



Alternative Dispute Resolution

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Editor's Note

Welcome to this issue of Alternative Dispute Resolution Journal of the Chartered Institute of Arbitrators (CIArb). The Journal has a worldwide readership and is available online.

The Articles carried in the Journal deal with Arbitration and other forms of Alternative Dispute Resolution including Traditional Dispute Resolution mechanisms. They reflect diverse themes such as ADR and Access to Justice; Fostering International Commercial Arbitration; ADR and the Rule of Law; the Role of Information Technology in promoting ADR; the Jurisprudential basis of Justice through ADR; a comparative analysis of the Legal and Institutional Frameworks for ADR among EAC Member States; and Insights for Streamlining ADR to strengthen EAC Integration.

It is hoped that the readers will get much needed information on ADR, its environment, the difficulties it faces, and its promise as a vehicle for achievement of Access to Justice, Peaceful Regional Integration, the Rule of Law and Development.

The Chartered Institute of Arbitrators wishes to thank the contributors, editorial team, reviewers and all those who have made the publication possible.

Enjoy the read.

Dr. Kariuki Muigua, Ph.D, FCIArb, (Chartered Arbitrator)
Chairman,
Chartered Institute of Arbitrators (Kenya)
Nairobi, March 2015

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua
**BROADENING ACCESS TO JUSTICE IN KENYA THROUGH
ADR; 30 YEARS ON**

by: **PROF. PAUL MUSILI WAMBUA***

ABSTRACT

Access to justice is a core tenet of democracy and a basic Human Right. Article 48 of the Constitution of Kenya enshrines the right of access to justice as a fundamental right and requires that the same shall not be limited by time or scarcity of resources. Article 159(2)(c), enumerates Alternative Dispute Resolution (commonly abbreviated as ADR) as one way of accessing justice by granting the courts power to promote ADR as an alternative to the adversarial and overly technical method that is litigation.

Arbitration and Mediation are the two most preferred means of ADR by which parties seek to resolve disputes of a commercial nature. With globalization of commerce and multiplicity of commercial disputes, ADR has become the preferred mode of settlement of disputes in most jurisdictions.

Despite the growing popularity of ADR in Kenya as an alternative to court litigation, there are still serious challenges that face the practice of ADR. A sound and effective legal framework for ADR in Kenya is key to facilitation of commerce and attainment of Vision 2030. This study examines the concept of justice, the constitutional and legal basis of ADR in Kenya, and demonstrates that despite the expanded scope of accessing justice introduced by the provisions on ADR in the Constitution of Kenya 2010 there are still various challenges that face ADR. At the end, the paper makes proposals for reform.

“You can use elders, churches or mosques to settle disputes. I have even been told that the people of Kitui, where I come from, are turning to witch doctors to solve some issues. Going to court is foolish because you will lose your money to lawyers.”¹

* Prof. Paul Musili Wambua, Associate Professor of Law, University of Nairobi School of Law and Member of the Chartered Institute of Arbitrators.

¹ Dr. W.M., Mutunga, Chief Justice of the Republic of Kenya and the President of the Supreme Court while opening new Gatundu Law Courts, Kiambu County on 25th March 2014. Statement available online at <http://www.nation.co.ke/counties/witchdoctors-Chief-Justice-Willy-Mutunga-/1107872/2258620/-/pratygz/-/index.html> (Accessed on 29th December 2014).

1. INTRODUCTION

ADR refers to the various approaches used in resolving disputes outside of the formal litigation in court. ADR typically includes, but is not limited to, early neutral evaluation, enquiry, negotiation, conciliation, expert determination, mediation, and arbitration.² The two major forms of ADR are Arbitration and Mediation.³ ADR has found favour with most litigants because of the inordinately long delays experienced in litigation and the unreasonable costs associated with such long processes. There are other advantages as well; parties are able to conduct the processes away from the public glare and are in control of the process by having the right to dictate the procedures to be used.⁴ Due to their consensual nature ADR processes are considered less adversarial in nature and thereby tending to reconcile the parties at the end of the process thus preserving their relationships. It is this attribute of ADR which has prompted some commentators to refer to it as "Appropriate Dispute Resolution."⁵

ADR has been adopted in many jurisdictions around the globe as the preferred means of settling disputes and is now recognized as one of the ways in which access to justice as a fundamental human right can be achieved. Various international conventions that promote the use of ADR have been adopted such as: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958);⁶ the UNICITRAL Model

² For a discussion on the definition see Legal Information Institute available at http://www.law.cornell.edu/wex/alternative_dispute_resolution (Last accessed on 29th July 2013). See also Fenn P, "Introduction to Civil and Commercial Mediation" in Chartered Institute of Arbitrators *Workbook on Mediation* (CI Arb, London), 2002 pp.50-52.

³ Although Arbitration and Mediation are the two major forms of ADR, Negotiation is almost always attempted first to resolve a dispute. It is the pre-eminent form of dispute resolution which allows the parties to meet and resolve a dispute thereby allowing them to control the process and the solution.

⁴ See sections 10 and 29(1) of the Arbitration Act, 1995.

⁵ The debate of whether to refer to ADR as Alternative Dispute Resolution of Appropriate Dispute Resolution started in the US. See <http://www.doj.state.or.us/adr/Pages/index.aspx> (Accessed on 16th August, 2013).

⁶ Adopted on 10th June 1958 and came into force on 7th June 1959. Kenya acceded (with a reservation on reciprocity) to the New York Convention on 10th February 1989.

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua
Law on International Commercial Arbitration 1985;⁷UNCITRAL Arbitration rules, 1978;Convention on the Settlement of Investment Disputes Between States and Nationals of other States (Washington Convention, 1965); and Convention for the Pacific Settlement of International Disputes,1907. ADR has been provided for in the Constitution of Kenya 2010.⁸

This study examines the concept of justice, the constitutional and legal basis of ADR in Kenya, and demonstrates that despite the expanded scope of accessing justice introduced by the provisions on ADR in the Constitution of Kenya 2010 there are still various challenges that face ADR, in respect of which the paper makes proposals for reform.

2. CONCEPTUAL AND THEORETICAL CONTEXT OF JUSTICE

The concept of justice is an interpersonal one, dealing with resolution of conflicts between individuals.⁹ Individuals can experience or perpetrate wrong; they can be punished, protected and even granted restitution. Justice entails upholding that which is right and due as between persons. Social justice which involves society and groups is a concept which is directly antagonistic to the liberal idea. Formal mechanisms for conflict management have not always been effective in managing conflicts. Mechanisms such as courts have been inaccessible by most people and especially the poor owing to high court fees; poor infrastructure/capacity of state's legal system; marginalization of minority groups; gender; and language barriers,¹⁰ technicalities, complex

⁷Adopted by the United Nations Commission on 21st June 1985 and passed by the UN General Assembly as Resolution 40/72 of 11th December 1985 which recommended that all member states harmonize their arbitration laws to meet the unique needs of the international commercial arbitration practice.

⁸ See Article 159(2) (c) which requires the courts of Law to use ADR as a means of accessing justice.

⁹ L.J.M. Cooray, *The Rule of Law: The Concept of Justice*, at pp 1 Available at: <http://www.ourcivilisation.com/cooray/btof/chap182.htm> (Accessed on 12th January, 2015).

¹⁰ International Commission of Jurists (ICJ) Kenya, "Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution," *ICJ Kenya, Vol. III* (2002); See also K. Muigua, "Avoiding Litigation through the Employment of Alternative Dispute Resolution," pp 6-7, a Paper presented at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012, available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> (Accessed on 12th January, 2015).

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua procedures, and delays.¹¹ There has been a shift towards informal mechanisms for conflict management, including ADR and traditional dispute resolution mechanisms (TDRMs). ADR and TDRMs processes contribute to enhanced access to justice by all, and in particular among the poor people.¹² Enhanced access to justice strengthens the Rule of Law, which in turn raises the level of development.¹³ Existing literature on development studies has shown a correlation between the Rule of Law and levels of development.¹⁴ Enhanced access to justice also contributes to respect for the Rule of Law, which is an essential precondition for development.¹⁵

Justice can be viewed from different perspectives.¹⁶ It can be viewed as distributive justice or economic justice which is concerned with fairness in sharing; procedural justice which entails the principle of fairness in sense of fair play; restorative justice (corrective justice) or retributive justice.¹⁷ The concept of justice means different things to different people and may generally refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.¹⁸ Therefore, a focus and emphasis on court-based system of access to justice is unfair and does not guarantee justice.

The right of access to law and civil justice is derived from what may be viewed as a form of “social contract” as per Hobbes in his book entitled *Leviathan*. He expounds on the notion of social contract and states that a presumption exists that we or our predecessors “agreed” to establish a particular political structure complete with its policy, legal and organisational

¹¹ K. Muigua & F. Kariuki , ADR, Access to Justice and Development in Kenya, at pp 6, available online at <http://www.kmco.co.ke/attachments/article/124/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf> (Accessed on 12th January, 2015)

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ K.I. Laibuta, “Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks” A thesis submitted in fulfillment of the Requirements of the Degree of Doctor of Philosophy, School of Law, University of Nairobi, November 2012.

¹⁷ *Supra* note 11 (See also http://changingminds.org/explanations/trust/four_justice.htm (Accessed on 5th January, 2015).

¹⁸ *Supra* note 11.

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua frameworks to which we submit and owe obedience by virtue of its legitimacy. The natural law theory holds that “there was a kind of perfect justice given to man by nature and that man’s laws should conform to this as closely as possible.”¹⁹ This suggests that there are certain normative rules of conduct which any social organisation must contain if it is to be viable²⁰ and are considered the minimum content of natural law.

The theory of natural law holds that “there was a kind of perfect justice given to man by nature and that man’s laws should conform to this as closely as possible.”²¹ This suggests that there are certain normative rules of conduct which any social organisation must contain if it is to be viable.²² The modern theory of natural law presupposes that there are universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims.²³ These principles may be considered the minimum content of natural law. According to Hart, “...without such a content, laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.”²⁴ Hart’s suggestion that human beings associate and cooperate by voluntary submission to the normative proposition of natural law and to the prescriptive contents of positive law merely for the purpose of survival is rather one-dimensional. There is more to it; the need to discharge the reciprocal political obligation by submission to authority in order to safeguard basic human entitlements to life, liberty and property, which (in the context of this study) require, *inter alia*, the establishment by the sovereign power of a legitimate system of government with appropriate legal and organisational frameworks for the resolution of disputes and realisation of competing claims and interests.

¹⁹ E.A. Martin (ed), *A Dictionary of Law* (4th ed. Oxford University Press New York 1997).

²⁰ H.L.A. Hart, *The Concept of Law* (2nd edn Oxford University Press New York 1994) pp.193.

²¹ *Supra* note 19.

²² *Supra* note 16 at p. 202.

²³ *Ibid.*

²⁴ *Ibid.*

Hart observes that, "without voluntary cooperation, thus creating authority, the coercive power of law and government cannot be established."²⁵ Further, that "if the system is fair it may gain and retain the allegiance of most for most of the time, and will accordingly be stable".²⁶ While a repressive system running the interests of the dominant group will ultimately collapse.

On the other hand, an alternative conception of natural law was promulgated by English philosopher John Locke who held an alternative conception of natural law and the derivative social contract that man renounces his liberty to a sovereign, in exchange for protection of his basic human entitlements to life, liberty and property. The social contract is therefore the concept that human beings have made an agreement with their government, whereby the government and the people have distinct reciprocal roles and responsibilities.

It may be concluded, therefore, that the stability of any political system and social order depends upon the maintenance of equilibrium between the reciprocal duties of state and its subjects. This study argues that full and equal access to civil justice and effective remedies in a democratic state facilitates the enjoyment by everyone of their entitlements and the advantages of social life, and is therefore a requisite component of those basic standards and values on which social order and good governance are founded.

According to David Hume, the need for rules of justice is dependent on the size of the society.²⁷ He argues that in very small societies where the members are more of an extended family, there may be no need for rules of *justice* because there is no need for regulating *property* (*liberty and personal security*); no need, indeed, for our notion of property at all. In his view, only when society becomes extensive enough that it is impossible for everyone in it to be part of one's "narrow circle" does the need for rules of justice arise.²⁸ Hume argues that the rules of justice in a given society are "...the product of artifice and contrivance" (i.e., scheme or ploy and machination) and are constructed by the society to solve the problem of how to regulate property (in the sense of a wider range of basic human entitlements and competing interests) even though other rules might do just as well. According to Hume

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷D.H. Morris, in *Stanford Encyclopedia of Philosophy* (2009) available at <http://plato.stanford.edu/entries/hume> (Accessed on 30th March, 2010).

²⁸ *Ibid.*

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua the real need is for some set of “general inflexible rules adopted as best to serve public utility.”²⁹

The concept of justice has been conceptualized in a diverse range of philosophical and theoretical frameworks. Access to justice may be achieved by the use of informal dispute resolution mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable alongside the judicial process.

Justice thus takes various forms but the underlying factor is that regardless of the various groups at which the same may be directed, justice requires equal treatment of all persons. It should not be dependent on the perceptions of particular judges but should instead be informed by the inherent dignity of all humans.³⁰

3. CUSTOMARY LAW AS A MEANS OF ADMINISTERING JUSTICE

The use of custom, special rules and communal practice to resolve disputes is not a new phenomenon. It is common in most African communities and in commercial communities the world over. It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems.³¹ The Kenyan ethnic communities like most other African communities, have engaged in informal negotiations and mediation as a means of resolving conflicts and settling disputes since time immemorial. Mediation as practiced by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence.³² Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as ‘mediators’ or ‘arbitrators’.³³ The constitutional recognition of ADR and TDRMs therefore expands the array of formal mechanisms in Kenya’s

²⁹ L.A. Selby-Bigge L A (ed) *Enquiry concerning the Principles of Morals* (3rd edn Clarendon Press Oxford 1975) p.305.

³⁰ K. Muigua, *ADR: The Road to Justice in Kenya*, a Paper Presented at the Chartered Institute of Arbitrators (Kenya Branch) International Conference 2014.

³¹ *Supra* note 29 at p. 35.

³² *Ibid*, p. 36.

³³ K. Muigua., *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter two, pp. 20-37; See also generally, J. Kenyatta, *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

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justice system that parties to a dispute can employ in ventilating their disputes.³⁴

Prior to the enactment of the 1963 Constitution, there was an application of a dual legal system where African courts applied customary law and the formal colonial courts applied British laws and system of justice.³⁵ At independence the two legal systems were unified and the African courts applying customary law were abolished in 1967.³⁶ Under the independence Constitution customary law did not apply to criminal cases and the courts made this very clear in the case of *Kamanza Chirwaya v Tsuma Shumar*³⁷. Under the unified legal system customary law was given recognition by virtue of Section 4 of the Judicature Act as a limited source of law. However the Independence Constitution did not expressly provide for African Customary law as a source of law.

While the 1963 Constitution purported to guarantee the right to equal treatment and non-discrimination, it limited the right with respect to 'personal law'.³⁸ Section 82 (1) of the Independence Constitution provided that 'no law shall make any provision that is discriminatory either of itself or in its effect' while subsection 4 exempted laws that made provision 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.'³⁹ Further, the subsection excluded laws that provided 'for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter to the exclusion of any other persons.'⁴⁰ The above two provisions were given statutory effect by the Judicature Act which directed that;

³⁴ Supra note 11 at p. 1.

³⁵ See discussion at aanam.law.emory.edu/ifl/...Kenya.htm (Accessed on 25th January, 2015).

³⁶ *Ibid.*

³⁷ Unreported High Court Civil Appeal No 6 of 1970 discussed by R.W. Hodgins, *Law of Contract in East Africa*, p. 10.

³⁸ R.A. Odhiambo & M. Oduor *Gender Equality*, in P.L.O. Lumumba *et al*, *The Constitution of Kenya* at p. 109.

³⁹ *Ibid*

⁴⁰ *Ibid*

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*"the courts shall be guided by African Customary Law in civil cases in which one or more parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or repugnant to any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*⁴¹

Although most communities applied TDRM in resolving civil disputes as well as criminal offences both the Independence Constitution and the Judicature Act excluded the application of customary law in criminal justice. The application of customary law was confined to civil disputes arising from family relationships, succession and inheritance, marriage, divorce and property. In the following paragraphs the study highlights some of the cases decided by the Kenyan Courts demonstrating the narrow focus of the courts when applying customary law in civil disputes.

In the leading case of *Otieno v Ougo & Another*,⁴² the court decided that a widow had no right to inter her deceased husband as this was a prerogative of the members of her husband's clan. The court rejected any insinuation that such practice was discriminatory on the ground that section 82(4) (b) of the Independence Constitution allowed the application of customary law in situations where they would otherwise be discriminatory.

In *Wambwa v Okumu*,⁴³ a dispute arose as to the custody of a four year old girl. The then African court had applied Bagishu customary law and custody was awarded to the father on payment by him of cattle valued at Kshs.200 to the other party. One ground of appeal was that the Guardianship of Infants Act⁴⁴ allows the court to award custody to either spouse depending on the best interest of the child. In this case, the appellate court felt that the mother was in the best position to care for a young female child. It was possible to refuse to follow customary law because that law was inconsistent with the Act.⁴⁵

The Constitution of Kenya 2010 has expanded the horizon of justice with regard to the application of customary law. It provides, *inter alia*, that

⁴¹ Section 3(2), *Judicature Act* 1967, Laws of Kenya.

⁴² (2008) 1 KLR (G&F) 918.

⁴³ [1970] E.A 578.

⁴⁴ Cap 144, Laws of Kenya section 17.

⁴⁵ *Supra* note 37.

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every person is equal before the law and has the right to equal benefit of the law. Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. This is clearly intended to reverse the historical exclusion that women have endured in society.⁴⁶

The Constitution 2010 extends the use of customary law to matters of personal law as well as other matters. Article 2(4) provides that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency. Article 60 provides for the elimination of gender discrimination in law, customs and practices related to land and property in land. Article 159 (2)(c) provides that in exercise of judicial authority, courts and tribunals shall be guided by principles, *inter alia*, that alternative forms of dispute resolution including, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 states that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice or morality or inconsistent with any written law.

In a recent decision post the Constitution 2010 the High Court appeared to suggest that customary law may as well be applied in criminal cases which is a complete departure from the jurisprudence developed by the courts prior to the promulgation of Constitution 2010. In *Republic v Mohamed Abdow Mohamed*,⁴⁷ the accused was charged with murder. The deceased's family wrote a letter to the Director of Public Prosecutions requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively.

The letter in question read in part:-

"...The two families have sat and some form of compensation has taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually, one of the rituals that have been performed is said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families have performed the said rituals, the family of the deceased is satisfied that the offence committed has been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they do not wish to pursue the matter any further be it in court or any other forum..."

⁴⁶ Supra note 40 at p. 127.

⁴⁷ 2013 eKLR.

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The Director of Public Prosecutions (DPP) then made an oral application in court to have the matter marked as settled. He cited Article 159 (2) (c) of the Constitution. He urged the court to consider the case as 'sui generis' as the parties had submitted themselves to traditional and Islamic laws which provide an avenue for reconciliation. He stressed that each of the parties was satisfied and felt adequately compensated.⁴⁸ The court referring to Article 157 which granted powers to the DPP to discontinue a matter at any stage allowed the application and discharged the accused.

This case has however drawn criticism and approval in equal measure and thus the legal position is far from settled.⁴⁹ The debate on the applicability of ADR mechanisms in criminal justice is international in nature. As noted above, criminal justice may either be retributive or restorative.⁵⁰ It has been argued that while retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases, restorative theory argues that "what truly vindicates is acknowledgement of victims' harm and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior."⁵¹ The conventional criminal justice system focuses on three questions namely: What laws have been broken?; Who did it?; and what do they deserve? From a restorative justice perspective, it is said that an entirely different set of questions are asked: Who has been hurt?; What are their needs ?; and Whose obligations are these?⁵²

The answers to the foregoing questions may have an impact on how the whole process is handled. The decision on which one to use depends on

⁴⁸ *Republic v Mohamed Abdow Mohamed*, eKLR 2013.

⁴⁹ See B. Pravin, 'High Court opens Pandora's Box on criminality', *Standard Newspaper*, Wednesday, June 12th 2013, Available at <http://www.standardmedia.co.ke/?articleID=2000085732> (Accessed on 20th March, 2014)

⁵⁰ *Supra* note 39.

⁵¹ S.U. Mark, *et.al.*, 'Restorative Justice In The Twenty first Century: A Social Movement Full Of Opportunities And Pitfalls' *Marquette Law Review*, [89:251, 2005] pp. 251-304, page 257, Available at http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/Marquette%20R%2021st%20Century%20Social%20Movement%20Full%20of%20Pitfalls%20and%20%20Opportunities.pdf (Accessed on 12th January, 2015)

⁵² *Ibid.*

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the legislative framework applicable and whether it only provides for retributive justice in some of the criminal cases while at the same time limiting use of restorative justice.

4. THE NEW CONSTITUTIONAL AND LEGAL BASIS OF ADR IN KENYA

The legislative framework for ADR in Kenya is to be found in the Constitution of Kenya 2010, the Arbitration Act,⁵³ the Civil Procedure Act,⁵⁴ the Civil Procedure Rules 2010, the Appellate Jurisdiction Act,⁵⁵ the International Arbitration Centre Act 2013, the Labour Relations Act 2012, Industrial Courts Act, and the Labour Institutions Act. In the following paragraphs the paper gives an overview of each of these legislations.

(i) The Constitutional Basis for ADR

The constitutional foundation for ADR is envisaged in Article 159(2) which requires the courts and tribunals in exercising their judicial authority, to be guided by the four listed principles including the principle that: "Alternative forms of dispute resolution including, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."⁵⁶

The Constitutional anchoring of ADR as a means of resolving civil disputes emphasizes the importance that the drafters of the Constitution placed on ADR as an alternative to formal court litigation. The objective is to enlarge the avenue for accessing justice to all Kenyans. It is worth noting that the repealed 1963 Constitution did not have provisions on ADR as a means of resolving disputes and accessing justice. In this regard the Constitution of Kenya 2010 makes a milestone by incorporating ADR in its provisions thereby granting to ADR constitutional recognition.

⁵³ Cap 49, Laws of Kenya.

⁵⁴ Cap 21, Laws of Kenya.

⁵⁵ Cap 9, Laws of Kenya.

⁵⁶ See Article 159 (2)(c) of the Constitution of Kenya 2010 that was promulgated on the 27th August 2010 (Available online at <http://www.kenyalaw.org/klr/index.php?id=741>, (Accessed on 14th August 2013).

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The ADR mechanisms shall be promoted, subject to sub-clause 159(3).⁵⁷The limitations in Article 159(3) are necessary to ensure that the expanded space in accessing justice afforded by the new constitutional provisions is not abused by litigants thereby occasioning injustice to others, The standard of justice to be achieved through the ADR processes must be as near as possible to the standard of justice a litigant expects to receive through the use of conventional court processes. The framers of the Constitution expected that the new constitutional provisions would be put into full effect by more detailed and specific legislation.

The scope of application of ADR has also been widened by Article 189(4) which provides that all national laws shall provide for the procedures to be followed in settling intergovernmental disputes by ADR including negotiation, mediation and arbitration. These constitutional provisions on ADR have been amplified in the Civil Procedure Act and the Appellate Jurisdiction Act as discussed in the following paragraphs.

(ii) The Civil Procedure Act and the Civil Procedure Rules 2010

Section 1A & 1B of the Civil Procedure Act provides that the overriding objective (commonly referred to as the “Oxygen principle”)⁵⁸ is to promote just, expeditious, proportionate and affordable resolution of civil disputes. The Oxygen principle calls for the courts to ensure that the parties explore alternative means of resolving their disputes. The court on its own motion or at the request of the parties can refer a matter before it to any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1 A and 1 B of the Act.

The statutory provisions require the courts to explore other forms of ADR to resolve the dispute between the parties. The Civil Procedure Rules 2010 provides a new approach to case management that envisages prompt, expeditious, and just disposal of civil suits in compliance with the Oxygen

⁵⁷ Article 159(3) places a restriction on the application of the Traditional Dispute resolution mechanism by providing that they are not to be used in way that “(i) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or (c) is inconsistent with this Constitution or any written law”.

⁵⁸ For a full discussion of what the Oxygen Principle entails, see the judgment of Nyamu JA in *Kenya Commercial Bank vs Kenya Planters Cooperative Union* [2010] eKLR. Commentary of the judgment is available online at <http://joply-achanceatlaw.blogspot.com/2010/07/oxygen-principle.html>. (Accessed on 17th August, 2013).

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua Principle.⁵⁹ Under Order 46 of the Civil Procedure Rules 2010 and Sections 59 and 59(C) of the Civil Procedure Act⁶⁰ a court can make orders referring a suit to arbitration.

There is no legislative framework on mediation in the Civil Procedure Act or the Civil Procedure Rules 2010. However, the Civil Procedure Act provides for the Mediation Accreditation Committee⁶¹ that is tasked with the responsibility of determining the criteria for the certification of mediators; propose rules for the certification of mediators; maintain a register of qualified mediators; enforce such code of ethics for mediators as may be prescribed; and set up appropriate training programmes for mediators.

The Civil Procedure Rules provide that the courts may, on the request of the parties concerned; or where it deems it appropriate to do so; or where the law so requires, direct that any dispute presented before it be referred to mediation. Upon the court referring the dispute to mediation, the parties shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee and proceedings are to be conducted in accordance with the mediation rules. An agreement between the parties to a dispute as a result of a process of mediation is to be recorded in writing and registered with the court giving the direction.⁶² It should be noted that draft Rules on Court ADR in Kenya were forwarded to

⁵⁹ Order 11 of the Civil Procedure Rules 2010, (which were gazetted on 17th September 2010) became effective on 17th December 2010. It provides for pre-trial rules which court need to consider such as ADR before setting the matter for hearing. On more discussions see *The Mechanisms of Case Management under the new Civil Procedure Rules, 2010* by The Hon. Lady Justice Jeanne W. Gacheche (as she then was), Presiding Judge, Constitutional and Judicial Review Division of the High Court of Kenya 2011 available online at <http://www.kenyalaw.org/klr/index.php?id=896> (Accessed on 14th August, 2013).

⁶⁰ Chapter 21, Laws of Kenya.

⁶¹ See Section 59A of the Civil Procedure Act, CAP 21 Laws of Kenya on the membership of the Mediation Accreditation Committee that is appointed by the Chief Justice. The Mediation Accreditation Committee shall consist of – the Chairman of the Rules Committee; one member nominated by the Attorney-General; two members nominated by the Law Society of Kenya; and eight other members nominated by the following bodies respectively :the Chartered Institute of Arbitrators (Kenya Branch);the 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 Organization of Trade Unions.

⁶² See section 59B of the Civil Procedure Act.

