tribunal found no reason to doubt the evidence of Zhongshan’s witnesses who with supporting documents
showed how Zhongshan, through Zhongfu spent considerable sums on works to the infrastructure of the Zone, and in particular Fucheng Park, as well as on marketing and managing Fucheng Park and the Zone. Furthermore, the audited accounts of Zhongfu and OGFTZ for the calendar year 2015 ("the 2015 Accounts") recorded expenditure (in rounded figures), respectively, of 54 million Nigerian Naira on "road construction" and 297 million Nigerian Naira on infrastructure expenditure.

Thirdly, Nigeria contended that the arbitration was ill-founded because Zhongshan failed to allow the six-month period referred to in the first sentence of article 9(3) of the Treaty, to expire before serving the Request. The Tribunal found that Nigeria’s contention failed on the facts because Nigeria did not even acknowledge the notice sent by Zhongshan on 21st September, 2017 requesting negotiations concerning the disputes about the investments. The Tribunal held that the six-month period referred to in the first sentence of article 9(3) should be treated as running from the date of the 2017 notice. According to the Tribunal’s analysis Zhongshan started the negotiating process and since nothing happened, they were free to initiate arbitration proceedings, after six months.

The Tribunal was guided by the decision in the case of Khan Resources Inc, Khan Resources BV and CAUC Holdings Company Ltd v The Government of Mongolia PCA Case No 2011-09, Decision on Jurisdiction, 25 July 2012, pg. 406, where it was held that the stipulated period for negotiations was triggered by a letter from the Claimant expressing "willingness to discuss the issues". Fourthly, Nigeria claimed that the second sentence of article 9(3) precludes Zhongshan bringing the arbitration, on the ground that Zhongfu opted for Court proceedings. Nigeria relied on both the Court proceedings, but in particular on the State court proceedings where Zhongfu claimed substantial damages, which apparently included loss of income which it would have enjoyed if it had not been effectively deprived of its rights under the 2010 Framework Agreement and the 2013 JVA. Nigeria contends that either court proceeding fell within submission of “the dispute to a competent court” as
stipulated in the second sentence of article 9(3). The Tribunal considered the decision in the case of *Khan v Mongolia*, where the Tribunal in this case established two tests that are used in analysis of the “Fork in the Road” point.

The Two tests the Tribunal considered were, "the triple identity test" that requires the domestic court proceedings to involve the same parties, the same cause and the same object as the treaty arbitration and "the fundamental basis test" that involves asking whether the basis of the domestic court proceedings was fundamentally the same as the basis for the treaty arbitration. In its analysis, the Tribunal found that neither of the parties to the arbitration, Zhongshan and Nigeria, was party to either of the Court proceedings. In addition, the Tribunal noted that, article 9(3) refers to the "*investor concerned*, which is a reference back to the definition in article 1(2), so that, in the present context, it referred to the Chinese investor, Zhongshan, not the Nigerian subsidiary, Zhongfu. The Tribunal was prepared, on this basis alone, to hold that Article 9(3) of the treaty was not triggered.

However, the Tribunal also held that Zhongfu’s case in the State Court Proceedings was based on alleged breaches of its contractual and possessory rights under the 2010 Framework Agreement and the 2013 JVC; in the Federal court proceedings on alleged breaches of Nigerian domestic public law, whereas Zhongshan's case in this arbitration is based squarely on the Treaty. Therefore, the Tribunal accordingly found for Zhongshan on the fork in the road argument. Fifthly, Nigeria contended that the Tribunal cannot meaningfully engage in a consideration of Nigeria's conduct when the People’s republic of China’s conduct that would necessarily also be in issue, was not present before the Tribunal to explain its position and action with regards to the conveying of Note 1601 to Nigeria. The Tribunal expressed that the facts and reasoning behind the existence and contents of Note 1601 are by no means entirely clear and in the absence of such evidence, Zhongshan could not be precluded from proceeding with this arbitration, or that the Tribunal could not be precluded from publishing an award.
The Tribunal noted that if Nigeria considered China's explanation for the Note, is relevant to Nigeria's case in this arbitration, then it was open to them to call, or at least to seek to call, relevant employees or agents of the China’s government to give evidence to us, however, no such witness or no proof or such statement was presented to the Tribunal. Therefore, the Tribunal rejected Nigeria’s argument that the arbitration could not conclude without evidence the Chinese government.

Sixthly, the Tribunal expressed itself on the issue, whether the considerable latitude given to the defendants and how their anti-suit injunction was processed very quickly in comparison with the very slow progress of the Court proceedings, could represent a breach of the treaty? The Tribunal was reluctant to conclude that the grant of the anti-suit amounted to a breach of the Treaty even though it considered the reasoning and conclusion of the learned Justice misconceived. The Tribunal expressed that Zhongfu’s failure to prosecute its appeal even though the proceedings were discontinued, was enough to disentitle it from relying on the decision as an infringement of the Treaty. Although the Tribunal noted that it did not need to reach a conclusion on the issue because Zhongshan was prepared to not rely on that claim.

Finally, Nigeria contended that the 2010 Framework Agreement transferred or created an interest in land and was therefore invalid because it required the consent of the Governor of Ogun State. In addition, Nigeria contended that the 2010 Framework Agreement violated domestic law because Zhuhai was not registered as a Nigerian company at the time it was entered into. However, the tribunal identified, “it was the duty of OGFTZ as transferor or grantor, not Zhuhai as transferee or grantee, to obtain the Governor's consent; Ogun State was a substantial shareholder in OGFTZ; in reliance on the 2010 Framework Agreement, Zhuhai and its successor in title Zhongfu, to the knowledge of Ogun State made substantial investments, and Ogun State both directly and as a substantial shareholder in OGFTZ benefitted from these investments.”
Therefore, the Tribunal held that Nigeria could not have successfully impugned the Agreement on the basis that the consent of Ogun State's governor was not obtained and that Zhuhai was not registered as a Nigerian company at the time it was entered into, especially since the benefit of the 2010 Framework Agreement became vested in a Nigerian registered company within a few months of its execution.

**Misrepresentation and Concealment**

Nigeria, aside from its jurisdictional and preliminary points, argued that Ogun State had been induced by fraudulent misrepresentation and concealment of material facts. It was Nigeria's contention that Zhongfu wrongfully persuaded Ogun State to write the November 2011 letter, the March 2012 letters and eighteen months later, to enter into the 2013 JVA. Nigeria's case was that this misrepresentation and concealment entitled it to invalidate, or, in more technical terms, to rescind, the 2013 JVA, on discovering the misrepresentation and concealment. Zhongshan strongly denied Nigeria’s claims on the basis of documentary and oral evidence.

In particular Nigeria contended, Zhongfu represented to Ogun State that CAI and its parent company have been liquidated and wound up without successor companies, in order to achieve its target of securing appointment as substantive manager of the Zone. The Tribunal held that Nigeria had failed made out its contention. The Tribunal firstly considered that Nigeria’s witnesses never identified the individuals who had made the alleged misrepresentations. Secondly, the Tribunal found that the one of Nigeria’s witnesses suggested someone in China as the source of the information, but he could not remember who the individual was.

Lastly, the Tribunal held that even if they had found that the alleged misrepresentation was made, it was nonetheless apparent that what "swayed" Mr. Adeoluwa, one of the witnesses of Nigeria, into writing the 2011/2012 letters was, Zhongfu's record and promises, as well as CAI's poor performance.
On the alleged concealment, Nigeria contended that Zhuhai and GXIG entered into an "Entrustment of Equity Management Agreement" ("the Equity Agreement"), on 29th March 2012. Dr. Han for Zhongshan explained that Zhuhai had negotiated to purchase GXIG's shareholding in CAI, because Zhuhai feared that CAI's involvement in the Zone might be terminated, and Zhuhai wished to preserve the investment it had made since it had entered into the 2010 Framework Agreement. Dr. Han gave evidence that the Equity agreement had not been implemented.

The Tribunal after considering the issue on concealment held that even if the Equity agreement became effective, not disclosing about the agreement did not amount to some sort of wrongdoing on the part of Zhongfu. The Tribunal accepted that Ogun State might as well have been surprised to discover that CAI and Zhongfu had entered into such an arrangement.

**Nigeria’s Liability to Zhongshan**

Having rejected Nigeria's jurisdictional and preliminary points and its argument based on misrepresentation and concealment, the Tribunal addressed itself on question of Nigeria’s liability to Zhongshan. Whether Zhongshan had established that Nigeria wrongly deprived Zhongfu of its rights under the 2010 Framework Agreement and/or the 2013 agreement?

Nigeria in it’s defence contended that that OGFTZ had not actually executed the 2010 Framework Agreement and that Ogun State was unaware of it. However, the Tribunal identified that the seal of OGFTZ was visible on the copy of the 2010 Framework Agreement, and it appeared to have been signed on behalf of OGFTZ. In addition, the Tribunal found no reason to doubt the genuineness and accuracy of the 2011 Deed, the 2011 Receipt and the 2013 Document, all of which are consistent with the 2010 Framework Agreement being in existence. So far as the facts were concerned, the Tribunal found no good reason for not accepting as accurate both the documentary evidence, and the oral testimony, adduced by of some of the documents was challenged by Nigeria.
Nigeria further contended that the carrying out of infrastructure work to Fucheng Park and the organization of letting to occupiers of sites in Fucheng Park after the execution of the 2010 Framework Agreement, was effected by CAI, at any rate up to 15th March 2012 and not Zhongfu. Nigeria called no witness to support that contention, or to contradict Zhongshan's documentary evidence and witness testimony which supported the contention that it was Zhuhai and Zhongfu, not CAI, who were responsible for those matters from the time of the 2010 Framework Agreement. The very existence of that Agreement, and the terms of the March 2012 letters also support Zhongshan's case on liability.

Finally, the Tribunal held that the 2016 Activities, in so far as they involved Ogun State and NEPZA between April and August 2016, were clearly aimed at getting Zhongfu and its staff to vacate the Zone and abandon their rights. Further, the Tribunal concluded that the written and oral communications and the actions taken by Ogun State, NEPZA and the police between April and August 2016, infringed Nigeria's obligations under articles 2(2), 2(3), 3(1), and 4 of the Treaty.

Therefore, the Tribunal held that in light of the conclusions on the facts, it was clear that Zhongshan's claim must succeed. They held that Zhongshan had made out its case that Nigeria breached its obligations under the Treaty when it effectively deprived Zhongfu of its rights under the 2010 Framework Agreement and the 2013 JVA, and that Zhongshan is entitled to require compensation to be paid by Nigeria under article 5.

Compensation
Zhongshan’s case on compensation was that it was entitled to a sum which was the aggregate of compensation for the loss of its rights under the 2010 Framework Agreement and the 2013 Joint Venture Agreement as at the date those rights were lost, namely 22nd July, 2016. It was Zhongshan’s contention that there should be no adjustment for a possible fall in the value of those rights since that date. The Tribunal concluded that there was more than a single act of
expropriation and agreed with Zhongshan's suggestion that 22nd July 2016 is the right date to select. Zhongshan’s contention was not challenged by Nigeria.

Zhongshan's based their submissions on the terms of article 4(1)(d) and 4(2) of the treaty, which requires an expropriation of an investment to be for "fair compensation", which was defined as "the value of the expropriated investments immediately before the expropriation is proclaimed". The Tribunal considered that in the case at hand, the expropriation infringes the Treaty, thus it would have seemed wrong if Zhongshan's compensation was less than it should have been if the expropriation had been lawful. Although the Treaty did not expressly state what the basis of the assessment of Compensation should be, the Tribunal considered Article 34 of the ARSIWA and expressed that, in respect of all breaches of an Investor-State treaty, the standard was one of "full reparation" for a claimant's losses.

Further the Tribunal relied Article 36(2) of the ARISWA and a number of ICSID tribunal decisions where it was held that compensation may also extend to loss of profits. The Tribunal identified that it had received fully reasoned and detailed expert report from a qualified expert witness, Mr. Noel Matthews, in support of Zhongshan's primary contention, that it should receive Compensation of USD 1,078 million (plus interest) (or USD 1,446 million using an approach based on a comparable transaction), without any expert evidence on behalf of Nigeria in response.

Nigeria had failed to instruct an expert when it had the opportunity to do so in accordance with the procedural timetable, and, when it finally applied to do so late, it sought an adjournment of the hearing. The Tribunal considered they could not grant the adjournment, as Nigeria had already been granted one adjournment over Zhongshan's strong and understandable objection, and with a warning that a further adjournment would only be granted in wholly exceptional circumstances.
In order to move forward with the matter and because Nigeria did not have an expert witness as explained hereinabove; the Tribunal deemed it wise to ask Mr. Matthews significantly more questions about his evidence than they would have done had Nigeria called an expert witness. The Tribunal, in an effort to be impartial, told the parties to feel free to object if either party felt that any questions were inappropriate. Further, the parties were given the opportunity to comment on those revised calculations. The Respondent commented briefly, and the Claimant did not wish to add anything to its earlier submissions.

Assessment of Compensation

Mr. Mathew was an experienced chartered accountant and he had considerable experience in the quantification of damage, the valuation of shares and businesses. He had also given evidence and advice in a large number of investor-state and similar arbitrations involving the loss or depreciation of an asset or a right. His primary assessment of the value of Zhongfu's rights in the figure of USD 1,078 million was principally based on a discounted cash flow (DCF) exercise, which involved assessing the likely income and outgoings which would have been enjoyed and incurred each year over the term of the Agreements and capitalising the net annual income as of 22nd July, 2016. The DCF exercise involved assessing the likely revenues which would be generated by the Zone and paid to Zhongfu and the likely costs which would be incurred in developing and managing the Zone and paid by Zhongfu and thereafter taking the capitalised value of the difference between those two sets of figures. The DCF exercise also involved making a number of assumptions that the Tribunal had to consider while relying on authorities where the DCF exercise was applied or not applied.

The Tribunal, after considering all the valuations, authorities and assumptions, concluded that they were to accept an assessment on a DCF valuation, on the basis that they have the track record of Fucheng Park, which can be relied to support an evidence-based assumption as to annual letting rates (and lettable area). Further, the Tribunal expressed that it would proceed on the basis of a sequential letting policy for the Zone as whole while relying on Mr. Matthews's
assessment of the likely infrastructure costs based as it is on the Fucheng Park expenditure, and that they were to adopt a reasonably conservative but realistic valuation period of 20 years.

Thus, the Tribunal assessed the Compensation by valuing Zhongfu's rights over Fucheng Park on the DCF basis proposed by Mr. Matthews, save that it was to be assumed that it would be fully developed after 30 months rather than 1 year, and the cut-off was to be after 20 years. The Tribunal agreed to value the Pharmaceutical Park on the DCF basis proposed by Mr. Matthews, save that, it was to be assumed that it would be let off at the rate of 200,000 square meters per annum from the end of 2019, as opposed to being fully let within 10 years from some time in 2017, and that the cut-off was to be after 20 years, and therefore 3,500,000 square meters would be let after 17.5 years.

Finally, the Tribunal agreed to disregard the letting prospects of the Rest of the Zone and accordingly amended Mr. Matthews’s primary DCF approach to award Zhongshan USD 55.6 million by way of Compensation.

**Moral Damages**

In addition to the claim of compensation Zhongshan contended that it was entitled to moral damages. The Tribunal considered the award in the case of *Lusitania (US v Germany) (1923) VII RIAA 32 pg. 40* where the Tribunal in that case, held that damages could be awarded for “injury inflicted resulting in mental suffering, injury to his feelings, humiliations, shame, degradation …and such compensation should be commensurate to his injury”. The Tribunal also considered the award in the case of *Desert Line Projects LLC v The Republic of Yemen ICSID Case No ARB/05/17, Award, 6 February 2008, pgs. 290-291* where such damages were recognized and awarded to an employee of the Claimant for mistreatment.

The Tribunal found that without a doubt, aspects of the 2016 Activities such as mistreatment of Mr. Zhao by the police in August 2016; the threats to Dr. Han by Mr. Adeoluwa and Mr. Onas in July 2016 and the fact that Zhongfu's
employees were intimidated on 22nd July, 2016 reinforced the claim for moral damages. Therefore, the Tribunal assessed moral damages at USD 75,000 and considered that the figure would be an appropriate sum to cover for the claim of moral damages. Further, the Tribunal explained that the amount represented around USD 5,000 for each day of Mr. Zhao's mistreatment plus a further sum to reflect the other inappropriate behaviors of representatives of Nigeria towards employees and one Zhongfu’s director.

**Interest**

Nigeria having not provided the Tribunal reasons for not awarding interest, the Tribunal found that Zhongshan is entitled to interest on the figures claimed and accepted for compensation and moral damages. Thus, the Tribunal considered that the interest should run from 22nd July, 2016, being the date the compensation was assessed. The questions that were left for the Tribunal to determine were what is to be the rate of interest and whether the Tribunal should award interest on a simple or compound basis? Further, if the interest was to be awarded on a compounding basis, what would be the frequency of the compounding?

The Tribunal considered the rate of 2% over LIBOR asked for by Zhongshan, not seeming unreasonable and a rate which had been awarded in other investor-state arbitrations. Furthermore, the Tribunal found that the said interest rate had not been challenged by Nigeria. In the Enron case (supra) the Tribunal considered it right to award interest at the 6-month average LIBOR rate plus 2% for each year, or proportion thereof compounded semi-annually.

The Tribunal considered investor-state arbitration awards where it had been said that compound interest was more normal than simple interest, however it noted that there are still cases where simple interest has been awarded. In *Tenaris S.A. and Talta-Trading E Marketing Sociiedade Unipessoal LDA v. Bolivarian Republic of Venezuela ICSID Case No. ARB/11/26, 29 January 2016, pg. 588 to 594* the tribunal acknowledged that either basis was appropriate however, after quoting from Dozer and Scheuer, *Principles of International Law (2nd ed, 2008)*
where the Tribunal in that case discovered a trend towards compounding interest as more in accord with commercial reality. Further in *Foresight Luxembourg Solar I Sari v. Kingdom of Spain*, SCC Case No. 2105/150, 14 November 2018, pg. 544, a majority of the Tribunal in that case expressed that compound interest is the general acceptable standard in international investment arbitration.

Zhongshan relied in the case of *Foresight Luxembourg* pg. 545 (*supra*) in making its case for a monthly compounding of interest and the Tribunal was satisfied it was a reasonable approach. Therefore, the Tribunal awarded Zhongshan interest on the Compensation and on the moral damages to run from 22\textsuperscript{nd} July, 2016 until payment, at the one-month USD LIBOR rate plus 2\% for each year, or proportion thereof, such interest to be compounded monthly. The Tribunal noted that the interest figure sums up to USD 9.4 million on the basis that the award was made on 26\textsuperscript{th} March, 2021.