Broadening Access to Justice in Kenya through ADR; 30 Years on - Prof. Paul Musili Wambua the Rules Committee⁶³ by the Chartered Institute of Arbitrators on their request. However, these Rules have not been gazetted or enacted to date.⁶⁴

(iii) *The Appellate Jurisdiction Act*

Sections 3A and 3B of the Appellate Jurisdiction Act replicates the provisions on the Oxygen Principle as stated in sections 1A and 1B of the Civil Procedure Rules. Sections 3A and 3B requires the court, while exercising its powers under the Act or the rules made there under or interpreting the provisions of the Act or the Rules, to give effect to the overriding principle. In *Kenya Commercial Bank Vs Kenya Planters Cooperative Union*⁶⁵, Hon Nyamu JA noted that since the application before him was principally grounded on sections 3A and 3B of the Appellate Jurisdiction Act, the decision that the list of factors to be considered was not exhaustive, was prophetic in that after the enactment of the Oxygen Principle, the Court was statutorily required, when exercising its powers either under the Act or the rules made pursuant to the Act or in interpreting the provisions of the Act or the rules, to give effect to the Overriding Objective.

Under the Oxygen Principle, the court's mandate in each case or appeal was to act justly and as far as was practicable, to act fairly. The principal purpose of the Oxygen Principle is to achieve or attain justice, and fairness in the circumstances of each case; reduce cost and delay; deal with each matter in ways which are proportionate; and ensure that the parties are on an equal footing and finally, allot to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.⁶⁶

(iv) *The Arbitration Act 1995*

⁶³ See section 81 of the Civil Procedure Rules Chapter 21 of the Laws of Kenya.

⁶⁴ For details of the draft rules see,

A.W. Gichuhi *Court Mandated Mediation- The Final Solution to Expeditious Disposal of Cases*. International Conference 2014 Journal Vol. 2 No.1 at p.142. Available online at <http://www.ciarkkenya.org/International%20Conference%20Journal%202014.pdf>. (Accessed on 29th December, 2014).

⁶⁵ *Op.cit.* note 38 above.

⁶⁶ See commentary on Hon. Nyamu JA's judgment in *Kenya Commercial Bank Vs Kenya Planters Cooperative Union* at <http://joply-achanceatlaw.blogspot.com/2010/07/oxygen-principle.html>, *Op cit. note 38 above*, (Accessed 17th August, 2013).

The Arbitration Act, 1995 (the 1995 Act) was amended by the Arbitration (Amendment) Act 2009 (the 2009 Act) which came into operation on 1st January, 2010. The 1995 Act came into force on 2nd July, 1996 after the repeal and replacement of the Arbitration Act of 1968 (the 1968 Act) which was closely modeled on the English Arbitration Act of 1950. Two main weaknesses have been identified in the provisions of the 1968 Act: the frequent reference of the arbitration proceedings to court; and the interference by courts of the arbitral process. This prompted the introduction of Section 10 in the Arbitration Act, 2009 to cushion the arbitral processes from court interference. The 2009 Act is modeled on the UNCITRAL Model Law on International Commercial Arbitration of 1985.⁶⁷ One of the major reforms introduced by the 2009 Act is the introduction of Section 10 that cushions arbitral proceedings from court interference.

(v) *The Arbitration Rules 1997*

The Arbitration rules provide for the procedure to be followed in arbitration proceedings. The rules were formulated by the Honorable Chief Justice on 6th May, 1997 pursuant to Section 40 of the Arbitration Act, 1995. The section empowers the Chief Justice to, *inter alia*, make such rules. The rules provide for the application of the Civil Procedure Act in matters involving the Arbitration Act.

(vi) *The International Centre For Arbitration Act No.26 of 2013*

This recent legislation provides for the establishment of an International Arbitration Centre in Kenya. It seeks to set up a readily available centre for international commercial dispute resolution and give investors the necessary confidence in the country's legal system. It is expected that this would in turn open up the country to foreign investment thereby contributing to its economic development.

(vii) *The Industrial Courts Act 2011*

⁶⁷ UNCITRAL Model Law on International Commercial Arbitration of 1985 was adopted by the United Nations Commission on 21st June, 1985. This follows the General Assembly resolution 40/72 of 11th December, 1985 that recommended all states to harmonize their arbitration laws to meet the unique needs of international commercial arbitration practice.

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The Act applies the provisions of the Constitution on ADR.⁶⁸ Section 15(1) of the Act provides for the use of ADR mechanisms in resolving employment and labor related disputes. It expressly states that no section of the Act may be interpreted to restrain the court from acting, either on its own motion, or at the request by the parties from adopting and implementing any other appropriate means of dispute resolution in accordance with Article 159(2) (2) of the Constitution.⁶⁹

Other than an appeal or review before the Court, the Court may refuse to hear disputes where it is satisfied that there has been no attempt at settlement.⁷⁰ The court may also stay any proceedings and refer the dispute for conciliation, mediation or arbitration when it becomes evident that the dispute ought to have been referred to these alternative ADR methods.

(viii) Labour Relations Act of 2012

Section 65 of the Act provides for conciliation as the method to be used in resolving trade disputes. However, the Act provides that as a condition precedent the matter has to be referred to the Minister to appoint a Conciliator who has 30 days to resolve the matter.⁷¹ The Conciliator has the power to mediate between the parties or make recommendations or proposals to the parties for settling the dispute.⁷²

(ix) The Labour Institutions Act, 2007

The Labour Institutions Act directs the National Labour Board in consultation with the Minister to establish, among others, a Trade Disputes Committee to advise the Minister on trade disputes.⁷³ The provisions of this section compliment the provisions of section 65 of the Labour Relations Act which empowers the Minister to appoint a Conciliator to mediate the parties to a trade dispute.

⁶⁸ See Article 159 (2) of the Constitution of Kenya 2010.

⁶⁹ See section 15 (1) of the Industrial Courts Act 2011.

⁷⁰ *Ibid*, section 15 (2).

⁷¹ *Ibid*, section 67 (1).

⁷² *Ibid*, section 6(2).

⁷³ See section 8 (c) of the Labour Institutions Act.

5. CONCLUSION

The globalization of commerce requires that Kenya as an economic hub in the continent should have an efficient and cost effective means of resolving commercial disputes. This would enhance investor confidence and promote international trade and economic development. It would enable the country to achieve the objectives of Vision 2030. However, in order to attract investor confidence, the legislative framework is in need of urgent reform to facilitate an efficient resolution of commercial disputes.

The Constitution 2010 has expanded the scope for access to civil justice by incorporating provisions on ADR. But challenges still abound. Admittedly, the Judiciary has undergone reform process to ensure that members of the public are able to access justice through the courts. However the reforms undertaken so far fall far short of ensuring that civil justice is available to all disputing parties. ADR offers an opportunity to redress the problem of backlog of cases in the courts and to ease the pressure on the courts. This calls for the urgent need to reform the legislative framework on ADR in order to ensure that the both the members of the public as well as practicing lawyers and judicial officials are sensitized to the benefits of ADR. The services of arbitrators, mediators and conciliators should be decentralized and made available in the counties in order to serve the emergent business communities in the counties.

OPENING UP INTERNATIONAL ARBITRATION IN AFRICA

by: HON. JUSTICE EDWARD TORGBOR*

1. INTRODUCTION

The purpose of this presentation is to review old prejudices that hold back African practitioners and arbitrators from appointments and involvement in the practice of international arbitrations in Africa even in disputes emanating from the continent, involving African state parties, parastatals and other national and corporate entities. Although the discussion draws mainly from jurisdictions influenced by the UNCITRAL Model Law like Kenya, it is less concerned with the substantive law of international commercial arbitration than with the promotion of the arbitrators and practitioners of that law on the African continent. As the title suggests, the direction and thrust of the thesis is “opening up” rather than “closing-down” or locking out suitably qualified persons from other parts of the world from participation.

2. DIAGNOSIS AND PROGNOSIS

Commentators continue to dwell on perceived drawbacks to international arbitration practice in Africa. A presenter at a London seminar asserted, that if the AfDB (African Development Bank) is to be believed, 90% of all international contracts negotiated in Africa or concerning African investment are drafted as being subject to English Law.

¹ He further states that for the most part African entities are usually the respondent in international arbitrations, that in terms of representation, the parties in 99.9% of all African disputes, both past and present, will be represented by lawyers and law firms based in the UK, USA and France; and that experience naturally remains the overriding concern. From these, he

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¹ For further discussion on this topic, see A.A. Asouzu, “Some Fundamental Concerns and Issues about International Arbitration in Africa.” *Law for Development Review*, pp. 82-98. African Development Bank.

concluded that the future of African arbitration is in Europe.² He omitted adding that in nearly all these arbitrations the African respondents with high-profile foreign lawyers were unsuccessful.

That tendencious conclusion should however not surprise if the drafters of such international contracts are English or American with preferences for applicable laws with which they are familiar, and for seats and venues with which they are accustomed, and in jurisdictions where they feel comfortable but with unrewarding outcomes for their African clients. It underscores and demonstrates the importance and force of the arbitration clause or separate arbitration agreement as the originating source and the crucial instrumental device by and from which Africans and their advisers wittingly or unwittingly transfer their problems and disputes for solutions abroad.

The Model Law-based statute does not preclude any person by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.³ There is support therefore for the development of a modern arbitration culture that enables every person to share in the opportunity and experience of participation in international arbitrations where they are suitably qualified to do so. Again therefore, as international arbitration practice and standards calibrate domestic arbitration practice, the involvement of foreign practitioners and arbitrators in African arbitrations will not only open up the international arbitration space in Africa but also beneficially expose the different role players to international dispute resolution standards.

Spare a thought also for the fact that important strides have been made in the arbitration world towards the convergence of national laws on international arbitration, that there is growing international recognition of the commercial importance of arbitration, that these trends have assisted the modernization of many different national laws that regulate international commercial arbitration in different parts of the world, ostensibly for the benefit of the role players – parties, users, advisers, arbitration institutions – and therefore, the need to recognise the continuous interplay between national and international arbitration laws. It makes sense then to be rid of parochial and bigoted preferences for familiar laws and terrains and to open up favourably to other systems of law that may be more effective than one's own in resolving

² “The Challenges of Arbitrating in Africa,” London Seminar, 19 September 2012.

³ Article 11, Model Law.

particular kinds of international disputes. This open-minded approach may be even more productive of best outcomes as there is no uniform or standard dispute resolution procedure, despite the UNCITRAL Model Law. And if experience is still an overriding genuine concern then, for purposes of this presentation, it is good reason for African practitioners and arbitrators not to be excluded, or exclude themselves, but vigorously engage in its acquisition and beneficial provenance.

3. PRECONCEIVED IDEAS, PREJUDICE AND BIAS AGAINST AFRICA

Preconceived ideas, prejudice and misconceptions have a common foundation in, and association with, a tendency to bias. Bias is an obliquity. If that is not saying much then move down the definition line to a one-sided inclination of the mind, a special influence that sways the mind, or downright prejudice and discrimination. In that last sense bias is not a happy thing to indulge in or write about by one who desires "*the greatest happiness of the greatest number.*"⁴

For present purposes the entry point is bias in international trade and commerce relative to international commercial arbitration practice.⁵ Prejudice and bias against Africa stem from the negative image of Africa as a hopeless continent forever afflicted by ignorance, poverty and want, always in need of something or the other and even salvation from itself. The negative branding is so potent that the mere mention of Africa calls up images of subservience, incompetence and failure such that any positive development is credited to the controlling involvement of international donors, expatriates and expert advisers. The connection between this negative image and a deliberate design to keep Africa conflicted and fragmented is deeply rooted in exploitation,

⁴ To borrow Hutcheson's summation of Bentham's leading principle.

⁵ It bears mention that bias is also an unruly horse and pervasive. Therefore the concern that while Africa wants an "international forum for justice and accountability what it gets instead is bias and race-hunting at the International Criminal Court" adds poignancy to this discourse: At the Extraordinary Session of Assembly of Heads of State and Government of the African Union, Addis Ababa, 12th October, 2013.

trade, commerce and the execution of an aggressive and continuing profit motive of a past and present mercantilist agenda. Pre-conceived notions of incompetence and bias against suitably qualified Africans in the discriminatory selection, nomination and appointment of arbitrators in international commercial arbitration practice translate to deliberate acts of prevention with direct consequences of denial and deprivation inextricably linked with the negative branding of Africans from unremedied historical injustices and today's pernicious arbitrariness.⁶ It is time for change.

Advancements made in putting people first in the development of Africa in various sectors should not be ignored any more than the increasing modernization of towns and cities with growing economies across the continent that offer business opportunities to foreigners.⁷ Africans must be inspired by the frantic pulse of a vibrant continent.

Prejudice, misconceptions, discrimination and bias against Africa in the management of the world economy have kept Africa impoverished. Yet mankind has reached a major threshold in the accumulation of vast experiences with technological and scientific gains to enable wealth managers to reverse current unfavourable trends in trade and investment for the achievement of equity and transparency in Africa's development.

Still, it is of no use blaming others for this unpalatable predicament as Africans bear the heaviest responsibility to engage in the creation and projection of a true self-worth. African governments and professionals are probably their own worst enemies. Non-Africans may ignore African experts in international arbitration out of a facile assumption that Africa has no such

⁶ In a riveting call for image-change and a new vision for Africa, Tito Alai, Group Chief Commercial Officer for the Zain Group, speaks of a negative global perception and conditioning that puts Africa down as inferior and the inferiority complex is so overwhelming that Africans are predisposed to expect their problems, disputes and conflicts to be diagnosed and solved by foreigners assumed to know best: "Where is Africa's big bold vision?" *New African*, No. 538, April 2014, pp 56 - 58. However this writer is conscious of and appreciates that some of these indications raise or involve fundamental, ideological, philosophical and cultural issues that do not easily translate into international arbitral practice.

⁷ Exemplified by the "State of the Nation 2014" address to the Ghanaian Parliament by H.E. President John Dramani Mahama. Rwanda was destroyed in 1994 but recognised today as a model of reconstruction. Liberia and Sierra Leone dubbed basket cases are today showing progress with national recovery and reconstruction.

experts or a genuine difficulty in locating qualified African experts as counsel and or arbitrators. Such assumption is by no means limited to non-Africans as Africans themselves exhibit this attitude. In this connection therefore Africans must aspire to and achieve greater visibility in the formulation of the international laws, conventions and treaties that regulate the global economy and international business relations in particular. In addition, Africans must invest heavily in reclaiming their cultural assets by the re-assessment of their heritage and values and the introduction of new perspectives and strategic programmes upon which to build a better and brighter future.

3.4 Commenting on bias against Africa in arbitration practice the Chairman of the Kenya Institute of Chartered Arbitrators observes that *“the business association and interaction of Africa with the outside world is downplayed and kept to a minimum. The result is a weaker business environment culminating in a weaker international arbitration environment.”*⁸

3.5 Arbitration doctrine preaches and demands equal treatment of arbitral parties. It is therefore in the scheme of equality and fair treatment not to restrict this doctrine to arbitral parties but extend its practical essence to affording equal opportunities for the players in dispute and conflict resolution on the African continent, at least in the 99.9% of those African disputes in international arbitration otherwise exported abroad.

4. COMMERCIAL ARBITRATION

Let us start with the benign proposition that foreign interest in Africa was and is natural resources and commerce; that it has been so since the bullion rush and the consequential enrichment of foreign lands therefrom; and that merchants, investors and business seekers do not come to the continent because they are sentimental about the African poor.

⁸ K. Muigua, “Promoting International Commercial Arbitration in Africa”, available at <http://www.kmco.co.ke/index.php/publications/119-promoting-international-commercial-arbitration-in-africa>, The author addresses challenges to the practice of International Commercial Arbitration under various sub-headings that include Bias against Africa.

Let us add to this the realities that the serious conflicts arising from resource exploitation necessitated international legal instruments and procedures to safeguard profit acquisition, exportation and asset seizure wherever found; that historical injustices and disadvantages against Africans ought not be extended or perpetuated; and that Africans should be involved and involve themselves not only in wealth creation on their continent but also in the processes of peaceful settlement of the disputes and serious conflicts generated by trade and commerce, capitalizing on the concepts of inclusivity and mutual advantage.

4.1 Arbitration is considered suitable for solving disputes from commercial and business relationships. Commercial contracts were those commonly made by merchants and traders and so they were governed by specific laws and statutes distinct from the general law of contracts or obligations. Therefore in many states such laws are associated with Chambers of Commerce.⁹ The importance of commerce and trade in international relations is underscored by the centrality of the commercial contract in international commercial arbitration. Indeed a “commercial reservation” clause is preserved by Article 1.3 of the New York Convention and the emphasis on commerce enables states to distinguish and regulate commercial transactions from other relationships not considered suitable for submission to arbitration. But the importance of the commercial reservation, a right that could not be arbitrarily taken away from states, is considerably whittled down by the expansive definition of the scope of commerce as evident in framework arbitration laws and the International conventions¹⁰ and treaties designed to give states effective methods for

⁹ These include: International Chamber of Commerce in Paris, the Stockholm Chamber of Commerce and the Geneva, Zurich and Belgian Chambers of Commerce, all European, although several others have emerged in other countries in recent years.

¹⁰ Examples are: the Geneva Protocol (1923) and Geneva Convention (1927), The New York Convention (1958) and Washington Convention (1965). Others are The European Convention (1961), the Strasbourg Uniform Law (1966), the Panama Convention, and the Amman Convention. The Montevideo Convention 1989, a regional convention for the Union of South American States in respect of Procedural Law, provided for the recognition and enforcement of arbitration agreements between Latin American states parties. The North American Free Trade Agreement (NAFTA) (1993) and the Energy Charter Treaty 1994 are other regional treaties.

the recognition and enforcement of international commercial agreements and arbitral awards.

- 4.2 In the context of international arbitration practice in Africa, the commercial content is emphasized by UNCITRAL's elaboration of the scope of the word "commercial" – the core element in international commercial arbitration which notably and relevantly covers and includes exploitation and concession agreements, joint ventures, and various other forms of economic, industrial and business activities. There is the additional fact that UNCITRAL's encouragement of a wide interpretation of "commercial" results in a vast list of economic activities, not restricted to contracts.¹¹

UNCITRAL makes clear the list is not closed and its Model Law, copied into arbitration statutes across Africa, is intended to regulate the resolution of a vast array of commercial and investment disputes from this open list by international commercial arbitration.

The point has been made, without stridency, that the evolution of the present global economy, designed by powerful players with historical advantages, has enabled them to attain legendary levels of development and concomitant returns; and by dint of their control and influence over the main multilateral financial institutions of today, these players control the decision-making apparatus in matters affecting commerce, trade and investment flows, and even the development agenda of the still developing nations.¹²

¹¹ Including: trade transactions for the supply or exchange of goods and services; distribution agreements, commercial representations or agencies, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, and carriage of goods or passengers by air, sea, rail or road.

¹² As one perceptive commentator puts it: "Trojan horses and puppet regimes are part of the arsenal against weaker nations globally. And the reason is always economic exploitation": Pusch Commey, *New African* No. 538, April 2014 p. 11.

4.3 The commercial emphasis had resonance in the early attempts at providing for international recognition and enforcement of arbitration agreements and awards. In order therefore to be efficacious, international arbitration systems needed linkage with national legal systems without being subsumed to the latter. This had led to the formulation of Conventions and Treaties to provide for the enforcement of arbitration agreements and awards by national courts of state parties to those conventions and treaties. The early global attempts are exemplified by the Geneva Protocol of 1923¹³ and the Geneva Convention of 1927.¹⁴

The International Chamber of Commerce (ICC) also had an early hand in the establishment of an international regime for the regulation of international commercial arbitration by its 1953 proposals. These were taken up by the United Nations Economic and Social Council (ECOSOC) leading to the adoption of the New York Convention in 1958,¹⁵ designed to apply to international arbitration agreements as distinct from domestic arbitration agreements apart from the primary objective of providing for the recognition and enforcement of foreign arbitral awards.¹⁶

¹³ Its objectives were to ensure the enforceability of arbitration agreements and arbitration awards as reflected in the New York Convention.

¹⁴ Its objective was to widen the territorial application of the Geneva Protocol by providing for the recognition and enforcement of Protocol awards in Contracting States and not merely within the host state of the award.

¹⁵ A.J. Van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*. Kluwer Law International, 1981.

¹⁶ *Ibid.*

It is probably unarguable that the enforcement of a Convention Award is better protected than the enforcement of foreign court judgment thereby encouraging the choice of arbitration for dispute resolution. It is noteworthy that membership of the Convention by African states¹⁷ has increased not decreased.

- 4.4 The Executive Directors of the International Bank for Reconstruction and Development (“the World Bank”) formulated the Washington Convention of 1965¹⁸ that established ICSID (hence the “ICSID Convention”). Notably, the preamble declares that no Contracting State, by the mere fact of its ratification, acceptance or approval, is to be deemed obliged without its consent to submit any particular dispute to conciliation or arbitration. It gave investors (both individuals and corporations) in a foreign state the right of direct recourse and redress in their own name and behalf in conciliations and arbitrations against the state.¹⁹

Each contracting state recognises an ICSID award and enforces the pecuniary obligations imposed by that award within its territories like a final court judgment of that state, without revision or review under the law of that state.²⁰

¹⁷ See website: www.newyorkconvention.org. The membership stands at 149 countries in 2013 including 29 African countries.

¹⁸ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (the ICSID Convention) in force from October 4, 1966.

¹⁹ See C. Schreuer: *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).

²⁰ Convention Art. 54(1), despite which the underlying conditions of an ICSID arbitration made room for serious consideration and negotiation before committing to the Convention: (i) party agreement was necessary to submit the dispute to ICSID, (ii) the dispute must be between a contracting state (or its subdivision or agency) and a national of another contracting state (iii) it must be a legal dispute, and (iv) arise directly from an investment.

There is an interesting link between the ICSID and New York Conventions (NYC) through ICSID's Additional Facility procedure. The procedure allows ICSID to administer an arbitration (or conciliation) not covered by the ICSID Convention - where one party is not a state or national of a contracting state; or the dispute does not arise directly out of an investment. The connection is that an ICSID Additional Facility award would in such a situation qualify for recognition and enforcement under the NYC.

The Washington Convention governing BITs operates through statutory or "treaty consent" and so differs from other conventions regulating international commercial arbitrations based on "contractual consent". The term "arbitration without privity" has therefore crept into arbitration parlance.

The problem of not getting all states to accede to these conventions necessitated the allowance of reservations requiring "reciprocity" and a national criteria for "commercial clauses", "arbitrability" and "public policy" as states choose to apply to these conventions, with particular regard to the refusal or recognition and enforcement of arbitration agreements and awards. Therefore however compelling these conventions were, there was an opportunity for African states and their advisers to apply their minds to what was and is acceptable to their governments in the best interest of their peoples in consonance with their development agenda goals.

5 INVESTMENT TREATY ARBITRATION

- 5.1 Investment treaty arbitration is an aspect of international arbitration in which African involvement and participation is negligible. Therefore, the observations concerning participation in international commercial arbitrations apply in equal measure to investment treaty arbitrations.

The term "investment" is not specifically defined by the Washington Convention but is now increasingly interpreted to cover services, technology and various forms of capital outlay. But, the jurisdiction of ICSID and the essential requirement of consent by Convention Article 25(3) and the mechanism by which Contracting States can make known in advance, if they so desired, the classes of disputes for submission to

the Centre, allowed states to define investment by national legislation.²¹

- 5.2 The modern Bilateral Investment Treaties (BITs) were preceded by “Treaties of Friendship Commerce and Navigation” by which concerned states granted each other favourable trading conditions and agreed to the resolution of disputes by arbitration. The main objective was to encourage trade and investment. The definition of “investor” was broad enough to include nationals and public legal entities of the host state.²²

From an informed vantage position Rukia Baruti writes:

*“Investment treaty law is a complex area with multiple sources and is in constant state of evolution. Due to its specialised nature, expertise in this field has generally been limited to a small group of lawyers and arbitrators, based mainly in Europe and the United States. African states have usually relied on foreign lawyers to mount an effective defence to investment treaty claims.”*²³

Rukia should know, being the Managing Director of *Africa International Legal Awareness (AILA)*, a training organisation.²⁴ AILA is geared to capacity building and promotion of sustainable economic

²¹ The combined effect of ICSID Convention Article 25(1), (3) and (4) as elaborated in recent decisions such as *Phillip Morris Brands SARL & 2 Ors v Oriental Republic of Uruguay*, ICSID case No. Arb/10/7, 2nd July 2013 paras 197 – 203.

²² A. Parra, “Provisions on the Settlement of Investment Dispute in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 *Foreign Investment Law Journal* 287.

²³ R. Baruti, “Is Africa Finally Confronting Its Challenges On Investment Treaty Arbitration? Kluwer Arbitration Blog, 4th November, 2011.

²⁴ This writer is an honoured member of AILA’s Advisory Board.

development with a core focus on investment treaty law and arbitration. It offers to government and private practice lawyers from developing countries an annual week-long training programme in London on investment treaty law and arbitration and has the special merit of being able to deliver training tailored to the specific needs in African countries. But here again, once the training is done, the trained practitioners and arbitrators must access the opportunities for putting training to beneficial use, by transferring knowledge to practice, in international treaty arbitrations as in international commercial arbitrations. AILA's work and contribution therefore signify progress and advancement for the continent.

- 5.3 Regarding the complexity of investment treaties, African states conclude such treaties on the professional legal advice of their state law officers and consultants engaged for that purpose, who ought to be aware of and address the "complexities" before the treaties are signed with commitment to implementation involving the use of the agreed dispute resolution mechanisms. In the main BITs follow the same pattern. The differences relate to the particular circumstances of the parties.²⁵ Typically, they provide legal guarantees and safeguards ostensibly for the fair and equitable treatment and protection of foreign investors, protection against expropriation and nationalization, free transfer of capital and profits and international arbitration of disputes between the investor and host state.
- 5.4 It is open to African states to discard disadvantageous old BITs that exploit such states and to renegotiate new ones. Technical advice and expertise are available on the continent for states that need modern and efficacious agreements for the better management and resolution of disputes governed by them. This does not exclude the continuing use of foreign expertise, if still needed, but the doors ought to be open for the engagement of the suitably qualified continental practitioners. Their involvement will not only promote capacity building but also facilitate the acquisition of the much touted experience otherwise denied to them. Africans therefore bear greatest responsibility for the

²⁵ For a bird's eye view see Peter-John Vickers, *Bilateral Investment Treaties*, Meier - Boeschenstein News Bulletin, Nr 01/03.

short-changes meted out to them, their disappointments and frustrations, and the consequences of their own decisions and choices on who they appoint to solve their disputes, how and where they do it.

- 5.5 Disputes, commercial or investment, are about resources and services. Within the ambit of party autonomy, African states are free to write suitable arbitration clauses and agreements and to choose the applicable law, the venue and seat of arbitration. Bring to mind also that the New York Convention, the Washington Convention (and the various institutional rules of arbitration practice) copied into African law enable the usually successful foreign parties in such disputes to access the unsuccessful respondent's assets wherever located. Consequently an African state that chooses foreign laws or arbitral seats to settle its disputes can only have itself to blame if it is dragged willy nilly to the chosen jurisdiction, with open access to its assets.

6. Changing Perceptions

Because policies in the international trade area designed by the dominant economic powers patently reflected a self-interest propulsion, the Bretton Woods institutions had been originally charged with the well-intentioned post-war effort of formulating and overseeing policies to guarantee a new economic order. Opinion differs whether this mandate has been adequately, satisfactorily or successfully discharged or whether these institutions have continued to project the policies of their dominant shareholders. The difference of opinion is stuff for expert research and analysis beyond the scope of this paper.