**Costs**

The Tribunal found that Zhongshan had proved that its version of events was accurate; successfully resisted Nigeria's jurisdictional and preliminary objections; established that it has a valid claim against Nigeria under the Treaty and obtained an award for substantial damages. Therefore, the Tribunal considered Zhongshan as the effective winner in the arbitral proceedings.

The Tribunal being guided by sections 61(1), 61(2) of the Arbitration Act, 1996 and Article 42(1) of the UNCITRAL Rules found that subject to the parties agreement, Nigeria (the unsuccessful party), was to bear the costs of the arbitration unless the Tribunal, taking into account the circumstance of the case determines that apportionment is reasonable. The Tribunal identified that Nigeria neither gave any reason for reducing the costs accepted to be claimed nor protected its position on costs by making a sealed offer. However, the Tribunal considered that that it does not mean that they were to simply award Zhongshan the entire amount which it sought by way of costs.
The Tribunal noted the significant disparities between Zhongshan’s and Nigeria’s claims for costs which were £3,012,067.61 and £850000 respectively. For instance, The Tribunal identified that Nigeria, among other reasons, had not instructed international counsel or solicitors thus they had lower costs of arbitration. Therefore, the Tribunal in its discretion, applied a reduction of over 20% to Zhongshan’s claimed figure to a new figure of £2,400,000. Zhongshan was also awarded its additional claim of £109,789.57 for dealing with the Amended and Re-Amended Statement of Reply. The Tribunal refused to award pre-award interest on legal and other costs, even though it was claimed, on the basis that it would be unusual to do so given that they were not given the information as to when the amounts were paid to enable it to do so.

The Tribunal found the other payable costs of the arbitration totaling to £549,655.17. The costs were broken down as £457,095.86 for Tribunal fees; £147.76 for Tribunal disbursements; £15,996.01 for PCA Fees; £61,324.76 for Hearing hosting fees (Opus 2) paid by Zhongshan and £7,067.76 for Interpretation fees paid by Zhongshan. Further, Nigeria was liable to pay £286,262.65 in respect of the costs of arbitration paid in the first instance from Zhongshan’s share of the deposit.

**Conclusion/Award**

The Tribunal after considering the all the issues raised before it, accordingly concluded, ordered and awarded that: Zhongshan, despite Nigeria’s contentions, had locus to pursue a claim for compensation under the Treaty in respect of its rights under the 2010 Framework Agreement and the 2013 Joint Venture Agreement; Nigeria was in breach of its obligations under articles 2(3), 3(1) and 4(1) of the Treaty; therefore, Nigeria was ordered to pay to Zhongshan compensation for the expropriation, in the sum of USD 55.6 million and moral damages in the sum of USD 75,000;

In addition, Nigeria was ordered to pay to Zhongshan interest on the aforesaid sums for compensation and damage from 22nd July, 2016 at the one-month USD LIBOR benchmark rate plus 2 per cent for each year, or proportion thereof, such
interest to be compounded monthly, until and including the date of the award, in the sum of USD 9.4 million. The Tribunal also awarded Nigeria to pay Zhongshan’s £2,509,789.57 for the legal and related costs of the arbitration. In respect of the other costs of the arbitration that arose from unequal contributions to the deposit, Nigeria was ordered to pay to Zhongshan £354,655.17.

Furthermore, Nigeria was ordered to pay to Zhongshan interest on the aforementioned sums for compensation, moral damages and interest on sums for compensation and moral damages, from the day after the award until payment. This former interest was to be paid, at the one-month USD LIBOR benchmark rate plus 2% for each year, or proportion thereof, and compounded monthly, until and including the date of payment. The Tribunal ordered that, if for any reason the USD LIBOR benchmark ceased to be operative while any amount remains outstanding, the interest due from that date onward, was to be calculated on the basis of whatever rate is generally considered equivalent to USD LIBOR plus 2%, compounded monthly, until and including the date of payment.

Finally, Nigeria was ordered to pay to Zhongshan interest on the aforementioned sums for in respect of Zhongshan’s legal and related costs of the arbitration and sums in respect of other costs of the arbitration, from the day after the award until payment. This particular interest was to be paid, at the one-month GBP LIBOR benchmark rate plus 2% for each year, or proportion thereof, and compounded monthly, until and including the date of payment. The Tribunal similarly ordered that, if for any reason the GBP LIBOR benchmark ceased to be operative while any amount remains outstanding, the interest due from that date onward, was to be calculated on the basis of whatever rate is generally considered equivalent to GBP LIBOR plus 2%, compounded monthly, until and including the date of payment.
Awards Considered

Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka ICSID Case No ARB/09/2, Award, 31 October 2012, pg. 357.

Flemingo DutyFree Shop Private Limited v Republic of Poland UNCITRAL Award, 12 August 2016, pg. 416.

Nissan Motor Co Ltd v Republic of India, PCA Case no. 2017-37

Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic ICSID Case No ARB 97/3 Award, 21 November 2000, pgs. 77-82.

Azinia, Davitian, & Baca v The United Mexico States ICSID Case ARB (AF)/97/2 Award, I November 1999, pg. 84).


Garanti Koza LLP v Turkmenistan ICSID Case No ARB/11/2019 Award, 16 December 2016, pg. 244.


Khan Resources Inc, Khan Resources BV and CAUC Holdings Company Ltd v The Government of Mongolia PCA Case No 2011-09, Decision on Jurisdiction, 25 July 2012, pg. 406
Bayinder Insaat Ticaret Ve Sanayi AS v Islamic Republic of Pakistan ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, pg. 102.

Pantechniki v. Albania, ICSID case no. ARB/07/21, pgs. 21-27

H&H Enterprises v Arab Republic of Egypt, ICSID Case no. ARB/09/15, pgs. 373-375.


Waste Management Inc v United Mexican States (Number 2) ICSID Case No ARB(AF)/00/03, Final Award, 30 April 2004, pg. 98.

Desert Line Projects LLC v Republic of Yemen, ICSID Case No ARB/05/17, Award, 6 February 2008, pgs. 151-9.

Ronald S Lauder v The Czech Republic UNCITRAL, Final Award, 3 September 2001, pg. 221

Biwater Gauff (Tanzania) Lt v United Republic of Tanzania ICSID Case No ARB/05/22, Award, 24 July 2008, pg. 709

Metalclad Corporation v The United Mexican States ICSID Case No AR_B(AF)/97/1, Award, 30 August 2000, pg. 103

Ioannis Kardassopoulos v Georgia ICSID Case No ARB/05/18, Award, 3 March 2010, pg. 517.

Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica ICSID Case No ARB/96/1, Award, 17. February 2000, pg. 78.

Lusitania (US v Germany) (1923) VII RIAA 32 at pg. 40
Desert Line Projects LLC v The Republic of Yemen ICSID Case No ARB/05/17, Award, 6 February 2008, pgs. 290-291.

Enron Corporation Ponderosa Assets LP v Argentine Republic ICSID Case No ARB/01/3 22 May 2007, pg. 385.

Tecnicas Medioambientales Tecmed S. A. v United Mexican States ICSID Case No ARB (AF)/00/2, 29 May 2003, pg. 186.

Wena Hotel v Arab Republic of Egypt ICSID Case No. ARB/98/4, 8 December 2000, pg. 124.

SPP (Middle East) v Egypt ICC Award, Case No 3493, 11 March 1983, 22 ELM 752 (1983).


**Statutes**
Sections 61(1), 61(2) of the Arbitration Act, 1996.

**International Instruments**


Article 42(1), UNCITRAL Arbitration Rules.
Book
Dozer and Scheuer, Principles of International Law (2nd ed, 2008).

Article
12 Practical Ways to Expedite Arbitrations

By: Paul Ngotho HSC*

Introduction
This article is derived from my presentation in the Law Society of Kenya and Chartered Institute of Arbitrators Kenya Branch (CIArbK) webinar on 20th January 2022. Of the 1,000 participants registered for the course, over 600 attended and many took part in the lively chat, Q&A and the quiz.

A commercial arbitration could take three months. Many arbitrations take one to two years but a few extend to much longer. A friend of mine who retired from arbitration practice 10 years ago, is still holding some arbitral awards because the parties have not picked them due to the outstanding fees. Every Kenyan arbitrator I know is holding at least one award. I know an arbitrator who is holding five. In addition to the arbitrations which are complete, many arbitrations are stuck midway because of the same reason.

Generally, arbitral tribunals are slow to lock out a defaulting party. Proceedings *ex parte* is lawful, but it should be the very, very last option not only because of the interest of justice but also due to the finality of arbitral awards.

Causes and Effects of Delay

That default in payment of the tribunal's fees is one of the major reasons for delay in arbitration is obvious from the arbitration above. Delay in filing various documents and unavailability of the tribunal, counsel and critical witnesses is the other cause of delay.

One cause which is often overlooked is the logistics of a large arbitral tribunal. Appointing a 3-member tribunal typically takes months. Deliberations are also

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time consuming as even issuing very simple directions like on whether to allow a party more time to file a document involves communication back and forth within the tribunal.

The most obvious effect of delay is that justice delayed is justice denied. In addition, the party which is eventually successful suffers because money loses value with time – a shilling today is worth more than a shilling tomorrow, next month and next year.

While disputes are about law and money, law is only a tool or ladder which parties use to reach the money. When the value of the prize is diminished, then even the person who wins is still a loser.

Delay drives also up arbitration costs. Mentions and letters back and forth all take time, which the prudent arbitrator bills accordingly.

Courts and arbitrations are notoriously unpredictable. A party cannot, however, strong or weak its case, predict the outcome. Extended uncertainty is bad for business and it's bad for clients. Delay can reach a point where the parties get exhausted and move on as they are not prepared to invest more time or money in a process which has no end in sight.

The longer the proceedings, the more likely it is that one or both parties will change counsel. Incidentally, younger advocates and associates, who take charge of routine arbitrations in the law firms, are very mobile career-wise as they easily move to another law firm or start their own practice. Another associate takes over the matter.

Change of representation could cause considerable delay as the affected party requires time to recruit a replacement, which also requires time to familialise itself with the matter. However, in my experience, something more important is lost whenever even nominal change of representation changes takes place: the loss of momentum or just the personal knowledge of some facts and of the proceedings, the chemistry with the opposing counsel and with the client. Such loss can’t be quantified or captured in hand-over notes, however thorough.
Arbitrators are also affected by delay. Having lost track of the facts and the evidence, they must spend considerable time refreshing their memories through re-reading of documents. However, they also move on to appointments where they are not allowed to carry out private arbitrations. And of course, the longer the proceedings, the higher the risk that an arbitrator might die in the process. Last, but not least, delayed proceedings give both the arbitrator and arbitration a bad name.

My thoughts on this subject to have crystallised into 12 practical ways to expedite arbitration. That list, which is not exhaustive, is drawn from my experience as a sole arbitrator and chairman or member of a larger panels. It is mainly in the context of ad hoc commercial arbitrations but much of it is universal.

12 Practical Ways to Expedite Arbitral Proceedings

Expediting arbitration is a joint responsibility of the parties and the arbitrators. However, the parties and their advocates hold most of the aces.

1. Consensual Arbitrator Appointments
In my experience, the best arbitrator appointments are the consensual ones because both parties, or at least both advocates, have a level of confidence in the arbitrator who is appointed. Such appointments produce good arbitrators. The proceedings run smoothly and with little drama, if any. Lawyers should do everything possible to facilitate consensual arbitrator appointments for the benefit of their clients.

2. Early Preliminary Meeting
An arbitrator should, within seven days of receiving the appointment letter, revert to the parties proposing a date for preliminary meeting. Some party representatives keep postponing that meeting, without which nothing much can happen as the various procedural issues are considered in that meeting. Only the most experienced and innovative arbitrators are able to move the proceedings forward if one of the parties is obstructive.
3. Advance Preparation of the Claim
Declaring a dispute, attempting amicable settlement, exploring consensual arbitrator appointment and writing to the independent appointing authority take time. Nothing stops a claimant from drafting the claim and compiling the necessary attachments for filing immediately after the preliminary meeting. Yet there are claimants who request for 42 days after the preliminary meeting and then apply for an extension of time. Such behaviour sets a very slow tempo, as the respondents would also typically as for 42 days to respond.

4. The War Chest
There are Respondents who pay and Claimants who don't. Generally, the Claimant is the first to pay while the Respondent drags his feet.

The Claimant and the Respondent are severally and jointly liable for the tribunal's fees. Therefore, the Claimant should, when filing the case, be ready to pay not only its own share of the tribunal's deposits but also, the Respondent's share in the event of delay or default.

It is difficult for parties to estimate the tribunal’s fees in advance, but it is possible especially for those prepared to err on the higher side. In any case, it is just an estimate. The estimation is easier when the fees are based on quantum. Whatever the case, the tribunal should assist the parties in this. I must say I was not successful on the last two occasions when, as a party representative, I asked the sole arbitrators for estimates of their fees. An average arbitration with 2 parties, 2 witnesses of fact and a short list of issues take a sole arbitrator about 100 hours. That assumes there are no expert witnesses, arbitrator challenges, jurisdictional challenges or other side shows.

Parties do not seem to understand that the payment of the tribunal’s fee deposits are an integral part of arbitral proceedings. A court\(^1\) recently expressed great displeasure with a tribunal which had withheld decision on a jurisdictional issue due to outstanding further deposits, even though it was aware that the applicable rules allowed for the payment of such deposits and that the

\(^1\) http://kenyalaw.org/caselaw/cases/view/217490/
determination of the challenge had the potential of disqualifying the tribunal. Interesting, considering that the court itself would not have heard that application of the applicant had defaulted in paying the necessary filing fees.

Several related questions, which were asked in the plenary sessions will be answered at this juncture.

Q. Arbitration sounds like an elitist court. Does arbitration serve the ordinary person or and SME in Kenya?

A. Another description of arbitration is “designer justice”. I am just being honest. The view that arbitration saves costs has to be understood in a certain context. Court fees are minimal, while the services of the judge, registrar and the clerks are paid for from public coffers. In arbitration, the parties pay the arbitrator. It can be pretty expensive, depending especially the seniority of the arbitrators and other choices which are made either by or on behalf of the parties. In addition, the CIArbK Arbitration Rules of 2020 provides for expedited arbitration which cap arbitrator fees to a certain percentage of the disputed amount.

Q. What happens when arbitration fees are so high that they are disproportionate to the subject matter - e.g if the subject matter is ksh.3m but the arbitrator fee is Kshs.2m? Is there option to challenge the fee? How best do you keep arbitrator’s fee low or reasonable or cap maximum fee?

A. Generally, arbitrators in Kenya are paid on the time they spend on a matter. Some low-value disputes are in fact quite complicated and take much time to determine.

You cannot negotiate the fees mid-way or at the end.

Several options are available when a party is faced a low-value dispute. One is the expedited procedure, which caps arbitrator's fees. Two, choosing a less experienced arbitrator. Three, persuading the other party to attempt mediation even if there is no pre-existing agreement to mediate. Further options of challenging the fees are available in administered arbitrations. Finally, s. 32B.(4)
of the Act provides a mechanism for taxation of the tribunal’s fee by the High Court.

5. Arbitrator and Jurisdictional Challenges
Challenges on the tribunal’s alleged bias or lack of jurisdiction should be short and rare. Assuming each party can say all it has to say in two pages and that the tribunal’s decision can fit in 5 pages, then routine challenges would involve minimal time and fees.

But if the parties decide to go for full-blown applications written submissions, highlighting, witnesses and all that, then determining the matter could cause considerable delay and cost. A sole arbitrator’s fee could be about Ksh. 1 m (40 hours at 20,000/= plus VAT and minimal disbursements) and much more if the tribunal has 3 members or if the issues for determination are complicated.

6. Diversions Ahead!
All arbitration legislations and rules give the parties the option of going to court or to other fora in the course of arbitration, if necessary. Applications to court are not only costly and disruptive but, in my experience, fail 95% of times. It is shocking that advocates go to court so easily and with so much pomp when their success rate is just about 5%. No wonder some arbitrators are of the view that most such applications are motivated by advocates’ financial needs.

There is another reason why parties should not go to court recklessly. When parties go to court, especially alleging arbitrator bias, they put in some exaggeration and outright lies under oath. The arbitrator gets to know what a party said about him or her. Arbitrators are trained to be civil when the arbitral proceedings resume counsel are, apparently, quite experienced in going on as if nothing happened. But there's always a level of discomfort, which can be avoided by simply not making unwarranted court applications.

7. The Stay Pending Court Decision
The first prayer when a party goes to court is to stay the arbitral proceedings pending the determination of the substantive issues. Courts generally grant such orders, and for good reason. Read together, sections 14.(8) and 17. (8) of
the Arbitration Act of Kenya 1995 (the Act) stipulates that while an application under the applicable subsection is pending before the High Court,

“the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.” (Emphasis added.)

These provisions allow the parties to decide whether or not they wish to proceed with the arbitration pending the determination of the court case. They also stipulate what should happen to the tribunal’s award vis-à-vis the cost judgment. It is a difficult choice for the parties especially if the arbitral proceedings are at an advanced stage because of the cost implications should the court application succeed. That is a commercial decision for the parties to take. However, even if the parties agreed to continue, the tribunal might be reluctant to do so especially if one party has made personal or scandalous allegations about the arbitrator in court.

8. Expedited Arbitration Procedures
All arbitration rules, including those regularly used in domestic arbitrations in Kenya, provide for expedited procedures, which set strict time limits for the parties and for the tribunal for various activities. Expedited procedures are very unpopular for reasons which I will not discuss here. Suffice to say that experience in construction adjudication and dispute boards demonstrate that due process is over-rated.

9. Bifurcation
Bifurcation is quite common in investment disputes but, unfortunately, rare in commercial arbitrations, especially the domestic ones. It is the practice in which arbitral proceedings are, with the consent of the parties, divided into two or three successive stages each of which produces an award. The first one or two stages produce partial awards, which determine some of the issues in dispute.

The most common basis for bifurcation is to determine liability first and then, if necessary, address the quantum. Furthermore, the early and separate
determination of liability opens a window for the parties to agree on the quantum amicably, saving time and costs.

10. The Tribunal Size
A sole arbitrator is sufficient in many commercial disputes apart from the ones which are extremely complicated, require multiple skills and have very high quantum.

11. Busy Arbitrators
Some arbitrators run very busy professional practices or multiple businesses while others take long prescheduled holidays locally or abroad. Arbitrators should not take up appointments if they cannot, within the foreseeable future, dedicate necessary time.

Parties which are concerned about delay should feel free to send a remainder to the arbitrator, ask for directions about the delivery of the award or suggest a mention. Arbitrators are sensible and responsible people and would not hold such requests against any party.