- 6.1 On changing perceptions however, it is on record that a decade ago the *Economist magazine*²⁶ had brushed off Africa as a hopeless continent. A decade later the same magazine²⁷ portrayed Africa as a rising and

²⁶ *The Economist*, 13th May, 2000. The Economist Group, London.

²⁷ *The Economist*, 3rd December, 2011.

hopeful continent, sought after by old and new economic powers, the changing perception being Africa's fabulous wealth of natural resources, an economy growing faster than any other continent (by more than 6%), the second most populous continent on earth and the second largest mobile market.²⁸ Between 2009 and 2011 the AfDB reportedly funded \$2.5 billion to help Fragile States and a High Level Panel on Fragile States in 2013. Their report *"Ending Conflict and Building Peace in Africa: A Call to Action"* is acclaimed for recommendations that address the drivers of serious conflict, post-conflict, state building and peace-building. There can be no excuse therefore for continuing to recycle old prejudices instead of moving forward.

- 6.2 In a poignant official statement, the Head of the 28-country European Union in Kenya²⁹ advised the European delegation to "stop wagging" its finger at Kenya and the rest of the continent, adding *"Europe has its own share of challenges already and Africa is surely getting aware of her growing potential, economically and otherwise"*. The EU mission is persuaded by the need for *"the successful execution of a meaningful development agenda in the region"* and by Africa being *"a continent on the rise with resources and a very hopeful future."* He therefore enjoined the West to deal with the African leadership on the basis of this understanding and mutual respect.³⁰

²⁸ Kagwanja, Chief Executive of Africa Policy Institute, "EU-Africa Forum a wake-up call for Continent's Leaders," *Sunday Nation*, April 6, 2014.

²⁹ L. Briet, Head of Delegation of the European Union and Permanent Representative to the United Nations Environment (UNEP) and UN-Habitat.

³⁰ The signatories to this statement included envoys from Britain, Canada, Germany, Japan and an IMF representative. Published by Standard on Sunday, 14th May, 2014 p. 2. In the presence of four East African Heads of State, China signed a deal for KShs. 327 billion to fund a Standard Gauge Railway in Kenya, KShs. 170 billion to establish the China-Africa Development Bank, KShs. 5.1 billion to set up a China-Africa Research Centre in Nairobi and KShs. 880 million for ecological and wildlife protection, with more to come for the development of the region. *Sunday Nation*, Nairobi, May 11, 2014 p. 1. See also commentaries in *China Daily* and *China*

- 6.3 The changes in Africa's economic growth and its importance in the world economy ought therefore to bring with it, and open up, the opportunities for the beneficial involvement of Africans in the exploitation and use of its natural bounty and the development processes that include the peaceful management and resolution of the disputes and conflicts germinated from the noted wide list of economic activities across the continent. For their part in fulfilling that expectation "foreign partners" ought to shed negative attitudes that hold back the continent and keep Africa poor and impoverished.
- 6.4 Africa's self-imposed predicament is apparent. In asking Africans to change tact, one scholar observes that the African corridors of power are awash with high-flown talk about 'equal partnership' with old emerging global powers, and the mantra of 'Africa's ownership' of its development process.³¹ Another scholar urges African countries to appreciate and utilise their endowed resources and strive towards conducting their own economic and social affairs according to their aspirations by alluding to the "Aggrey eagle" that was domesticated as a chicken and, when freed, had to be kicked to realise it can not only fly but even soar into the highest heavens.³²

7 RECYCLING OLD CHALLENGES

- 7.1 In arbitration practice the drawbacks commonly dressed up as "challenges" start with a call for the provision of extensive training of Africans ostensibly to enhance capacity building. Stated as such this

Watch by He Wenping (Fellow of the Chahar Institute and researcher with Institute of West Asian and African Studies at the Chinese Academy of Social Sciences) and Jerry Zhang (Chief Executive Officer, Standard Chartered China) on "Advancing China-Africa Ties" and "Trade relations for Rapid Expansion."

³¹ Kagwanja, *supra*.

³² PLO Lumumba, Professor of Law and Director of Kenya School of Law in "Africa must Exorcise the Ghost of Low Self-esteem to foster Growth," *Standard on Sunday*, 30th March, 2014, p.39.

challenge ignores the virtual exclusion from international arbitration of the already trained and suitably qualified practitioners and arbitrators on the continent who are looking for opportunities for practice and experience in the ever-expanding arbitration space in Africa. There is a growing number of Africans, brandishing beautifully embossed ADR certificates from training centres and institutions home and abroad, who nevertheless continue to attend expensive ADR training workshops, seminars and conferences but still complain about the lack of appointment as arbitrators even in African disputes with African parties and entities. Suitably qualified African practitioners and arbitrators unable to shed the status of perennial students are therefore compelled to turn themselves into perpetual trainees at arbitration institutions. There is nothing against training. The point of emphasis is that mastery of the rules of international arbitration does not translate into expertise in the underlying substantive issues in international arbitration that only the opportunity for practice and acquisition of experience offer.³³

- 7.2 Other perceived old challenges speak to the need to adopt modern arbitration laws and to establish arbitral institutions. What has changed? Those involved in arbitration practice on the continent cannot fail to be aware of the improvements in arbitration laws across Africa. Several of the mainly English speaking states have either adopted or adapted the UNCITRAL Model Law making them applicable to both domestic and international arbitrations. States such as Nigeria, Kenya, Uganda, Zambia, Zimbabwe and Mauritius are in this category. The structure of such modern national arbitration statutes closely follows the Model Law scheme covering the various stages of arbitration from the appointment of arbitrators, conducting the arbitral proceedings with the mechanisms for challenging the arbitrator and the arbitral jurisdiction, the making of the final award, termination of the arbitral proceedings by award or settlement, to the setting aside or recognition and enforcement of the award. The statutes include mandatory provisions intended to attract universal application, force and effect. In addition, states like Nigeria, Kenya and Zimbabwe have domesticated the New York Convention to reinforce the award enforcement procedures.

³³ See para 9.2 below.

- 7.3 The Cairo Regional Centre for International Commercial Arbitration (CRCICA) came into existence in 1979 and the Lagos Regional Centre for International Commercial Arbitration (LRCICA) in 1989. Since then the establishment of the Kigali Centre for International Arbitration (KIAC) in May 2012, the Lagos Court of Arbitration (LCA) in November 2012, the LCIA-MIAC Arbitration Centre in Mauritius in December 2012 and the Nairobi Centre for International Arbitration (NCIA) in January 2013 – are all recent developments and indicators of continental progress.
- 7.4 Novel and extensive functions are allocated to the Nairobi Centre for International Arbitration (NCIA) in Act No. 26 of 2013.³⁴ They include facilitating the conduct of domestic and international commercial arbitration and ADR techniques, developing appropriate rules, organising international conferences, seminars and training programmes for arbitrators and scholars, and so capacity building is not ignored. Also included are provisions for pro-active co-operation with regional and international institutions, co-ordination of research and dissemination of arbitration data and material, the establishment of a comprehensive library, provision of administrative and technical assistance to arbitral parties, educating the public on arbitration and ADR mechanisms and concluding strategic agreements with regional and international bodies for technical assistance. So this new law opens up opportunities for local, regional and international participation and co-operation. There is also in Kenya the Centre for Alternative Dispute Resolution (CADR, an initiative of the Kenya Institute of Arbitrators), incorporated in May 2013 to establish and maintain a regional Dispute Resolution Centre in Kenya. CADR is also mandated to organise, supervise, run and operate international arbitrations and conciliations.³⁵ Successful implementation will not only showcase the skills and expertise of local, regional and international commercial

³⁴ Government Printer, 2013, Nairobi, Kenya.

³⁵ CIArb Kenya Website available at www.ciarbkenya.org. (Accessed on 30 March 2014).

arbitrators but also attract international clients and users to Africa with greater exposure to international experience.³⁶

- 7.5 The joint marketing conferences initiative would be a valuable tool for African international arbitrators and the arbitration centres. Joint websites listing such centres and maintaining the profiles of all qualified international arbitrators would be an additional boost. Existing institutions will seek collaboration with reputable international arbitration institutions.³⁷
- 7.6 Such welcome advances, successfully implemented, can assist the growth of arbitral jurisprudence and expertise for the benefit of domestic and foreign parties and enhance the standard and quality of international arbitration practice on the continent, drawing appropriately from the experience of the well-established international institutions like the LCIA, ICC, ICSID and the PCA. Opportunities will open up for users and practitioners with cost and time saving devices for resolving commercial disputes locally.
- 7.7 For the mainly French speaking countries, the OHADA Treaty and system of arbitration have also made comparable advances in dispute resolution under a Uniform Arbitration Act that prescribes the basic rules applicable to any arbitration with a seat in an OHADA member state and supersedes the arbitration law of any member state. For present purposes the significant observation is that the OHADA system of arbitration is modern and that an OHADA award may be refused enforcement only if manifestly contrary to the international public order of the OHADA member state – a public policy limitation

³⁶ There is already a measure of continental co-operation and progress in that the Kenyan CIArb has been training arbitrators across Africa from countries including Nigeria, Zambia, Uganda and Malawi.

³⁷ In this connection, for example, the Kenyan CIArb already maintains close relationship with the International Law Institute in Kampala (ILI) and the Centre for Africa Peace and Conflict Resolution of California State University (CAPCR) in conducting ADR courses locally and internationally; Courtesy of K. Muigua's paper, *supra*. The Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos, also have cooperation agreements with ICSID. See: [https://icsid.worldbank.org/ICSID/FrontSerolet?requestType=CasesRH&actionVal=RightFrame&FrontPage=Co-operation agreements&pageName=Coop with Oth Inst.](https://icsid.worldbank.org/ICSID/FrontSerolet?requestType=CasesRH&actionVal=RightFrame&FrontPage=Co-operation%20agreements&pageName=Coop%20with%20Oth%20Inst.) (Accessed on 10 April 2014).

consonant with state sovereignty. As some, but not all OHADA states are party to the New York Convention an investor needs advice and awareness of a limitation that is not necessarily a drawback to award enforcement in all Africa.

8. Included in the package of impediments to arbitration practice in Africa is a perceived lack of supportive “African” judges and arbitration-friendly environments. With particular reference to Africa this requirement, to an extent, stems from a bias against Africa as there is nothing definitive as an “African” Judge or an “African” Court any more than there is an “European” or “Asian” judge or court. Applied sweepingly by the adjectival “African” this generalization does more harm than good for the promotion of arbitration in the 56 old states of Africa several of whom have gone some considerable way to modernise and improve arbitration standards in recent years under the impact of UNCITRAL.

This requirement is also troublesome because there is no equivalent or similar requirement for supportive judges or courts in litigation practice against which, ironically, arbitration competes and claims to be a preferred dispute resolution method of choice. In other words litigants do not ask courts to be supportive or friendly other than dispense justice between litigants, and the supportive requirement cannot extend to upholding questionable arbitral awards.

Judicial support for arbitration is prompted by the universal recognition of the differences between arbitration and litigation and the desirable supportive role of the national courts in all jurisdictions in which the national courts have supervisory powers over arbitral tribunals. Here, some differences between domestic and international arbitration practice emerge.

- 8.1 At the domestic level, in some African jurisdictions, there are glaring obstacles to domestic arbitration proceedings from the attitude of some unscrupulous lawyers in delaying an arbitration by deliberately opening the doors to judicial intervention and obtaining court orders that injunct or indefinitely postpone domestic arbitration proceedings. There are several arbitration matters languishing, for example, in Kenya’s High Court because of stay and injunctive applications hastily filed in court that do not proceed further or quickly enough. There is evidence however that the increasing number of arbitration-trained judges is making a difference in the expeditious disposal of arbitration

matters and clarification of arbitration law. In addition, the Constitution of Kenya, quite apart from the Arbitration Act, mandates the settlement of disputes by ADR procedures and mechanisms including arbitration. In that respect a judicial decision such as that of the Abuja Division of the Nigerian Court of Appeal that courts do not have legal justification whatsoever to grant an interlocutory injunction restraining on-going arbitral proceedings is welcome support for arbitration practice in an African jurisdiction.³⁸

In another case ³⁹ the Nigerian Supreme Court declared it an abuse of the court process for a respondent to initiate fresh proceedings in Nigeria in an arbitration case pending in London.

8.2 Over time there still appears to be a need for further statutory limitations on the occasions when courts can intervene in arbitration. With hesitation, one approach would be for the law to allow the arbitral tribunal to conduct the arbitration from start to finish and confine the courts to issues of confirming appointment of arbitrators, interim measures, setting aside, and enforcement of the final award.⁴⁰ The hesitation is that arbitrators do make mistakes and when they get things wrong their errors might be too late and too expensive to correct.

Notably, the Mauritian arbitration statute provides for all appointments and specified administrative functions to be performed

³⁸ *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation and Oando OML 125&134 Ltd* summarised in AILA Newsletter, March 2014.

³⁹ *M.V. Lupex v NOC (2003) NWLR (Part 844) 469* circulated by R. Baruti, footnote 22 above.

⁴⁰ See R. Hall, "Pre-Hearing Removal of Arbitrators" for the numerous instances in which US courts discourage interlocutory arbitral injunctions and the fewer exceptional instances in which injunctions may be granted.

by the Permanent Court of Arbitration in a way that detaches the arbitral process from the national court.⁴¹

- 8.3 At the international level the restriction of judicial intervention in arbitration matters seems to be taken and enforced more seriously. This is reinforced by the Model Law-influenced statutes that specifically provide for court support for arbitration in specified instances such as in party request for referral of a dispute to arbitration (Article 8), interim measures of protection (Article 9), court assistance in taking evidence (Article 27), award enforcement (Article 35) and appeals where so provided.

Again, the Mauritius International Arbitration Act can be exemplified for including specific provisions for the speedy determination of interlocutory issues and endorsement of *competence-competence* to prevent local courts from deciding jurisdictional issues.⁴²

- 8.4 To conclude this aspect of the discussion the debate is entirely different where the call is for sustained improvements and the use of best endeavours to compel judiciaries everywhere to be consistently fair and just in the global delivery of justice. It is then not restricted to judges but extends to lawyers and other role players in the justice delivery system, under a common obligation, to adhere to and be guided by a consistent application of the laws, rules and the universal standards of practice in the dispensation of justice. Otherwise the incompetent, biased or corrupt judge is neither supportable nor defensible in any jurisdiction or continent in arbitration or litigation matters.

9. RECOMMENDATIONS

⁴¹ At the launch of the 2010 MIAC-LCIA the response to this writer's query about the split function was that it was an innovative measure to win foreign confidence in doing business in that country.

⁴² *Ibid.*

Recommendations from colleagues home and abroad that take in the above concerns start with the recognition that as arbitration appointments are competitive, self-promotional efforts are inevitable for getting known by the appointers – governments, ADR institutions and centres, and users of arbitration.

Proposals for change require setting up (a) a representative group of professionals and (b) substantial funds to implement programs that include:-

1. working on changing the African mindset of inferiority and on confidence-building by mounting vigorous awareness campaigns home and abroad to promote and showcase African arbitrators and practitioners.
2. strengthening specialist training events with Africans leading the training programmes tailored to the specific needs in African countries as AILA is doing.
3. embarking on membership drives among African lawyers and encouraging the drafting and use of arbitration clauses favourable to the choice of applicable laws, seats and venues on the continent.
4. working for the creation and support of arbitration-friendly jurisdictions to encourage the conduct of international arbitrations and hearings on the continent.
5. embarking on focused specialist visits to African organisations such as the AfDB, AU, ECOWAS, COMESA, Africa Regional Property Organization (AFRIPO) and others in addition to State Attorney Generals, Ministers of Justice and Chief Judges of local courts to create necessary awareness and sensitising them first to the existence of suitably qualified African practitioners and Arbitrators and second, to their availability for nomination and appointment in arbitrations.
6. Networking with other arbitration users in the West, the Arab, Latin American, Caribbean and Asia-Pacific countries.

7. organising mentoring sessions for young African arbitrators and practitioners.
8. identifying and working with major users and appointers of arbitrators in Africa and appointing agencies.

The door is not closed on exploring the ways and means of opening-up international arbitration practice to Africans and raising the necessary funds to do so.

10. CONCLUSION

It is apparent that foreign arbitrators and practitioners monopolise or at any rate dominate arbitrations in their own states to the virtual exclusion of Africans. It is also apparent that Africans themselves transfer their disputes abroad and appoint foreigners to resolve them at enormous cost and expense to their governments.⁴³ With the noted advances made for resolving disputes on the continent there can be no justification for continuing to live the lie that there are no suitably qualified African practitioners and arbitrators or arbitral institutions or centres to manage and administer arbitrations on the continent. Africans must therefore wake up to the realisation that they remain perennial outsiders by choice.

- 10.1 For what else needs or remains to be learnt about dispute resolution, Africans, like everybody else, can learn as they go along and from their mistakes, while also benefitting, like everyone else, from the fruits of participation, effort and experience. Africans must therefore desist from treating themselves or being continually lectured and treated as perpetual students. Going forward therefore from old prejudices formulated as eternal challenges to arbitration in Africa, the doors must be widely open, home and abroad, for African exposure to, and involvement and participation in, continental and international arbitrations the better to gain, develop and improve the skills and

⁴³ See paragraph 3.1, supra.

techniques for dispute resolution on globally acceptable standards of practice.

There is resonance with and support for this approach:

“Hand in hand with the need for stronger and more predictable enforcement regimes for arbitral awards in Africa is the need for more arbitration hearings to be held on the continent. The regular application and testing of arbitration laws will develop the arbitration experience of domestic courts and increase public awareness in commercial matters, which in turn may alleviate current challenges such as the time it takes to enforce arbitral awards in certain countries.”⁴⁴

This approach could promote confidence-building in African arbitration instead of the defeatist recycling of old prejudices.

- 10.2 On the confident note that the future of arbitration in Africa, wherever it is now, will be in Africa, there is pause to recognise that some renowned international arbitration institutions are beginning to expand their business interests and institutional profiles in parts of Africa. The initiative ought to extend across the continent noting that Nigeria is now the largest economy in sub-Saharan Africa, that there are world-class and fascinating destinations in Kenya, and hospitable and business-friendly environments in Ghana and all over the continent.⁴⁵

⁴⁴Prescient message from H. Lovells, “Arbitration in Africa” 28th March, 2013, <http://w.w.w.hoganlovells.com/files/Publications>. (Accessed on 10 April 2014).

⁴⁵ A. Wutawunashe says, “Dear Africa! It is time to pause and reflect” for “none can change our situation but ourselves”. *New African*, March 2014 No. 537 pp 40 – 49.

BUILDING LEGAL BRIDGES: FOSTERING EASTERN AFRICA INTEGRATION THROUGH COMMERCIAL ARBITRATION

by: **DR. KARIUKI MUIGUA***

ABSTRACT

This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration, that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts.

This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice.

The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing frameworks and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.

1. INTRODUCTION

This paper explores the feasibility of commercial arbitration as a means to foster the process of Eastern Africa integration. The author proffers an argument in the context of Eastern Africa integration,

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that commercial arbitration offers a better platform for dealing with commercial disputes that are bound to arise considering the differing personal or state interests in the ongoing Eastern Africa integration, as compared to national Courts

This discourse is premised on the fact that the five member countries making up the East African Community (EAC) have different legal systems and this presents a major challenge in harmonising the various legal systems. This also affects the possible use of courts in managing the potential transnational commercial disputes due to the potentially different rules of procedure and practice. It is unlikely that any of the Member States may be willing to give up on their legal system and adopt one practised in another State, solely for the interests of EAC. Based on this, this discourse makes a case for commercial arbitration as a potent mechanism of managing commercial disputes amongst the EAC Member States and any legal persons doing business in any of these countries.

The paper briefly examines the state of commercial arbitration in the EAC Member States with a view to identifying the existing legal frameworks and any impediments in their effectiveness. Finally, the author makes a case for utilizing commercial arbitration to build bridges and foster Eastern Africa integration for development.

2. BACKGROUND TO THE EASTERN AFRICA INTEGRATION

The East African Community (EAC) is a regional intergovernmental organisation of the Republics of Kenya, Uganda, Tanzania, Rwanda and Burundi, with its headquarters in Arusha, Tanzania. The East African Community (EAC), first established in 1967, disintegrated in 1977, due to lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address the situation.

1

¹ *Treaty For The Establishment Of The East African Community* (As amended on 14th December 2006 and 20th August 2007), Preamble.

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The EAC was re-established by the *East African Community Treaty* which was signed on 30th November, 1999 and entered into force on 7th July, 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to the EAC Treaty on 18th June, 2007 and became full members of the Community with effect from 1st July, 2007.²

The Member States stand to benefit greatly in terms of economic development from the integration of Eastern Africa region. It is noteworthy that the countries in the East African Community (EAC) are among the fastest growing economies in sub-Saharan Africa, making significant progress toward financial integration, including harmonization of supervisory arrangements and practices and the modernization of monetary policy frameworks.³ Regional integration expands the possibility for an increased flow of both intra-regional and inter-regional Foreign Direct Investment (FDI) due to the expanded market created by the borderless (or less restricted) trade across the member countries.⁴

The four Pillars of the regional integration include Customs Union, Common Market, Monetary Union and Political Federation.⁵ These are meant

² *Ibid.*

³ P. Drummond *et. al.*, *The East African Community: Quest for Regional Integration*, International Monetary Fund, January 2015.

⁴ A.I. Abdi & E.H. Seid, 'Assessment of Economic Integration in IGAD,' *the Horn Economic and Social Policy Institute (HESPI) Policy Papers No. 13/2*, August 2013, p.7. Available at <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH0b09.dir/doc.pdf> [Accessed on 7/02/2015].

⁵ Uganda 'Umoja', *Quarterly Update on the East African Community*. Edition 6 October - December 2014. P. 19.

Available at http://www.meaca.go.ug/index.php/publications/cat_view/54-umoja.html [Accessed on 29/01/2015]. The Customs Union came into effect in 2005 and it allows East Africa to operate as a free trade area where Partner States reduce or eliminate taxes on goods originating from

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to enhance the efficiency and performance of the Eastern Africa region as an economic bloc. The East African region prospects a future that will have the region operating as a regional economic bloc with a common market and possibly a common currency.

This will come with other benefits such as increased regional cross-border business and commercial investment. The EAC seeks to set up a prosperous, competitive, secure, stable and politically united East Africa; and provide platform to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.⁶

These potential benefits may however be curtailed by the disputes, including commercial disputes, that are bound to come with increased regional trade and investment or even conflict of interest amongst the Member States. For effective liberalisation of trade and investment in any region, the role of competent dispute settlement mechanisms is vital.⁷ Regional integration is not an end in itself but is an instrument to support a strategy of economic growth and development.⁸ Development is not feasible in a conflict

their countries and have a common tariff on goods imported from outside the participating Countries. The common market became effective on 1st July 2010 and objective is to provide the region with a single economic space within which business and labour will operate in order to stimulate investment. The Monetary Union was signed on November 2013 with a view to transform the East African economy to operate with a common currency. Political federation is said to be in its last stages and under this, the EAC Partner States are expected to have a regional political Union and harmonized operations.

⁶ *Treaty for the Establishment of the East African Community*, Article 5.

⁷ A.F.M. Maniruzzaman, 'International Commercial Arbitration in the Asia Pacific: Asian Values, Culture and Context', *Journal of International Affairs*, Vol. 6, No. 3, July-December 2002, pp. 61-63, p.61.

⁸ V.E. Iglesias, "Twelve Lessons from Five Decades of Regional Integration in Latin America and the Caribbean." *Presentation to the Conference Celebrating the 35th Anniversary of the Institute for the Integration of Latin America and the Caribbean (INTAL)*, Buenos Aires, November 27-28, 2000.

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situation. Conflicts and disputes ought to be managed effectively and expeditiously for development to take place.⁹

The national legal systems are grounded on legislation and/or policy statements, which may include judicial and regulatory frameworks. This approach mainly uses the adjudication and arbitration processes to settle arising conflicts. However, litigation has been criticized in many forums as one that does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the region have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.¹⁰

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.¹¹ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice.

p. 2. Available at <http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/iglesias-12lessons.pdf> [Accessed on 09/02/2015].

⁹ K. Muigua & F. Kariuki, 'ADR, Access to Justice and Development in Kenya,' *Paper Presented At Strathmore Annual Law Conference 2014 held On 3rd & 4th July 2014 at Strathmore University Law School, Nairobi*. p.2. Available at <http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis> [Accessed on 09/02/2015].

¹⁰ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

¹¹ J.B. Ojwang, *The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development*, *Kenya Law Review Journal* 19 (2007), pp. 19-29 at p.29.

As such, national courts are not very popular with the international commercial community when it comes to settling commercial disputes due to the alien laws and fear of bias.

Arbitration is thus preferred to litigation when it comes to settlement of international commercial disputes due to its advantages over litigation, such as, parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexible; cost-effective; confidential; speedy and the result is binding.¹²

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers a more viable mechanism in dealing with commercial disputes. This is informed by the international community's desire to create a multinational treaty regime for international commercial transactions that is based on the private law principle of autonomy of contract - party autonomy- and, specifically, two of the most important creations of autonomy of contract: first, agreements to submit disputes that might arise during the course of a commercial relationship to binding private arbitration; second, contractual terms designating the law that will apply to such disputes.¹³

It is against this background that this paper explores the viability of international commercial arbitration as a means to foster the Eastern Africa integration through effective management of commercial disputes in the region for enhanced economic development of the Member States.

3. LEGAL AND INSTITUTIONAL FRAMEWORK ON COMMERCIAL ARBITRATION IN EASTERN AFRICA

¹² K. Muigua, *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*. The Chartered Institute of Arbitrators-Kenya, *Alternative Dispute Resolution Journal*, Volume 1 Number 1 (2013), pp. 43-78 at p. 61.

¹³ P.J. McConnaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles,' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, pp. 11-12.

This section is limited to Kenya, Tanzania, Uganda, Rwanda and Burundi being the Member States of the East African Community.¹⁴ The discussion briefly examines the legal and institutional framework on international commercial arbitration in each of these Member states. It is important to point out that all the five Member States have some form of legal and institutional framework on arbitration in place, albeit some of them underdeveloped. Most of these States' frameworks are not specifically on commercial arbitration which is the concern of this paper, but they do contemplate the practice of commercial arbitration in these countries.

3.1 Kenya

Kenya's legal system is based on the English Common Law system resultant from its British colonial history. The *Arbitration Act*¹⁵ governs the arbitration process in Kenya. Parties to a dispute can, by way of a written agreement refer their disputes to arbitration.¹⁶ Arbitration is international if *inter alia*, the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.¹⁷ Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act, 1995* provides for court intervention on limited grounds. One such instance is where the Arbitration Act expressly provides for intervention of the court

¹⁴ The Treaty for Establishment of the East African Community, Article 3.

¹⁵ No. 4 of 1995 (As amended in 2009), Laws of Kenya.

¹⁶ Section. 4, No. 4 of 1995.

¹⁷*Ibid*, Section 3(a).