12. Post-award Issues
The less the time the corrections, additional awards etc take, the better for everybody so that the parties can move to the next stage.

Parting shot - Arbitration Quiz

Question 1: Can an arbitrator nullify a marriage under Kenyan law? Yes, or No?
Question 2: Are disputes on the custody of children arbitrable under Kenyan law? Yes, or No? Please mark for yourself. Write your answer to each question on a piece of paper. This is quiz is absolutely confidential. Nobody else will know what you score.

The answers to both questions, ladies and gentlemen, believe it or not, are “Yes”. My authority is the Court of Appeal bench of Musinga, Gatembu, and Murgor
JJ.A in *TSJ v. SHSR Civil Appeal No. 119/2017*. The judgment dated 18th November 2019 interrogates and dismissed all the arguments which suggest that such things were not arbitrable and must be reserved for ordinary and Kadhi courts. It upheld an arbitral tribunal’s award, which dissolved a marriage and decided on the custody of children.

Congratulations those of you who got 100%. Those of you who got 50% gave it a fair try. To those who scored zero, not to worry because, with all due respect, herd mentality among Kenyan lawyers, family law practitioners and arbitrators is that those matters are not arbitrable. Courtesy Musinga, Gatembu, and Murgor J J. A, we all now know better.

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The Zambian Public Procurement Act No. 8, 2020 –
The Dispute Resolution and Arbitration Provisions: Are they Fit for Purpose?

By: Bwalya Lumbwe*

Introduction
Public procurement in Zambia is administered through the Zambia Public Procurement Authority (the Authority)¹ which is an independent regulatory body.² The Authority regulates all public procurement of goods,³ works⁴ and services⁵.⁶ The procurement process as well as the functions of the Authority are governed by statute. The present statute is the Public Procurement Act No. 8, 2020 (2020 Act) which came into effect on the 16th of April 2021 replacing the Public Procurement Act No. 12, 2008(2008 Act).⁷

The 2020 Act ‘applies to all procurement carried out by a procurement entity⁸ with a procurement entity being defined as:

(a) a Government Agency or parastatal body carrying out procurement using public funds or any other funds;

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¹ s3(1), The Public Procurement Act No. 8, 2020 and s3(1) the Public Procurement Act No. 12, 2008.
² s6(1), The Public Procurement Act No. 8, 2020 and s6(1) the Public Procurement Act No. 12, 2008.
³ Defined under 2020 Act, s2.
⁴ Defined under 2020 Act, s2.
⁵ Defined under 2020 Act, s2.
⁶ 2020 Act, s6.
⁷ Zambia Public Procurement Authority, Commencement of the Public Procurement Act No.8 of 2022, Circular No. 2 of 2021(23rd April 2021).
⁸ 2020 Act, s3.
(b) any other body or unit established or mandated by Government to carry out procurement using public funds.\(^9\)

The commencement of the 2020 Act has no effect on any right, privilege, obligation, or liability acquired, accrued or incurred under the Public Procurement Act No. 12, 2008.\(^{10}\) All procurement commenced under Public Procurement Act No. 12, 2008 continues and are required to be completed under the provisions of that Act.\(^{11}\)

In regulating public procurement, the Authority and a procurement entity are required to make decisions as regards the bidding process and execution of the contracts\(^12\) which may partly be because of the compliance monitoring and enforcement obligations entrusted to the Authority.\(^{13}\) These decisions may well affect the rights of a bidder or supplier.

The terms bidder and supplier are defined in the 2020 Act as follows. A bidder means:

\[
\text{...a person or group of persons that offers to provide goods, works or services in response to an invitation from a procuring entity and includes, where applicable, a sub bidder, potential bidder and applicant to pre-qualify.}\(^{14}\)
\]

While a supplier is:

\[
\text{...a contractor, consultant, service provider or a natural person or incorporate body that is a party to a contract with a procuring entity for}
\]

\(^9\) 2020 Act, s2.
\(^{10}\) Zambia Public Procurement Authority, Commencement of the Public Procurement Act No.8 of 2022, Circular No. 2 of 2021(23\(^{rd}\) April 2021) par 3.
\(^{11}\) Zambia Public Procurement Authority, Commencement of the Public Procurement Act No.8 of 2022, Circular No. 2 of 2021(23\(^{rd}\) April 2021) par 4.
\(^{12}\) 2020 Act, s6.
\(^{13}\) 2020 Act, s83-88.
\(^{14}\) 2020 Act, s2.
the provision of goods, works or services including a person that has a contract with the supplier in relation to the provision of goods, works or services to a procuring entity.15

For every contract awarded, a procurement entity is obligated to appoint a contract manager whose responsibilities are to:

1. manage the obligations of the procurement entity; and
2. ensure that the supplier performs the contract in accordance with the terms and conditions specified in the contract.16

A contract manager derives duties and powers from the contract between a procurement entity and a supplier, 17 while generally acting as the employer’s agent.18 A contract manager, thus, generally takes decisions on behalf of the procurement entity.19 In carrying out functions, a contract manager is required to make decisions as provided for under a contract, for the proper execution of that contract.

Regardless of who makes a decision required under the 2020 Act or under the terms of the contract, be it the Authority, a procurement entity, or a contract manager as an agent of a procurement entity, a bidder or supplier may disagree with that decision. The disagreement may well result in a dispute, which then, must be resolved through the dispute resolution methods provided for under the 2020 Act.

15 2020 Act, s2.
16 2020 Act, s76.
17 A good example is that of construction contracts. See Julian Bailey, Construction Law (2nd edn, Vol 1, Informa Law) 5.16.
18 A good example is that of construction contracts. See Julian Bailey, Construction Law (2nd edn, Vol 1, Informa Law) 5.18-5.22.
19 See the construction industry English case of Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC).
This article, thus, analyses the dispute resolution provisions as incorporated into the Act 2020 and considers if the provisions are fit for purpose.

As there are similarities in the dispute resolution provisions in the 2008 and 2020 statues, statements in this article may well apply to the Public Procurement Act No. 12, 2008 which as stated remains in force for those procurements commenced under it.

Contracts
A procurement entity is obligated under the Act 2020 to use only a standard contract approved by the Attorney-General and issued by the Authority or any other contract approved by the Authority, in all procurement proceedings.\(^2\)\(^1\)

A contract comes into existence or is formed, in simple terms, when a bidder makes an offer to a procurement entity for the supply of goods, works or services. Acceptance of the offer, unconditionally, will bring into existence a binding contract.\(^2\)\(^2\) A bidder whose offer has been accepted then becomes the supplier of goods, works or services to a procurement entity, under the terms of a contract.

The 2020 Act, through the regulations, further mandates that all conditions of contract contain a dispute resolution clause.\(^2\)\(^4\) As such, all the approved forms

\(^{20}\) The inclusion of this latter provisions provides the authority and not the Attorney General power to approve contracts that are not at the time of 2020 Act commenced. This surely is not the intent.

\(^{21}\) 2020 Act, s73(f).

\(^{22}\) Stephen Furst, Vivian Ramsey, Keating on Construction Contracts (9th edn, Sweet and Maxwell) 2-016.

\(^{23}\) Though the the Public Procurement Regulations, 2011 have not been revised specific to the Act, 2020 they are still in force except where there is conflict in which case the Act 2020 provisions will prevail. See Commencement of the Public Procurement Act No.8 of 2022, Circular No. 2 of 2021(23rd April 2021) par 8.

\(^{24}\) The Public Procurement Regulations, 2011, r130(h).
of contract contain such a clause. The following table illustrates the type of dispute resolution method used in all the diverse types of procurements.

<table>
<thead>
<tr>
<th>Type of Procurement</th>
<th>Tier 1 Clause &amp; Dispute Settlement method</th>
<th>Tier 2 Clause &amp; Dispute Settlement method</th>
<th>Tier 3 Clause &amp; Dispute Settlement method</th>
<th>Tier 4 Clause &amp; Dispute Settlement method</th>
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</thead>
<tbody>
<tr>
<td>Non-Consultant Services</td>
<td>Cl 8.1 Amicable Settlement/Negotiation</td>
<td>Cl 8.2 Adjudication</td>
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<td>Good and Services Framework Agreement</td>
<td>Cl 9.1 Amicable Settlement/Negotiation</td>
<td>Cl 9.2 In accordance with the laws of Zambia</td>
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<td>Textbooks &amp; Reading Materials</td>
<td>Cl 10 Amicable Settlement/Negotiation</td>
<td>Cl 10 Arbitration</td>
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<td>Information Systems</td>
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<td>Cl 27 Amicable Settlement/Negotiation</td>
<td>Cl 27 Arbitration</td>
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<tr>
<td>Goods Open National Bidding</td>
<td>Cl 9 Amicable Settlement/Negotiation</td>
<td>Litigation</td>
<td></td>
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<tr>
<td>Goods Open International Bidding</td>
<td>Cl 10 Amicable Settlement/ Negotiation</td>
<td>Cl 10 Arbitration</td>
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</table>


This information is found on the Zambia Public Procurement Authority website https://www.zppa.org.zm/procurement-legislations-and-handbooks accessed 1 March 2022. Note that the contract is part of the standard bidding document so is embedded into that document.

This is the odd one out which does not state either adjudication or arbitration.
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<td>Cl 24.1 Adjudication only on the Decision of the Project Manager within 28 days³¹</td>
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<td>Works Open International Bidding³³(FIDIC PINK Book)</td>
<td>Cl 20.2 Dispute Board Opinion³⁴</td>
<td>Cl 20.2, 20.4 Dispute Board Decision within 84 days or³⁵ Cl 20.5 Amicable Settlement 84 days after Decision ³⁶ Cl 20.6 Arbitration</td>
</tr>
</tbody>
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²⁸The choice between adjudication or arbitration should be stated in the special condition of contract.
²⁹The wording on timing is confusing but indicative of a period more than 28 days.
³⁰The choice between adjudication or arbitration should be stated in the special condition of contract.
³¹This in effect means that decisions as made by the parties are not subject to the dispute resolution process but to litigation unless an amendment is secured. See similar based on the Public Procurement Act No. 12, 2008, article Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314.
³²There is a period of 28 days between the decision and referral to arbitration which the parties can use to settle.
³³The form of contract is the FIDIC MDB Harmonised Contract Form or the Pink Book, 2010 edn.
³⁴Getting an opinion is a party’s choice and not that of the Dispute Board.
³⁵The period can be increased only by a proposal of the dispute board with the agreement of the parties.
³⁶28 days for issuance of notice to notice of dissatisfaction to commence arbitration, cl 20.4 plus 56 days after the issuance of notice of dissatisfaction, cl 20.5.
All of the methods employ a tiered system of dispute resolution. It is worth noting that, whereas, all the other procurements specifically mention amicable settlement/ negotiations, adjudication or arbitration, the Goods and Services Framework Agreement states that settlement of disputes shall be in accordance with the laws of Zambia as the second-tier method of dispute resolution. It is thus not clear if this reference is to arbitration or litigation.

**Dispute Resolution Provisions under the 2020 Act**

Despite the mandatory requirement that all supplier contracts provide for dispute resolution terms, and which the approved contracts abide by, the 2020 Act oddly includes the term supplier in its dispute resolution provisions. To recap, a supplier is in contract with a procurement entity for the supply of goods, works and services and such a supply contract has its own dispute resolution mechanism.

Under the 2020 Act, there are two instances under which a bidder or supplier can refer a matter to arbitration in case of a dispute resulting from a decision made by the Authority or the procurement entity. Under these instances, the right to take a dispute to arbitration lies only with the bidder or supplier and not the Authority or procurement entity. This makes sense as in any case, it’s the Authority’s decisions that are to be contested.

There is, though, a third instance, which permits the Authority and again the bidder or supplier to refer a dispute to arbitration. It is hard to see though under which instance the Authority may refer an issue to arbitration.

These instances are referred to below as Provision One, Two and Three. Provision Two is tiered in that a dispute between a bidder or supplier with a procurement entity must be referred to the Authority first before a secondary referral to arbitration.

The three provisions are analyzed below.
Analysis of the Dispute Resolution Provisions

Provision One

This provision states that:

A bidder or supplier aggrieved by a decision of the Authority to suspend the bidder or supplier from participating in public procurement or over any other matter under this Act may submit the matter to arbitration within ten days of the Authority’s decision to suspend.

This provision is confusing because of the inclusion of the words ‘or over any other matter under this Act’. The provision can be read in two ways, with the first being as demonstrated below by removing the words ‘or over any other matter under this Act’:

A bidder or supplier aggrieved by a decision of the Authority to suspend the bidder or supplier from participating in public procurement …….may submit the matter to arbitration within ten days of the Authority’s decision to suspend.

The second reading is with the words ‘to suspend the bidder or supplier from participating in public procurement or’ removed:

A bidder or supplier aggrieved by a decision of the Authority over any other matter under this Act may submit the matter to arbitration within ten days of the Authority’s decision to suspend.

The first reading makes sense but the second does not. It is not clear what the purpose of the words ‘or over any other matter under this Act’ given that the

37 Emphasis mine.
38 2020 Act, s99.
referral to arbitration is limited to a grievance resulting from the suspension of a bidder or supplier.

A further observation to note is that the Authority has power to permanently prohibit or bar a bidder or supplier from participating in public procurement on certain grounds. As disputes are likely to result from such action, it is thus curious and not clear as to why a grievance resulting from a bidder or supplier being permanently excluded from participating in public procurement is not referrable to arbitration under the first provision given that both suspension and barring are under the same part in the statute and may well result from the same set of facts.

Provision Two

This provision is two-tiered, starting off with a referral to the Authority first, before an aggrieved bidder or supplier is permitted to make a secondary referral to arbitration. The provision states that:

100(1) A bidder or supplier who is aggrieved with a decision made by a procurement entity under this Act may appeal against the decision to the Authority.

(2) ..........

(4) Unless an application is dismissed or resolved by mutual agreement between the applicant and the procurement, the Authority shall-

(a) .............
(b) .............
(c) issue a written decision, within ten working days after the submission of the application.

39 2020 Act, s77.
Alternative Dispute Resolution

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(6) A bidder or supplier who is aggrieved by the decision of the Authority may submit the matter to arbitration under section 101 within ten working days.

In analyzing this provision, it’s important to remember that the 2020 Act mandates the use of standard conditions of contract. These standard conditions of contract have dispute resolution provisions as mandatorily required by the 2020 Act.

It is a well-known principle of law that conditions of contract are inferior to statutory or case law in defining the rights and obligations of the parties. Hence, where there is a conflict between the provisions in the legislation and a contract, the legislative provisions are superior. This principle, in the writers’ view is also applicable even when the legislation itself requires that a contract, contain dispute resolution provisions as is the case at hand.

As a result of the legislative provision, the dispute resolution provisions contained in the contracts are, thus, of no consequence as they are overtaken by the provisions in the 2020 Act. This could have hardly been the intent of the legislation.

40 See with Reference to Public Procurement Act No. 12, 2008 with legal principles being the same, Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314;
42 See with Reference to Public Procurement Act No. 12, 2008 with legal principles being the same, Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314;
It is also plausible to argue that since the contracts are mandated by the 2020 Act, they are therefore, a creature of that legislation.43 So any act under a contract is an act under the procurement law. This argument, if correct, then permits a bidder or supplier to ignore the provisions under a contract as they are inferior to those under the 2020 Act.

The solution to above confusion lies in the removal of the term supplier in the legislation, though this will not resolve the issue resulting from the inclusion of the Provision Three analyzed below.

**Provision Three**

This provision at s101 reads:

Any dispute over a matter or decision made under this Act44 shall be determined by arbitration in accordance with the provisions of the Arbitration Act.

Under this section any dispute resulting under the Act is, thus, referrable to arbitration. As this is a standalone provision, it is likely to be interpreted to mean that a disputant need not go through the other provisions as this section carries equal weight as the other two provisions. In addition, it also implies that the Authority, is entitled to make a referral to arbitration which is not the case under the other two provisions.

Where a bidder or supplier is permanently barred from participating in public procurement, as has been stated above, this provision permits them to refer a dispute arising out of being barred to arbitration.

What are some of effects of s101? Where a disputant chooses to make a reference under s101 as opposed to under s99, the ten-day time bar for submission of the

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44 My emphasis.
issue to arbitration does not come into play. This, in complicated disputes, may be advantageous to a disputant.

With reference to s100, a bidder or supplier does not have to go through an appeal to the Authority first, before referring a dispute to arbitration. Hence, a bidder or supplier in not invoking an appeal to the Authority, may see this as a time and cost saving measure. In addition, the ten-day time bar for submission of the issue to the Authority\(^\text{45}\) and to arbitration\(^\text{46}\) will not arise. This may well be an advantage in certain instances.

As already stated above, it is also plausible to argue that since the contracts are mandated by the 2020 Act, they are therefore, a creature of that legislation.\(^\text{47}\) More so that, certain terms of contract are mandatorily required to be incorporated into the contract as default position by the provisions in the 2020 Act. As such any act under the contract is in fact an act under the procurement law. This argument, as already referred to and if correct, then permits a bidder or supplier to ignore the provisions under a contract as they are inferior to those under the 2020 Act as already stated.

This view is particularly useful in avoiding litigation under the Small Works Contract. The Small Works Contract is peculiar in that, under its terms, only matters that result from a decision of a project manager\(^\text{48}\) are referrable to the dispute adjudication process.\(^\text{49}\) A matter that is a decision of a supplier or procurement entity such as termination of contract, resulting in a dispute, cannot be resolved under the terms of the Small Works Contract and has to be

\(^{45}\text{2020 Act, s100(3).}\)
\(^{46}\text{2020 Act, s100(4).}\)
\(^{47}\text{Mohsen Manesh, Creatures of Contract: A Half-Truth About LLCs (Harvard Law School Forum on Cooperate Governance, 21st ... 2017).}\)
\(^{48}\text{Referred to under the 2020 Act as Contract Manager.}\)
\(^{49}\text{See with Reference to Public Procurement Act No. 12, 2008 with legal principles being the same, Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314.}\)
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litigated.\textsuperscript{50} This remains the case unless the contract terms are amended by the authority of the Treasury and legal advise of the Attorney General.\textsuperscript{51}

Conclusion
The provisions in the 2020 Act in terms of dispute resolution are confusing and are uncoordinated resulting in the problems described above.

The dispute resolution provisions should, thus be streamlined. Clearly, it would have been much better to have had only one dispute resolution provision or section in the statue.

The conditions of contract approved are mainly copies used by the World Bank. As such dispute resolution provisions under these contracts should be the ones in use as they have been time tasted worldwide.

In ending, the statutory dispute resolution provisions as provided for under the 2020 Act are badly written and therefore, not fit for purpose.