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under section 10.¹⁸ The courts are however still involved in the arbitral process and can actually be used to bog down the same.¹⁹ Courts can intervene on a number of grounds to set aside the arbitral award. The most common ground is public policy. The High Court of Kenya may set aside the award where it finds the award is in conflict with the public policy of Kenya.²⁰ Public policy is however vague and has not yet been clearly defined. In the Kenyan case of *Christ for All Nations vs. Apollo Insurance Co. Ltd*,²¹ the Court stated that although public policy is a most broad concept incapable of precise definition, an award could be set aside under section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it was shown that either it was: Inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. This therefore leaves the matter to the discretion of the courts to determine what entails public policy of Kenya.

In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, Kenya is a State Party to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC)*²² and to

¹⁸ *Ibid*, Section 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'.

¹⁹ See generally K. Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and after Arbitration in Kenya'. *Kenya Law Review* 2008-2010. Available at <http://kenyalaw.org/kl/index.php?id=1923>; see also http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf [Accessed on 09/02/2015].

²⁰ Section 35(2) (b), No. 4 of 1995.

²¹ [2002] 2 EA 366.

²² The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (the "New York Convention"). Adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

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*International Convention on the Settlement of Investment Disputes (ICSID)*²³. The *Kenyan Arbitration Act, 1995* provides that international arbitration awards are to be recognised as binding and enforced in accordance to the provisions of the *New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards*.²⁴(*Emphasis ours*). This clears doubt as to Kenya's stand on enforcing international arbitration awards and all that remains is the national courts' goodwill.

Under the *Civil Procedure Act*²⁵ there are provisions dealing with the use of both mediation and arbitration.²⁶ The *Civil Procedure Act* gives the court jurisdiction to refer any dispute to Alternative Dispute Resolution (ADR) mechanisms where parties have agreed or where the court considers it appropriate.²⁷ Further, where all parties agree, the court has jurisdiction to refer any matter in difference between the parties to arbitration.²⁸ However, these provisions are mainly applicable to domestic arbitration.

²³ 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967).

²⁴ Section 36(2)

²⁵ Cap 21, Laws of Kenya.

²⁶ See generally Section 59, *Civil Procedure Act*, Cap 21; See also Order 46, *Civil Procedure Rules 2010* (Legal Notice No. 151 of 2010).

²⁷ Sections 59, 59B and 59C, Cap 21.

²⁸ Order 46, R. 1, *Civil Procedure Rules 2010*.

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The *Nairobi Centre for International Arbitration Act* 2012,²⁹ which was enacted in January 2013, established an independent institution, the Nairobi Centre for International Arbitration (NCIA) for commercial arbitration based in Nairobi. Its functions are set out in the Act as *inter alia* to: to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; and to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives.³⁰

This Centre places Kenya on a better platform to engage with other regional international commercial arbitration centres in promoting international commercial arbitration in the region and the ultimate increase in investments and trade for enhanced economic development in the region.

The Chartered Institute of Arbitrators Kenya Branch, established in 1984, is one among the branches of the Chartered Institute of Arbitrators, which was formed in 1915 with headquarters in London. It promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and Adjudication. It has affiliations with arbitration bodies and institutions in other countries across the world and with the London Court of International Arbitration and the International Chamber of Commerce in Paris.³¹

The Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution

²⁹ No. 26 of 2013, Laws of Kenya.

³⁰ Section. 5.

³¹ The Chartered Institute of Arbitrators Kenya Branch website, Available at http://www.ciarkbkenya.org/About_Us.html. [Accessed on 16/02/2015]

(CAPCR) of California State University to conduct courses in Mediation and other forms of ADR both locally and internationally. The branch has also been involved in training of Arbitrators in East, West and Southern Africa respectively. The institute thus plays a major role in promoting international commercial arbitration not only in the Eastern Africa region but also in Africa as a whole.³²

The Kenyan legal and institutional framework has the potential to advance international commercial arbitration for the integration of Eastern Africa. However, this framework has not been streamlined with EAC policies on deepening integration. This needs to be done if any meaningful progress is to be achieved. Even as Courts play their role as provided for in Kenya's *Arbitration Act*, Kenyan Courts ought to have due regard to the regional interests of maximizing investment and trade in the region through attracting more foreign investors. Minimal and objective courts' intervention in international commercial arbitration in the region will go a long way in fostering regional integration through international commercial arbitration.

3.2 Tanzania

Tanzania's legal system is based on the English Common Law system derived from its British colonial legacy. It has been argued that although there are two arbitration bodies in Tanzania, arbitration is not yet popular among the Tanzanian business community.³³ The two arbitration bodies, each with their own set of rules on arbitration proceedings are equipped to deal with domestic and international arbitrations.³⁴ The Tanzania Institute of Arbitrators

³² *Ibid.*

³³ 'Tanzania', *Arbitration in Africa*, June 2007. P.2.

Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 4/02/2015].

³⁴ *Ibid*, p. 5; See also R. Rana, 'The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday's Tools?', in Chartered Institute of Arbitrators, Kenya, *Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014, pp. 229-237 at p.230.

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(TIA) is a Non-Governmental Organisation registered under the *Societies Act*³⁵ and the National Construction Council (NCC) is a statutory body created under the *National Construction Council Act*,³⁶ which sponsors and encourages arbitration as a means of settling disputes within and outside the construction industry regardless of the subject matter of the dispute.³⁷

The Tanzanian *Arbitration Act*³⁸ was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent out of court³⁹ as well as provisions on court-annexed arbitration.⁴⁰ Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*⁴¹, made under the Arbitration Act.⁴² It has been noted that the

³⁵ Cap 337, Laws of Tanzania.

³⁶ No. 20 of 1979, Cap. 162.

³⁷ *Ibid.*

³⁸ Cap 15, Laws of Tanzania (2002 Revised Edition).

³⁹ Sections 3-26.

⁴⁰ Tanzania's Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings (see Schedule 2 to the Code).

⁴¹ Published in Government Notice 427 of 1957.

⁴² *Arbitration in Africa*, June 2007, *op. cit.* p.5.

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arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL model law and has never been changed to take into account its provisions.⁴³Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17th June, 1992.⁴⁴

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Act.⁴⁵ It has also been observed that the Tanzanian national Courts have immense powers to intervene on any matter of law in an arbitration proceeding.⁴⁶ As such, party autonomy is restricted thus severely affecting investors' confidence in the Tanzania's law on arbitration.

It has been argued that as a general rule: the more reliably a nation's national courts honour written arbitration agreements and refuse to hear claims within the scope of an arbitration agreement, the more clearly defined and limited the possible occasions of judicial involvement in arbitration proceedings; and the more reliably a nation's national courts recognize and

⁴³ *Ibid*, p.6.

⁴⁴ W. Kapinga, *et. al.*, 'Getting the Deal through - Arbitration- Tanzania', Chapter 2014, p. 406. Available at https://www.academia.edu/9872218/Getting_the_Deal_Through_-_Arbitration-Tanzania_Chapter_2014 [Accessed on 4/02/2015].

⁴⁵ R. Rana, 'The Tanzania Arbitration Act: meeting the Challenges of Today with Yesterday's Tools?' *op. cit*, p.231.

⁴⁶ *Ibid*. See also generally, N.S. Mkumbukwa, 'Is The Commercial Court Jealous Of Arbitration?'

Available at http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-jealous-of-Arbitration_-_Commercial-Court-Roundtable-8th-Oct.-2009.pdf [Accessed on 14/02/2015]; K. Kepher, 'Procedural Laws Of Commercial Arbitration In Tanzania: An Analysis'. ISSN 2321 - 4171. Available at <http://jsslawcollege.in/wpcontent/uploads/2013/12/PROCEDURAL-LAWS-OF-COMMERCIAL-ARBITRATION-IN-TANZANIA-AN-ANALYSIS.Pdf> [Accessed on 14/02/2015].

enforce arbitration awards without reviewing or “second guessing” the merits of the award-the better the business climate and reputation of the nation as a preferred destination for foreign direct investment.⁴⁷Currently, Tanzania cannot be said to have clearly defined and limited occasions of judicial involvement in arbitration proceedings. Courts do set aside arbitral awards and interfere with arbitration on grounds that are fluid and this makes the practice of international commercial arbitration in Tanzania unreliable.

The country’s laws on arbitration have also been criticised as archaic and in need of urgent reforms.⁴⁸ It is perhaps the only country in the region with very outdated laws.

In light of the foregoing, Tanzanian authorities need to reform the country’s laws on arbitration in line with the international best practices and harmonise them with the objectives of the Eastern Africa integration process. Arbitration practice in Tanzania ought to be afforded more autonomy and independence from unnecessary national courts interference, as this is the only way that international commercial arbitration in Tanzania can take root and spur development in the country and the region. The reforms are especially necessary due to the anticipated in flow of foreign investments in oil and gas in the region.

3.3 Uganda

Uganda was a British colony and thus English legal system and English law are predominant in Uganda. Its legal system is based mainly on English Common Law. The laws applicable in Uganda are statutory law, common law, doctrines of equity and customary law if it does not conflict with statutory law.⁴⁹

⁴⁷ P.J. McConnaughay, ‘The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles’ *op. cit.* p. 14.

⁴⁸ A. Bitekeye, ‘TZ arbitration laws outdated, new statutes a must’, *The Citizen*, Tuesday, April 30 2013. Available at <http://www.thecitizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html> [Accessed on 14/02/2015].

⁴⁹Judicature Act, Cap 13, Laws of Uganda.

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The Ugandan *Arbitration and Conciliation Act*⁵⁰ was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.⁵¹ Its provisions on arbitration apply to both domestic arbitration and international arbitration.⁵² Perhaps a little uniqueness about the Ugandan law on arbitration is its provisions on conciliation.⁵³ The Ugandan Act states that except as provided in the Act, no court is to intervene in matters governed by the Act.⁵⁴ The national Courts may assist in taking evidence⁵⁵, setting aside arbitral award,⁵⁶ recognition and enforcement of the arbitral award.⁵⁷

⁵⁰ Cap 4, Laws of Uganda.

⁵¹ *Ibid*, Preamble.

⁵² *Ibid*, Section 1.

⁵³ Part 5, Sections 48-66.

⁵⁴ *Ibid*, Section 9.

⁵⁵ *Ibid*, Section 27.

⁵⁶ *Ibid*, Section 34.

⁵⁷ *Ibid*, Sections 35 & 36.

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However, the Ugandan *Arbitration and Conciliation Act*, provides for grounds upon which the High Court may set aside an arbitral award upon application by a party. The Act provides that recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This may be made only if the party making the application furnishes proof that—a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or the arbitral award is not in accordance with the Act.⁵⁸

The award may also be set aside where the court finds that—the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or the award is in conflict with the public policy of Uganda.⁵⁹ This presents the same hindrances as in the Kenyan jurisdiction.

The Act establishes the Centre for Arbitration and Dispute Resolution (CADRE).⁶⁰This Centre is charged with *inter alia*: to make appropriate rules,

⁵⁸ *Ibid*, Section 34 (2) (a).

⁵⁹ *Ibid*, Section 34(b).

⁶⁰ *Ibid*, Section 67.

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administrative procedure and forms for effective performance of the arbitration, conciliation or Alternative Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.⁶¹

Noteworthy are the provisions on enforcement of New York Convention awards.⁶² The Act provides that when seized of an action in a matter in respect of which the parties have made an arbitration agreement referred to in section 39,⁶³ the court is to, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.⁶⁴ Further, any New York Convention award which would be enforceable under the Act is to be treated as binding for all purposes on the persons as between whom it was made, and

⁶¹ *Ibid*, Section 68.

⁶² *Ibid*, Part 3 (Sections 39-44).

⁶³ Section 39(1) is to the effect that a “New York Convention award” means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a State (other than Uganda) which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958. Subsection. (2) thereof further states that an award is to be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.

⁶⁴ Section 40.

may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Uganda; and any references in the Act to enforcing a foreign award is to be construed as including references to relying on an award.⁶⁵ Also important are the provisions that where the court is satisfied that a New York Convention award is enforceable under the Act, the award is to be deemed to be a decree of that court.⁶⁶

The Act also has provisions on the enforcement of an arbitral award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention").⁶⁷ Any person seeking enforcement of an ICSID Convention award is to be entitled to have the award registered in the court subject to proof of the prescribed matters and to the other provisions of the Act.⁶⁸ Ugandan Courts are willing to enforce ICSID Convention awards and only stay execution of any ICSID Convention award registered under the Act if there is proof of such application.⁶⁹

These provisions demonstrate Uganda's willingness to adopt and uphold international best practices in international arbitration. This is important for the foreign investors, who require some confidence in national courts' willingness to enforce foreign arbitral awards when called upon to do so.

⁶⁵ Section 41.

⁶⁶ Section 43.

⁶⁷ Part 4 (Sections. 45-47).

⁶⁸ Section 46(1).

⁶⁹ Section 47.

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Arbitration in Uganda has the potential to boost commercial arbitration for Eastern Africa integration. Uganda can benefit from regional cooperation on setting up infrastructure on international commercial arbitration. It is important to point out that CADRE in Uganda plays a more active role in domestic arbitration than possibly any other institution in any of the EAC Member countries. International commercial arbitration would however require minimal intervention by the institution especially in areas of making appropriate rules, administrative procedure and forms for effective performance of the arbitration, establishing and enforcing a code of ethics for arbitrators. This is because where Parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore cooperate with the other EAC Member States in coming up with a transnational commercial arbitration framework for the region and streamline its domestic framework with the same.

3.4 Rwanda

Rwanda has had considerable improvement in the investment climate and this has positioned the country as an ideal investment destination.⁷⁰ The implication has been that both domestic and cross border deals have increased, with an emerging need to use arbitration and other friendly ways of commercial disputes resolution.⁷¹

Rwanda has been a party since 1979 to the *Washington Convention on the Settlement of Investment Disputes*, which provides for protection for investors and direct arbitral recourse against the State. On November 3, 2008, Rwanda became the 143rd country to accede to the *Convention on the Recognition*

⁷⁰ Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4. Available at http://www.kiac.org.rw/IMG/pdf/web_annual_report.pdf [Accessed on 09/02/2015].

⁷¹ *Ibid.*

and Enforcement of Foreign Arbitral Awards (the New York Convention). The Convention entered into force for Rwanda on January 29, 2009.⁷²

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body.⁷³ It is noteworthy that until the establishment of the Kigali International Arbitration Centre (KIAC), there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.⁷⁴

Rwanda's framework on international arbitration coupled with its membership to various international instruments on international commercial arbitration places it in a favourable position. With alignment of this framework to the EAC policies, Rwanda can competitively participate in commercial arbitration in the region in a way that fosters regional integration, attracting foreign and national investors to the region.

3.5 Burundi

The Burundian legal system is largely based on German and Belgian civil codes and customary law, with the Constitution guaranteeing the independence of the judiciary.⁷⁵ Commercial and investment disputes are normally settled by commercial courts, which have original and appellate

⁷² 'Rwanda Accedes to UN Convention on Commercial Arbitration', UN NEWS CENTRE, Nov. 3, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention> [Accessed on 09/02/2015].

⁷³ Law No 51/2010 of 10/01/2010, Laws of Rwanda.

⁷⁴ Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4

⁷⁵ The judiciary is regulated by the law *Code of Organization and Judicial Competence of 17 March 2005*, promulgated pursuant to Article 205 (3) of the 2005 Burundi Constitution.

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jurisdiction.⁷⁶ Further, in 2005, the code on judicial competence⁷⁷ introduced provisions on arbitration.

In 2007, the Burundian Government created a centre for arbitration and mediation to deal with commercial and investment disputes.⁷⁸ In 2009, *Investment Code of Burundi*⁷⁹ was enacted with its purpose being to encourage direct investments in Burundi.⁸⁰ This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. The Burundian Investment Code was enacted with the aim of simplifying the existing legislation and harmonizing the country's investment legislation with the frameworks applicable in other countries within the East African Community (Kenya, Uganda, Tanzania and

⁷⁶ A & J.N.Mabushi, 'Investment Guide, Burundi'. P.27.

Available at www.africalegalnetwork.com/wp-content/uploads/2014/09/Burundi.pdf [Accessed on 06/02/2015].

⁷⁷ Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

⁷⁸ *Ibid.*

⁷⁹ Law No. 1/24 of 10 September 2008 Establishing The Investment Code Of Burundi.

⁸⁰ *Ibid.*, Article 2.

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Rwanda).⁸¹ Burundi is also a member of the *International Centre for Settlement of Investment Disputes* (ICSID).⁸²

In 2014, Burundi became the 150th state party to the *New York Convention* 1958. Burundi however made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The Convention was to come in force in the country on 21st September, 2014 thus enabling arbitral awards made in Burundi to be enforceable in all states that are party to the New York Convention, and awards made in other states to be enforceable in Burundi.⁸³ The implication of Burundi’s ratification is that all the EAC Member States are now party to the New York Convention and it is expected to improve the confidence of foreign investors in not only Burundi, but also East Africa generally.⁸⁴

It is also worth mentioning that the Burundian Investment Code contains provisions regarding the settlement of disputes between investors

⁸¹ S. De Backer and O. Binyingo, ‘A new investment code for a new Burundi’. P. 1. Published in IFLR1000 – edition 2008. Available at

<http://www.mkono.com/pdf/A%20new%20Investment%20Code%20for%20a%20new%20Burundi%202008.pdf> [Accessed on 08/02/2015].

⁸²A & J.N. Mabushi, ‘Investment Guide, Burundi’. *Op. cit.* p. 27.

⁸³ Herbert Smith Freehills Dispute Resolution, ‘Burundi becomes 150th state party to the New York Convention’. Available at <http://hsfnotes.com/arbitration/2014/09/03/burundi-becomes-150th-state-party-to-the-new-york-convention/> [Accessed on 06/02/2015].

⁸⁴ *Ibid.* The U.S. Supreme Court noted in *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1973): The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. (<http://www.jdsupra.com/legalnews/revisiting-the-new-york-convention-as-bu-23338/>).

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and the state.⁸⁵ If such disputes are not settled, investors have the choice of litigation before a court or arbitration. If the investment has been made with Burundian capital, the choice of arbitration will be limited to internal arbitration. If, the investment does not involve the resulting from the application of the present investment code between the Government and the investor, the investor will be able to opt for internal arbitration or international arbitration.⁸⁶ However, when the investor takes recourse to international arbitration, he must do so in accordance with arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID) as applicable at the time of execution of the investment, which gave rise to the dispute.⁸⁷

It is noteworthy that the Burundian Code does not have provisions harmonizing it with the regional initiatives, which should be the case in order to reflect Burundi's entry into the EAC, which opens up major economic opportunities for investors that could be better exploited if the legal framework were modernised and harmonized.⁸⁸ This is especially important considering that the *Vision Burundi 2025*⁸⁹ provides for regional integration as one of its main pillars in order to benefit from regional integration to increase

⁸⁵ Titre iv, Law No. 1/24 Of 10 September 2008 Establishing The Investment Code Of Burundi.

⁸⁶ S. De Backerand & O. Binyingo, *op. cit.* p. 2.

⁸⁷ Article 17.

⁸⁸ United Nations Conference on Trade and Development, Unofficial, edited translation of Chapter IV of the Investment Policy Review of Burundi (French original), 2010. P. 4.

Available at http://unctad.org/en/docs/diaepcb200917ch4_en.pdf

⁸⁹ Vision Burundi 2025, available at http://www.burundiconference.gov.bi/IMG/pdf/VisionBurundi2025_short_en.pdf

and diversify its economy.⁹⁰It acknowledges that Burundi's robust and speedy economic growth will necessarily result from its successful integration at both the regional and sub-regional levels.⁹¹

The Vision 2025 also requires that in order to make a success of its integration with the regional groups that entail hope for its population, Burundi should undertake the reforms necessary in order to rehabilitate its macroeconomic framework, to set up a favorable environment for businesses, in order to attract foreign investors and to stimulate the Burundian private sector.⁹²Arguably, this can be achieved through enhancing the practice of international commercial arbitration in Burundi. Burundi can put in place legal and institutional framework on international commercial arbitration as a step towards facilitating harmonized approach to international arbitration in the region for enhanced investment and trade and ultimately economic growth.

Considering its relatively young economy, Burundi can greatly benefit from employing measures aimed at setting in place appropriate rules, administrative procedure and forms for effective performance of international commercial arbitration, qualifying and accrediting arbitrators, providing administrative services and other technical services in aid of arbitration and general sensitization of the public on international commercial arbitration. This will go a long way in building capacity and afford the country the ability to engage competitively with other EAC Members.

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⁹⁰ Vision Burundi 2025, pp. 39-40.

⁹¹ *Ibid*, p. 39.

⁹² *Ibid*, p. 40.

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It is noteworthy that while Kenya, Uganda and Tanzania share a common legal system (Common law), Rwanda and Burundi have the civil law system. This state of affairs presents difficulties due to the different legal procedures and practices where national laws are used in settlement of commercial disputes. Further, these countries have very different economies, and levels of development. This comes with its fair share of challenges and the developing countries have been advised that they need to devise regulatory and judicial mechanisms that transcend traditional methods of economic exchange within local communities and that instead facilitate exchange with strangers from outside the countries-strangers who often bring with them very different commercial customs and legal traditions.⁹³

It is suggested that developing countries need to develop legal institutions: that are not dependent on existing public institutions (which often are either non-existent or unreliable); that are capable of operating independently of existing public institutions; and that, preferably, are allowed to operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions.⁹⁴

Cross-border trade in goods and services has triggered commercial disputes across the East African region. Establishing national commercial courts alone may not be very effective in reducing delays in resolving commercial disputes due to the differing legal systems. It has been suggested in previous regional conferences that as a region, EAC needs to reform arbitration process in courts to ensure parties involved in a commercial dispute obtain justice promptly since investor confidence is bolstered if the justice system is transparent and fast.⁹⁵

⁹³ P.J., McConnaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *op. cit.* p. 11.

⁹⁴*Ibid*, p. 11.

⁹⁵ Kenya Private Sector Alliance (KEPSA) chairman Vimal Shah, as quoted in Tralac, 'Special courts expected in East Africa to arbitrate commercial disputes'. Available at <http://www.tralac.org/news/article/6342-special-courts-expected-in-east-africa-to-arbitrate-commercial-disputes.html> [Accessed on 07/02/2015].

4.1 Choice of Law in Court Proceedings

Considering the different legal systems in the EAC countries, any court proceedings in a particular country presents a handicap due to the varying procedural rules and practices. It is noteworthy that different laws provide for different time frames for approaching court to have the award set aside. For instance, in Uganda, an application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award.⁹⁶ However, in Kenya, the period is set at three months.⁹⁷ Such differences in domestic laws may present difficulties when it comes to transnational commercial arbitration. Therefore, even as parties make choice of applicable law such factors ought to be considered.

4.2 Limitations on the Application of National Law in Court Proceedings and in Arbitration

From the foregoing discussion, it is clear that most the countries in the region have sought to abide by the international arbitration best practices especially on limiting court intervention. However, in some countries such as Tanzania, the extent of Courts' intervention is still unclear and this may therefore hinder development of international commercial arbitration in the region. In the past Courts in Kenya have also exploited the various grounds for court intervention provided for in the Act to interfere with the arbitration process in Kenya.⁹⁸

⁹⁶ Section 34(3), the Arbitration and Conciliation Act.

⁹⁷ Act No. 4 of 1995, section 35(3).

⁹⁸ See generally, K. Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya', *op. cit.*

4.3 Public Policy

In almost all jurisdictions in Eastern Africa, public policy is one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. However, courts have adopted a different approach to public policy, especially with regard to national public policy.

In Kenya, Public policy is not only problematic at the national level but also at the international level. For instance, it has been observed that there is a general agreement that it is even more difficult to formulate the definition of international public policy than that of national public policy.⁹⁹ In fact, international public policy plays an important function not only in the exclusion of the application of some national rules but it can also influence the decision of arbitrators when fundamental notions of contractual morality or basic interests concerning international trade are involved.¹⁰⁰ It is meant to protect interests, which cross borders, and is applicable in international cases.¹⁰¹ To this extent, specific domestic public policy may not be applicable to international commercial arbitration.

⁹⁹ A. Harmathy, 'New Experiences of International Arbitration with special emphasis on legal debates between parties from Western Europe and Central and Eastern Europe'. *Electronic Journal of Comparative Law*, vol. 11.3 (December 2007), p. 12. Available at <http://www.ejcl.org> [Accessed on 16/02/2015].

¹⁰⁰ *Ibid.*

¹⁰¹ C. Adeline, 'Transnational Public Policy in Civil and Commercial Matters'. *Law Quarterly Review*, 128, pp. 88-113, 2012.

The public policy of individual states is divided into domestic public policy and international public policy, with the latter being the (more restricted) public policy of the state as applied to international transactions.¹⁰²

Court interference intimidates investors since they are never sure what reasoning the particular national court might adopt should it be called upon to deliberate on such commercial disputes. In some or most jurisdictions around the world, “Public policy” is defined to include procedural questions as well as questions relating to substantive law.¹⁰³

One of the impediments to be overcome in using international commercial arbitration in fostering Eastern Africa integration is harmonizing what entails public policy as a ground for setting aside arbitral awards in international commercial arbitrations.

4.4 The Doctrine of Arbitrability

Arbitrability is also one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. Arbitrability refers to the determination of the type of disputes that can be settled through arbitration and those that are the domain of the national courts. It deals with the question of whether specific classes of

¹⁰² D.J.A. Cairns, ‘Transnational Public Policy and the Internal Law of State Parties’. April 27, 2007. p. 2. Available at <http://www.cremades.com/pics/contenido/File634523788247688756.pdf> [Accessed on 16/02/2015].

¹⁰³ J. Whittaker, *et al.*, *Principles relating to public policy in the International Arbitration Act*, 29 November 2012, Available at www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/ [Accessed on 16/02/2015]

disputes are barred from arbitration because of the subject matter of the dispute.¹⁰⁴ Courts often refer to “public policy” as the basis of the bar.¹⁰⁵ The problem arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may be either subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute.¹⁰⁶ Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they might be dealt only by the courts, for instance criminal law.¹⁰⁷

It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current

¹⁰⁴ L. Shore “Defining ‘Arbitrability’-The United States vs. the rest of the world”, *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>.

[Accessed on 16/02/2015].

¹⁰⁵ *Ibid*, p. 1.

¹⁰⁶ Available at www.paneurouni.com/files/sk/fp/ulohy.studentov/2rocnikmgr/arbitrability-students-version.pdf [Accessed on 16/02/2015].

¹⁰⁷ K. Chovancová, *Arbitrability*, Extract, page 1, Institute of International and European Law, Available at <http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf> [Accessed on 16/02/2015].

Constitution of Kenya, 2010,¹⁰⁸ which elevates the status of Alternative Dispute Resolution (ADR). In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the *Arbitration Act*.¹⁰⁹ Article 159 of the Constitution provides that in the exercise of judicial authority by Courts and tribunals are to be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms are not to be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law. However, this remains to be seen especially due to the subjection of the same to repugnancy clause.

In 2014, while ratifying the *New York Convention* 1958, Burundi made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The arbitrability of non-commercial matters under international arbitration in Burundi is therefore debatable.

The issue is how the parties to an arbitration agreement would deal with the question of arbitrability while exercising their party autonomy. What would happen where a subject matter is arbitrable in one jurisdiction and non-arbitrable in another? Would the courts uphold the arbitration agreement in such circumstances? This is especially difficult where either of the parties did not know that the

¹⁰⁸ Government Printer, 2010, Nairobi, Kenya.

¹⁰⁹ F. Kariuki, “Redefining “Arbitrability”: Assessment of Articles 159 & 189 (4) of the Constitution of Kenya”, *Alternative Dispute Resolution, The Chartered Institute of Arbitrators, Kenya Journal*, Volume 1, Number 1, 2013. ISBN 978-9966-046-02-4.

subject matter for which they intend to subject to arbitration is non-arbitrable in another jurisdiction. It is therefore important that the question of arbitrability of a subject matter be addressed to ensure that when parties are entering an arbitration agreement they have the correct information. One of the factors contributing to this state of affairs is the lack of uniformity in the laws, application and indeed application of arbitration laws in different countries as well as different arbitral tribunals and institutions.¹¹⁰

It is noteworthy that in Uganda, the Centre for Arbitration and Dispute Resolution (CADRE) makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts.¹¹¹ This is a positive step towards helping parties avoid difficulties that may arise if they were to have their subject matter declared non-arbitrable when the dispute has already arisen. A harmonized legal and institutional framework would go a long way in ensuring that arbitrability does not become a hindering factor in conducting international commercial arbitration in Eastern Africa region. The other option would be to go the Burundian way of having express provisions to the effect that only commercial disputes of certain nature are to be subjected to arbitration.¹¹²

¹¹⁰P. Muliisa, 'Arbitrability of tax disputes in international commercial arbitration: The case of Uganda, The'. The Centre for Energy, Petroleum and Mineral Law and Policy.

Available at <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=32229> [Accessed on 16/02/2015].

¹¹¹A.C., Kakooza, 'Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects' *op. cit.* p. 5.

¹¹² In 2014, while ratifying the *New York Convention* 1958, Burundi made a "commerciality reservation" to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law.

4.5 Scope of the Courts' Control of Arbitral Awards/Governments' Interference

In the Ugandan case of *East African Development Bank vs Ziwa Horticultural Exporters Ltd*¹¹³ it was observed that: "Sec. 6 (currently section 5) of the *Arbitration and Conciliation Act*, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration." This shows the Ugandan courts' support for arbitration although at the risk of such discretion being misused. Under section 5(1) of the Ugandan Act on Arbitration and Conciliation, the Court should exercise its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed.

Sometimes matters will be litigated all the way to the highest court on the law of the land in a bid to set aside either of the parties consider. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.¹¹⁴ This delays justice and waters down the perceived advantages of arbitration and ADR in general. Setting up tribunals or courts with finality in their arbitral decisions and operating free of national courts interference can effectively deal with this impediment.

4.6 Institutional Capacity

¹¹³ High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000.

¹¹⁴ K. Muigua, *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824> [Accessed on 10/02/2015].

For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR).

There exists a problem on the capacity of existing institutions to meet the demands for international commercial arbitration. Much more needs to be done in order to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitating international commercial arbitration. The East Africa Court of Justice (EACJ) also needs to be better equipped to enable it handle international commercial arbitration, as its status currently cannot arguably handle such matters especially in light of the conflicting laws and policies in the Member countries.

5 OPPORTUNITIES FOR INTERNATIONAL COMMERCIAL ARBITRATION IN FOSTERING EASTERN AFRICA INTEGRATION

Due to the legal hurdles associated with national courts, international commercial arbitration, with its potential advantages, emerges as a viable mechanism of handling the potential commercial disputes that may arise in the course of commercial transactions amongst the EAC Member States.

Experience in other regional economic communities is a demonstration that international commercial arbitration can be used foster Eastern Africa integration and to enhance the regional harmonization of disputes management mechanisms in commercial practices among the Member States. The Organization for the Harmonization of Corporate Law in Africa¹¹⁵ is a regional international organisation that groups together 16 African states, mainly of the Francophone area. Its aim is to harmonize the legal and judicial systems specifically in the field of business and corporate law of member States.¹¹⁶

The OHADA seeks to restore the confidence of foreign investors and facilitate economic exchanges among the member States by providing them with a set of common and simple laws that suit modern economies, promoting arbitration as a discrete and speedy dispute settlement system in trade-related

¹¹⁵ Organisation pour l'harmonisation du droit des affaires en Afrique (OHADA).

¹¹⁶ OHADA, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, available at <http://www.pict-pcti.org/courts/OHADA.html> [Accessed on 10/02/2015].

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disputes, improving the training of the judges and the court clerks, preparing for future regional economic integration.¹¹⁷

The Common Court of Justice and Arbitration (CCJA) is both a judicial court and an arbitration institution responsible for supervising the administration of arbitration proceedings in OHADA member states.¹¹⁸ In cases concerning OHADA law, the CCJA takes precedence over member states' courts.¹¹⁹ The *Uniform Act on Arbitration* (the Uniform Act) governs any arbitration in an OHADA member state, whether the arbitration involves parties from an OHADA country or from a foreign State, and it is framed on the UNCITRAL Model Arbitration Law.¹²⁰ Its purpose is to promote arbitration as an efficient means to settle disputes. However, it is noteworthy that the Uniform Act does not limit arbitration to commercial and professional matters; individuals and corporate bodies alike may refer their dispute to arbitration.¹²¹

Indeed, there are jurisdictions where domestic courts support international commercial arbitration. This was demonstrated in the Mauritian case of *Mall Of Mont Choisy Limited v Pick 'N Pay Retailers (Proprietary) Limited*

¹¹⁷ *Ibid.*

¹¹⁸ Girard Gibbs LLP and Lazareff Le Bars AARPI, 'The Organization for the Harmonization of Business Law in Africa (OHADA) & the Common Court of Justice and Arbitration (CCJA)'. Available at <http://www.internationalarbitrationlaw.com/arbitral-institutions/ohada/> [Accessed on 10/02/2015]

¹¹⁹ *Ibid.*

¹²⁰ Girard Gibbs LLP and AARPI, Lazareff Le Bars, *OHADA Uniform Act of Arbitration*. Available at <http://www.internationalarbitrationlaw.com/ohada-uniform-act/> [Accessed on 10/02/2015].

¹²¹ *Ibid.*

& *Ors*¹²² where the Supreme Court of Mauritius was to decide on the validity of an arbitration agreement. The Claimant brought an action in the Supreme Court seeking sums under an agreement to develop and lease a shopping Centre in Mauritius. The defendant made an application under section 5 of *International Arbitration Act* 2008 to refer the matter to arbitration, because an arbitration clause in the lease over the property covered the dispute. Section 5 provides that where proceedings are started in a Mauritian court and it is asserted that the dispute is covered by an arbitration agreement, the matter is to be referred immediately to the Supreme Court. Unless the party denying the arbitration agreement can show before the Supreme Court, on a prima facie basis, a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court will refer the case to arbitration.¹²³

The Claimant asserted that the lease, including the arbitration clause, had not become binding because it had been signed only as a holding measure by one director, while negotiations continued. The Supreme Court decided to refer the dispute to arbitration. The court decided that a non-interventionist approach should be taken on a section 5 application. The test of a “very strong probability” in section 5 is “a very high one”. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.¹²⁴ Courts in Mauritius are thus supportive of international arbitration in Mauritius and do not seem eager to interfere with the process.

This is just an example of how regional judicial bodies and in some instances domestic courts can be utilized in fostering regional integration through international arbitration of trade and investment disputes. The EACJ

¹²² 2015 SCJ 10.

¹²³ D. Bagshaw, ‘Mauritius Supreme Court hands down two judgments on international arbitration’, February 2015. Available at <http://www.lcia-miac.org/news/mauritius-supreme-court-hands-down-two-judgments.aspx> [Accessed on 18/02/2015].

¹²⁴ *Ibid.*

jurisdiction on arbitration¹²⁵ needs to be enhanced to enable the Court effectively handle international commercial arbitration in the region. Arbitration through EACJ would be cheaper considering that it does not charge fees for arbitration matters lodged from the Eastern Africa region. The other viable option would be to set up an independent body similar to OHADA with a unique uniform law that would apply to transnational commercial arbitration matters from the region. This may help overcome the legal barriers arising from the differing legal systems in the region and bring about certainty as to what rules and procedures would be applicable to a transnational commercial dispute subjected to arbitration.

6. BUILDING LEGAL BRIDGES

It has been argued that regional integration alone is not enough to spur growth but the EAC needs an investment climate—including a business regulatory environment—that is well suited to scaling up trade and investment and can act as a catalyst to modernize the regional economy.¹²⁶ Improving the investment climate in the EAC has therefore been seen as an essential ingredient for successful integration the foundation for expanding business activity, boosting competitiveness, spurring growth and, ultimately, supporting human development.¹²⁷ Weak judicial systems can undermine trust, reducing the scope of commercial activity while efficient and transparent courts encourage new business relationships; speedy trials are essential for small enterprises because they may lack the resources to stay in business while awaiting the outcome of a long court dispute.¹²⁸

¹²⁵ Article 32.

¹²⁶ World Bank, *Doing Business in the East African Community 2013: Smarter Regulations for Small and Medium-Size Enterprises*. Washington, DC: World Bank Group, 2013, p.1.

¹²⁷ *Ibid.*

¹²⁸ *Ibid*, p. 55.

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Harmonization of trade laws and commercial practices has been hailed as an important ingredient of regional integration, without which meaningful economic integration cannot be achieved.¹²⁹ In fact, in relation to the Southern African Development Community (SADC), it has been argued that conflicts and divergences arising from the laws of different SADC States in matters relating to trade, arbitration and enforcement of judgments would rank among the major barriers to intra-regional cooperation and integration that SADC countries would confront as they moved towards establishing a free trade area in the region.¹³⁰ SADC Member States were able to overcome these barriers and today SADC may arguably be said to be a success.

International Commercial Arbitration is highly relevant to business and trade, because investors prefer to put capital into countries with high political stability, legal certainty, and strong markets. Without these three conditions, investors lack assurance that contractual arbitration clauses will lead to nationally enforceable resolutions of any disputes that may arise in the course of business supported by internationally accepted legal norms and principles.¹³¹

Indeed, the important role of international commercial arbitration in international market integration has been acknowledged and it is capable of being used as an important means of confidence building among foreign

¹²⁹ M. Ndulo, "The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)" in A.A. Yusuf (ed.), *African Yearbook of International Law*, Volume 4, Issue 1, Paper 60. pp.195-225 at p.211.

¹³⁰ *Ibid*, p.196.

¹³¹ Organization of American States Secretariat for Legal Affairs Department of International Law, 'International Commercial Arbitration: Training Judicial Officers in Cross-Border Decision Enforcement'. Available at http://www.oas.org/en/sla/dil/docs/International_Commercial_Arbitration_BROCHURE_En.pdf [Accessed on 3/02/2015].

investors and the host countries in the context of economic cooperation at the regional level.¹³²

Apart from boosting trade and investment in the Eastern Africa region, international commercial arbitration if used as the preferred mode of dispute settlement can also be a useful tool in fostering mutual trust, peaceful co-existence and good neighbourliness and cooperation for mutual benefit. This is because a 'good' dispute settlement mechanism prepares the basis for consultation and arbitration, and makes sure that 'sanctions are used only as a measure of last resort'.¹³³ Such a mechanism also provides a way of preventing disputes being settled by expression of political and economic power.¹³⁴

6.1 East Africa Court of Justice and International Commercial Arbitration

Effective regional judicial institutions are believed to perform two core tasks that can stimulate economic activity: they settle disputes in efficient and impartial ways and they coordinate the interpretation of laws and treaties. This could in turn also have broader effects on regional cooperation such as improving incentives for compliance, increasing the perceived commitment of parties to a regional integration project, and contributing to the implementation of agreements.¹³⁵

¹³² A.F.M., Maniruzzaman, *op. cit.* p.61.

¹³³ A. Zorob, 'The Potential of Regional Integration Agreements (RIAs) in Enhancing the Credibility of Reform: The Case of the Syrian-European Association Agreement'. GIGA German Institute of Global and Area Studies, *GIGA Working Papers* No. 51, May 2007. P. 11.

Available at http://www.giga-hamburg.de/en/system/files/publications/wp51_zorob.pdf [Accessed on 10/02/2015]

¹³⁴ *Ibid*, p. 24.

¹³⁵ E. Voeten, 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' *Asian Development Bank Working Paper Series on Regional Economic Integration*, No. 65,

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It is noteworthy that the EAC Treaty provides for the establishment of organs of the Community, which include the East African Court of Justice (EACJ).¹³⁶ The Court is a judicial body, which is to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.¹³⁷ Initially, the Court is to exercise jurisdiction over the interpretation and application of the Treaty: provided that the Court's jurisdiction to interpret under this paragraph is not to include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.¹³⁸ The Treaty provides that a Partner State that considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty, may refer the matter to the Court for adjudication.¹³⁹

Relevant to this discussion is the Court's jurisdiction on arbitration. The Court has jurisdiction to hear and determine any matter: *arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or arising from an arbitration clause contained in a commercial contract or agreement in which the*

November 2010. p.22. Available at

http://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf [Accessed on 10/02/2015]; See also 'COMESA Court of Justice', available at http://about.comesa.int/index.php?view=article&catid=43%3Ainstitutions&id=83%3Acomesa-court-of-justice&format=pdf&option=com_content&Itemid=133 [Accessed on 10/02/2015].

¹³⁶ Article 9.

¹³⁷ Article 23(1).

¹³⁸ Article 27(1).

¹³⁹ Article 28.

parties have conferred jurisdiction on the Court(Emphasis ours).¹⁴⁰ Such jurisdiction must be specifically conferred upon the Court as the Treaty provides that except where jurisdiction is conferred on the Court by the Treaty, disputes to which the Community is a party cannot on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.¹⁴¹

Furthermore, decisions of the Court on the interpretation and application of the Treaty are to have precedence over decisions of national courts on a similar matter.¹⁴² Perhaps as an attempt to reconcile the decisions of the national courts and the East Africa Court of Justice, the Treaty states that where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.¹⁴³

The East African Court of Justice, which is the main East African regional Court, needs to be supported in terms of finances and Member States' political goodwill in order to equip it for handling commercial disputes.

The EACJ jurisdiction on arbitration can be used to further the harmonisation of law and trade practices within the Community. Indeed, establishment of regional courts has been supported on grounds that it is *inter*

¹⁴⁰ Article 32.

¹⁴¹ Article 33(1).

¹⁴² Article 33(2).

¹⁴³ Article 34.

alia, a manifestation of the role of law and judicial functions within regional integration processes in developing countries.¹⁴⁴

Also noteworthy is the Treaty's provision that in order to promote the achievement of the objectives of the Community asset out in the Treaty, the Partner States are to take steps to harmonise their legal training and certification; and should encourage the standardisation of the judgments of courts within the Community.¹⁴⁵The EACJ can follow in the footsteps of European Court of Justice (ECJ), which has been very active in expanding European Union Community competences and enhancing the effectiveness of Community law, whilst it also has actively promoted the integration of Community law into national legal systems.¹⁴⁶

These initiatives are to be hailed considering that they are aimed at ensuring minimal or no conflicts among the Member States. However, the current state of affairs in the region presents hurdles to the effective integration of the region and utilisation of court systems in managing disputes. There are economic, legal, social and political barriers that need to be addressed if the contemplated measures are to be successful.

Before the realisation of the Treaty's objectives on harmonized legal systems and equipping EACJ for international commercial arbitration, there is need to ensure that business does not come to a stop. Currently, the EACJ is more involved in handling non-economic disputes, and the State Parties may consider making use of other existing international commercial tribunals for commercial disputes in the region. The use of existing regional international commercial arbitration centres such as NCIA and KIAC presents a viable option that would be easier to address interstate commercial disputes faster

¹⁴⁴ P.K., Kiplagat, 'Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience,' *Northwestern Journal of International Law & Business*, Volume 15, Issue 3, 1994-1995. pp. 437-490 at pp. 449-450.

¹⁴⁵ Article 126(1).

¹⁴⁶ E. Vos, 'Regional Integration through Dispute Settlement: The European Union Experience'. Maastricht Faculty of Law, *Working Paper No. 2005-7*, October 2005. P. 4; O., Osiemo, 'Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa' *Legal Issues of Economic Integration*, Vol. 41, Issue 1, 2014, pp. 87-121.

and efficiently, even as the Court gets on its feet in its capacity to deal with matters of transnational commercial nature. Deeper integration in EAC cannot be effectively achieved without the establishment of a stronger institutional structure with a better enforcement mechanism for international commercial arbitration in the region. The EAC Treaty provides for the fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States as including *inter alia*: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; equitable distribution of benefits; and co-operation for mutual benefit.¹⁴⁷ The principles of political will and sovereign equality however ought to be treated carefully as they may hinder the State Parties from pursuing policies that would promote regional integration citing conflict with their national sovereignty.

7. CONCLUSION

International commercial arbitration is a powerful tool that can foster Eastern Africa integration through effective management of commercial disputes and this eventually translates to enhanced development in the region. Building legal bridges that facilitate the regional integration is an imperative whose time has come.

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¹⁴⁷EAC Treaty, Article 6.

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ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: PUBLIC POLICY LIMITATION

by: **NJOKI MBOCE***

ABSTRACT

International arbitration has significantly grown in prevalence in the last 50 years as commercial parties seek to minimize the potential uncertainties and dragged out litigation process and procedural technicalities.¹ Enforceability of an arbitral award is the bedrock of any arbitration process. However, there are grounds upon which this enforcement can be denied. One of the grounds where an arbitral award may be denied is a case where a court finds that enforcement of an award is likely to offend public policy of the enforcement state.

Apart from public policy being an expressly stipulated limitation to enforcement of arbitral award, this consideration poses yet another challenge: the lack of a concise statutory definition of public policy both under domestic and international law.

As judicial interpretation is mainly the second source of law, interpretation of public policy in this case naturally shifts to judicial interpretation. Tragedy resides in the fact that various judges have accorded divergent interpretation of public policy. This lack of a clear cut definition of public policy has led to a relative lull by international investors on arbitration in Kenya because of the uncertainty.² This paper adopts the view that enjoyment of the benefits of arbitration as a mode of dispute resolution is substantially hampered by the lack of a concise definition of public policy which is a ground for setting aside of arbitral awards.

This paper explores the need for a concise definition of public policy in enforcement of international arbitral awards in Kenya. The author takes that view that public policy as a ground for setting aside of an international arbitral award in Kenya ought to be concisely defined.

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¹ International Arbitration Law Review (2012), Issue 5, 2012, Thomson Reuters (Professional) UK Limited and Contributors, p. 186.

² K. Muigua, *International Commercial Arbitration Lectures*, LLM Class of 2013, University of Nairobi.

1. DEFINITIONS OF ENFORCEMENT OF ARBITRAL AWARDS; DOMESTIC ARBITRAL AWARDS AND INTERNATIONAL ARBITRAL AWARDS

The process of compelling the performance of an arbitral award through national courts is referred to as enforcement. Effectively, two steps may be taken, one of which includes invoking the powers of the state, through its national courts in order to obtain a hold on the losing party's assets or in some other way to compel the performance of the award.³

An arbitral award is international if it is made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.⁴ It also refers to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.⁵

Enforcement of an award may be refused if it is contrary to the public policy of the Enforcement State.⁶ The term public policy is not defined and seemingly depends on the interpretation by the court faced with the application to set aside the international arbitral award on this ground.

2. THE PLACE OF PUBLIC POLICY IN ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS.

³ A. Redfern & M. Hunter, *International Arbitration*, 5th ed., (New York: Oxford University Press Inc., 2009), p.623; posits that the other step would be to exert some form of pressure, commercial or otherwise, in order to show the losing party that it is in their interests to perform the award.

⁴ Arbitration Act, 1995 as read together with the Arbitration (Amendment) Act, 2009, section 3(3).

⁵ Definition borrowed from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), Article 1. See also UNCITRAL Model Law, Article 1 (3) on the definition of an international arbitration.

⁶ A. Redfern & M. Hunter, (2009), *op.cit*, at p.657.

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Both domestic and international instruments entitle the courts of an enforcing state to deny enforcement of international arbitral awards where the courts find that enforcement of the award will result to an infringement of the public policy of the enforcing state. Neither of these instruments however offer a definition of public policy.

The lack of a concise definition of public policy yet having it as a ground for setting aside an arbitral award has complicated the inherent nature and perception of the arbitral process as an expeditious and effective mode of resolution of disputes. It has raised significant questions regarding the role of the state and the courts in the arbitral process which has hitherto been widely viewed as a private process, mainly driven by the parties in a dispute.

This paper briefly explores five closely related questions:

- a) who is mainly prejudiced by the uncertainty?
- b) what is the Kenyan law position on enforcement of international arbitral awards domestically?
- c) what is the international law position on enforcement of international arbitral awards in Kenya?
- d) what is the definition of public policy and what is its place in the enforcement of international arbitral awards?
- e) how does the public policy consideration affect enforcement in Kenya?
- f) how best can public policy be applied to the enforcement of international arbitral awards?

This paper seeks to offer a step towards the development of a benchmark as to what constitutes public policy as a ground for setting aside an international arbitral award. It is essential that a concise definition of public policy as a limitation on enforcement of international arbitral awards should be adapted to anticipate and promote the certainty and finality of the arbitral process.

3. WHO IS MAINLY PREJUDICED BY THE UNCERTAINTY?

A successful party in an international arbitration reasonably expects the award to be performed without delay.⁷ If a losing party fails to carry out an award, a winning party is entitled to take steps to enforce the performance of the award.⁸

4. WHAT IS THE KENYAN LAW POSITION ON ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS DOMESTICALLY?

The Constitution of Kenya, 2010 (the Constitution) is the supreme law of Kenya. The Constitution requires the courts and tribunals in exercising their judicial authority to be guided the principle of alternative forms of dispute resolution (ADR).⁹ One such form of ADR is Arbitration.¹⁰ Domestically, this provision is mainly reinforced by the Arbitration Act, 1995 (Arbitration Act). The Arbitration Act provides that 'An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention (New York Convention) or any other convention to which Kenya is a signatory and relating to arbitral awards'.¹¹ The New York

⁷A. Redfern & M. Hunter, *op.cit* at p. 621.

⁸ *Ibid*, p. 623.

⁹ The Constitution of Kenya, 2010, Article 159(2) (c).

¹⁰ *Ibid*, the Constitution of Kenya, Article 159 (2).

¹¹*Ibid*, Arbitration Act, section 36 (2).

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Convention requires state parties to ensure that arbitral awards are recognised and enforced in their territories.¹²

The Constitution also provides that the general rules of international law shall form part of the law of Kenya.¹³ The Constitution further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya, subject to the domestic laws of Kenya.¹⁴

These provisions lay the basis of application of international law on enforcement of international arbitral awards in Kenya.

5. WHAT IS THE INTERNATIONAL LAW POSITION ON ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN KENYA?

Premised on the above stipulation of section 36 (2) of the Arbitration Act, the principal instrument governing the enforcement of commercial international arbitration agreements and awards in Kenya is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958)(the New York Convention).¹⁵ The New York Convention to which Kenya is a member, requires its member states to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states subject to certain limited exceptions. Article V of the New York Convention sets out these grounds where recognition and enforcement of the award may be refused which are as follows:

Article V (1):

¹² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), Article III.

¹³ *Ibid*, Article 2(5).

¹⁴ *Ibid*, Article 2(6).

¹⁵ Commonly referred to as 'the New York Convention.

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- a. the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- c. the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article V (2):

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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- a. the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- b. the recognition or enforcement of the award would be contrary to the public policy of that country.

This paper mainly addresses the ground under Article V(2)(b) which subject enforcement of international arbitral award(s) to the public policy of the enforcing state.

6. DEFINITION OF PUBLIC POLICY AND ITS PLACE IN THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

A major limitation of public policy consideration arises from the fact that neither the domestic instruments, nor the international ones define the term 'public policy'. There is therefore no standard test for public policy in this case.¹⁶

As a requirement of both law and practice, judicial interpretation fills gaps in statute. The courts have therefore attempted to define public policy.¹⁷ However, as held by Ringera J. in the case of *Christ for all Nations -vs-Apollo Insurance Company Limited*(case of *Christ for all Nations*): 'Public policy is a broad concept incapable of precise definition.'¹⁸ RingeraJ however, while not setting out a specific definition, propounded three main grounds upon which an application for setting aside an arbitral award should be predicated upon as regards public policy. These are:

¹⁶ Supra, the Act, Section 37(b) (ii) and Article V (2) (b), respectively.

¹⁷ See the holding by Ringera J. in the case of *Christ for all Nations -vs-Apollo Insurance Company Limited* (2002) 2 EA 366 (Christ for all Nations).

¹⁸ *Ibid.*

- i. inconsistency with the Constitution or any other laws of Kenya, whether written or unwritten;
- ii. inimical to the national interests of Kenya; and
- iii. contrary to justice and morality

As did Ringera J. in the above decision, various judges have set out a criterion by which the existence of public policy can be tested. Similar to the lack of a concise statutory definition, neither a specific standard definition nor criteria has been supplied by the judiciary. This disparity in defining public policy creates an opportunity for unscrupulous liable parties to avoid or defer enforcement. Although the effect of each of the grounds for refusal of recognition and enforcement of arbitral awards are considerably similar, as with each of the grounds public policy limitation has its practical salient challenges.

An unenforceable judgment is at best valueless, at worst; it is a source of additional loss.¹⁹This is because of the various challenges arising from the legal opportunities to avoid or defer enforcement. In particular, this leads to uncertainty over whether or not an arbitral award is enforceable, which understandably undermines confidence in arbitration.

As proponents of international trade and investments continue to present arbitration as an attractive, effective and efficient mode of resolution of disputes in international trade, policy makers, legislators, and the judiciary are yet to gain sufficient consensus on the best way to address the challenges created by the lack of a clear definition of public policy as a ground for setting aside international awards in Kenya. It is therefore against this background that the author undertakes this study. The study will focus mainly on the claim of public policy limitation.

7. THE EFFECT OF PUBLIC POLICY CONSIDERATION ON ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN KENYA?

The foregoing analysis of the domestic and international law illustrates that public policy is indeed a ground upon which courts in Kenya can set aside

¹⁹ *Société Eram Shipping v CieInternationale de Navigation* [2004] 1 AC 260 at [10].

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international arbitral awards. The discussion also establishes the lack of a definition of public policy. The effect of this position in Kenya is examined below.

Overtime, courts have in various decisions, some of which are set out below, acknowledged the lack of a concise definition of public policy as a ground for refusal of enforcement of international awards. Courts have attempted to give a guideline as to what constitutes public policy in this case.

In the case of *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, the Appellant sought to set aside an arbitral award on the grounds that she had not been served with a notification of the delivery of the award, she had not been served with a notice of filing the award and that she had not been served with a copy of the application seeking to enforce the award.²⁰ The High Court dismissed the application, whereupon the Appellant appealed. In dismissing the appeal, the Court of Appeal held that the Appellant's application to set aside the arbitral award offended the doctrine of public policy. The court held that the underlying principle in the Arbitration Act is the recognition of an important public policy in the enforcement of arbitral awards and the principal of finality of arbitral awards.