\textsuperscript{50} See with Reference to Public Procurement Act No. 12, 2008 with legal principles being the same, Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314.

\textsuperscript{51} 2020 Act, s77; See with Reference to Public Procurement Act No. 12, 2008 with legal principles being the same, Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’ (2020), 36 Const.L.J. Issue 4, 314.
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Conditions of Contract Goods Open International Bidding

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Conditions of Contract Lump-Sum Selection of Consultants

Conditions of Contract Condition of Contract Works National Open Bidding (Small Works)

Conditions of Contract Works Open International Bidding (FIDIC PINK Book)
Understanding Dispute Settlement Mechanisms Under World Trade Organization

By: Peter Mwangi Muriithi*

Abstract

The World Trade Organization (herein WTO) is a global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. The trade agreements negotiated under the aegis of WTO, are negotiated with the primary purpose of opening trade amongst nations.¹

The author briefly seeks to critique the ways and procedures through which trade disputes between states who have ratified various trade agreements under the aegis of WTO are settled. In doing so this paper offers; an introduction, a historical perspective of dispute settlement under WTO, an analysis of the type of disputes subject to the dispute settlement System under WTO, the establishment of the Dispute Settlement Body and its administrative role, critiquing the forms of dispute settlement under Dispute Settlement System under WTO and lastly a conclusion.

1.0 Introduction

The World Trade Organization and its predecessor, the General Agreement on Tariffs and Trade 1994 (herein GATT) have been enormously successful over the last 50 years at reducing tariff and other trade barriers among an ever-increasing number of countries.² This has been largely due to various agreements entered into by members.

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² Meredith A. Crowley, An introduction to the WTO and GATT
One such agreement is the “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding (DSU).³

2.0 A historical perspective of dispute settlement under WTO

Since the establishment of GATT in 1947, it had a lot of success at reducing barriers to trade. Despite this success, by the 1980s several problems had surfaced with the GATT apparatus. One such problem was the dispute resolution mechanism of GATT was not functioning as effectively as had been hoped. Countries with longstanding disagreements were unable to reach any sort of resolution on a number of issues, ranging from government subsidies for exports to regulations regarding foreign direct investment.⁴

To address this problem among others, a new round of trade negotiations the Uruguay Round was launched in 1986. The goals of the Uruguay Round were far more ambitious than in previous rounds.⁵ It sought to introduce major reforms into how the world trading system would function.

The “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding (herein DSU), like all other Uruguay Round agreements, is an annex to the Agreement establishing the World Trade Organisation (WTO). The “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding (DSU) is Annex II of Marrakesh Agreement Establishing the World Trade Organization (WTO).

There is no opting out of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding (DSU) once a state is a member of WTO. This is best captured by Article 2 (2) of

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⁴ Meredith A. Crowley, An introduction to the WTO and GATT
⁵ WTO, The Uruguay Round <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed on 4/9/22
the Agreement Establishing the World Trade Organization. Verbatim, Article 2 (2) provides “The agreements and associated legal instruments included in Annexes 1, 2 and 3 (annex 2 being DSU) are integral parts of this Agreement, binding on all Members.”

It therefore does not have its own signature and ratification process but will enter into force at the same time as the WTO Agreement and Annexes I, II and III. The exception to this rule is Annex IV of the WTO.

3.0 An in-depth analysis of the Dispute Settlement System under WTO

The WTO’s dispute settlement system has as its foundation the rules, procedures and practices developed under the General Agreement on Tariffs and Trade (GATT) 1947. However, it improves upon the previous system in a number of ways, including by being more accessible. This is shown by the increased participation of developing countries.

The dispute settlement system follows specific and detailed timetables for completing the examination of a case. This first takes place by a group of three panelists who are specially selected for the case. Their findings are published in a report which may be appealed by the members concerned. Appeals are considered by the WTO’s Appellate Body, which consists of seven members elected for a four-year term.

The rules and procedures of the WTO’s dispute settlement system are set out in the Dispute the “Understanding on Rules and Procedures Governing the

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7 Article 2(3) of Agreement establishing WTO
9 WTO, Resolving disputes among WTO members.
10 WTO, Resolving disputes among WTO members.
Settlement of Disputes” or Dispute Settlement Understanding (DSU)11 which is Annex II of Agreement establishing the World Trade Organisation (WTO), which is administered by the Dispute Settlement Body (DSB), consisting of representatives of all WTO members. When lodging a complaint, WTO members are required to specify which WTO agreements are allegedly being violated. (Consider Annex I to IV of WTO agreement).

The “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding (DSU) agreement provides the common rules and procedures for the settlement of disputes related to the WTO Agreements. It aims to strengthen dispute settlement procedures by prohibiting unilateral measures, establishing dispute settlement panels whose reports are automatically adopted, setting time frames for dispute settlement, establishing the Appellate Body, etc.12

The WTO dispute settlement mechanism also contains provisions for special or extra procedures under agreements such as Articles XXII and XXIII of GATS (General Agreement on Trade in Services) as well as the procedures and rules of the Appellate Body. The mechanism covers the procedures for mediation, conciliation, good offices and arbitration, and the core part of those procedures includes “consultation” and “panel procedures” and a series of other procedures relevant to them.

4.0 Type of disputes subject to the dispute settlement system under WTO
Paragraph 1, Article 1 of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” or Dispute Settlement Understanding agreement provides that the rules and procedures of the DSU shall apply to the following:

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a) Disputes brought pursuant to the consultation and dispute settlement provisions of the Agreements listed in Appendix 1 to the DSU; and

b) Consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (WTO Agreement).

On this basis, it is fair to state that the DSU rules and procedures apply to the following specific agreements: WTO Agreement, General Agreement on Tariffs and Trade (GATT), Agreement on Agriculture, Agreement on Sanitary and Phytosanitary Measures (SPS), Agreement on Technical Barriers to Trade (TBT), Agreement on Trade-Related Investment Measures (TRIM), Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping measures), Agreement on Subsidies and Countervailing Measures (SCM), Agreement on Safeguards (SG), General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Government Procurement Agreement (GPA).

5.0 Establishment of Dispute Settlement Body under DSU and its administrative role

Article 2 of DSU agreement establishes the Dispute Settlement Body (DSB) to administer DSU agreement and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements.

Accordingly, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a plurilateral trade agreement.

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<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s5p1_e.htm> accessed on 4/9/22
6.0 Forms of dispute settlement under WTO
These can be generally classified into three:

a. Consultation
b. Panel procedures
c. Countermeasures

A) Consultation
Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner.\textsuperscript{14} GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2 (specifying that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations), as well as in the “1960 GATT decision on arrangements for consultations on restrictive business practices” (specifying that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation).

However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that “formal” consultation to take place prior to panel procedures.

i) Consultation under Article XXII and Article XXIII of GATT 1994, respectively
Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters. Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is

\textsuperscript{14}\textless https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf\textgreater accessed on 4/9/22
being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

a) the failure of another contracting party to carry out its obligations under GATT, or
b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
c) the existence of any other situation.

Thus, disputes over “nullification or impairment of any benefit otherwise to accrue under GATT” may be brought to consultation under Article XXIII. Another point of difference between the two concepts of consultation is the participation of a third country; it is permitted only with respect to consultations under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of GATS.

ii) Consultation under Article 4 of DSU
The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT (paragraph 1, Article 3 of DSU). Article 4 of DSU provides for consultation procedures and rules and specifies that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.

According to the DSU (paragraph 4, Article 4), a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB (Dispute Settlement Body of WTO).

It provides that the party to which a request is made shall reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a
view to reaching a mutually satisfactory solution (paragraph 3, Article 4 of DSU).

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party’s desire to join in the consultations when the party considers that “the claim of substantial trade interest is not well-founded” (paragraph 11, Article 4 of DSU).

B) Panel Procedures

i) Establishing a panel

Paragraph 2, Article XXIII of GATT provides that if no satisfactory adjustment is effected through consultations between the contracting parties concerned, the dispute concerned may be referred to the DSB (Dispute Settlement Body, or “Contracting Parties” under the former GATT) with respect to alleged “nullification or impairment of any benefit otherwise to accrue under GATT” as mentioned above.

In the past, such disputes referred to the Contracting Parties were brought to a working group consisting of the disputing parties and neutral parties. The working group was supposed to confirm claims of the respective disputing parties and discuss them, but was not required to make a legal judgment. The function of the working groups was limited to the facilitation of negotiations and dispute settlement.

Later, however, the “panel” procedure was introduced and has become the regular practice. A panel is composed of panelists (Article 6 DSU) who do not represent a government or any organization but are supposed to serve in their individual capacities.
A panel is principally to make a legal judgment regarding the matters in dispute. Also, the WTO dispute settlement mechanism employs a two-tier appellate system, establishing the Appellate Body.

GATT provides that consultations pursuant to paragraph 1 of its Article XXIII should precede the establishment of a panel in accordance with paragraph 2 of Article XXIII, but it was generally accepted that a panel could be established after consultations under Article XXII even if there had been no consultation under Article XXIII.

The WTO dispute settlement mechanism does not differentiate consultations under Article XXII from those under Article XXIII of GATT. If consultations fail to settle a dispute within 60 days after the date of receipt of a request for consultations, the complaining party may submit a written request to the DSB for the establishment of a panel (paragraph 7, Article 4 of DSU). It is provided that such written request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present clearly the problem of inconsistency with trade agreements in question (paragraph 2, Article 6 of DSU).

As a rule, decisions of the DSB are made by consensus, but the so-called “negative consensus method” is applied to the issues of “establishment of panels” (paragraph 1 of Article 6), “adoption of reports of a panel or Appellate Body” (paragraph 4 of Article 16 and paragraph 14 of Article 17) and “compensation and the suspension of concessions” (paragraph 6 of Article 22), the requested action is approved unless all participating Member countries present at the DSB meeting unanimously object.

As far as the DSB’s establishment of a panel is concerned, paragraph 2, Article 6 of DSU specifies that “a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda unless at that meeting the DSB decides by consensus not to establish a panel.”
Parties other than the complaining party which requested the establishment of a panel are entitled to block the panel establishment but only once (paragraph 1, Article 6 of DSU). This veto is most frequently employed by the respondent. Therefore, in most cases, a panel is established at the second DSB meeting at which the request appears as an item on the DSB’s agenda. Any Member that desires to be joined in the panel procedure as a third party because of having a substantial interest in the matter concerned is required to express such desire at the time of the establishment of a panel or within 10 days after the date of the panel establishment.

ii) Composition of Panels

Once a panel is established, the next step is to select panelists. Selection of panelists is conducted through proposals by the WTO Secretariat on panelists (paragraph 6, Article 8 of DSU). Generally, the Secretariat summons the disputing parties and hears their opinions concerning desirable criteria for selecting panelists, such as home country, work experience and expertise.

Then, the Secretariat prepares a list of nominees (generally six persons) providing their names and brief personal record, and show the list to both parties. It is provided that citizens of the disputing parties or third parties joined in the panel procedure may not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise (paragraph 3, Article 8 of DSU). It is also provided that either disputing party “shall not oppose nominations except for compelling reasons” (paragraph 7, Article 8 of DSU). However, since the definition of a compelling reason is not very strict, frequently nominations made by the WTO Secretariat are not accepted by either party, and sometimes this happens several times.

Also, it is provided that if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, the Director-General, upon request of either party, shall determine the composition of the panel after consulting with the parties to the dispute (paragraph 7, Article 8 of DSU).
iii) Making written submissions
After the composition of a panel is determined, the panel meets to determine the timetable for the panel process and the working procedures it will follow throughout the dispute. Then, after three to six weeks from the establishment of the panel, the complainant provides the panel a written submission containing all facts relating to the issue concerned and its claims. The respondent also provides a written submission to the panel in two to three weeks after the receipt of the complainant’s written submission (paragraph 12 of Appendix 3 of DSU). Although there is no rule specifying the composition of a written submission, in many cases they are composed of five parts: 1) introduction; 2) facts behind the complaint; 3) procedural points at issue; 4) claims based on legal grounds; and 5) conclusion.

Regarding the disclosure of the written submissions, it is provided (in paragraph 3, Appendix 3 of DSU) that “deliberations of a panel and documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public.” Thus, disputing parties may disclose their own written submissions to the public.

Actually, the United States and EU disclose many of their written submissions to the public, and Japan also releases some of its written submissions to the public on websites.

iv) Panel meeting
A panel generally meets two times. Meetings of a panel are held in the WTO building, instead of a special facility such as a court. Traditionally, a panel meets in closed session, just like other meetings of WTO. Generally, panel meetings last one to three days.

The first meeting of a panel is supposed to be held in one to two weeks after the receipt of the written submission submitted by the respondent (paragraph 12, Appendix 3 of DSU). This first substantive meeting is to begin with a briefing made by the chairman of the panel on how to proceed with the meeting. Then,
the complainant and the respondent, respectively, give oral statements regarding their own written submissions.

This is followed by questioning by the panel and in some cases a question-and-answer session between the disputing parties. Next, a third party session is held, where oral statements and a question-and-answer session occurs.

As a rule, the presence of third parties is permitted only at these third party sessions, and third parties may not be present at substantive meetings.

The second substantive meeting of a panel is supposed to be held after two to three months since the first substantive meeting. The second meeting focuses mainly on counter-arguments against claims of the other party made during the first substantive meeting.

Unlike the first substantive meeting, third parties are not permitted to attend the second substantive meeting. Unless otherwise agreed between the disputing parties, third parties may not make written submissions or obtain written submissions submitted by the disputing parties.

v) Interim report
Following the second substantive meeting, the panel issues an interim report to the disputing parties. The interim report describes the findings and conclusions of the panel. An interim report provides the first opportunity for disputing parties to tell whether their arguments are supported by the panel or not. Disputing parties are entitled to submit comments or submit a request for the panel to review and correct technical aspects of the interim report for correction.

vi) Final panel report
The DSU provides (in paragraph 9 of its Article 12) that the period in which the panel conducts its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the disputing parties, “shall not exceed six months as a general rule.” When the panel considers that it cannot issue its report within six months, it is supposed to inform the DSB in writing of the reasons for the delay together with
an estimate of the period within which it will issue its report (paragraph 9, Article 12 of DSU).

The recent trend is that cases requiring an examination period exceeding six months are increasing because of the difficulty in confirming facts due to the existence of a highly technical matter or difficult interpretations of a legal matter at issue.

Generally, a final panel report is issued shortly after the disputing parties comment on the interim report, first to disputing parties and then to all Members in the three official languages of the WTO (English, French and Spanish).

A panel report contains, in its conclusion, the judgment reached by the panel as well as recommendations regarding correction of the measures in question. This conclusion is referred to the DSB, where the “negative consensus method” is applied for the adoption of the panel report.

The DSB adopts the “recommendation and rulings”, which are legally binding the parties concerned. Adoption of a panel report is supposed to be completed between 21 and 60 days after the date the report has been circulated to the Members (paragraphs 1 and 4 of Article 16 of DSU).

vii) Appeal (review by the Appellate Body)
If there is an objection to a panel report, disputing parties may request the Appellate Body to examine the appropriateness of the legal interpretations employed by the panel (paragraph 4, Article 17 of DSU).

The Appellate Body is a standing group composed of seven persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally; the Appellate Body membership is broadly representative of membership in the WTO. Three persons out of the seven Appellate Body members are to serve on any one case. Persons serving on the Appellate Body are selected by a consensus of all
Members at the DSB and serve for a four-year term. Each person may be reappointed once (paragraph 2, Article 17 of DSU).

A Notice of Appeal should be filed no later than the DSB meeting at which a panel report is scheduled to be adopted. Since it is provided that the adoption of a panel report should be completed within 60 days after the date of circulation of the panel report to the Members, an appeal is supposed to be made within 60 days after the date of circulation (paragraph 4, Article 16 of DSU).

It is provided (in paragraph 6 of Article 17 of DSU) that an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In principle, factual findings of a panel may not be challenged. Regarding legal interpretations and findings, there is a precedent that mentions: “

To determine whether a certain incident occurred at a certain place/time is a matter of fact typically. However, to determine whether a certain fact or a series of facts complies with any given rule of a certain convention is a matter of law and requires legal interpretation.” (EC-Hormone-Treated Beef Case (DS26))

After the filing of a Notice of Appeal, the Appellate Body shows the timetable for set out in its working procedures. The three major steps in the procedures are: (1) filing of a written submission by the appellant; (2) filing of written submissions by the appellee and third participants, respectively; and (3) meeting of the Appellate Body with the parties (oral hearing).

It is provided that the appellant’s filing of its written submission ((1) above) should shall be made within 7 days after the filing of a Notice of Appeal, that the appellee’s filing of its written submission ((2) above) should be made within 25 days after the date of the filing of a Notice of Appeal, and that the meeting of the Appellate Body (oral hearing) ((3) above) is supposed to be held between 35 and 45 days after the date of the filing of a Notice of Appeal (paragraphs 21, 22, 24 and 27 of Working Procedures for Appellate Review “WT/AB/WP/5” issued on January 4, 2005). It is also provided that the participation of a third party in appellate review procedures may be accepted only if such party was
joined in the panel procedure (paragraph 4, Article 17 of DSU). Third party participants may file written submissions and also may be present at the meeting of the Appellate Body.

During a meeting of the Appellate Body (1) the appellant, (2) the appellee and (3) third participant(s), respectively, make oral arguments in the order mentioned. This is followed by questioning by the Appellate Body of the disputing parties as well as of third party participants; and each party is required to address the questions. The Appellate Body takes the initiative in questioning, and either disputing party is generally not allowed to ask a question to the other party. In general, following the question-and-answer session, disputing parties and third party participants are provided with the opportunity to make oral statements again at the end of the meeting.

Following the meeting, the Appellate Body is to circulate its report to the Members within 60 days after the date of filing of a Notice of Appeal. The proceedings should not exceed 90 days in any case (paragraph 5, Article 17 of DSU). Unlike panel procedures, there is no rule concerning an interim report for appellate review procedures.

viii) Adoption of reports
A report prepared by the panel or the Appellate Body following the review process becomes the formal written recommendations of the DSB when adopted by the DSB. Regarding the adoption of panel reports, the DSU provides (in paragraph 1, Article 16) that “In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date on which they have been circulated to the Members.”

It is also provided (in paragraph 4, Article 16 of DSU) that “within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting.” Regarding the adoption of reports of the Appellate Body, the DSU provides (in paragraph 14, Article 17) that “a report shall be adopted within 30 days after the date of circulation of the report to the Members.”
Together with a panel report, a report of the Appellate Body becomes the official written recommendations and rulings of the DSB once it is adopted at a DSB meeting.

ix) Implementation of recommendations
The DSU provides that at a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member to which the recommendations are directed is supposed to express its intentions with respect to the implementation of the recommendations mentioned in the report.

If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such a reasonable period of time may be decided by mutual agreement between the disputing parties concerned.

However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three Appellate Body members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the “reasonable period of time” within 90 days after the date of the adoption of the report.

It is provided (in paragraph 3, Article 21 of DSU) that the reasonable period of time to implement the recommendations mentioned in a panel or Appellate Body report should, as a general rule, not exceed 15 months from the date of adoption of the report. It is also provided that the DSB should keep under surveillance the implementation of adopted recommendations and that the Member concerned should provide, after a certain period of time following the date of establishment of the reasonable period of time, the DSB with a status report in writing of its progress in the implementation of the recommendations until the issue of implementation is resolved (paragraph 6, Article 21 of DSU).

In general, a panel or the Appellate Body recommends that the Member concerned to bring a measure determined to be inconsistent with a covered agreement into conformity with that agreement. It does not usually give any specific instruction on how to implement the recommendations. Therefore, it is
not unusual that disagreement arises between disputing parties as to the existence or consistency with the WTO Agreement of measures taken to comply with the recommendations.

In this respect, the DSU provides (in paragraph 5, Article 21) that “such disagreement as to the existence or consistency with a covered agreement of measures taken to comply with adopted recommendations or rulings” may be referred to a panel. Such panel established for the purpose of determining whether there has been the implementation of adopted recommendations or rulings (“compliance panel”) is supposed to be composed of those panelists who served on the original panel.

The panel is required to issue a report within 90 days after the date when disagreement is referred to the panel. Unlike regular panel procedures, the establishment of the compliance panel does not have to be preceded by consultations. Generally, such panels meet only once. When the complaining party doubts that there has been the appropriate implementation of adopted recommendations or rulings, it may request a review by a compliance panel repeatedly without limitation. In addition, there is a precedent that compliance panel decisions may be appealed to the Appellate Body for review, although DSU does not have any provision providing for such a process.

C) Countermeasures

With the approval of the DSB, the complainant may take countermeasures, such as suspension of concessions, against the party who respondent’s interests also in cases where it fails to implement the recommendations adopted by the DSB within a given reasonable period of time, provided that no agreement on compensation is reached between both parties. Specifically, it is provided that the complainant may request the DSB to suspend the application, to the Member concerned, of concessions or other obligations under covered agreements (“countermeasures”) when such Member fails to bring the measures found to be inconsistent with a covered agreement into compliance therewith within the said “reasonable period of time” or that a panel or the Appellate Body confirms a failure of such member to fully implement adopted recommendations (paragraph 2, Article 22 of DSU).
There are rules as to the sectors and level of countermeasures to be taken. For instance, it is provided (by Article 22 of DSU) that the complainant, when taking countermeasures, should first seek to target sector(s) that are the same as that to which the dispute concerned is associated, and also that the level of countermeasures should be equivalent to the level of the “nullification or impairment” caused.

If the complainant considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement (item (b), paragraph 3, Article 22 of DSU). In addition, if that party considers that it is not practical or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement (item (c), paragraph 3, Article 22 of DSU).

The latter practice is called “cross retaliation,” and it can be represented by a case where retaliation for a violation of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) involves the suspension of customs-related concessions under GATT.

Such cross retaliation is one of the unique measures employed in the WTO dispute settlement mechanism, and was introduced as a result of the coverage of the WTO Agreement over not only goods but also services and intellectual property rights (However, GPA sets special provisions on the prohibition of “cross retaliation.” Paragraph 7, Article 22 stipulates that “any dispute arising under any Agreement …other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement.”).

In the case that the respondent objects to the contents or level of the countermeasures for which the complainant requested authorization, the matter may be referred to arbitration (paragraph 6, Article 22 of DSU). When
arbitration is conducted, the resulting decision is taken into consideration for the authorization of countermeasures. The negative consensus method is applied to finalize the authorization of the DSB (paragraph 7, Article 22 of DSU).

7.0 In conclusion
The dispute settlement system as set out by DSU is very elaborate and serves the purpose of enhancing the implementation of various agreements under WTO. However, there is the need for reforms to the WTO’s dispute settlement procedures to further strengthen and sustain what is perhaps its most prominent function. Importantly, these reforms should focus on establishing dispute resolution mechanisms that are acceptable to the member states and that are at per with the demands of settling trade disputes in the 21st Century.
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The End of Arbitration is the Beginning of Justice: A Plea to Set Time Frames for Completion of Arbitration Proceedings

By: Paul Mwaniki Gachoka

Abstract

To a soul that picks a pen and gadget to write down some of his experiences as an arbitrator, the abstract forms an integral component of his work. After months of solitude, reflection, downloading documents, perusing case law, visiting libraries and writing, the man implores the reader through the abstract to consider critiquing or appreciating their effort. Sometimes just to be listened to, understood and perhaps believed. My intellect now clothed with years’ experience leads me to discuss at length, the length of time taken in arbitration proceedings.

Among the key emerging inefficiencies of arbitration as an alternative dispute resolution forum is the time taken for proceedings to come to an end. To young legal scholars and even erudite lawyers, one hallmark of arbitration is thought to be the expeditious nature of the proceedings. Often, lawyers will advise their commercial clients to opt for arbitration. The sum of my time as an arbitrator has taught me otherwise. Arbitration disputes with somewhat straightforward issues might take a decade to end.

The need for expedited arbitral proceedings and the ultimate triumph of justice is the pith of the paper. It is apt to state at the outset that this manuscript shall not veer to discuss the length of time taken for parties to execute the award after completion of arbitral proceedings. While sometimes courts refer parties to arbitration despite an arbitrator having penned their award, the temptation to discuss that setback has been subdued. The sine qua non of this paper remains a discussion of the length of time taken in the seat of justice of arbitration, the arbitral tribunal. This paper analyses the
drawbacks that sustain lengthy arbitration proceedings and proposes a raft of legislative cum contractual proposals.

1. Introduction
The length of court and arbitration proceedings are no doubt a significant component of the fairness and effectiveness of a system of justice. Failure of arbitral tribunals to resolve disputes in a timely fashion can have major ramifications for the administration of justice in society, as the legal axiom 'justice delayed is justice denied' indicates.

In nearly all judicial or quasi-judicial proceedings in Kenya, the law sets the time frames on when certain steps in litigation should be completed. At the time of writing this paper, leading constitutional lawyers and academicians engaged on the constitutionality of Section 175 (3) of the Public Procurement Act that provides that the High Court ought to hear and determine judicial review proceedings arising out of the Public Procurement Administrative Review Board within forty-five days. In a catena of judicial decisions, the courts have upheld the importance of having such timeframes. Such a decision is the Court of Appeal decision in Civil Appeal No. E039 OF 2021, Aprim Consultants vs. Parliamentary Service Commission & Another1 where the court was adamant that timelines were necessary due to the nature of the procurement process.

No doubt the setting of timelines and timeframes is not unique to our legal architectural design. A plethora of laws affirm this stance. For instance, a party who wishes to file a statement of defence in a civil case has fourteen days to

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1 In the Aprim decision, the Court of Appeal was quite eloquent on the matter. The bench unwaveringly stated that “Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended; the jurisdiction also ended. Thus any judgement returned outside time would be without jurisdiction and therefore a nullity, bereft of any force of law. That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.”
comply. In addition, some proceedings have set time frames from start to conclusion of the proceedings. The Small Claims court bars parties from litigating after the lapse of sixty days save for where it is not practicable. Indeed, this is also the legal position in cases filed under the Public Procurement and Asset Disposal Act 2015. Furthermore, the Constitution also restricts the time the Supreme Court ought to hear and determine a presidential election petition to fourteen days.

In Kenya, arbitration proceedings are conducted under the aegis of the Arbitration Act. One salient feature of the arbitration act that runs through the fibre of the legislation is the principle of party autonomy. The parties to the arbitration are the sole arbiters to their conduct albeit under the keen watch of the arbitral tribunal. This amongst other factors have greatly affected the timeliness of delivery of award by arbitrators.

2. Factors contributing to the delay of arbitration proceedings

2.1. Party Autonomy

The arbitration agreement is the cornerstone of every arbitration proceeding. The parties' agreement constitutes a pact to refer to arbitration any issues that have arisen or may arise between them in the future. The principle gives the parties to an arbitration proceeding the right to choose the governing

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2 Order 7 Rule 1 of the Civil Procedure Rules 2010.
3 Section 34 of the Small Claims Court Act, 2016
4 Section 175(1) of the Public Procurement and Asset Disposal Act provides that Judgments arising out of applications for Judicial Review have to be delivered within 45 days.
5 Article 140(2) of the Constitution of Kenya 2010
7 For instance, section 24(1) provides that parties shall agree on the timelines of filing the Petition. The parties solely decide the timelines for filing of the Statement of Claim, a response to the same among others.
8 See Levi Onyeisi Wilson Odoe, “Party Autonomy and Enforceability of Arbitration Agreements and Award as the Basis of Arbitration” (January 2014)
The End of Arbitration is the Beginning of Justice: A Plea to Set Time Frames for Completion of Arbitration Proceedings: Paul Mwaniki Gachoka

substantive law, which will guide the parties' contractual arrangement.\(^9\) While parties to an arbitration dispute have wide powers to determine the nature of the arbitral proceedings, the parties discretion ought not lead to an ‘agreement to delay’ the determination of the dispute.

However, the concept of party autonomy also contributes to the delay in arbitration disputes. Noting that a party reserves the right to determine the dispute resolution forum, the timeliness of filing of responses and time taken for the witnesses to testify, a party who wishes to frustrate the process often takes inordinate time to comply. This in turn affects the time for the opposing party to comply with any agreed directions.

2.2. Adjournment by Parties
While the Arbitration Act does not explicitly grant parties the right to seek an adjournment when the case come up for hearing, natural law dictates that it is only fair for a party to be granted an adjournment in clear circumstances. Further, flowing from the principle of party autonomy, parties may elect to have a request for an adjournment as a feature of the proceedings.

The desire of a party to seek an adjournment is fundamentally different from the procedures in seeking an adjournment in court. While judicial officers in court proceedings have a duty to ensure a speedy and fair trial, the arbitral tribunal is not under an obligation to curb adjournments to match the standards of a court trial. Sometimes, an arbitrator could be lenient to a party that present flimsy reasons for adjournment. This is more so as an Arbitrator ought to be and should be seen to be a neutral.

2.3. Filing of Numerous Applications in the Arbitral Tribunal and Court
To protect and advance the interest of justice, the Arbitration Act allows parties to make applications before the arbitral tribunal or in court. A party in an arbitral dispute, might, with the permission of the arbitral tribunal seek the

\(^9\) Section 20 of the Arbitration Act provides that parties are free to agree on the procedure to be followed by the tribunal in the conduct of the proceedings
assistance of the court in taking evidence\textsuperscript{10}. Alternatively, a party might challenge the appointment of an arbitrator\textsuperscript{11} or seek that certain question of law be determined by the court\textsuperscript{12}.

To a legal practitioner whose primary duty is to seek the proper administration of justice, these dictums of the law come in handy. Sadly, to a party or an advocate who seeks to delay arbitral proceedings, these provisions are appropriate to his or her cause. In certain instances, parties file contemporaneous applications before the court and the arbitral tribunal. Since the arbitral tribunal and the court must deliver rulings to the applications, the hearing and ultimate determination of the main suit remains highly impeded.

2.4. Delay in Payment of Arbitrators Fees/Impecuniosity of a party
Just like any well-oiled machine would run, the payment of an arbitrator’s fees improves the likeliness that the proceedings will be conducted with acumen and appropriate arbitral haste. Payment of an arbitrator’s fees and costs is often an item agreed during the preliminary stages of the arbitration proceedings. However, not all parties are cut from the same financial fibre and therefore a party may-without ill intent-fail to pay the arbitrator’s charges. No doubt, this clogs the functioning of the arbitration machine.

In certain instances, a party who is not a ‘man of straw’ may intentionally fail or delay in paying its share of the arbitrator’s costs. While the other party can opt to pay such costs, the financial burden might be too huge to bear since arbitration costs can be quite significant. Such occurrences may lead to a straightforward arbitration dispute dragging in an arbitrator’s chamber for an inordinate amount of time.

\textsuperscript{10} Section 28 of the Arbitration Act allows a party, with the permission of the Arbitral Tribunal, to seek court assistance in taking evidence. This may include the summoning of witnesses or production of evidence.
\textsuperscript{11} Section 14 of the Arbitration Act gives parties the latitude to challenge the composition of the arbitral tribunal.
\textsuperscript{12} Section 39 of the Arbitration Act provides that parties can agree to have certain questions of law be determined by the court rather than the arbitral tribunal.
2.5. Inordinate Delay by Arbitrators in Delivering the Awards

In court proceedings, judicial officers have a set timeline of sixty days within which to deliver their judgments on a matter. Failure to adhere to the above rule behoves a judge to give written reasons to the Chief Justice for the failure to deliver judgments before the said dates. Unfortunately, the Supreme Court, where the Chief Justice sits, often fails to deliver their judgments within the sixty-day timeframe.

In arbitration, however, arbitrators don’t have set timelines to deliver their awards. Without any statutory dictates on when to deliver their awards, arbitrators may delay the awards until prompted by court action.

Sometimes, arbitrators may have their awards ready for collection but parties delay in collection due to non-payment of the arbitrators’ fees. In University of Nairobi v Multiscope Consultancy Engineers Limited [2020] eKLR, the court was faced with the debate about the timelines of collecting an arbitral award. The court acknowledged the importance of timeliness in arbitration proceeding by holding that the three-months fixed timeline of collecting arbitral awards is cast in stone. Consequently, the court upheld the preliminary objection by the Applicant on the basis that the court lacked jurisdiction to hear and determine the application to have the award set aside since the timeframe for filing the application had lapsed.

3. Comparative Analysis: The Case of India

One of the common law countries that has made tremendous efforts in placing itself as a proper domestic and international hub for arbitration is the Republic of India. Like most countries, India’s arbitration regime was adopted from the
model arbitration law\textsuperscript{16}. However, major amendments have since been undertaken to catch up with modern times.

3.1. A Case of its Time: Jayesh H. Pandya vs Subhtex India Limited Civil Appeal No. 6300 of 2019

India struggled with the problem of delayed completion of arbitration proceedings for quite a while.\textsuperscript{17} A classic case of tremendous delay is pronounced in the case of Jayesh H. Pandya vs Subhtex India Limited\textsuperscript{18} which took a record time of ten years to completion despite there being a four-month time frame for completion of the arbitration. Sadly, after ten years of arbitration, the Supreme Court of India directed the parties to return to the arbitral tribunal.

The appellants were partners in a partnership firm known as Hetali Construction Company while the Respondent was a company incorporated in India. The arbitration agreement contained a provision on how long the arbitration was to take. Apart from the procedure to be followed by the Arbitrator, the Arbitrator was required to make his award within four months after receiving a copy of the agreement, with the condition that the Arbitration panel would have the option to extend the period for making and publishing the award with the concurrence of both parties. However, the four months lapsed before the Arbitrator could deliver the award.

Consequently, the appellants filed a written application with the Arbitrator, asserting that the four-month period from the date of the first preliminary meeting had expired and that the Arbitral Tribunal had become \textit{functus officio}, with no jurisdiction to sustain the arbitral proceedings. However, the learned Arbitrator rejected it which was challenged by the appellants in Arbitration Petition(L) No. 59 of 2008 before the High Court of Judicature at Bombay invoking Section 14 of the Act, 1996, seeking a declaration that the Arbitrator

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\textsuperscript{16} UNCITRAL Model Law on International Commercial Arbitration

\textsuperscript{17} https://theimpactlawyers.com/articles/the-time-clauses-in-indian-arbitration-act-doing-more-harm-than-good accessed on 24th March 2022

\textsuperscript{18} Jayesh H.Pandya vs Subhtex India Limited Civil Appeal No. 6300 of 2019
was barred to perform his functions and that the mandate to act as an Arbitrator in the arbitration process between the parties had lapsed.

The High Court dismissed the petition filed at the request of the appellants in an order dated March 14, 2008, holding that the appellants had waived their defence to enforce a strict adherence to the four-month time schedule; and that sustaining the objection would frustrate the object and purpose of the arbitral proceedings and would bring the entire machinery provided by the Act to a halt.

However, on appeal to the Supreme Court, the High Court decision was reversed. The court held that while the aim of the law was to ensure the timely resolution of conflicts founded on the fulcrum of promptness, nonetheless, the Arbitrator was obligated to adjudicate the disputes in light of the agreed-upon contract terms and procedures.

As a result, the arbitration process was to be governed and run according to the terms agreed upon by the parties. The court was quite clear that the need of a quick and effective arbitral proceeding could not be overstated, but at the same time, the procedures ought to be governed and run by the terms agreed upon by the parties in finalizing the arbitral proceedings.

This case constitutes a classic case where the principle of party autonomy dragged a case that ought to be completed in four months for more than ten years through legal craft. It also highlighted the importance of adherence to the timelines agreed by parties.


In taking a different tangent from other jurisdictions, India amended the Arbitration & Conciliation (Amendment) Act 2015\(^{19}\) by introducing section 29A

\(^{19}\) This act drastically amended the Arbitration & Conciliation Act 1996.
which set time limits on the completion of arbitration proceedings. The amendment directed that an arbitrator must make an award in matters other than international commercial arbitration within twelve months of the pleadings being completed. However, the parties had the liberty to extend the time limit for making an award for such a period not exceeding six months.

Section 29A (4) further provides that the mandate of the arbitrator(s) must lapse if the award is not issued within the twelve months period, or the extended period specified unless the Court has extended the period either prior to or after the expiration of the period so specified. The Court may grant the extension of period only on the application of one of the parties and only for good reason and on the terms and circumstances imposed by the Court.

In a bid to expedite the proceedings, the act further provides that it shall be open to the Court to substitute one or all of the arbitrators while extending the period, and if one or all of the arbitrators are substituted, the arbitral proceedings shall proceed from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed shall be deemed to have received the same. Additionally, If arbitrator(s) are appointed, the reconstituted arbitral tribunal will be considered to be a continuation of the previously appointed arbitral tribunal.