The Court of Appeal in the recent case of *Tanzania National Roads Agency-vs- Kundan Singh Construction Limited* was faced with two main issues: whether the Court of Appeal has jurisdiction to hear an appeal against the Order of the High Court made in exercise of powers under section 37 of the Act and what constitutes the public policy of Kenya.²¹ On jurisdiction, the Court of Appeal held that jurisdiction regarding the recognition and enforcement of arbitral awards is vested in the High Court. Article 164(3)(a) of the Constitution gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. There is a clear distinction between jurisdiction or power to hear and determine an appeal which is vested in the court and a right to appeal which is vested on a litigant. In this case, the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the Arbitration Act and rules which regulate the procedure in arbitration matters. Although the Arbitration Act provides a right of Appeal in the case of

²⁰*Anne Mumbi Hinga -vs- Victoria Njoki Gathara* [2009] eKLR.

²¹ Court of appeal at Mombasa in civil appeal no. 38 of 2013, *Tanzania National Roads Agency-vs- Kundan Singh Construction Limited*.

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domestic arbitral awards, it does not provide any right of appeal in the case of international awards.

The appellant can only find respite if there is a right of appeal under UNCITRAL Model Law which governs International Commercial Arbitration and to which Kenya is a signatory. In respect of recognition and enforcement of international arbitral awards, UNCITRAL Model Law, like the Arbitration Act only provides a one-step intervention in a 'competent' court. The court proceeded to note that in this case, the 'competent court' is the High Court which is the one vested with powers under sections 36 and 37 of the Arbitration Act to determine applications for recognition and enforcement of International arbitral awards. The court concluded that no further right of appeal has been provided for thereby curtailing the intervention of the court.

The court noted the argument for the appellant that because of the application of the principles of International Law and Treaty on Conventions signed by Kenya, the invocation of Article 2(5) and 2(6) of the Constitution raises Constitutional issues and that the appellant therefore has an automatic right of appeal. The court rejected this argument. The court held that the invocation of a Constitutional provision does not necessarily give rise to a constitutional issue, particularly where neither the application of the constitutional provision nor the interpretation of the constitutional provision is in dispute, which the court held was the case in this appeal.

On the issue of general public importance and public policy, the court found that there is no right of appeal to the Court of Appeal anchored on matters of 'general importance'. A matter of public importance is one whose determination transcends the circumstances of the particular case, and has a significant bearing on the public policy interest. Public policy has been described as an intermediate principle which fluctuates with the circumstances of the time. Public policy is a broad concept incapable of precise definition... an award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either: inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or inimical to the national interest of Kenya, or (c) contrary to justice and morality".

The court went on to say that the appeal did not raise an issue of general public importance but raised an issue concerning the recognition and enforcement of an agreement between two individuals.

In the case of *Christ for all Nations*, the Plaintiff/Respondent had a comprehensive insurance cover with the Defendant/Applicant in respect of

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the Respondent's motor vehicle.²² On 4 July 1997, an endorsement was effected to the policy. The endorsement extended the geographical area of the cover to include Tanzania and Zambia for the period up-to 3 October 1997. The endorsement indicated that the total sum insured was K. Shs. 1,500,000.00 and TPO. During the subsistence of this policy, the Respondent's insured motor vehicle was involved in an accident while in Zambia. The vehicle was written off. The Applicant refused to compensate the Respondent for the loss, on the ground that only third party policies were covered outside Kenya. The Respondent then sued the Applicant claiming compensation. The suit was stayed and referred to arbitration, pursuant to an arbitral clause in the insurance policy. The arbitrator decided in favor of the Respondent.

The Applicant made an application to the High Court, seeking to set aside the arbitral award in favor of the Respondent, on the ground that the award was in breach of public policy. The Applicant alleged that public policy would be breached because insurers would shy away from covering people going outside countries and this would mean loss of business for travellers. In dismissing the application, the court held that:

"Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35(2) (b) (ii) of the Arbitration Act Laws of Kenya, as being inconsistent with the public policy of Kenya if it is shown that it was ... either (a) inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality"

The court then held that there was no evidence that the insurance industry would react in concert and negatively to the arbitral award. The Applicant had therefore not shown that the arbitral award was contrary to public policy. The application was dismissed.

In *Glencore Grain Ltd-vs-TSS Grain Millers Ltd*, the court held that:

...an arbitral award will be against public policy, if it is immoral or illegal, or that it would violate in clearly unacceptable manner basic and or moral principles or values in the Kenyan society. It has been held world over that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or acts that are void. 'Against public policy' would

²² *Christ for all Nations case, op.cit.*

also include contracts or contractual acts or awards which would offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”²³

8. ARGUMENTS FOR AND AGAINST PUBLIC POLICY GROUND

The issue as to whether and to what extent public policy limitation should be applied in considering enforcement of international arbitral awards has been widely debated. Two main schools of thought have emerged from this debate.

On the one hand is the private autonomy school which strictly supports the contractual nature of arbitration and opposes any legislative and judicial attempts to limit this. This school of thought suggests that parties to a contract have the right to dictate the extent and effects of their contracts and the law has no business impeding the recognition or enforcement of international arbitral awards.

On the other hand is the public policy school of thought. This school argues in favour of the out the social obligation theory. This school of thought contends that the state is required to exercise restraint and to protect the right of the individual to contract freely, albeit by incorporation of legal limitations to the recognition or enforcement of international arbitral awards.

Other schools of thought relevant to this discussion are: classical contract theory, social obligation theory and conflict of laws theory.

Classical contract theory advocates for the unrestricted freedom of contract between parties who bear equal bargaining power, perfect knowledge of relevant market conditions and equal skill. Roscoe Pound, a classical positivist observed that “the social order rests upon stability and predictability of conduct, of which keeping promises is a large item”. They argue that the doctrines of promissory estoppel and unconscionability ought to apply with regards to protection of the benefits that freedom of contract was believed to establish. They observe that social order rests upon stability and predictability of conduct, of which keeping promises is paramount. They thus propose that enforcement of bargains as made protects the reasonable expectations of the parties that promises will be performed and contributes to certainty and stability in the marketplace. Accordingly, they say, the government has a duty to exercise restraint and to guard the right of the individual to contract freely.

²³ *Glencore Grain Ltd-vs-TSS Grain Millers Ltd*, [2002]1 KLR 606, p. 626.

The social obligation theory on the other hand advocates that it is the duty of government to exercise restraint and to protect the right of the individual to contract freely. They therefore encourage incorporation of community norms into the contract relationship. They also suggest the role that courts should also play in matters of private bargaining.

Conflict of laws theory advances that party autonomy presents a problem in that if individuals are allowed to choose which law will be applied to their dispute, it would appear that private persons could determine the outcome of the battle between states. Under this, the principle of Party autonomy which has become the one principle in conflict of laws that is followed by almost all and which is said to be the most widely accepted private international law rule of our time will be keenly examined.

In light of this, the study examines the existing system of enforcing trans-national awards issued to be executed outside the geographical jurisdiction of the awarding tribunal. It looks at the international instruments governing enforcement of these awards. It examines domestic instruments in selected countries across the world: Brazil, the United States of America (U.S.A) and France. It further inquires into the interaction between the international and domestic instruments and points out the challenges. It examines to what extent the two jurisprudential schools should be embraced. Finally the paper recommends interventions to achieve a cohesive system of enforcing trans-national arbitral awards internationally.

9. CHALLENGE OF PUBLIC POLICY AS A GROUND FOR SETTING ASIDE AN INTERNATIONAL ARBITRAL AWARD

Enforcement against an unscrupulous liable party can be achieved by an application, to the courts by a successful party, for the recognition and enforcement of the award. Often times however, it proves quite challenging to enforce an award against an unscrupulous liable party. This is because the law gives a variety of instances where the courts may refuse to recognize and enforce an arbitral award. A claim of public policy limitation is one such instance.

Both the domestic law in Kenya as well as international law applicable in Kenya lend public policy as a ground for the court's refusal to enforce international arbitral awards in Kenya. Public policy is however not concisely defined. Public policy as a limitation has therefore often been invoked by

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parties desirous of evading enforcement of international arbitral awards.²⁴ Some litigious parties almost always want to challenge all awards against them on this ground, to try out their luck.²⁵ This position of uncertainty continues to weigh down on arbitration as a form of dispute resolution.²⁶

It is equally important to consider how the courts in other jurisdictions have addressed the issue. In the case of *Honeywell International Middle East Ltd -vs- Meydan Group LLC* (formerly known as Meydan LLC), the court considered when and how public policy would be applied in setting aside an international arbitral award.²⁷ The court held that '...the grounds on which a New York Convention award may not be recognised are limited as set out in section 103 of the Arbitration Act 199. Section 103(3) provides that ... enforcement of the award may be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.'

The court in this case cited Dicey, Morris and Collins that English law recognises an important public policy in the enforcement of arbitral awards and the courts will only refuse to do so under section 103 in a clear case. Equally as stated in Redfern and Hunter, 'the intention of the New York Convention ... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively. They then cite Van den Berg *The New York Arbitration Convention of 1958 (1981)* at pp 267 and 268 where he said: 'As far as the grounds for refusal for enforcement of the Award as enumerated in Art V are concerned it means that they have to be construed narrowly.' As held in the case of *Rosseel NV v Oriental Commercial & Shipping Co (UK)* enforcement may only be refused on the grounds set out in section

²⁴ This position is well discussed in *Tanzania Roads Agency-vs-Kundan Singh Construction Limited (UR)*, op.cit.

²⁵ K. Muigua, *Op.cit.* p. 224.

²⁶ *Ibid.*

²⁷ *Honeywell International Middle East Ltd -v-Meydan Group LLC (formerly known as Meydan LLC)* - 154 ConLR 113 [2014] EWHC 1344 (TCC).

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103 of the Act and are therefore exhaustive.²⁸ The burden of establishing the grounds under section 103(2) is upon Meydan, although the court can raise matters under section 103(3) of its own motion.

In the case of *Soleimany -v-Soleimany (the Soleimany case)*, the court considered the issue of whether an international award could be enforced in the event of an illegality as against the backdrop of public policy consideration.²⁹ The court held that 'where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it.'

Parties in the *Soleimany* case were a father and son of Iranian Jewish origin. In contravention of Iranian revenue laws and export controls, the son arranged for the export from Iran of carpets which were subsequently sold by his father in England and other countries. A dispute arose over the division of the proceeds of the scheme, and the parties referred the matter to binding arbitration by the Beth Din, a body which applied Jewish law. The Beth Din's award explicitly referred to the illegal nature of the enterprise, but nevertheless awarded a substantial sum to the son; under Jewish law the illegality of the enterprise did not affect the rights of the parties. The High Court granted the son leave to enforce the award, but the father applied for leave to be set aside, contending that it would be contrary to public policy to enforce an award founded on an illegal transaction. That application was dismissed by the judge, and the father appealed. On appeal, the son contended that, at the enforcement stage, the court should not examine the underlying transaction.

The court held that: It would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the parties to conceal, through the procurement of an arbitration that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process. Thus, where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it. In the instant case, although the arbitration clause was valid, the award referred on its face to an enterprise with an illegal object which the English court viewed as

²⁸ *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 at 629.

²⁹ *Soleimany v Soleimany* [1999] 3 All ER 847.

contrary to public policy. Accordingly, the award would not be enforced, and the appeal would be allowed.

Not all challenges on the ground of public policy can be considered to be as clear cut as this. An attempt to define public policy is seen in the case of *Eco Swiss China Time Ltd v Benetton International NV* (the Eco case).³⁰ The court found that only if the terms of the award or its enforcement conflicted with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental.

B, a company established in the Netherlands, entered into a licensing agreement with E Ltd, a Hong Kong based retailer, and another company, under which it granted E Ltd the right to manufacture and sell watches and clocks bearing its name for a period of eight years. Article 26A of the agreement, which also involved a market sharing arrangement, provided that disputes between the parties were to be settled by arbitration in accordance with Netherlands law. In 1991 B terminated the agreement, whereupon arbitration proceedings were instituted in the Netherlands resulting in interim and final awards being made against B. B contended that the awards were contrary to public policy on the ground that the licensing agreement was void under Art 81 EC (ex Art 85) of the EC Treaty and applied to the District Court for their annulment under Art 1065(1)(e) of the Code of Civil Procedure, and also a stay of enforcement. The District Court dismissed the application, but on B's appeal the Regional Court of Appeal granted a stay of the final award, holding that Art 81 EC was a provision of public policy within the meaning of Art 1065(1)(e). E Ltd appealed by way of cassation proceedings to the Supreme Court, which held that an arbitration award was contrary to public policy within the meaning of Art 1065(1) (e) only if its terms or enforcement conflicted with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application, but that a prohibition laid down in competition law was not sufficiently fundamental. The court, however, was unclear whether the position was the same where the provision in question was a rule of Community law and therefore stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling the question, inter alia, whether, in such circumstances, a national court to which application was made for annulment of an arbitration award had to grant it where, in its view, that award was contrary to Article 81 EC.

³⁰ *Eco Swiss China Time Ltd v Benetton International NV* [1999] 2 All ER (Comm.) 44.

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The court held that Article 81 was a fundamental provision which was essential for the accomplishment of the tasks entrusted to the Community and in particular for the functioning of the internal market. Its provisions, therefore, might be regarded as a matter of public policy within the meaning of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958. Furthermore, Community law required that questions concerning the interpretation of the prohibition laid down in Art 81(1) EC (ex Art 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award. It followed that a national court to which application was made for annulment of an arbitration award had to grant that application if it considered that the award in question was contrary to Art 81 EC, where its domestic rules of procedure required it to grant an application for annulment founded on failure to observe national rules of public policy.

The court in the case of *Yukos Capital Sarl v OJSC Rosneft Oil Co* examined the issue of whose public policy should be considered in enforcement of international arbitral awards.³¹ The court held that an award will not be enforceable in the UK if it contravenes or effecting it clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights. The court noted that this limitation was discussed and applied in *Kuwait Airways v Iraqi Airways Co*, where Lord Nicholls said that the acceptability of a provision of foreign law must be judged by contemporary standards.

The court also noted the decision in the case of *Blathwayt v Lord Cawley* where the court held that conceptions of public policy should move with the times.³² The court noted the decision in the case of *Oppenheimer v Cattermole (Inspector of Taxes)* that 'the courts of this country should give effect to clearly established rules of international law'. The court in this case noted that this position is increasingly true today.

As nations become ever more interdependent, the need to recognize and adhere to standards of conduct set by international law becomes ever more important....International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law.

³¹ *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2013] 1 All ER 223.

³² *Blathwayt v Lord Cawley*[1975] 3 All ER 625 at 636, [1976] AC 397 at 426 as per Lord Wilberforce.

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The court in this case further cited the decision in the Oppenheimer's case and held that:

“A judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations. This principle normally requires our courts to recognize the jurisdiction of the foreign state over all assets situated within its own territories. A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognize it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.”

The court further held that:

‘The essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention, And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.’

The court in this case held that ‘... there can be a still further distinction to be made between the act of state which cannot be challenged for its effectiveness despite some alleged unfairness, and the act of state which is sufficiently outrageous or penal or discriminatory to set up the successful argument that it falls foul of clear international law standards or English public policy and therefore can be challenged.

The issue of whose public policy should be considered in enforcement of international arbitral awards was also examined by the court in the case of *Tamil Nadu Electricity Board –vs- St-CMS Electric Company Private Ltd (the Tamil Nadu case)*. The court in this case held that “public policy” means international public policy and differs from public policy in a domestic context.

The claimant was the state electricity board for the state of Tamil Nadu. Its principal objective was the generation and distribution of electrical power. The defendant was an Indian company incorporated by foreign investors from the United States, Switzerland and the Netherlands in 1993, for the purpose of the development and operation of a 250 MW lignite-fired power plant at

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Neyveli in Tamil Nadu. At the time of the defendant's incorporation, foreign companies were not permitted to construct or own power plants; hence an Indian company was formed. The parties concluded a long term supply agreement in 1993, which was subsequently restated and amended in November 1996 (the PPA). Under the PPA disputes were to be settled by ICC arbitration in London, governed by English laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; by contrast, the PPA itself was to be governed by Indian law. A dispute subsequently arose as to charging under the PPA, which the defendant referred to arbitration. It alleged that the claimant had used a computation methodology not provided for by the PPA and disregarded certain key terms of the PPA. It stated that the claimant had, inter alia, refused to give the complete benefit of the foreign exchange rate variation on the foreign currency elements of the actual capital cost, for which specific provision was made in the PPA. It sought an award declaring that the actual capital of cost was as it had calculated, and a direction that the claimant pays the sum claimed.

The claimant applied to the court under section 72 of the Arbitration Act 1996 for declarations that the matters submitted to arbitration were not within the scope of any arbitration agreement between the parties. Two contractual exceptions existed to the application of the arbitration clause: the first related to a dispute about an acceptance test, which was to be resolved by an independent engineer, and secondly in the event of a 'buy-out', the price was to be determined ultimately by an independent appraiser absent agreement. The claimant also submitted that by virtue of the choice of Indian law as the governing law of the PPA, there was a further exception to the jurisdiction of the arbitrator, namely the compulsorily applicable principles of Indian law. It submitted that those principles, required determination of the tariff to be charged by the statutory Indian body, which had to be recognised as a matter of English conflicts principles. It further argued that the defendant was estopped from denying that the pricing had to be determined by the Indian authorities and not by arbitration.

Whether or not there might be a defense to enforcement in India under Article V.2 (b) of the New York Convention, as a matter of the public policy of India, is neither here nor there for these purposes, but in the context of an international treaty, "public policy" means international public policy and differs from public policy in a domestic context. The courts of many parties to the Convention have expressly recognised this - see The New York Arbitration Convention of 1958 - towards a Uniform Judicial Interpretation by Van den

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Berg at pages 359-368, illustrated in the decision of Hobhouse J (as he then was) in the *Marques de Bolarques*.³³

Furthermore, on the evidence of ST-CMS' expert on Indian law this distinction is clearly recognised in the law of India. In his second affidavit, Mr. Jaitley referred to the decision of the Supreme Court of India in *Renusagar Power Company Ltd v General Electric Co.*, AIR. There, when looking at Article V(2)(b) of the New York Convention and the section of the Foreign Awards Act which enacted it in India, it was held that the expression "public policy" in the Act must necessarily be construed in the sense that the doctrine of public policy is applied in the field of private international law. Consequently, "it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law or (ii) the interests of India or (iii) justice or morality." In order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. In an earlier decision, the Supreme Court, in *Murlidhar Aggarwal v State of Uttar Pradesh*³⁴, it was held at paragraph 28, by reference to English law authorities, that the expression "public policy" had an entirely different meaning from "the policy of the law" and depended upon "customary morality" and "social consequences" with regard to the "current needs of the community."

The court ruled: On the true construction of the PPA, the Indian law clause and related provisions did not equate to provisions requiring a dispute resolution other than arbitration, so as to render the dispute out with the arbitration clause. There was no principle of English private international law, nor any public policy basis, for not adopting the construction of the arbitration clause under English law, on which basis the claimant's argument had to fail. In any event, on the evidence as to Indian law, there was nothing which impinged on the right to arbitrate. Nor had the claimant established any estoppel: it had not acted on any shared or agreed assumption with the defendant that the Indian authorities would make a final and binding decision on the relevant matters to the exclusion of any jurisdiction of the arbitrators.

The claimant's applications would be dismissed and the defendants would be entitled to declarations as to the validity of the arbitration

³³ [1984] 1 WLR 642 at 658-659.

³⁴ [1974] 2 SCC 472.

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The questions of definition of public policy as well as whose public policy should be considered was also examined in the case of *R -v- V*.³⁵ The court held that:

“Previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well.”

The claim had been brought under the terms of a consultant agreement of March 2002. The defendant was beneficially owned by F, whose personal services as a consultant were being retained by the claimant. The recitals to the agreement recorded that the defendant had expertise in Libya concerning the oil industry (F had been retained by the claimant and others for some years as a consultant in that field).

The agreement provided for F to use his influence and information, concerning, *inter alia*, negotiations with Government officials and state and private corporations, to assist the claimant in connection with the promotion of its interests in Libya. Subsequently, the claimant took the view that the agreement was unenforceable on three grounds: (i) lack of consideration; (ii) that F was in breach of his fiduciary duty and was precluded from obtaining any personal benefit from the agreement; and (iii) the agreement was illegal under Libyan law and contrary to English public policy in regard to influence peddling. The dispute was referred to arbitration in London under the auspices of the ICC. By an award of December 2007, the tribunal rejected the claimant's contentions and upheld the defendant's claim for immediate payment of \$US 3,000,000 and substantial further payments due on the achievement of specified oil production figures. The claimant applied to challenge the award under (i) section 68(2) (g) of the Arbitration Act 1996 on the ground that it was contrary to English public policy; and (ii) section 81(1)(c) of the Act on the ground that it was contrary to public policy at common law.

³⁵ [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep 97.

The court held that previous authority established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. Contracts for the sale of influence if to be performed in England would not be enforced but if to be performed abroad would not be enforced only if performance would be contrary to the domestic public policy of that country as well. There was no material distinction between that previous authority and the instant case, which accordingly had to fail. There was ample material before the tribunal that the contract was not illegal under Libyan law and the arbitrators had expressly so held. No new evidence to the contrary had been adduced by the claimant. The tribunal was composed of arbitrators who were highly commercially experienced and there was no suggestion of bad faith. Moreover, the claimant's challenge would in any event have failed on the merits. The applications were dismissed.

Literature Review on Public Policy Ground

Kariuki Muigua observes that 'the aim of all legal proceedings is to achieve justice and efficiency. Arbitration is widely preferred for its advantage with regards to efficacy.'³⁶

Muigua notes that the practice of commercial arbitration in Kenya continues to be weighed down by 'litigious parties who even after the arbitrator makes an Award, would still want to challenge it in court on public policy grounds. He takes the view that this could hamper the enforceability of arbitral Awards and also erode the gains made in fronting arbitration as an expeditious dispute settlement mechanism in Kenya. Muigua however cautions that 'if the final Award cannot be timeously recognised and enforced by a competent court, the superiority of arbitration in terms of efficiency will be weakened or even thoroughly frustrated.

Githu Muigai and Jacqueline Kamau, in their chapter on the legal framework of Arbitration in Kenya make various observations.³⁷ They note

³⁶ K., Muigua, *Settling Disputes Through Arbitration in Kenya*, (Glenwood Publishers, Second Edition, 2012).

³⁷G. Muigai, and J. Kamau, *Arbitration Law and Practice in Kenya: the legal framework of arbitration in Kenya*, (2nd ed. Kenya: Law Africa Publishing (K) Limited, 2011) pp. 1-10.

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that an arbitral award is binding and final upon parties. In this regard, they point out that an award can only be appealed against if parties reserve their right of appeal. Even then, they note, such reservation and appeal can be only on points of law. They further note that there has been rapid growth in international commerce, effectively requiring that international commercial arbitration have an international enforcement mechanism for enforcement of international arbitral awards. Muigai and Kamau note that this mechanism has taken the form of the New York Convention.

Njoroge Regeru in his chapter on Recognition and Enforcement of Arbitral Awards cautions that an arbitral award, though automatically binding upon the parties, does not immediately entitle the successful party to levy execution against the unsuccessful party.³⁸ Regeru notes that the successful party must first lodge the award with the court for recognition and enforcement, whereafter it shall be treated as a judgment of the court, where execution may ensue. Regeru thus observes that the recognition and enforcement of arbitral awards is of great importance and significance in the arbitral process. He says that the award is the culmination of the arbitral process and the recognition and enforcement of the award as the final vindication of the process.

As stated by Regeru that:

“The purpose of enforcement is to act as a sword, it is a positive action taken to compel the losing party to carry out an award that he is unwilling or unable to carry out effectively.³⁹It therefore means applying sanctions to ensure the

³⁸ Regeru, N., *Arbitration Law and Practice in Kenya: Recognition and Enforcement of Arbitral Awards*, in G. Muigai, and J. Kamau, (eds), *Arbitration Law and Practice in Kenya: the legal framework of arbitration in Kenya*, (Law Africa Publishing (K) Limited, 2nd Edition, 2011) pp 121-156, p. 123.

³⁹ Regeru, p.122. See also Redfern, A. Hunter, M. 1999, *Law & Practice of International Arbitration* 3rd edn. (Sweet & Maxwell: London). P.449. Also see Campell, D. and Summerfield, P., (1989), *Effective Dispute Resolution for the International Commercial Lawyer* (Kluwer Law and Taxation Publishers, Boston) p. 169.

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award is carried out.⁴⁰ Possible sanctions include seizure of assets and forfeiture of bank accounts."

Brenda Brainch, in her paper presented in the year 2003 on the Climate of Arbitration in Kenya discusses the advantages of arbitration including the expeditious disposal of matters, as compared with the court process.⁴¹ Brenda points out an infamous adage that: 'It is better to enter the mouth of a lion than a Kenyan court of law.' Brenda refers to the words of the Chief Justice of Tanzania, the Hon Justice Nyalali who once said: 'The use of custom, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over.'

Brenda cautions that while enacting legislation is a positive step, the reality is that it does not necessarily provide certainty. She points out that Kenya's legal fraternity is concerned at judges recently overturning arbitral awards on seemingly weak grounds. She notes that at the international level, arbitration is still very much in its infancy but Kenya can boast competent, if insufficient numbers of, experienced arbitrators. She notes that donor contracts, citing World Bank and construction-related contracts usually espouse and envisage arbitration as the first step in dispute resolution and there is no question that arbitration makes a significant contribution to commercial justice in Kenya and that concerted efforts are needed to ensure the development of ADR on a Pan-African scale. Brenda states that a Regional Arbitration Centre has been discussed by the Attorney General over the past five years but nothing has transpired. It is important to point out that Brenda's paper was presented in the year 2003. There have been considerable developments in the field of international arbitration in Kenya since then. For purposes of this paper, Brenda's paper has been used as one of the reference points in terms of Kenya's journey in the arena of international arbitration.

⁴⁰ *Ibid*, Regeu, p.122. See also A. Redfern M. Hunter (1999), p. 169.

⁴¹ B. Branch, "The Climate of Arbitration and ADR in Kenya" Paper presented to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003. The paper is presented at a time soon after a new government had assumed power in Kenya. (This paper has since been published in the Commonwealth Lawyer 2003, Indian ICFAI Journal of ADR, Corporate Africa, CEDR (Centre for Effective Dispute Resolution) London Website).

Aakanksha Kumar examines Arbitration as the most popular method of dispute resolution.⁴² Kumar explains that arbitration is currently the predominant method of settlement of disputes arising in international commercial relations. Kumar observes that for many lawyers, and clients too, worldwide arbitration is one of the most successful and flexible forms of dispute resolution.