However, if the Court deems that the proceedings have been delayed for reasons attributable to the arbitration panel, it may award a reduction in the remuneration of the arbitrator(s) of not more than 5% for each month of delay while extending the period under this sub-section. Furthermore, the legislation provides that the Court shall deal with such an application as soon as reasonably

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20 Section 29A of the Act provided that awards in arbitral disputes other than international commercial arbitrations shall be made within twelve months after the date of the filing of pleadings by the parties.
21 Section 29A (1) of the Arbitration & Conciliation (Amendment) Act 2015
22 Section 29A (5) of the Arbitration & Conciliation (Amendment) Act 2015
23 Section 29A (6) of the Arbitration & Conciliation (Amendment) Act 2015
24 Section 29A (7) of the Arbitration & Conciliation (Amendment) Act 2015
practicable, and every effort will be made to resolve the issue within sixty days of the date of serving of notice on the opposing party.25

The amendment further provided that the award in an international commercial arbitration dispute may be made as soon as reasonably practicable, and that every endeavour may be made to resolve the dispute within twelve months after the date of completion of pleadings.26

4. Alternative Modes of Having Arbitration Proceedings Completed Timeously

It remains a key component of this paper to advocate for statutorily set timelines for the completion of arbitration proceedings. In the same vein, it is opportune that while legislation might take some time to come to fruition, parties and other relevant persons and bodies such as parties to the arbitral dispute, the Chartered Institute for Arbitrators and the courts might employ to expedite arbitration proceedings.

4.1. Implementation of Soft Sanctions to Parties, the Arbitral Tribunal and Parties’ Representatives

Admittedly, the cause for delay in arbitration proceedings is enabled by the players in the arbitration proceedings. During my vast tenure as an arbitrator, the delay is often caused by advocates of a party, a party’s representative or the arbitral tribunal.

In normal judicial proceedings, the court has powers to punish a party whose circumspection delays the judicial proceedings.27 The court might even proceed to dismiss a suit on the basis of non-attendance. In view of these practices by the courts, parties and advocates are always hesitant to adjourn their cases willy-
nilly. However, there is often no sanction upon the court if it does not proceed with the hearing on the scheduled date.

Unfortunately, not all arbitral tribunal have the power to issue this sanction. Noting that parties are the primary drivers of the process, the arbitral tribunal’s hands are often tied. In some cases, the adjournments may be beneficial to an arbitrator who seeks to secure more costs from the adjournments. To curb this menace, it is befitting for arbitrators to impose fiscal penalties upon a party that seeks to circumvent the arbitral process to cause delay. Further, arbitrators should also face appropriate financial sanctions if it fails to proceed with the case without good and satisfactory cause.

4.2. Implementation of a case tracking system by the Chartered Institute of Arbitrators

A case tracking system is a component of a case management process that aids the judicial system's case evaluation process\(^{28}\). Its purpose is to enable court administrators in keeping case processing on schedule by identifying delays in individual cases and highlighting large system bottlenecks.\(^{29}\) It isn't intended to provide details on the quality of a case's adjudication outcome. Further, a case tracking system ensures initial case management and continues to document every activity and decision related to the case, culminating in a thorough case record.

This process can easily be implemented by the Charted Institute of Arbitrators. As along as the arbitration pillar of confidentiality is adhered to, the process is protected. Through this system, the Institute can track how arbitrators timeously complete their matter and ease the work of assigning cases to arbitrators. Unfortunately, this efficacy of this proposal is that the appointing authority becomes functus officio after it is done with the task of appointing an arbitrator. But this still does not curb the appointing authority from assessing

\(^{28}\) https://pdf.usaid.gov/pdf_docs/Pnadj628.pdf  
the efficacy of an arbitral tribunal on the length they take to complete the arbitral proceedings before allocating any more matters them.

4.3. Statutory Timelines for Filing of Pleadings
As discussed earlier in this paper, the judicial system imposes strict timelines for parties to file their relevant pleadings. For instance, a defendant in a suit is granted fourteen days to file its defence to a claim after entering appearance. These timelines are evident throughout the fibre of the practice of civil and commercial claims. Failure to adhere such a rule may lead to severe consequences such as dismissal of a case or striking out of pleadings.

Time is now ripe for the law to set up timelines for filing of pleadings in arbitration proceedings. Parties should bear the consequences of not filing their pleadings within the statutorily set timelines. In the alternative, the arbitral tribunal ought to be clothed with the necessary powers to ensure sanctions are imposed for non-compliance with the statutorily set timelines.

4.4. Setting timeliness in the arbitration agreement.
Parties indeed can agree that the arbitration shall be conducted in accordance with a procedural timetable set out in the arbitration agreement or by the arbitral tribunal. The notable advantage of having the matter settled in this way is that the fundamental principle of party autonomy is automatically respected.

5. Conclusion
As clearly stated in the heading of this paper, its main purpose is to advocate for the enactment of provisions setting timeframes for the completion of arbitration proceedings. Our reliance on the current Arbitration Act to guide the conduct of arbitration proceedings ought to change fundamentally.

Just like the path trodden by the Republic of India, the law ought to be amended to include set statutory timelines for the completion of arbitration proceedings. The author suggests that the time period of twelve months for completion of arbitration proceedings is appropriate with the option for extension by the
parties or the Arbitral Tribunal. Arbitrators and parties should also face appropriate sanction if they exceed the timeframe of twelve months.

Finally, the Chartered Institute of Arbitrators ought to take charge of the process or arbitration and implement a simple, secure and effective case tracing system.
Bibliography


Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies

By: Kariuki Muigua

1.0 Introduction
With the promulgation of the Constitution in 2010, the dream of realizing access to justice has become more evident than ever before. Access to justice has been enshrined as a fundamental right under the Constitution. The constitution creates various avenues for enhancing access to justice in Kenya through courts and Alternative Dispute Resolution strategies.

In this paper the author discusses access to justice and how the same can be enhanced through alternative dispute resolution mechanisms and public participation. The obligation of the different arms of government in enhancing access to justice through public participation will be examined and the key issues the government has to consider in giving effect to the principle of public participation. The author will also outline opportunities for enhancing access to justice through public participation in the judiciary and ADR and the areas in need of reform in that regard.

2.0 Access to Justice and Public Participation
Access to justice in Kenya has been hampered by many factors. Some of these factors are high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court’s role is also ‘dependent on the

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2 Ibid, chapter ten.
limitations of civil procedure, and on the litigious courses taken by the parties themselves.

There is also limited uptake of ADR mechanisms with many Kenyans still preferring to settle their dispute through the court process. The judiciary has witnessed an increase in cases filed in courts each year with most of these cases taking years to be decided. These reasons make access to justice in Kenya difficult for many people.

However, with the Constitution of Kenya 2010 access to justice is now a right enshrined therein. Under the constitution, the State is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The content and scope of this right has been said to be far reaching, infinite and encompasses inter alia, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access to all of judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; easy availability of information pertinent to one's rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims and timely enforcement of judicial decisions.

Access to justice has further been enhanced by the recognition of public interest litigation in environmental matters which overcomes the limitations of demonstrating locus standi. This is aimed at removing hurdles facing realizing

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6 Article 48 of the Constitution of Kenya 2010, Government Printer, Nairobi
access to justice in environmental matters under the doctrine of *locus standi* which requires a person to demonstrate a personal interest in a matter before bringing a suit in court. Article 70 (3) of the Constitution provides that an applicant who alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened does not have to demonstrate that any person has incurred loss or suffered injury in an application to court. Moreover, Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. These principles are that justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of the Constitution shall be protected and promoted.  

It can thus be seen that so as to realize access to justice public participation is essential. Public participation has been enshrined as a national value and principle of governance in Kenya. The Constitution obligates all state organs, state officers, public officers and all other persons to apply, among others, the national principle of public participation, when developing policy or enacting a law or in the interpretation of laws and the constitution.

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In that role therefore, public participation is essential in enhancing access to justice. Mechanisms that involve the public in decision-making processes have to be used in that regard. ADR mechanisms have the potential of increasing public participation in management of disputes. These

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8 Article 159 (2) (c) of the Constitution of Kenya 2010, op.cit.
9 Constitution of Kenya, 2010, Article 10 (2) (a)
10 Ibid
mechanisms are participatory in nature and give parties considerable control and involvement in the dispute management process.

Further, article 35 of the Constitution grants every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicise any important information affecting the nation. It is arguable that the right to access information will be essential in the promotion of public participation in decision-making. This right grants the public the right to access all the information they may need so as to institute a suit and in a way is geared towards enhancing access to justice.

3.0 ADR and Access to Justice

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term ‘alternative dispute resolution’ is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true. Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement,

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12 Constitution of Kenya, 2010, Article 35
13 Ibid
resort to regional agencies or arrangements, or other peaceful means of their own choice.\textsuperscript{16}

Some conflict management mechanisms are resolution mechanisms while others are settlement mechanisms\textsuperscript{17}. Litigation and arbitration are coercive and thus lead to settlements\textsuperscript{18}. They are formal and inflexible. Whereas mediation, negotiation and the traditional dispute resolution mechanisms are resolution mechanisms which mean they are informal, voluntary, allow party autonomy, expeditious and their outcomes are mutually satisfying\textsuperscript{19}.

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.\textsuperscript{20} The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute management in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR and enhancing access to justice. It is also a clear manifestation of the acceptance of ADR as a means of conflict management in all disputes.

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy and are flexible, informal and leave room for parties to find their own lasting solutions to their problems.\textsuperscript{21} For

\textsuperscript{16} United Nations, \textit{Charter of the United Nations}, 24 October 1945, 1 UNTS XVI.
\textsuperscript{17} Muigua.K., ‘Alternative Dispute Resolution and Access to Justice in Kenya’ Op Cit
\textsuperscript{18} Ibid, pg 17
\textsuperscript{19} Ibid
\textsuperscript{20} Constitution of Kenya 2010, op.cit
\textsuperscript{21} P. Fenn, “Introduction to Civil and Commercial Mediation”, op. cit, p.10.
example in environmental conflicts, mediation encourages public participation and “environmental democracy” in the management of environmental resources\(^{22}\). Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.\(^{23}\) Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management. Public participation is a tenet of sound environmental governance and is envisaged in the constitution. Mediation in the informal context leads to a resolution (court-annexed mediation as envisaged under Section 159A-159D of Cap.21 is a settlement process) and in environmental management it involves parties’ participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues.

As such inclusion of ADR mechanisms as some of the mechanisms to be employed by courts in the exercise of the judicial authority is thus a recognition of the role of public participation towards realizing access to justice in Kenya. This is because ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes. Alternative dispute resolution, and particularly mediation, is a reflection of customary jurisprudence and under customary law conflict resolution was people driven and a consensual process involving a party, usually an elder, who acted as a mediator. In this way ADR mechanisms have a lot to do with the public participating at the making of decisions affecting them. This is unlike in the formal court process.


\(^{23}\) Ibid.
ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management\textsuperscript{24}. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation\textsuperscript{25}.

Traditional dispute resolution mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result to mutually satisfying outcomes\textsuperscript{26}. They are thus most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts\textsuperscript{27}. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases. Traditional dispute resolution mechanisms include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others\textsuperscript{28}. The council of elders is a common institution in almost all communities in Kenya. Some refer to it as the institution of Wazee. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans’ lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment\textsuperscript{29}. In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community disputes such as those involving use and access to natural resources among the pastoral communities in Kenya.

\textsuperscript{24} Muigua K., ‘Alternative Dispute Resolution and Access to Justice in Kenya’ Op Cit
\textsuperscript{25} Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.
\textsuperscript{27} Ibid
\textsuperscript{28} Ibid
4.0 Challenges and Opportunities for enhancing Access to Justice through Public Participation and ADR

Before the promulgation of the Constitution of Kenya 2010 which has enhanced the recognition and uptake of ADR mechanisms one of the main barriers that hindered the right of access justice in Kenya was the lack of awareness and recognition of ADR and traditional dispute resolution mechanisms.30 Traditional dispute resolution mechanisms are now recognized by the Constitution. This provides a platform for management of disputes through these mechanisms which encourage public participation rather than taking them to court. So as to realize access to justice these mechanisms must be effectively embedded within the justice system. A legal and policy legal structure should be developed to effectively link these mechanisms with the formal court systems. Currently, there is progress towards achieving this goal through the Alternative Dispute Resolution Bill31 However, caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration.

The legal environment has swallowed arbitral practice in Kenya. It has become more like a court process in which lawyers use court technicalities to derail the process32. The same is true of the practice of mediation in Kenya which been linked to the court process through court annexed mediation33. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice. Judges, magistrates, lawyers and even the public need to be made aware that ADR mechanisms are effective and that their application will enhance access to justice. They will need training on ADR mechanisms and operationalisation of the same. As such the decisions,

30 Ibid
negotiated settlements and awards made by ADR practitioners should be given a similar publicity to that given to court judgments by the National Council for Law Reporting to promote public confidence in these mechanisms.

A framework should also be formulated providing that before parties file a case in court, they should first exhaust ADR and other traditional dispute resolution mechanisms in appropriate disputes. This way there will be enhanced access to justice since parties will explore the avenue of ADR as a tool of access to justice in addition to courts. This will facilitate reduction of backlog of court cases thus enhancing access to justice. For instance, a boundary dispute should first be looked into at the local level by the elders or recognized council of elders through negotiations and informal mediations before they are brought to court. Mediations conducted in such a forum are distinguishable from court-annexed mediation as envisaged under section 59A-59D of the Civil Procedure Act. Whereas court-annexed mediation is a legal process leading to a settlement, informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships34.

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a criterion for the selection and accreditation of traditional dispute resolution practitioners, their areas of jurisdiction and the types of disputes that they are to handle and community dispute resolution committees. Such dispute resolution committees should take cognizance of the devolved units.

Laws and regulations on the effective implementation of ADR and traditional dispute resolution mechanisms should be developed, designed and entrenched well to ensure public participation and enhance access to justice. They should be well linked with the courts to avoid conflicts. As such mapping ADR

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mechanisms and all traditional dispute resolution mechanisms should be done to be able to determine the most applicable ones in the circumstances.

Funding from the government and the development partners should be directed towards operationalisation of Article 159 of the constitution and implementation of ADR and traditional dispute resolution mechanisms due to their suitability to enhance access to justice and involve the public in decision-making processes. In this regard guidelines should be developed on the best way forward on working ADR to ensure adequate training of arbitrators and mediators. This could also include accreditation of ADR practitioners to ensure quality control, disciplinary mechanisms and the necessary accreditation of institutions thereof. Funding should also be directed towards creating public awareness on the ADR mechanisms and the opportunities they offer in enhancing access to justice and public participation. This should be in addition to funding directed towards the setting up of courts in rural areas to address the geographical limitations that hinder access to justice.

The laws contemplated by Article 189 (4) should be well designed and entrenched in the national and county systems to facilitate the expeditious resolution of disputes therein with maximum participation of the public at both levels of government.

5.0 Conclusion
ADR and Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict continuum has been recognized in the Constitution. They are mechanisms that enhance access to justice. Some like mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will be a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise ADR mechanisms is needed. It should be realized that most of the disputes reaching
the courts can be resolved without resort to court if members of the public are involved in decision-making and resolution of their own disputes using ADR and traditional conflict resolution mechanisms. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.
References


Formalization of Mediation through Legislation in Kenya

By: Peter Mwangi Muriithi*

Abstract

Mediation is one of the Alternative Dispute Resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence. It existed even before the other Alternative Dispute Resolution mechanisms were invented.¹ This longevity of mediation as a mode of dispute resolution is a manifestation of the vital role it plays in the resolution of disputes.

Mediation, however, as a mode of dispute resolution mechanism has for a long time operated outside the bounds of what can be termed as “formal law i.e written law”. However, there has been a concerted effort to formalize mediation through legislation with the most recent effort being the Mediation Bill 2020.²

This paper seeks to critique the ways through which mediation has been formalized and the criticism levelled against the formalization of mediation in Kenya. In doing so, this discourse shall; offer a brief introduction, critique the ways through which mediation has been formalized, and lastly, give a conclusion.

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²<http://www.parliament.go.ke/sites/default/files/2020-06/Mediation%20Bill%2C%202020.pdf> accessed on 07/02/22
1.0 Introduction

In Kenya, there is a realization of the need to incorporate Alternative Dispute Resolution mechanisms in dispute resolution to ease the pressure on the judiciary as the forum for dispute resolution. Chief Justice emeritus Dr. Willy Mutunga held this opinion.

This view held by Chief Justice emeritus Dr. Willy Mutunga demonstrates the vital role played by Alternative Dispute Resolution mechanisms in dispute resolution. There is no universally accepted definition of Alternative Dispute Resolution mechanisms. However, Alternative Dispute Resolution mechanisms may refer to all those decision-making processes other than litigation including but not limited to, enquiry, mediation, conciliation, expert determination, arbitration, and others.

In other words, Alternative Dispute Resolution mechanisms refer to the set of mechanisms that are utilized to manage disputes without resorting to the often costly adversarial litigation. It is noteworthy, however, that to some writers the term “Alternative Dispute Resolution” is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.

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3Alternative dispute resolution mechanism is considered to be a procedure for settling disputes encompassing all legally permitted processes of dispute resolution other than litigation (Bryan A. Garner, Black’s Law Dictionary 9th Edition page 91)
4Abigael Sum, Judiciary to foster alternative mechanisms to clear backlog says CJ Willy Mutunga (26th September 2014)
6Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 19
This is because Alternative Dispute Resolution mechanisms not only complement litigation in dispute resolution, but they also offer on their own, tested and accepted forum for dispute resolution that has existed since antiquity.\(^8\)

Indeed, the author as an Alternative Dispute Resolution mechanisms practitioner is of the considered view that the term “appropriate dispute resolution” is best suited to describe these mechanisms of dispute resolution, rather than the term “Alternative Dispute Resolution.” This view by the author is justified by the following rhetorical question; Assuming courts are completely effective, does it mean we should have no “Alternative Dispute Resolution” mechanisms involved in the resolution of disputes?

This paper solely focuses on mediation as a mode of dispute resolution that squarely falls under this umbrella term “Alternative Dispute Resolution Mechanisms (herein ADR)”.\(^9\)

Notably, mediation is one of the Alternative Dispute Resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence. It existed even before the other Alternative Dispute Resolution mechanisms were invented.\(^10\)

Succinctly, mediation is defined as a voluntary, informal, consensual, strictly confidential, and non-binding conflict management process, in which a neutral third party helps the parties to reach a negotiated solution.\(^11\)

A statutory definition of mediation is offered by the Civil Procedure Act Cap 21 under Section 2 which verbatim states that:

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\(^8\)Mkangi, K., Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at <www.payson.tulane.edu> accessed on 07/02/22


\(^10\)Kariuki Muigua, Resolving Conflicts Through Mediation in Kenya, (2nd Edition 2017), page 1

“mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.”

Mediation has also been defined as a continuation of the negotiation process by other means where instead of having a two-way negotiation, it now becomes a three-way process, the mediator, in essence, mediating the negotiations between the parties.

Perhaps the best definition of mediation is offered by Bercovitch, who defines mediation as;

“A method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information and thus aiding in the processes of reaching an agreement.”