Mohamed Al-Nasair and **Ilias Bantekas** explores public policy violations in Islamic law in the UAE and Bahrain.⁴³ Nasair and Bantekas in attempting to shed some light on the notion of an Islamic public and to define the concept of public policy or public order from the perspective of Islamic, and from that of the law of the UAE and Bahrain argue that while it might be expected that public policy in the Muslim world would have encompassed all those religious elements that are usually associated with Qu'ranic prohibition, such as usury and the charging of commercial interest, this is not the case in general terms, and that the laws of the UAE and Bahrain are no longer opposed to commercial practices that are routinely encountered in the industrialised nations of the West.

Keith Rosenn in the journal article on the enforcement of Foreign Arbitral Awards in Brazil examines the requirements for procedures before an arbitral award is enforced. Rosenn observes that the requirements for confirmation and other procedures before an arbitral award is enforced defeat the purpose of inexpensive and speedy resolution of disputes as aimed in international commercial arbitration.

Leonardo de Campos Melo in his article on the Recognition of Foreign Arbitral Awards in Brazil,⁴⁴ observes that a key indicator that Brazil is becoming a key player in world trade is the fact that its nationals and companies are increasingly involved in international contracts. He notes that effectively, the contracts have led to subsequent disputes. Melo observes that if an arbitral award is to become effective in Brazil, the winning party will have to file a request for the recognition of the foreign arbitral award before the Brazilian Superior Tribunal de Justiça ("STJ") and the STJ has final jurisdiction over disputes which raise issues of Brazilian federal law and also has original and exclusive jurisdiction over the recognition of foreign arbitral awards.

⁴² K. Aakanksha "Foreign Arbitral Awards Enforcement and the Public Policy Exception - India's Move Towards Becoming an Arbitration-Friendly Jurisdiction" [2014] Int. A.L.R. 76.

⁴³ A. Mohamed and B. Ilias, "The Effect of Public Policy on the Enforcement of Foreign Arbitral Awards in Bahrain and the UAE," *International Arbitration Law Review* [2013] Int. A.L.R. 88-96.

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Therefore, Melo observes that it is only upon such recognition by the STJ that a successful party in a foreign arbitration can be enforced or otherwise relied upon in Brazil.

While Brazil is not a Model state and therefore can be argued to have a different arbitral system from Kenya, Rosenn's and Melo's articles, expose substantively similar challenges on enforcement of international awards in Brazil to the Kenyan situation, hence forming part of this discussion. Through their study of the Brazilian position on this problem, they expose an example of a system that subjects foreign awards to rigorous tests before enforcement.

Christopher Koch, in his article on the comparison between the French and U.S. experience in the Enforcement of Awards Annulled in their Place of Origin also makes observations relevant to this study.⁴⁴ Koch compares the approach by France and the United States. He examines the extent to which awards which have been annulled in their country of origin can be enforced in the two countries. Citing the 1990's Hilmarton case in France and the United States decision in *Chromalloy Koch* notes that in both cases, the courts enforced awards that had been set aside in their place of origin, not pursuant to the New York Convention, but on the basis of the more favorable provisions of domestic arbitration law. Koch takes a similar position as Mehren that the French courts continue to ignore foreign annulment decisions, and will enforce an international arbitration award despite what the domestic jurisdiction finds as to its validity. The courts in the United States on the other hand have gradually refused to enforce awards, which were set aside at the place of arbitration: they will disregard a foreign annulment decision only if it fundamentally violates the United States public policy. This comparative study illuminates the glaring inconsistency of enforcement of transnational awards.⁴⁵

Taylor Von Mehren, in his journal Article on the contribution of the French Jurisprudence to international commercial arbitration discusses the principle of private autonomy as a guiding principle in arbitration. He demonstrates how France has well incorporated this principle in enforcement of foreign arbitral awards. He further supports his analysis of the "contractual nature of arbitration" approach by France by stating the fact that a foreign

⁴⁴ C. Koch, "The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience." *Journal of International Arbitration* 26(2): 267-292, 2009.

⁴⁵ *Ibid*, pp.291-292.

decision annulling or suspending an award-even an award rendered on the foreign court's territory-poses no legal impediment to the award's recognition or enforcement in France. This principle of private autonomy espouses that parties have a right to dictate the extent and effects of their contracts without interference by external factors including national legislation systems. This principle is relevant to this paper because arbitral awards are borne out of arbitration agreements set out by the parties to a contract.

10. CONCLUSION

Public policy is a wide concept. While domestic and international law have set it out as a ground for setting aside an international arbitral award, the definition of public policy has remained elusive. In the words of a popular text on the topic of the law and practice of international arbitration:

*"Public Policy is a very unruly horse, and once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."*⁴⁶

The definition of the Public Policy exception is yet to be clearly set out. If this is done, it will look to the broader public interest of honesty and fair dealing and create a high level of certainty in international commercial transactions.

Kenya has made great strides generally in providing a legislative and institutional framework in practice of international arbitration. However, the failure to define public policy which is a fundamental term in the arbitration process poses a key challenge to the practice of international arbitration. Judicial decisions which would otherwise fill in the gap of a lack of definition in the legislation instead introduces yet another challenge; inconsistency. This has created a murky situation where the enforcement of an arbitral award is uncertain and unpredictable.

11. RECOMMENDATIONS

⁴⁶ Burrough, J in *Richardson v. Mellish*. 2 Bing. 229, 252. 9 Eng. Com. L. R. 557.

As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss.⁴⁷

The author's recommendation is that to ensure that international arbitration becomes more preferable as a mode of resolution of international disputes, it is necessary to define public policy. The author proposes that public policy be defined by setting out a threshold. This is because as demonstrated in this paper, public policy is a wide concept. A brief definition of public policy may therefore prejudice the process further rather than remedying it. The author's proposal is to use the criminal law of the Enforcement State as the threshold. It is therefore suggested that both Kenyan as well as international legal instruments define public policy as follows:

'An issue will be considered to be against public policy and the court shall refuse to enforce such international arbitral award if the issue is one that the court would find to contravene the criminal law of the Enforcement State.'

⁴⁷ *SociétéEram Shipping v CieInternationale de Navigation, op.cit.*

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**EXPEDITING AD HOC ARBITRATIONS THROUGH EMAILS:
THE EXPERIENCE OF A KENYAN ARBITRATOR**

by: **PAUL NGOTHO***

ABSTRACT

The advent of Information Technology (IT) has remarkably transformed economies across the globe. This is manifested in terms of speed and accuracy in performance of various functions. Certainly, the developed countries have maximised the use of technology in their operations and this has accelerated economic growth and innovation. However, the adoption information technology in developing countries is rather slow and faced with numerous challenges. Particularly, African countries are in the process of transiting to IT driven economies in order to claim their place in the global platform.

Undoubtedly, ADR is one of the areas that begs for IT in order to realize expeditious and effective dispute resolution. In this regard, this paper presents insights as to how email communication can be used to save time and costs in arbitrations generally and ad hoc ones in particular. The discourse contends that internet-based fax facilities are not popular in developing countries. The fundamental issues with regard to the use of emails are brought out in the discussion and the author suggests solutions. The high internet and mobile telephone usage rates in Kenya create a conducive environment for the use of emails by arbitrators. The author concludes that email communication is an effective way of saving time and costs in arbitration despite its few demerits which are nevertheless outweighed by the advantages.

1. INTRODUCTION

Practitioners from some jurisdictions are surprised on whether or not the use of emails is an issue for discussion in Kenya, which has relatively high internet and mobile telephone usage rates.

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Most if not all domestic arbitrations held in Kenya are *ad hoc*, with professional bodies and courts as the major appointing authorities. After the Chartered Institute of Arbitrators, Law Society of Kenya, various other appointment, the arbitrator is literally left to his own devices.

The following discussion points have been compiled to guide a symposium discussion on how email communication can be used to save time and costs in arbitrations generally and *ad hoc* ones in particular.

Fax machines and video conferencing will be discussed in passing as they are close to emails technologically and offer many of the same benefits and challenges.

2. FAX MACHINES - PERSONAL EXPERIENCE

I returned to Kenya in June 2008 after a 6-year stint in the United Kingdom, where the fax was a primary mode of communication in arbitration.

My search for a fax machine to buy was not successful. A young sales lady whom I asked for a fax machine in an electronics shop in Westgate Mall had absolutely no idea what I was talking about.

Eventually, I got one as a gift from a cousin who had received it as a farewell present from a departing expatriate. The machine was brand new, complete with the manual, Styrofoam wrapping and the original box since neither my cousin nor his benefactor had used it. I could not believe my luck.

All my attempts to send fax messages have been in vain as most of the recipients' machines are out of order. I am still waiting to receive the first message through my machine.

The basic problem is that land lines, on which the standard fax machines work, are notoriously unreliable in Kenya. The lines are routinely vandalised for export as scrap metal. Internet-based fax facilities are not popular.

3. VIDEO CONFERENCING

I was recently in a video conference with participants from the US, Singapore, UK and other countries across the globe. The meeting went on very well for about an hour. Then there was a power outage, which interrupted internet for a few seconds before the stand-by generator kicked in. I could not connect to the internet after that. I would have been grossly inconvenienced if I had been conducting a hearing by video conference.

Video conferencing can also be quite expensive, but not when compared to the time and cost of travelling. Discussions end faster in video conference than in a meeting.

4. EMAIL COMMUNICATION - BENEFITS, RESISTANCE AND THE REAL ISSUES

4.1 Some of the Benefits

- i. Delivery/Service of documents is possible after offices close at 5.00 p.m.
- ii. Beating traffic jams.
- iii. Email communication saves the cost of printing, copying, envelopes and postage/courier.
- iv. One can send or receive emails from anywhere in the world, such that it does not matter when one travels.
- v. Easy to forward communication to arbitrator, client, parties, etc.
- vi. Searchable database.

vii. Ease of digital filing and retrieval

viii. Quoting documents verbatim is easy – just copy and paste!

4.2 Resistance to Email Use

- i. Culture of “real meetings” and “real hearings”.
- ii. Some arbitrators and party representatives still insist on sending hard copies of documents even after receipt of the soft copies has been acknowledged. They treat email communication with suspicion.
- iii. Employers and clients are left in the dark if the email address used in part of the proceedings is accessible to only one person in the firm if that person leaves the firm.
- iv. Some people dictate emails to their secretaries, so they might as well dictate letters.
- v. Lingering doubts about the legality of the use of emails in spite of provisions in the Arbitration Act and in other enabling laws.
- vi. Concerns about proof of service can be addressed.
- vii. Undue emphasis on form over content - some people are horrified at the thought that a multi million shilling claim can be handled by email.
- viii. Sentimental attachment to fancy letterheads on expensive paper, beautiful signatures, etc.

5. THE ISSUES

5.1 Confidentiality

Confidentiality is important in arbitration. How confidential is email communication?

5.2 Signature

Is a digital signature lawful? What of a hand-crafted signature in a scanned document which is sent by email?

5.3 Private Domains Vs Public Domains

Public domains like yahoo are very reliable. The level of security/privacy in public domains is doubtful. Gmail is apparently more secure than Yahoo and Hotmail. Public domains still not respected in some quarters.

Some company emails block out large attachments. Others are embarrassingly unreliable. The Government of Kenya is committed to email communication in order to save costs but its email addresses are quite erratic.

5.4 Back-up Tips

- i. Using Additional or 2nd email (ideally they should be from different domains)

- ii. Keeping someone else (boss, colleague or partner) in the loop.
- iii. Information storage back-up in case email address is hacked or computer stolen.
- iv. Sending a copy of the email to yourself.

5.5 Attachments

Word documents should be converted to PDF to make it harder (not impossible!) for someone to tamper with them. Soft copies of documents can be saved easily or printed if need be. They are also searchable electronically.

5.6 Compatibility of Software

Compatibility issues arising when someone in the system has outdated, extremely modern or completely different software need to be addressed when they arise.

5.7 Time/Date of Email delivery & Receipt

Beware of deadlines where different time zones are involved. When you are sending a document by email 11.59 PM, it might be mid-day the following day where the document is being received!

Note that the dates and times shown in computer-generated delivery records depend on the time and date settings on your computer and could be misleading.

6. PRACTICAL SOLUTIONS

I normally issue the following directions, having consulted the parties during the Preliminary Meetings (which I prefer to hold by email whenever that is practical), as part of my Order for Directions No. 1 (which I send by email):

- i. Email shall be the primary mode of communication in these proceedings whenever its use is practical. The recipient of an email shall acknowledge receipt and confirm if attachments have opened immediately on receipt and in any case within 24 hours, otherwise the sender shall assume the communication has not been received and follow up with a hard copy.
- ii. A person shall send an email to the recipient's main and secondary email addresses where both are available.
- iii. It is allowable for the sender to alert the receiver of the email message by sms, but such sms shall be copied to the others involved to prevent *ex parte* communication.
- iv. Substantive attachments shall be in PDF but those which are too bulky or cumbersome to send as attachments shall be sent as hard copies.
- v. A party shall assume that its email has not been received and send a hard copy if it does not receive acknowledgement of receipt within 24 hours.
- vi. Every communication from a party to me shall be copied to the other party's 2 email addresses, and shall have an indication to that effect.

7. CONCLUSION

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Email communication is an effective way of saving time and costs in arbitration. The arbitrator must lead by example and give the necessary directions.

Promoting Professionalism in ADR Practice - Kamau Karori
PROMOTING PROFESSIONALISM IN ADR PRACTICE

by: **KAMAU KARORI***

ABSTRACT

This paper appraises the Nairobi Centre for International Arbitration in light of its statutory mandates as spelt out in the Nairobi Centre for International Arbitration Act, 2013. It contends that the logical step is to put in motion measures designed to attract cross-border ADR business and ones that will give comfort and assurance to foreign investors and international organisations that Kenya is a suitable venue for handling of and resolution of disputes through ADR.

The author argues that one of the ways in which the Centre can market itself as a centre for international arbitration is by promoting the professionalism of ADR practitioners associated with the Centre. The discourse looks at the challenges facing professionalism in ADR practice in the region and other parts of the world. In conclusion, the author suggests the way forward for the new institution, based on the international best practices in international commercial arbitration and expresses optimism that if handled right, the Centre can take its place among the respected and recognised regional institutions in the world.

1. INTRODUCTION

With the enactment of the *Nairobi Centre for International Arbitration Act* (NCIA Act),¹ which establishes the Nairobi Centre for International Arbitration (NCIA), the next logical step is to put in motion measures designed to attract cross-border ADR business. This will entail deliberate efforts to give comfort and assurance to foreign investors and international organisations that Kenya is a suitable venue for handling of and resolution of disputes through ADR.

*FCIArb, Advocate of the High Court of Kenya. This paper was presented at the Nairobi Centre for International Arbitration (NCIA) Stakeholder Review and Forum, held on 26th February 2015 at Kenyatta International Convention Centre (KICC), Nairobi.

¹ No. 26 of 2013, Laws of Kenya.

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NCIA was fortunate to be established at a time when cross-border ADR practice is widely recognised across the world and many centres have been established to undertake the very task NCIA is charged with. Such centres have been established in Mauritius, Singapore, Hongkong and Rwanda among others. Indeed, the current debate globally is whether it is possible to come up with an international ADR law and practice. This would mean having uniform laws and procedures to be applied by all institutions.

Part of NCIA's task is already done by reason of the fact that Kenya is a well known destination with excellent air and rail connections. The ongoing road construction will further enhance its infrastructure credentials. Its hotel and hospitality industry is also well established. What remains is for the centre to market its ADR credentials. One of the ways in which the centre can market itself as a centre for international arbitration is by promoting the professionalism of ADR practitioners.

2. CAPACITY AND COMPETENCE OF ADR PRACTITIONERS

In this discussion, the author takes professionalism to mean the skill and good judgement that is expected from a person who is trained to do a job. It is clear that for this region to market itself as capable of offering ADR solutions, it needs to enhance the numbers, capacity and competence of practitioners at its disposal whom have the skill to undertake the job of offering ADR services.

2.1 Capacity

One of the challenges facing this region is the shortage of well trained and competent ADR practitioners. Up to now, the practice of ADR has remained a side job that professionals in other fields undertake from time to time. As a result, the region has lagged behind in terms of the number of trained individuals available to take up ADR in large scale. This means that even as NCIA seeks to market itself it must confront the question of whether there are sufficient ADR practitioners that will enable it discharge its statutory mandate of offering efficient and expeditious dispute resolution mechanisms. The Chartered Institute of Arbitrators Kenya Branch which is the only institution that currently trains ADR has about 500 registered members.² Of these, less

² Chartered Institute of Arbitrators Kenya Branch <http://www.ciarbkenya.org/About_Us.html> Accessed 26/02/2015.

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than half have been trained in award writing. This number is insufficient for a region seeking to market itself as having capacity to deal with the numerous disputes referrals it seeks to attract practitioners.

Given that the centre is still in its initial stages of establishment, it should build on the current number of trained ADR practitioners by pursuing an aggressive campaign of training and accrediting ADR practitioners. This it should do in the discharge of its mandate under Section 5 (m) of the NCIA Act.

Before embarking on the task of training, the Centre must confront the following key issues: who will undertake the training; whether there is a sufficient number of trainers in Kenya who can undertake training of ADR practitioner; and who will determine the curricula, including the setting and marking of requisite exams.

In my view, one of the options available to the centre is for it to liaise with other regional and international institutions such as the Chartered Institute of Arbitrators (Kenya) for purposes of securing technical assistance to enable it carry out its training mandate.

The training of ADR practitioners should be focused towards ensuring that they have the necessary expertise and skills to resolve disputes relating to different disputes. The training should combine elements of theory and law with skill training and development. It is important that ADR Practitioners not only understand the body of law that applies to a particular subject matter but also the skill of being a practitioner.³ Another aspect of training is requiring ADR practitioners to take part in continuous professional development programs. The goal of such programs would be to train and keep the practitioners informed on the latest developments in practice as well as best practices generally.

After building sufficient capacity, the centre must create a database of ADR practitioners based on their areas of practice and/or experience, a brief description of the matters they have dealt with (without compromising confidentiality). It must also create a system of evaluation where ADR Practitioners have an opportunity to evaluate each other and/or parties to comment (in confidence) on areas of improvement. The suggestion for this region therefore is to have an elaborate database and a tier-based classification of practitioners that is to be updated consistently based on feedback from consumers and assessment by peers.

Peer review is a crucial component of ensuring quality in the services offered by ADR practitioners. It is now a trite fact that no one has a monopoly

³ J. Feerick, C. Izumi, K. Kovach, and L. Love, Standards of Professional Conduct in Alternative Dispute Resolution, 1995 *J. Disp. Resol.* (1995).

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of knowledge. Entrenching peer review, at the stage of drafting awards, will clearly enhance confidence in the quality of services and decisions rendered by ADR practitioners accredited to the Centre.

2.2 Appointments

To attract the best brains, the centre must ensure sufficient supply of work for those who qualify. That will ensure it retains its accredited members remain focused and interested in offering the services that the Centre will seek to offer. It follows that the criteria for appointments must be fine tuned to ensure fair distribution of work. The centre must therefore adopt best practices in the selection and appointment of arbitrators, mediators, e.t.c.

(i) Party appointments

One of the often cited advantages of ADR is the parties' ability to appoint a decision maker. Unfortunately parties assume that arbitrators appointed through this method advocate that party's cause in the proceedings and will endeavour to sway the other decision maker. It may be useful to use a mixture of a party appointed process and neutral process thus ensuring that the principle of a party autonomy is not eroded.

A discussion about appointments cannot be complete without dealing with the issue of rules on disclosure of conflict of interest or dealings to avoid appointments that might create a perception of bias on the part of the appointing authority or by the appointees and lead to applications for disqualification of appointees. The Centre must encourage appointments based on complexity, specialization, expertise, experience and value of the subject matter.

(ii) Repeat Appointments

There is a growing concern about the same persons/practitioners being appointed over and over to deal with a majority of arbitrations. This could lead to actual or perceived conflicts in the administration or provision of neutral services. Multiple appointments by the same parties or counsel who happen to be called upon to resolve similar issues acquire a tag of lacking independence or impartiality, perception of bias and put the credibility of the institution at risk. There is ongoing debate whether the fears about an arbitrator's ability to act impartially

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and independently in light of reiterated and similar appointments are justified. The centre must strive to avoid the tag of repeat appointment without undermining the parties of freedom of appointment of arbitrators. The question is, can the centre impose a requirement for arbitrators to turn down appointments when there is a potential claim or perception of bias? The following decided cases are quite illuminating on the issue;

- In [*Tidewater v Venezuela*](#)⁴ the claimants challenged Venezuela's appointee, Professor Stern, who had been appointed by Venezuela to three other ICSID tribunals in the past six years. **Held:** whether "multiple appointments to arbitral tribunals may impugn the independence or **impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation**" and that "**either fewer or more appointments might, in combination with other factors, be needed to call into question an arbitrator's impartiality.**"
- *Universal Compression v. Venezuela*.⁵ In this decision the Chairman of the Administrative Council, Mr. Robert Zoellick, rejected a challenge to Professor Stern based on her multiple appointments by Venezuela, noting that there was "no objective fact" to suggest her independence or impartiality would be manifestly impacted by the multiple appointments.
- [*OPIC Karimum v. Venezuela*](#).⁶ A claimant challenged Professor Sands based on multiple appointments by Venezuela and by the law firm representing Venezuela, the two remaining members of the Tribunal (Professors Jones and Tawil), expressly disagreed with the statement in *Tidewater* that multiple appointments are neutral. The Two Members state that "**multiple appointments of an arbitrator by a**

⁴ ICSID Case No ARB/10/5.

⁵ ICSID Case No. ARB/10/9.

⁶ ICSID Case No. ARB/10/14.

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party or its counsel constitute a consideration that must be carefully considered in the context of a challenge.”

3. THE SINGAPORE EXPERIENCE

The Singapore Institute of Arbitrators (SIArb) has a stratified system of arbitrators based on qualifications and experience. Members are invited to submit their applications for admission to various panels based on their expertise. Members are admitted to different cadres after a process of selection by the Panel Review Committee. The List of Arbitrators in the Panel is updated periodically.

4. REGULATION

Many complaints have already been raised regarding the integrity of arbitrators and the quality of arbitration awards. Whereas the quality of awards can be dealt with through training, what of integrity?

Given the stated objective of the centre to promote ADR mechanisms, it behoves practitioners to maintain very high standards of ethics and professionalism in order to ensure the development of international ADR and the centre. There is divided opinion on whether there is need for ethical control over ADR practice considering that most practitioners are regulated by their own professional bodies. I don't see the wisdom of the centre allowing non practitioners to police the conduct of its practitioners.

5. CODE OF PRACTICE

In my view, ADR should be professionalised and become a full time profession. This will go along way in ensuring consistency in what consumers can expect from ADR service providers. The Centre should develop a code of practice and set the standards expected of practitioners, which standards can be expressed as codes, benchmarks, models or best practices. At a minimum, an appropriate code of practice should address the following aspects:-

5.1 Counselling

Every practitioner has an ethical obligation to counsel clients about the multiple ways of resolving problems and planning transactions.

5.2 Confidentiality

Confidentiality especially in mediation which unlike most court hearings that are public and have the possibility to be a source of great embarrassment is confidential and no one, save the mediator and parties involved, will know what has transpired during the process. This is another powerful benefit of mediation, though care should be taken to avoid confidentiality being used to advance unethical behaviour going unpunished.

5.3 Conflict of interest

This requires that if any person appointed as a mediator, arbitrator or in any other capacity to resolve disputes is faced with a situation of possible perception of bias, he or she should disclose it as early as possible.

5.4 Compliance

Parties involved in ADR proceedings ought to be prepared to accept and respect the outcome of the proceedings. In addition to setting standards, the centre, like other arbitration institutions should develop rules and channels by which complaints can be dealt with in order to preserve the integrity of the arbitral processes. The centre ought to set up a mechanism for regulation. This might however come with capacity and budgetary constraints. Judges can deal with this?

The threshold for challenging an arbitrator for misconduct should be higher than merely making an allegation and the tribunal should have power to summarily dismiss frivolous claims. The Centre should put in place a mechanism for dealing with frivolous challenges

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to the appointment of Arbitrators. For example, in Hong Kong, there is provision for a non-refundable filing fee where a party is challenging the appointment of an arbitrator aimed at acting as a deterrent for frivolous applications. The other alternative would be to provide that the fee be refunded if the application succeeds.

Where the Disciplinary Tribunal finds that the charge is proved, a range of sanctions can be imposed by the Tribunal including:-

- (i) Reprimand or warn the member as to their future conduct;
- (ii) Suspend the member from membership for a definite period.
- (iii) Expel the member;
- (iv) Make an appropriate order for costs.

6. SHIFT FROM THE NORTH TO THE SOUTH- Opening up borders

The issue here is whether the centre should advocate for free movement of practitioners, meaning that ADR practitioners should be free to come and practice from as opposed to in Kenya. One view is that we need to be careful not to be net importers of ADR practitioners. There is a real risk of multinationals walking in with their own counsel and arbitrators and therefore deprive the local practitioners of the opportunity to gain experience, learn and earn! In that case, the region will retain the perpetual tag of lacking experience in high value disputes or international ADR. The result of such an approach would be to inhibit capacity building in the region.

There is obviously the equally powerful and attractive argument that we cannot have a truly regional arbitration centre if we do not allow practitioners from elsewhere to practice locally. There is also the argument that allowing highly experienced and knowledgeable foreign practitioners will lead to knowledge exchange in the course of interacting with those practitioners in the course of their work in Kenya.

The establishment of the NCIA offers a useful avenue for this region to tap into what is clearly a lucrative and beneficial service. If handled right, I

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see the centre taking its place among the respected and recognised regional institutions in the world.

Mediation and The Role of Women In Peace and Security - Mbiriri Nderitu
MEDIATION AND THE ROLE OF WOMEN IN PEACE AND SECURITY

by: MBIRIRI NDERITU*

ABSTRACT

This paper critically examines the role of women in conflict resolution and peace building. This discussion is based on the fact that the female gender is the most adversely affected by conflict and its aftermath in any society, hence the need to seek their participation in resolving that conflict and also in peace-building.

The author discusses mediation as a conflict management mechanism and observes that the current approaches to mediation (indigenous and official mediation) share one thing in common, namely the limited role that women play in the mediation process. As such, there is a case to be made for the mainstreaming of gender equality at all levels of mediation, considering that while indigenous processes contain a range of progressive values, some of their practices are patriarchal and therefore not gender sensitive.

The author concludes by stating that the place of women in our society puts them in the most proximate contact with the environment and natural resources and therefore for mediation to be effective as a conflict management mechanism it must involve all concerned groups of people, including women and children and their views should be respected and taken into account. The process should ensure there is participation by both gender and neutral implementation of the decisions reached in mediation.

1. INTRODUCTION

Moore¹ says that Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.

Article 33 of the Charter of the United Nations provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry,

*LLB (MUK), MCI Arb, Advocate; A paper presented at CI Arb's FIDA Training in Mediation Course, Maanzoni Lodge, Machakos County, 11th December 2012 (**Revised on 25th February 2015**).

¹ C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14.

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mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.²

The United Nations Security Council on 31 October 2000, adopted resolution 1325 (2000) on women, peace and security. In the said resolution, the Security Council highlights the importance of bringing gender perspectives to the centre of all United Nations conflict prevention and resolution, peace -building, peacekeeping, rehabilitation and reconstruction efforts.