Lastly, Greenhouse delimiting what mediation is opined verbatim:

“Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputant…”

The third party in a mediation process is a mediator who assists the parties in negotiations but cannot dictate the outcomes of the negotiation. A mediator has

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12Section 2, Civil Procedure Act Cap 21.
13M. Mwagiru, Conflict in Africa: Theory, Processes and Institutions of Management (Centre for Conflict Research, Nairobi, 2006) page 115-116
been described as a third party who is independent, impartial, and has no stake in the outcome of the process, helps parties in dispute to clarify issues, explore solutions and negotiate their agreement and does not advise those in dispute, but helps people to communicate with one another.\(^\text{17}\)  

*Section 2 of Civil Procedure Act Cap 21*, defines a mediator as an impartial third party selected to carry out a mediation.  

From the foregoing, it is clear that certain elements must be present in a mediation situation these include: the parties in conflict, a mediator/third party, the process of mediation and the context of mediation. Succinctly, mediation is associated with the following attributes; flexibility, cost-effectiveness, party autonomy, informality, focus on interests and not rights, voluntariness, fostering relationships, allowing creative solutions and allowing personal empowerment.\(^\text{18}\) The attributes of mediation delimit the advantages and disadvantages associated with mediation. Mediation is considered to have the following advantages; it is cheaper, maintains relationships, it is faster, hospitable, offers unique solutions, educates the parties about each other’s needs and those of the community and is voluntary.\(^\text{19}\)  

These advantages of mediation, are the basis of preference of mediation over litigation. Critics of mediation, however, point at various disadvantages associated with mediation. These disadvantages include; it is considered to be non-binding, time-consuming, can have power imbalance, and can lead to endless proceedings/indefinite hence does not encourage expediency.\(^\text{20}\) This

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\(^{18}\) Kariuki Muigua, Resolving Conflicts Through Mediation in Kenya, (2nd Edition 2017), page 37-51 (Chapter 3)  
\(^{19}\) Ibid No. 18-page No.6 to 7  
\(^{20}\) Kariuki Muigua, Resolving Conflicts Through Mediation in Kenya, (2nd Edition 2017), page 7-8

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paper seeks to critique to what extent mediation has been formalized in Kenya and the criticism levelled against such formalization.

2.0 Critiquing the formalization of mediation in Kenya
The longevity and informality of mediation as a mode of dispute resolution as earlier pointed out means that mediation was rarely codified in statutes, policies, and treaties. However, over time there has been a concerted effort to formalize mediation through legislation in Kenya. Indeed the most recent effort is the Mediation Bill 2020\(^{21}\) which sought to give mediation a statutory basis in Kenya.

Consequently, to a great extent as a form of formalization mediation has been codified in the Constitution of Kenya 2010\(^{22}\), statutes, treaties that Kenya has ratified, rules, guidelines. and manual. Under the Constitution of Kenya 2010, the basis of Alternative Dispute Resolution mechanisms like mediation is Article 159 2(c).\(^{23}\) These alternative dispute resolution mechanisms are portrayed as one of the principles that will guide the court and tribunals in their exercise of judicial authority.\(^{24}\) In this regard, Article 159 2(c) of the Constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted. Article 159 2(c) of the Constitution, hence captures the constitutional basis upon which courts and tribunals ought to promote mediation as a mode of dispute resolution.\(^{25}\)

\(^{21}\)\(<http://www.parliament.go.ke/sites/default/files/2020-06/Mediation%20Bill%2C%202020.pdf>\) accessed on 07/02/22

\(^{22}\)The Constitution of Kenya as the grund norm is the supreme law of the land; Article 2(1) of the Constitution of Kenya 2010 provides: This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

\(^{23}\)Kariuki Muigua, "Alternative Dispute resolution and Article 159 of the Constitution

\(^{24}\)Article 159 2(c) of the Constitution verbatim provides: In exercising judicial authority, the courts and tribunals shall be guided by the following principles; Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

\(^{25}\)Kariuki Muigua, Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution, page 1
Further, cementing the place of mediation, the Constitution under Article 189 (4) mediation is one of the modes of dispute resolution that can be used to settle intergovernmental disputes. In this regard, it states that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, *mediation* and arbitration.

Indeed, under Article 113 of the Constitution mediation is the preferred mode of dispute resolution where a disagreement arises between the two Houses of Parliament (National Assembly and Senate).  

Article 113 of the Constitution establishes a *mediation committee* tasked with the role of mediation where a disagreement arises between the two Houses of Parliament.

This is buttressed by Article 112 of the Constitution which provides for referral of ordinary bills to a mediation committee in case of disagreement between the two Houses of Parliament regarding ordinary bills as established under Article 113 of the Constitution.

Similarly, Article 217(6)(b) of the Constitution provides for use of mediation by a joint committee as established under Article 113 of the Constitution in case of disagreement by the two Houses of Parliament regarding the division of revenue.

Lastly, Article 252 of the Constitution empowers independent commissions to adopt mediation as a mode of dispute resolution. In this regard, it provides that each independent commission established under the Constitution, and each holder of an independent office has the powers necessary for conciliation, mediation and negotiation.

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26Establishing the two houses of Parliament, Article 93(1) of the Constitution of Kenya 2010 provides verbatim: There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate
Other than the Constitution various statutes codify mediation and seek to promote the use of mediation in dispute resolution in Kenya. The most apparent statute codifying mediation in Kenya is the Civil Procedure Act.  

As earlier noted Section 2 of the Civil Procedure Act Cap 21 offer a statutory definition of both the term ‘mediation’ and the term ‘mediator’. Section 59(C) (1) of the Civil Procedure Act Cap 21 provides for use of ADR to solve disputes where courts find it suitable and refer such a dispute to ADR. This includes mediation. To promote mediation Section 59(A)(1) of the Civil Procedure Act Cap 21 establishes the Mediation Accreditation Committee appointed by the Chief Justice. The membership of the committee is from various professional bodies which include: Law Society of Kenya, the Chartered Institute of Arbitrators (Kenya Branch), Kenya Private Sector Alliance, the International Commission of Jurists (Kenya Chapter), the Institute of Certified Public Accountants of Kenya, the Institute of Certified Public Secretaries, the Kenya Bankers’ Association, the Federation of Kenya Employers, and the Central Organisation of Trade Unions.

Under Section 59(A)(3) of the Civil Procedure Act Cap 21, the Chief Justice is tasked to designate a suitable person to be the Mediation Registrar. The Mediation Registrar is then responsible for the administration of the affairs of the Mediation Accreditation Committee.

Section 59(A)(4) of the Civil Procedure Act Cap 21 outlines the functions of the Mediation Accreditation Committee which include; determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.

Section 59(B) of the Civil Procedure Act Cap 21, introduces what has now been termed as court-annexed mediation. Section 59 (B)(1) Civil Procedure Act Cap 21,  

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27 Cap 21 of the Laws of Kenya
28 Section 59(A)(2) of the Civil Procedure Act Cap 21
29 Mediation Accreditation Committee established under Section 59(A)(1) of the Civil Procedure Act Cap 21
30 Kariuki Muigua, Court Sanctioned Mediation in Kenya-An Appraisal page 9
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Peter Mwangi Muriithi

verbatim provides that: “the court may; (a) on the request of the parties concerned; (b) where it deems it appropriate to do so, or (c) where the law so requires, direct that any dispute presented before it is referred to mediation.”

The court-annexed/mandated mediation is conducted in accordance with the mediation rules. Consequently, the Mediation (Pilot Project) Rules, 2015 were enacted to support the court-annexed mediation process. The Mediation (Pilot

(Court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court encourages them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification.)

The mediation process within Court Annexed Mediation:

Screening of Files: In this stage, the file is presented before the Mediation Deputy Registrar (MDR) who determines which cases are to be referred for Mediation. The matters referred to mediation are those with disputes relating to facts and not of law, few disputed facts and those that are not complex in nature.

Parties Notified of the Decision: When the Mediation Deputy Registrar (MDR) makes a decision for a case to be referred to mediation, the MDR notifies the parties of this decision within seven (7) days.

Case Summaries: The parties are, within 7 days of receipt of notification to file Case Summaries.

Nomination of Accredited Mediators: The MDR will then nominate three (3) mediators from the Mediation Accreditation Committee Register and notify the parties of the names.

Parties Respond: Parties respond by stating their preferred mediators in writing. The MDR will appoint a mediator to handle the case. Parties are notified about mediation.

Notification of Appointed Mediators: The MDR shall within 7 days of receipt of notice of preference of mediators appoint a mediator and notify the parties.

Appointed Mediator responds: Upon receipt of the notification, the mediators are expected to file their response.

Mediation Begins: The appointed mediator will schedule a date for initial mediation and notify the parties of the date, time and place. The mediation proceedings will be concluded within sixty (60) days from the date it is referred for mediation. However, this period may be extended for a further ten (10) days.

Filing of report: Upon completion of mediation, the mediator is expected to file a report which indicates whether or not a Mediation Settlement agreement was reached. The mediator files a certificate of non- compliance where a party fails to comply with any of the mediator’s directions or constantly fails to attend mediation sessions.

Section 59(B)(3) of the Civil Procedure Act Cap 21

Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, (Consist of 19 Rules and standard forms to be used in the court-annexed mediation process)
Project) Rules, 2015 lay out the procedures and timelines for guiding the process under the court-annexed mediation.³³

Any agreement between the parties to a dispute as a result of a process of court-annexed mediation is recorded in writing and registered with the Court and is enforceable as if it were a judgment of the Court.³⁴ To promote the finality of an agreement and/or settlement entered into through court-annexed mediation, an appeal is not allowed on such an agreement recorded in court as a court judgment.³⁵

Lastly, supporting the court-annexed mediation the judiciary of Kenya published the Judiciary Mediation Manual, which is a guide for Judges, Magistrates, Registrars, Deputy Registrars, Registry Staff, Mediation Parties, Advocates and Mediators on the processing of matters referred to Court Annexed Mediation.³⁶

The Judiciary Mediation Manual provides important sections outlining screening and referral of matters; the standards and expectations of a mediator; roles of the parties and advocates in mediation; issues pertaining to non-compliance by parties; mediation settlement agreement; enforcement of the agreement and other essential areas that will enhance the efficiency in the delivery of services.³⁷

Other than the Civil Procedure Act Cap 21, other statutes also codify and provide for use of mediation as discussed herein below.

The Commission on Administrative Justice Act, 2011 under section 29(2) provides that the commission should endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

³³<http://kenyalaw.org/kenya_gazette/gazette/volume/MTUxOQ--/Vol.CXIX-No.70/> accessed on 07/02/22, See also; Kariuki Muigua, Making Mediation Work for all: Understanding the Mediation Process, page 8
³⁴Section 59(B)(4) of the Civil Procedure Act Cap 21
³⁵Section 59(C)(4) of the Civil Procedure Act Cap 21
³⁶Judiciary Mediation Manual, page iii<https://www.judiciary.go.ke/download/the-judiciary-mediation-manual/> accessed on 07/02/22,
³⁷Ibid No.36
Similarly, the Environment and Land Court Act, No. 19 of 2011 under Section 20 encourages the Environment Land Court to adopt and implement alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

The Employment and Labour Relations Court Act No. 20 of 2011 under Section 15 encourages the Employment and Labour Relations Court to adopt and implement alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

The Marriage Act, No. 4 of 2014, under part X, recognizes mediation as a process for resolving matrimonial disputes.\textsuperscript{38} The National Cohesion and Integration Act, No. 12 of 2008 tasks the National Cohesion and Integration Commission as established under Section 15, to promote mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.\textsuperscript{39}

The Nairobi Centre for International Arbitration Act No. 26 of 2013, establishes a centre that handles mostly commercial domestic and international arbitration and mediations. The Nairobi Centre for International Arbitration (herein centre) is tasked with developing rules on mediation processes and providing training and accreditation for mediators.\textsuperscript{40} It is on this basis that the centre developed the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 which were effective from 18\textsuperscript{th} December 2015.\textsuperscript{41}

Other than statutes analysed above codifying mediation, the Ministry of Interior and Coordination of National Government developed the Guidelines for

\textsuperscript{38} Section 64 and 68 of the Marriage Act, No. 4 of 2014 provide for mediation of disputes in Christian marriages and mediation of disputes in customary marriages respectively.

\textsuperscript{39} Section 25(2) (g) of the National Cohesion and Integration Act, No. 12 of 2008

\textsuperscript{40} Section 5(d) & (m) of The Nairobi Centre for International Arbitration Act No. 26 of 2013,

\textsuperscript{41} https://ncia.or.ke/wp-content/uploads/2021/02/mediation_rules_2016.pdf accessed on 09/02/22
Mediators and Mediation which to a great extent codify mediation.\textsuperscript{42} The Guidelines for Mediators and Mediation was developed to perform the following four major functions\textsuperscript{43};

i. Provide a framework for mediation.

ii. To push for greater inclusivity in mediation, to actualize UN Security Council Resolution 1325, 2250 & 2280 and any other subsequent resolutions, that promote inclusion of women, youth and other special interest groups in peace processes.

iii. To increase collaboration, coherence, capacity and coordination amongst mediators.

iv. To promote public confidence and trust in mediation as a method for resolving disputes. These guidelines have been developed through a consultative and participatory process, involving a wide range of stakeholders across the country.

Recently, there has been a deliberate attempt to statutorily codify mediation through the Mediation Bill 2020\textsuperscript{44}. Succinctly, Mediation Bill 2020 seeks to provide for the establishment of the Mediation Committee; to provide for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes.\textsuperscript{45}

Indeed, the Mediation Bill 2020 provides for; the establishment of a mediation committee(Part II), accreditation and registration of mediators(Part III), Mediation Process(Part IV), recourse to the High Court and recognition and enforcement of a settlement agreement (Part V) and provisions on delegated powers (Part VI).\textsuperscript{46}

\textsuperscript{42}Guidelines for Mediators and Mediation by Ministry of Interior and Coordination of National Government

\textsuperscript{43}Ibid No. 42, page 4

\textsuperscript{44}<http://www.parliament.go.ke/sites/default/files/2020-06/Mediation%20Bill%2C%202020.pdf> accessed on 09/02/22

\textsuperscript{45}Preamble of the Mediation Bill 2020

\textsuperscript{46}<http://www.parliament.go.ke/sites/default/files/2020-06/Mediation%20Bill%2C%202020.pdf> accessed on 09/02/22,
Locally, it is informative to state that various institutes exist in Kenya that promote mediation and have codified mediation through various rules for example; The Chartered Institute of Arbitrators (CIARB) which developed the CIARB Mediation Rules, January 2018 and as earlier pointed out the Nairobi Centre for International Arbitration which developed the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.

Other than the Constitution, statutes, rules, guidelines, and manuals mediation has also been codified in International and Regional Instruments and Resolutions, which Kenya has ratified and adopted. By dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of Kenyan law. Article 2(5) of the Constitution of Kenya incorporates general rules of international law into our municipal law.

Article 2(6) of the Constitution of Kenya transforms rules of treaty/conventions into our municipal Law. The United Nations Charter is one Convention that Kenya has ratified. The Charter applies to all member states hence Kenya being a member state the same binds Kenya.

Article 33 of the UN Charter outlines the various conflict management mechanisms that parties to any dispute may resort to. One such mechanism notably is mediation.

Article 33 of the UN Charter, provides that the parties to any dispute shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or peaceful means of their own choice. Other International and Regional Instruments and

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47<https://www.ciarb.org/media/3291/mediation-rules.pdf> accessed on 09/02/22,
49Article 2(5) states: The general rules of international law shall form part of the law of Kenya.
50Article 2(6) states: Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
51United Nations Charter, 24th October 1945, 1 UNTS XVI
Resolutions ratified by Kenya that codify mediation as a mode of dispute resolution include:

i. UN Resolution 37/10, the Manila Declaration on the Peaceful Settlement of Disputes, 1982.

ii. UN Resolution 65/283 of 2011 on Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution.

iii. The UN Resolutions 1325, 1820 and 1888 on Women, Peace and Security.

iv. The UN Resolution 2250 on Youth, Peace and Security.


There is however the need to point out that Kenya has yet to ratify the Singapore Convention on Mediation. From the foregoing, it is crystal clear that there has been a deliberate attempt to formalize mediation through codification and/or legislation in the Constitution, statutes, rules, manuals, guidelines, and conventions.

There is however criticism, levelled against this formalization of mediation. At the heart of this criticism is the belief that formalization of mediation through

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52 Guidelines for Mediators and Mediation by Ministry of Interior and Coordination of National Government at page 5-6
53 <https://www.singaporeconvention.org/convention/about> accessed on 09/02/22

[The Singapore Convention on Mediation, formally the United Nations Convention on International Settlement Agreements Resulting from Mediation which was adopted on 20th December 2018 and opened for signature on 7th August 2019. The Singapore Convention on Mediation is a multilateral treaty which offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute.](2022)10(2) Alternative Dispute Resolution)
codification and/or legislation may lead to the disregard of the traditional and cultural mediation techniques of the people receiving the services.\(^5^4\)

Further, the critics are of the considered view that such formalization of mediation does not address the cultural diversity of the people. It is with this that critics have posed that the informal mediation techniques also need to be involved and retained such as was done in Rwanda with the Gacaca Courts.\(^5^5\) Indeed Kariuki Muigua points out that mediation can potentially be distorted by legalism as mediation yields better results in the informal perspective.\(^5^6\)

3.0 In Conclusion
Over time, mediation as a mode of dispute resolution has found its way into the Kenya legal framework through legislation. There is, however, the need to ensure that this formalization of mediation does not make mediation lose its informal attributes which made it an attractive mode of dispute resolution and preferred over litigation.

\(^5^5\)Ibid No.54
\(^5^6\)Kariuki Muigua, Making Mediation Work for all: Understanding the Mediation Process, page 3
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Levelling The Playing Field: Institutionalizing Mediation in The Sports Arena

By: Jacqueline Waihenya*

The world of sports has a multitude of players all brought together by the love of the game. The space is a matrix of domestic and international interests dominated by the Olympic movement and the various international and national institutions that organize and regulate the respective disciplines and events. To add onto this commercial interests in sport have also expanded exponentially in recent times creating a perfect breeding ground for disputes and pronounced need for dispute resolution. Traditionally dispute resolution in sports have favoured arbitration notwithstanding the benefits that Mediation which is an ADR mechanism and a tool that can enhance collaboration and fair play in sport. This paper therefore considers the possibilities of institutionalizing Mediation within the dispute resolution sphere in Kenya and around the world to augment the existing framework.

1. Introduction

The world of sports comprises sports men and women engaging in competition as individuals or teams in competitions and events. At the apex lies the Olympic Programme which constitutes sports, disciplines and events¹ where a sport is

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¹ International Olympic Committee, The Olympic programme comprises sports, disciplines and events – what is the difference between the three? (2021) Available at
that which is governed by an international federation, a discipline being a branch of a sport that comprises one or more events and an event being a competition in a sport or discipline that gives rise to a ranking. Thus to put this in perspective athletics is a sport; cross-country running, steeplechase, hurdles, sprints and long distance running are disciplines; whilst world athletics series, marathon and half marathon races are events. In truth though it is acknowledged that it is not a simple undertaking to define what is a sport and what is not and therefore the World Sports Encyclopedia catalogues at least 8000 indigenous sports and sporting games.

Anecdotal evidence further suggests that the world of sports is a multibillion industry consisting of the athletes, coaches, their faithful fans as well as a variety of sports intermediaries all engaged within the sports industry such as referees, sports agents, team owners, coaches and managers, investors, media & entertainment organizations, regulators, governments, international sports federations and institutions and many more. Sport has become a global social phenomenon and business activity of huge scale.

Given the intricacies created by the need to perform at the athlete’s highest capacity, the player-management realities coupled with the huge matrix of participants and the high stakes involved particularly in view of the increasing aspect of monetary compensation and outlays, that is to say, (1) player salaries;
(2) Event ticketing sales; and (3) media revenues, disputes are inevitable in the sports arena.5

2. Dispute Resolution in Sports:

2.1 Lex Sportiva:
Lex sportiva,6 as international sports law is sometimes referred to, tends to be complex, its legal principles are sui generis and authority is shared through a dynamic network of international, national, governmental and nongovernmental institutions often with an overlapping intricate web of mandates.7 These institutions include national sports organizations (NSOs) or national governing bodies (NGBs), international sports federations (IFs), the International Olympic Committee (IOC) and constituent National Olympic Committees (NOCs), the International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS) also known by its French name Tribunal Arbitral du Sport (TAS), national arbitral tribunals, national courts, and international/regional authority.8 In international sports the entities recognised by the International Olympic Committee are National Olympic Committees(NOCs) and International Sporting Federations(IFs).9

2.2 Sports Disputes Decision Making Hierarchy:
The first point of call for any dispute resolution comprises the NSOs, NGBs and their subsidiary organisations which are clubs, leagues, regional and provincial

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8 Ibid
9 Ibid
organizations. These institutions are empowered to create private tribunals and are self-governing through their internal rules, regulations, by-laws and constitutions which form a contract between the organization and its members qua themselves especially with respect to selection criteria. The key challenge that then arises is the factor of such NSO or NGB being the rule maker, prosecutor and judge which may be deemed to offend natural justice principles and rules against bias. This perception may be reduced by utilizing outside arbitrators and thus several Commonwealth countries have adopted sport specific independent arbitral boards for such purposes.

The next level comprises IFs which per Rule 30 of the Olympic Charter are empowered to establish eligibility criteria; to create and enforce rules relating to their respective sports. NSOs and NGBs form the membership of IFs and are accountable to their respective IFs. They are nevertheless subject to their national laws. Disputes between NSOs, NGBs and IFs are typically resolved through arbitration. Emerging normative trends suggest that IFs have authority to review NSO decisions relating to status or competition and over the course of the last couple of decades they have established their own inbred procedures for resolving disputes which are antagonistic to outsider decision makers including civil courts. Thus though the Constitutionality of the Sports Tribunal in respect of football disputes was upheld by the Honourable Mr. Justice E. C. Mwita in Dennis Kadito v Office of The Sports Disputes Tribunal & another the ultimate effect over the game in Kenya following various interventions by the said Tribunal and the Ministry for Sports Culture and Heritage has been the suspension of Kenya from the world of football.

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10 Graem Mew et al, Op cit
11 Ibid
12 Ibid
13 Ibid
14 Ibid
15 Ibid
16 2017 eKLR
Another layer in the hierarchy of sports is the NOCs and multi-sport organizations such as the National Commonwealth Games Association. Decision disputes between the IOC or NOC and an IF are generally referred to the CAS.\textsuperscript{18}

2.3 Dispute Resolution Mechanisms - Court of Arbitration for Sport:
The dispute resolution mechanism of the Olympics Movement is the earlier mentioned CAS\textsuperscript{19} which resolves disputes through arbitration and mediation in accordance with the statutes or regulations of the bodies or specific agreements in place in the case of a federation, association or other sports-related body.\textsuperscript{20} Almost all IFs have incorporated CAS Arbitration Clauses in their contracts as well as many NOCs.\textsuperscript{21} The Second Schedule of the Kenyan Sports Act for its part requires all sports organisations to provide for incorporation of CAS Policy and Rules.\textsuperscript{22}

The CAS has therefore emerged as the central mechanism for resolving all activities pertaining to sport and whose settlement is not otherwise provided for in the Olympic Charter\textsuperscript{23} including for example (1) the eligibility and suspension of athletes; (2) the adequacy of protections for individual athletes during drug testing; (3) breaches of contract between an athlete and a sports club; (4) the validity of contracts for the sale of sports equipment; (5) and the nationality of athletes for purposes of competition.\textsuperscript{24} CAS does not entertain claims on technical issues such as rules of specific games, scheduling of

\begin{footnotesize}
\begin{enumerate}
\item Ibid
\item CAS is established per Article 61 of the Olympic Charter. Available at https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf [Last accessed 3 April 2022]
\item Section 1 of the Code of Sports Related Arbitration (1 July 2020) Available at https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2021__EN_.pdf [Last accessed 3 April 2022]
\item Hunter Whaley & R. Martin Witt, Update: International Sports Law (April 2018). This article was first written by Amy Burchfield and is available at https://www.nyulawglobal.org/globalex/International_Sports_Law1.html [Last accessed on 3 April 2022]
\item Regulation (f) Second Schedule Sports Act
\item Ibid
\item Ibid
\end{enumerate}
\end{footnotesize}
competitions or equipment and athletic kits but it considers claims brought by individual athletes, national governing bodies and IFs. As a result since its establishment in 1984 CAS has generated a respectable body of international sports jurisprudence which continues to guide other institutions including national courts.

CAS comprises an Ordinary Division which operates as a Court of sole instance and an Appeal Division which hears appeals from IFs and other sports organizations. CAS is further empowered to issue advisory opinions. During active Olympics periods CAS forms special ad hoc divisions that may determine urgent cases.

Though arbitration remains the preferred means for resolving disputes the dispute resolution framework remains highly pluralistic with concurrent authority. As the institutions do not play according to the same rules and are in large part not harmonized then the net effect is one that often allows for conflicting approaches and decisions. Be that as it may however it is nevertheless self-evident that litigation is not considered to be the ideal mechanism for determining international sports disputes.

25 Ibid
26 Ibid
27 Ibid
29 Ibid
30 Ibid
31 Ibid
2.3.1 Court of Arbitration for Sport – Mediation:
Mediation for its part is generally limited to contractual disputes save where the parties specifically agree and the circumstances necessitate this and such disputes are governed by the *CAS Mediation Rules*.³³

Per the CAS Mediation Rules parties may refer disputes specified in a mediation agreement between them³⁴ to a non-binding and informal procedure before a CAS Mediator³⁵ in a process where party undertakes to attempt in good faith to negotiate with the other party with a view to settling a sports-related dispute in a process guided by the CAS Mediator. The disputes eligible for mediation are contractual disputes while disciplinary, doping disputes, match fixing and corruption are specifically excluded.³⁶ ICAS for its part maintains a list of CAS Mediators where mediators serve for a 4 years renewable period³⁷ and who form part of the pool from which the CAS President may appoint a mediator to manage the mediation proceedings.³⁸

The Mediator is in charge of the conduct of proceedings³⁹ and though they may not impose a solution for the dispute in any way⁴⁰ they have the mandate to (1) identify the issues in dispute; (2) facilitate discussion of the issues by the parties; and (3) propose solutions.⁴¹ The proceedings are confidential and no records, transcripts or minutes of the mediation sessions may be recorded via video or otherwise and the mediator cannot be compelled to testify about the proceedings in any future arbitral or litigation proceedings.⁴² The parties may terminate the mediation proceedings upon execution of a mediation settlement

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³⁴ Article 2 CAS Mediation Rules
³⁵ Article 1 CAS Mediation Rules
³⁶ Ibid
³⁷ Article 5 CAS Mediation Rules
³⁸ Article 6 CAS Mediation Rules
³⁹ Article 8 CAS Mediation Rules
⁴⁰ Article 9 CAS Mediation Rules
⁴¹ Ibid
⁴² Article 10 CAS Mediation Rules
agreement, where the mediator executes a written declaration that mediation is no longer possible, where the parties agree to terminate the proceedings or otherwise where the parties fail to pay the mediator’s costs which are provided for in the rules. The parties may proceed for Arbitration in the event the mediation does not bear fruit provided that their agreement makes provision for this.

3. A Snapshot History of Sports in Kenya

3.1 Indigenous Sport:
Kenya is a sporting nation and sports has been part and parcel of the Kenyan way of life since pre-colonial times. Indigenous sports were fundamental to transferring the African way of life through generations enabling children and youth acquire physical and mental skills critical to their formal functioning in the community. For instance in the Agikuyu community competitions were arranged for various age sets to test their ability to recall and relate their history predominantly in song and dance that had been handed over to them with their parents and general public judging their abilities.

Since antiquity sports, games and dance have (1) provided fun and exercise; (2) been used to mark important life events such as birth, initiation, marriage and death; (3) to celebrate harvests, commemorations and installation of leaders; and (4) marked an end to hostilities such as wars granting moral ethnic pride and social discipline. Traditional sports such as wrestling were also used to mediate

43 Articles 11(a) and 12 CAS Mediation Rules
44 Article 11(b) CAS Mediation Rules
45 Article 11(c) CAS Mediation Rules
46 Article 11(d) CAS Mediation Rules
47 Article 14 and Appendix 1 – Schedule of Mediation Costs
48 Article 13 CAS Mediation Rules
disputes.\textsuperscript{51} Therefore for instance per Wilfred Wanyonyi, former Kenyan National Wrestling Team Member, some Abaluhya and Luo district boundary disputes were settled when both communities provided their best 2 wrestlers for a winner take all match.\textsuperscript{52}

### 3.2 Colonial Period:

The colonial period then saw the introduction of British sport into the country initially through mission schools where games were taken as a tool for imparting moral training and inculcating the spirit of fair play and almost every Kenyan was introduced into formal sports through boarding schools.\textsuperscript{53} British colonialists further promoted sports such as Lawn Tennis, Polo, Golf, Rugby and Cricket exclusive to Europeans with football and athletics predominantly featuring amongst African communities. Popular sports soon sprouted sports associations e.g. the Cricket Association, Kenya Amateur Athletics Association, the Kenya Olympic Association and Kenya Football Federation some along racial lines though increasingly allowing multiracial association particularly towards the onset of agitation for Independence.\textsuperscript{54} Sports associations acquired prominence in the1950s initially as a tool for social and political control.\textsuperscript{55}

### 3.3 International Sport – Post Independence:

Organized sports then saw the participation of Kenyan sportspersons in the Vancouver Empire Games, 1954 with significant sports performances at the 1962 and 1966 Commonwealth Games. It was however not until the 1968 Kenyan stellar performance at the Mexico Olympic Games that the Country established itself at the pinnacle of long-distance running\textsuperscript{56} and the nascent Government took it upon itself to use the colonial sports institutions to undo colonial


\textsuperscript{52} Ibid

\textsuperscript{53} Ibid

\textsuperscript{54} Ibid

\textsuperscript{55} Ibid

mentality and social conditions and further to utilize international sport as an instrument of international politics and diplomacy.\(^{57}\)

### 3.4 Competency Based Curriculum Sport:

The Ministry of Education recently launched the *Physical Education and Sport Policy for Basic Education, 2021*\(^{58}\) seeks to incorporate physical education and sport in the Competency Based Curriculum (CBC) as a learning area and a means for providing a career pathway in sports.\(^{59}\) The Policy defines basic education to be education offered to a person in pre-primary, primary, and secondary and Teacher Training Colleges including Adult and Continuing Education.\(^{60}\) It encourages a multi-agency approach targeting public private partnerships and it seeks to be a stimuli for the achievement of Kenya’s social economic transformation agenda per the *Kenya Vision 2030*.\(^{61}\) The Policy is comprehensive and seeks to develop both amateur and professional athletes within the next decade. What is however striking is the absence of any recognised dispute resolution framework though this Policy does refer to *Sessional Paper No. 3 of 2005 on Sport and Development*\(^{62}\) and *Kenya National Sports Policy 2002*.\(^{63}\)

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57 Ibid Byron & Thompson  
59 Ibid  
60 Ibid  
62 Ministry of Gender, Sports, Culture and Social Services, *Sessional Paper No. 3 of 2005 on Sport and Development*. Available at [Last accessed on 9 April 2022]  
63 Ibid
4. Kenyan Legal Framework for Dispute Resolution in Sports:
The Kenyan Constitution outlines the promotion of sports and sports education to be a National Government function\(^{64}\) whilst County Governments hold sports and cultural activities and otherwise maintain public entertainment facilities and amenities.\(^{65}\)

The *Sports Act*\(^{66}\) was further enacted to harness sports for development, encourage and promote drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration and management of sports in the country.\(^{67}\) The Act accordingly establishes Sports Kenya,\(^{68}\) the National Sports Fund,\(^{69}\) the Kenya Academy of Sports,\(^{70}\) the Office of the Registrar of Sportspersons\(^{71}\) and the Sports Tribunal.\(^{72}\)

The two entities that are charged with dispute resolution pursuant to the Sports Act include the Office of the Registrar of Sportspersons (ORS) and the Sports Tribunal respectively. The ORS is responsible for the arbitration of registration disputes between sports organizations\(^{73}\) whilst the Sports Tribunal for its part is the specialized Court in Kenya empowered to determine (1) appeals from national sports organizations whose rules provide for this;\(^{74}\) (2) appeals from selection\(^{75}\) and disciplinary decisions;\(^{76}\) (3) other sports related disputes with the concurrence of all the parties and the Tribunal\(^{77}\); as well as (4) appeals from the Sports Registrar.\(^{78}\) The Tribunal is further entitled to apply Alternative Dispute
Resolution (ADR) methods to sports disputes and provide the necessary expertise and assistance in this regard flowing from the Constitutional mandate set out at Article 159(c) to apply ADR mechanisms in the exercise of judicial authority. Appeals from the Sports Tribunal should lie with CAS.

In keeping with international sports norms Kenya is a member of the Olympics Movement under its fundamental principle of “All games, All nations…” where the nation is not necessarily a state. This she does through the Kenya National Olympic Committee and the formal accession by the Country to Olympic ideals can be gleaned through its ratification of the Nairobi Treaty on the Protection of the Olympic Symbol on 26th September 1981.

5. Why Mediation?
Sports disputes are unique because (1) they tend to rest on highly technical facts and specialized knowledge rather than on law and they are not necessarily legal problems; (2) they comprise at least 3 parties such as the athlete, the team owners and the sports federation; (3) the agents also tend to have a significant

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79 Section 60 Sports Act
80 Article 159(2)(c) Constitution of Kenya, 2010
83 https://olympics.com/ioc/kenya
84 Kenya Law Reports
voice in the proceedings; (4) the fans are always a factor; and (5) they require speedy resolution\(^87\) especially where media attention is pronounced.

In truth there does not exist a wholly subscribed to definition of mediation and as such it is almost always as contextual as the conflict that is presented for resolution.\(^88\) At a bare minimum however the key factors to take into account include (1) the willingness of all relevant stakeholders to work together to resolve their conflict(s); (2) the presence and availability of a skilled third-party neutral competent to handle difficult discussions; and (3) an agreement on the procedural ground rules.\(^89\)

There is an emerging school of thought that a quiet revolution has occurred shifting the business arbitration era into the business mediation era\(^90\) around the world particularly within the commercial sector and especially since the advent of the United Nations Convention on International Settlement Agreements Resulting from Mediation\(^91\) popularly known as the Singapore Convention which has added legal certainty to the enforcement of mediation settlement agreements on the international plane.\(^92\)

The shift is attributable to the benefits that accrue from the nature of the mediation process and within the context of sports disputes for athletes and

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\(^87\) Grabowski Op cit


\(^89\) Ibid

\(^90\) Supra Ibid Mordehai Mironi


managers these include (1) the process is confidential, private, and less formal than both litigation and arbitration; (2) parties participate in the selection of a mediator; (3) parties have direct participation and control over the outcome; (4) Mediators may help parties explore alternatives they might not have considered; (5) Mediation can be scheduled at an early stage in the dispute; (6) a settlement can be reached much more quickly than in litigation; (7) Parties generally save money through reduced legal costs and less staff time; and (8) parties enhance the likelihood of continuing their business relationship. Further mediation has been found to be adaptable across the board in jurisdictions with highly stratified high school, collegiate and professional cadres of sportspersons.

6. Recommendations:
The Kenyan Sports Dispute arena is fairly well defined and the statutory provisions make adequate provision for dispute resolution through the office of the Registrar of Sportspersons as well as the Sports Disputes Tribunal. The Sports Act for its part further provides for the adoption of ADR within the dispute resolution process. However, there is a gap and it is a yawning gap because other than provide for an appeal to be referred to CAS the Act as well as its Regulations fall short of providing a robust framework for adoption of mediation and arbitration. Further, historically there is a tendency to prefer arbitration over mediation which also creates a gap between the current business realities and what is available through the available legislative framework.

93 Supra Ibid Mark Grabowski
Meanwhile the *Physical Education and Sport Policy for Basic Education, 2021* has taken steps to entrench physical education and sport in the new CBC approach seeking to provide a concrete career pathway in sports. The expected result is that the next generation will sport more sportsmen and sportswomen and there is therefore an urgency to streamline our approaches to how junior athletes are organized in high school and at college level as well as make provision for professional athletes.

Mediation provides win-win solutions arrived at through the parties own control over decisions and this is its fundamental advantage over arbitration and other adversarial dispute resolution techniques.

This is therefore a call for reform of the Kenyan *Sports Act* to incorporate and institutionalize mediation and ultimately for the NOCs, NGBs and their subsidiary organizations such as clubs, leagues and regional organizations to take further steps and embrace Sports Mediation as an emerging tool for dispute resolution.
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**Kenyan Cases**

Dennis Kadito v Office of the Sports Disputes Tribunal & another [2017] eKLR

**Books, Monographs & Articles**


Hunter Whaley & R. Martin Witt, Update: International Sports Law (April 2018). This article was first written by Amy Burchfield and is available at https://www.nyulawglobal.org/globalex/International_Sports_Law1.html [Last accessed on 3 April 2022]


**Websites**

https://olympics.com/ioc/kenya
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