Top on its agenda in the above resolution, the Security Council urged and encouraged;

- i. Member States to **ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict**;
- ii. The Secretary-General to implement his strategic plan of action (A/49/587) calling for an **increase in the participation of women at decision-making levels in conflict resolution and peace processes**;
- iii. The Secretary-General to **appoint more women as special representatives and envoys to pursue good offices on his behalf**, and in this regard calls on Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster;

The passing of the above resolution was informed by the fact that women and girls were the most adversely affected by conflict and its aftermath in any society, hence the need to seek their participation in resolving that conflict and also in peace-building. From the onset, it is clear that the role of women in conflict resolution and peace building has been recognized by the premier organization charged with ensuring international peace and security of all nations.

2. MEDIATION AND THE ROLE OF WOMEN IN PEACE AND SECURITY

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

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A key aspect of any mediation process is the inclusion of primary and secondary actors. An effective mediation should adopt processes that create greater thresholds of inclusion while maintaining efficiencies.³ Current approaches to mediation (indigenous and official mediation) share one thing in common, namely the limited role that women play in the mediation process. Given the incidence of gender – based violence, rape and the exploitation of children in armed conflict, there is a case to be made for the mainstreaming of gender equality at all levels of mediation.⁴ In addition, indigenous approaches rely on traditional norms that have been developed over centuries. While indigenous processes contain a range of progressive values, some of their practices are patriarchal and therefore not gender sensitive. This has the effect of undermining the role of women in mediation and the peace process.⁵

Where it has been tried, the involvement of women in mediation and peace building has had a great impact on the affected communities and even lead to resolution of the conflict. A classic example here in Kenya is the **Wajir Peace Initiative**. The increasing frequency, severity and cumulative consequences of conflicts in Arid and Semi-arid Land (ASAL) areas in Kenya, particularly in the late 1980s and a better part of the 1990's due to scarcity of resources, caused by environmental hardships, surrogated a number of community based concerted initiatives to ameliorate the impacts of the then raging conflicts.⁶

The most noticeable of these emerging local level attempts to manage pastoralists' conflicts was in Wajir district, in the so called Wajir peace process, where local people peace dialogues and reconciliation meetings often resulted to prolonged period of ceasefire.⁷ The Wajir initiative was necessitated by the withdrawal of several NGOs from the district. However, their running away became a blessing in disguise as their absence gave the communities the

³ T. Murithi & P. M. Ives, Under the Acacia: Mediation and the dilemma of inclusion, Centre for Humanitarian Dialogue, April 2007, p. 77.

⁴ *Ibid.*

⁵ *Ibid.*, p. 85.

⁶ M. Adan & R. Pkalya, "The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya", Practical Action, Nairobi, (2006), p. 6.

⁷ *Ibid.*, p. 6-7.

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opportunity to take charge and begin their own Peace Initiatives in their own way.⁸

The Wajir clan conflict had degenerated to include fighting between women in market places in the district. Sensing danger posed by the continued clan fighting, a group of women (initially two in number) initiated peace meetings with women in Wajir town market with the express purpose of addressing the root causes of the confrontations. As a result, Wajir Women for Peace Group was formed. The initial fruits of the women led peace initiative in Wajir saw a group of educated professionals drawn from all clans in the district form Wajir Peace Group. The peace group teamed up with women for peace in facilitating peace dialogues in the district. Other groups also began to coalesce into peace groups in the district (elders for peace, youth for peace etc) culminating to the formation of Wajir Peace and Development Committee (WPDC) in 1995.

Another example of a conflict situation which has been resolved as a result of inclusivity is in Sri Lanka. While none of the previous attempts at formal peacemaking in Sri Lanka allowed women to play any role in the negotiating process, the peace talks which commenced in 2002 established a formal space for their engagement by creating a Sub Committee for Gender Issues (SGI) to report directly to the plenary of the peace talks.⁹ The SGI was mandated to explore the effective inclusion of gender concerns in the peace process. It was of the view that women are an indivisible part of society and are the main force behind social reconstruction and therefore their focus would be on women. However, SGI sought to bring a gender perspective to their work so as to make it holistic and to this end, they also worked with men.¹⁰

The inclusion of women combatants in the context of peacemaking opened space for discussions on gender sensitive strategising as much as it enabled delegations to share their different and specific experiences of conflict, conflict resolution and peacebuilding.¹¹ In recognising women militants as active political agents, there was a possibility of engaged feminist discussion and a sharing of feminist resources with militant women. This in turn could

⁸ M.K. Juma, "Unveiling women as pillars of peace: Peacebuilding in communities fractured by conflict in Kenya," New York: UNDP (2000).

⁹ S. Kumudini, The importance of Autonomy: Women and the Sri Lankan Peace Negotiations, Centre for Humanitarian Dialogue, November 2010, p. 2.

¹⁰ *Ibid.*, p. 4.

¹¹ *Ibid.*, p. 9.

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enable women combatants to engage with and shape peace processes beyond the narrow conceptions of territory and power sharing. Peace processes particularly those that deal with ethno political conflict can offer potential to open up more spaces to critically challenge dominant patriarchal and masculine nationalistic discourse from within.¹²

On its part, The North Atlantic Treaty Organization (NATO) responded to UNSCR 1325 by adopting an Overarching Policy, developed with its partners in the Euro-Atlantic Partnership Council (EAPC) in 2007. The Policy was revised in 2011. In addition, UNSCR 1325 is fully implemented in NATO-led operations and missions, and the Alliance has nominated Gender Advisers at Strategic Commands, in Afghanistan and in Kosovo. In August 2012, following an offer by Norway, a Special Representative for Women, Peace and Security was appointed at NATO Headquarters in Brussels.¹³

Kumudini says that the comparative political “invisibility” of women allows them the space to move across ethnic divides and work together to promote common agendas.¹⁴ These can range from raising gender imperatives to dealing with a range of moral and political issues including that of respect for human rights, transparency, accountability and inclusion. This engagement could also lead to redefining the manner of engagement as well as reframing issues at the heart of the peace process.¹⁵

The experience of the Northern Ireland Women’s coalition, an independent women’s political party established just before the all-party peace talks, suggests that there is value in having women present at the talks as a distinct political grouping in their own right. They keep track of gender concerns across the board and do not allow themselves to be marginalised into

¹² *Ibid.*

¹³ Sourced from

www.nato.int/cps/en/SID-473424B6-A3D021FD/natolive/topics_91091.htm, Accessed on 7th December 2012.

¹⁴ *Ibid.*, p. 10.

¹⁵ *Ibid.*

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or limiting their focus to women's issues.¹⁶ They also offer women the space to engage where/when party structures may limit or ignore such needs. An independent women's presence also offers women the neutral space to raise concerns that may be perceived as controversial or too politically charged for partisan politicians to engage with.¹⁷

As with representation for marginalised groups, the mere presence of a few individual women at the peace table does not by itself ensure that women's concerns and gender interests are met. A separate mechanism that allows for inclusive representation and a safe place to discuss and build concerns on specific issues would be a useful platform from which to engage formal peace negotiations.¹⁸ Kumudini concludes that the involvement of women must continue beyond the signing of an agreement after a successful mediation. Work must continue well into the period of transition and implementation phase. The interests of women can be realised only through the success of the involvement of the women in peace making.¹⁹

In her paper,²⁰ **Baechler** reflects, among other things, on what mediators and other third parties can do to include more women in peace talks. She notes that the peace talks in Nepal, like so many elsewhere, were notably absent of women. Yet women provided a wide range of contributions to the overall peace process. She argues that women roles in Nepali Society and the core issues of the Nepali peace are an expression of the active political role Nepali women started to play. Women activists were not satisfied with being politically marginalized and instead requested a seat at the peace table to defend their own rights, to get first hand information about the conditions

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 12.

²⁰ G. Baechler, A Mediator's Perspective: Women and the Nepali peace process, Centre for Humanitarian Dialogue, August 2010, p. 2.

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to end the war, to shed light on problems, to open up the close circle of men who reflected the conflict parties, to articulate their own perspectives and to define their own future, in particular with regard to the constitution making in a new Nepali society.

It is important to involve the women in the peace processes because to them, the process might mean more than what is presented on face value. **Baechler** says that²¹;

“for Nepali women, peace was never understood in the narrow or negative sense of the term, i.e. the absence of armed violence...It was only the first step towards a more comprehensive peace which emerged out of experiencing a long history of political oppression through a feudal monarchy; near total impunity; widespread insecurity in the rural areas; domestic and public violence as well as double and triple marginalization of women in the exclusionary caste system...”

Baechler says that peace for the women meant a political strategy to implement down-to-earth human security, implying a combination economic security, food security, health security, environmental security, personal security, right to human dignity and freedom of a person, community and political security.²² She argues that the direct participation of women in peace negotiations would make a significant difference both in terms of process and content. Women, she says, are agents of change who can make a significant and viable impact to a peace process. Inclusion of women democratizes the mediation process by making their voice heard at the negotiation table. They belong to a group that would previously be excluded from negotiations.

The inclusion of women enhances the systematic process of consultation and participation in the mediation process.²³ Owing to their focus on human security in the Nepali case, women were perceived as stakeholders who could play a facilitative role across party lines and sectors in the complex

²¹ *Ibid.*, p. 3.

²² *Ibid.*

²³ *Ibid.*, p. 4.

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Nepali society.²⁴ Mediators have many ways to engage (more) women in the mediation process. Such strategies depend on the formal role and the acceptance of the mediator. Strategies also depend on the political and cultural context; is there space for active mediation?²⁵ Negotiation and mediation training sessions could be conducted with the aim of bringing women to the table.

The long-term goal must be that women are not dependent on the interests of the conflict parties but become interest groups for peace by, and for themselves. Women are a major part of the workforce without whom the development of a stable economy will not be possible. Women (and in particular organised women) contribute significantly to human security, social stability, and to a sound social fabric in times of widespread poverty, ethnic tensions and suffering as a consequence of civil war and ongoing political struggle. Women should be further supported to consolidate this contribution.²⁶

The peace making community ought to be able to draw distinctions between 'thin peace agreements' which only involve armed actors and have a high probability of lapsing back into armed violence and 'thick agreements' with broad based involvement of a given society-including women-and a higher degree of success in the long run. Women's participation in mediation should be elevated. They should not only take their place at the mediation table, but should be able to put forward their vision of substantial peace for societies as a whole.²⁷

3. CONCLUSION

²⁴ *Ibid.*, p. 5.

²⁵ *Ibid.*, p. 6.

²⁶ *Ibid.*, p. 8.

²⁷ *Ibid.*, p. 9.

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Most, if not all, conflicts are about resource scarcity or abundance, resource allocation and utilization. The place of women in our society puts them in the most proximate contact with the environment and natural resources. Their everyday lives are affected and ordered according to the prevailing environmental issues and it is only prudent that they are involved in management of the environmental resources and resolution of conflicts arising there from. Women in our society are closest to land utility and therefore they ought to have a voice on any issues concerning access to and use of land, among other issues that are the source of conflicts.²⁸

For mediation to be effective it must involve all concerned and or affected groups of people and their views should be respected and taken into account. Men and women must be represented and included in the decision making processes. The gender dimension of the mediation process is crucial and should not be ignored. The process should ensure there is participation by both gender and neutral implementation of the decisions reached in mediation.

Conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for female mediators. The absence of women's voices and interpretations of law from the mediation process tends to encourage decision making that overlooks the rights of women and this should be discouraged.

It is also noted here that women have been of disservice to themselves by failing to take advantage of the opportunities afforded by such instruments as the UNSCR 1325 (2000) to propose to their governments some among themselves to mediate on conflicts that arise from time to time. This has led to disproportionate inclusion of women in peace processes, thus denying such processes the voice of women. Very few, if any, women have been involved in noticeable peace building initiative and the most recollectable locally is the involvement of madam Graca Machel in the Kenyan post election violence mediation initiative chaired by Dr. Kofi Annan.

Training of women as mediators is also a vital component of their involvement in resolutions of conflicts that arise. The Chartered Institute of Arbitrators (K) Branch, among other bodies²⁹, is mandated to conduct such

²⁸ K. Muigua, *Resolving Environmental Conflicts in Kenya Through Mediation*, (unpublished PhD Thesis), Nairobi, 2011.

²⁹ Other institutions include Centre for Alternative *Dispute Resolution* Limited (CADR), Mediation Training Institute (MTI), The Strathmore University's Dispute Resolution Centre, the Dispute Resolution Centre (K), CADER and the recently formed Nairobi Centre for International Arbitration.

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trainings and has international recognition. It is noteworthy that out of a total membership of **682** at the institute today, **only 201 are women** and majority are at associate level. How then are women able to push for recognition and inclusion without forming a critical mass in such institutions as the CIArb?

Mediation has previously been perceived as *hors d'oeuvres* for dispute resolvers to imbibe at cocktail events; not any more. On 24th February 2015, the Honourable the Chief Justice Dr. Willy Mutunga appointed 12 persons serve in the Mediation Accreditation Committee. Kenyan women should rise to the occasion, get trained and obtain relevant accreditation, especially in light of the constitutional dispensation under Article 159 (2) (c), so that they are in a better position to agitate for their inclusion as mediators in resolution of conflicts.

CONSOLIDATION OF COMMERCIAL ARBITRATION: INSTITUTIONAL AND LEGISLATIVE RESPONSES

by: LEONARD OBURA ALOO

I. INTRODUCTION

In an era in which dissatisfaction with the expense and inefficiency of formal litigation has stimulated the search for alternative methods of dispute resolution, arbitration enjoys increasing popularity as a substitute for the trial process.¹ Indeed the framers of the Constitution of Kenya 2010 specifically included arbitration as one of the alternative dispute resolution mechanisms that courts and tribunals while exercising judicial authority are expected to promote.² In disputes involving technical matters such as construction, arbitration enjoys distinct advantages over litigation.³ In the realm of international commercial disputes the importance of arbitration is enhanced, as there exists no realistic alternative to arbitration.⁴

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¹T.J Stipanowich, "Arbitration and Multiparty Dispute: The Search for Workable Solutions" (1986-87) Vol 72 *Iowa Law Review* 473, 473.

² The Constitution of Kenya, Article 159(2) (c).

³ K. Muigua, *Settling Disputes Through Arbitration in Kenya* Glenwood Publishers, Nairobi, 2012. p. 3-5.

⁴ Each party to an international commercial transaction would naturally prefer to use the courts in its own state. Choosing the courts of a third state would make little sense since the parties have little connection with it. Furthermore, due to the success of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, a foreign arbitral award will usually be easier to enforce than a foreign judgement.

The advantages of arbitration over litigation, generally stated as economy and efficiency,⁵ may however be frustrated by any number of dilatory tactics before, during, and after arbitration. Ironically, many of these potential causes of delay are rooted in those characteristics of arbitration that distinguish it from traditional adjudication processes. Nowhere is this paradox more evident than in disputes involving multiple parties. The problem has been summarised as follows:

*Modern court rules evolved over time to further the compelling policies against multiplicity of litigation. Rules governing consolidation of disputes, third-party practice, joinder of parties, and intervention accommodate multiparty disputes in a manner that will conserve public and private resources and minimise the potential for contradictory judgements. Arbitration, on the other hand, is rarely governed by these rules. Arbitration is a creature of contract, and classically involves one or more disputes between two signatories to a written agreement.*⁶

Simply stated the difficulty with the consolidation of arbitration proceedings where the parties had not provided for it in their agreement is that consolidation goes against the consensual basis of arbitration derived from an enforceable agreement between the parties.⁷

In some areas such as construction it appears illogical to have multiple arbitration proceedings running in parallel with the potential for contradictory awards in what is essentially the same project. It is common in construction

⁵ The advantages generally claimed for arbitration over litigation include flexibility of procedure which if utilized correctly can lead to a quicker and cheaper outcome. Other advantages include the use of an arbitrator with specialised knowledge and confidentiality of proceedings.

⁶ T.J Stipanowich, *op.cit*, p.473.

⁷ According to Butler and Finsen arbitration has five essential characteristics: (i) it is a procedure for resolving disputes; (ii) it has a consensual basis derived from an enforceable agreement between the parties; (iii) the adjudicator or arbitrator is appointed by or on behalf of the parties; (iv) the agreement must contemplate that the arbitrator will proceed impartially and make an award after receiving and considering evidence; and (v) the arbitrators award is final, D. Butler & E. Finsen, *Arbitration in South Africa- law and Practice*. Juta, Cape Town, 1993, p. 1-3.

for the employer to enter into a construction contract with the main contractor, who then subcontracts parts of the works to different sub-contractors. The effect is that the construction contract is an amalgam of contracts relating to a single project.

If disputes arise in the different contracts it appears absurd to have parallel proceedings and potentially contradictory outcomes. If the proceedings were before courts, then the courts in Kenya would have power under the Civil Procedure Act to order consolidation of the suits.⁸ Similar powers exist for courts to consolidate disputes in other jurisdictions.⁹ However, due to the consensual nature of arbitration, arbitrators and courts, do not traditionally have the same power to consolidate arbitration proceedings or join parties as courts have in respect of court proceedings. This is a source of a problem which, in construction disputes, has been expressed in the following terms:

The agreement to arbitrate is generally included within the terms of the main (or substantive) agreement. Unless, when drafting the arbitration agreement, the parties have given proper consideration to joining third parties and those third parties have given their consent), third parties may not be joined into any arbitration proceedings. Thus, in a situation where the employer has agreed to arbitrate its disputes with the contractor, unless the employer and contractor have also included provisions allowing sub-contractors or the professional team to be joined, it may not be possible to have them (or join them) into the arbitration.¹⁰

⁸ Order 11 r. 3(1)(h) of the Civil Procedure Rules, 2010 Legal Notice No 151 of 2010 Government Printer Nairobi 2010.

⁹ For example, Uganda and England.

¹⁰ G. Bell and P.Masons, "Construction Arbitration-past and present" (2006) 17 6 Cons law 17.

So what choice is there given that consolidation of proceedings where similar questions of law and fact are involved seems instinctively¹¹ to be the proper choice? The choice appears to be between *inter alia* having a formal consolidation leading to an award binding on all the parties; a joint hearing regarding the issues but leading to separate awards; and continuing with separate hearings.¹²

The purpose of this essay is to undertake a nomadic survey of the various institutional and legislative responses to the problems posed by the issue of consolidation in commercial arbitration. The paper looks specifically at the Arbitration Rules of the Chartered Institute of Arbitrators Kenya Branch which do not include a specific power of the arbitrator to consolidate proceedings. The paper argues that future reviews of the rules should consider including such a power. In order to achieve this, part II of the paper begins with a short look at the rationales for and against consolidation of arbitration proceedings. In Part II the paper examines a few cases that illustrate the problems that arise from consolidation of arbitration proceedings. The paper then takes a brief look at some of the legislative and institutional responses to the problem. The focus is on informing possible review of the Chartered Institute of Arbitrators Rules. It is perhaps hubris to attempt to analyse such a vast and vexatious issue in a short paper like this one. The utility of the paper, it is hoped, will lie in its providing a sketch outline of the issues involved and how various arbitration institutions and jurisdictions have approached the problem in order to inform debate by rule reviewers.

i. Rationales For and Against Consolidation

It has been rightly stated that:

¹¹ The discussion on the advantages and disadvantages of consolidation below shall test the validity of this instinct.

¹² For definition of the various forms of consolidation see Chiu, Julie C. "Consolidation of Arbitration Proceedings and International Commercial Arbitration" (1990) vol 7 no. 2 *J of Int Arb* 53; formal consolidation involves the original proceedings losing their identity and leads to a consolidated award. Diamond, "Multi-party Arbitrations: a plea for a pragmatic piecemeal solution" (1991) 7 *Arbitration International* 403-409 advocates for joint hearings regarding the issues which arise in the different proceedings, leading to a separate awards.

*the question of whether consolidation is desirable cannot be answered in the abstract, but must be considered in the light of its alternative. Ultimately, the answer depends upon whether the advantages of consolidation outweigh the advantages of separate proceedings.*¹³

It is essentially this question that this part of the paper, in examining the rationales for and against the consolidation of arbitration proceedings shall seek to address. No answer is however proposed and the issue is left open.

The arguments for consolidation of proceedings are clear and simple. The two most powerful arguments in favour of consolidation are based on the need to promote efficiency and the desire to prevent inconsistent awards. Perhaps the only true argument in favour of consolidation, but one which carries a lot of weight is that consolidation minimises and perhaps eliminates the problems associated with contradictory and inconsistent awards.¹⁴ This is particularly important when it is remembered that appeal in arbitration is limited and review of arbitration awards is confined to allegations of procedural irregularity and a few other narrow exceptions. Perhaps the only valid challenge to this argument is one that states that by entering bilateral arbitration agreements, the parties are assumed to have voluntarily assumed the risk of inconsistent awards.¹⁵

Where disputes are based on a common or closely related sets of facts, significant savings of both time and money can be achieved if the presentation of evidence, particularly expert testimony, can be made once, rather than duplicated before numerous tribunals.¹⁶ Consolidation of arbitral proceedings

¹³ J.C. Chiu, "Consolidation of Arbitration Proceedings and International Commercial Arbitration," (1990) vol 7 no 2 *J of Int Arb* 53, p.55.

¹⁴ *Ibid.*, p. 56.

¹⁵ *Ibid.*

¹⁶ See discussion on construction disputes above.

therefore, it is argued, promotes efficiency. However, while efficiency is reasonably clear, the costs for some parties may actually increase due to consolidation.¹⁷ "Nonetheless, on the whole it seems reasonable to conclude that the consolidation of closely-related disputes, where essentially the same evidence will be presented, will result in significant savings of both time and money."¹⁸

The arguments against consolidation of arbitral proceedings range from the fact that it reduces party autonomy to that the issue of enforcement difficulties that it may create.

"Arbitration is consensual, a creature of contract. As such, only those who consent are bound."¹⁹ These words summarise one of the most fundamental principles of arbitration and provide ammunition to those who argue that compelling consolidation without the consent of the parties involved directly undermines the freedom of contract that forms the basis of an arbitration agreement. The argument is basically that fundamentally, arbitration is a product of private contract that is voluntarily entered into and by not providing for consolidation, the parties have expressed a preference for two-party arbitration, which preference should not be lightly discarded.²⁰ Chiu however provides an eloquent rebuttal to this argument- she states:

¹⁷ C.Y. Small, "Consolidation of Claims: A Promising Avenue for Investment Arbitration?" (OECD Directorate for Financial and Enterprise Affairs), p.233, available at <http://www.oecd.org/investment/internationalinvestmentagreements/40079691.pdf>, (Accessed on 23rd February, 2014).

¹⁸ *Ibid.*, p.55.

¹⁹ T.J. Stipanowich, *op.cit* p.476-477.

²⁰ J.C Chiu, *op.cit*, p.57.

Indisputably, arbitration agreements are motivated in part by the desire to bypass the courts. At the same time, it should be equally clear that not all aspects of the legal process are intended to be discarded, for the parties ultimately must rely upon the courts to enforce the arbitral agreements and the awards. Thus, the argument that consolidation violates the parties' freedom to contract is inadequate, since consolidation can be understood as a judicial modification of contracts that did not include all of the necessary procedural provisions and that is intended to effectuate the parties' fundamental goal for a speedy and fair resolution of their disputes.²¹

Therefore although the argument that consolidation goes against the parties' freedom to contract at first appears to be an impervious argument, a close scrutiny in fact allows for the possibility that the parties desired consolidation although they did not have it in their contemplation at the time the arbitration agreement was entered into.

A second argument levelled against consolidation is that, if one accepts that a general duty of confidentiality exists in arbitration,²² then consolidation of arbitration proceedings would undermine this aspect of arbitration. Thus, for example, a subcontractor could through the consolidation become privy to information about the main contractor's profit margins.²³ Expressing an opinion on this objection to consolidation an English court in the so-called *Eastern Saga* stated its objection to consolidation as follows:

It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties

²¹ *Ibid.*, p.58.

²² It is not clear that such a general duty of confidentiality exists. See *Esso Australia Resources Ltd and others vs Plowman and others* (1995) 11 Arbitration International 265-71 see also L.O Aloo, "Confidentiality in Government Arbitrations in Light of the Constitution of Kenya 2010," (forthcoming).

²³ It is apparently usual practice in the construction industry for contractors not to let sub-contractors know of their profit margins. See J.C Chiu, op.cit p. 60.

*can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated the disputes in question may be.*²⁴

There is also a possibility that consolidation of proceedings may infringe upon a party's substantive rights by adding participants to the arbitration and exposing a party to unforeseen liability.²⁵

Consolidation may also affect a party's procedural rights. In particular consolidation usually leads to changes in the makeup of the arbitral tribunal not initially contemplated by the parties. This can be the source of great difficulty as illustrated by the French *Cour de cassation* decision in *Siemens vs BKMI and Ducto*²⁶ where great confusion arose after the ICC consolidated two arbitrations and asked the plaintiff who was the same in each of the arbitrations to nominate an arbitrator and asked the two defendants to jointly nominate a second arbitrator.²⁷ Related to this would be the logical problem of what numbers would make up the tribunal.²⁸

It could also be argued that consolidation of arbitral proceedings could lead to enforcement difficulties. Article V(1) of the New York Convention provides a number of defences which a losing party to consolidated arbitral

²⁴ J. Leggatt, in *Oxford Shipping Co. Ltd. v Nippon Yusen Kaisha. The Eastern Saga* [1984] 3 All E.R. 835 quoted in Neill, P. "Confidentiality in Arbitration" (1996) 62 (no3 Supplement) *JCI Arb* 1-18.

²⁵ J.C Chiu, *op. cit* p.60.

²⁶ XVII YBCA 140 (1993).

²⁷ J. Devolvé, "Multipartism: The Dutco Decision of the French Cour de cassation" (1993) vol. 9 *Arbitration International*, p.197.

²⁸ J.C Chiu, *op.cit*, p.60.

proceedings could use to avoid enforcement.²⁹ The clearest is article V (1) (d) - if the composition of the tribunal or procedure was not in accordance with the original agreement. Article V (1) (a) also presupposes a valid arbitration agreement under article II. It may be argued that there is no formal validity of the arbitration agreement between the parties to the consolidated agreement. The consolidation, it could be argued, was not by agreement but pursuant to a court order or otherwise forced on the parties.³⁰

Four different approaches have been put forward to solve the dilemma posed by consolidation in arbitration. Firstly, parties could contract for consolidation of arbitral proceedings. Secondly, courts could compel consolidation by liberal construction of arbitration legislation and the rules of civil procedure. Thirdly, national and local arbitration legislation could be revised to establish greater power for courts to compel consolidation. Finally, arbitrators and arbitral institutions can formulate rules that encourage consolidation.³¹

The complexity of an arbitration clause that would provide for consolidation covering all possible scenarios perhaps makes contracting for consolidation without other support the least compelling. Privity of contract also means that each of the contracts would have to envisage consolidation and be framed appropriately. The three other options are examined below.

²⁹ The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. S. 36(2) of the Arbitration Act 1995 Laws of Kenya provides that the convention applies to enforcement of foreign awards. Domestic awards are enforced under section 37 of the Arbitration Act which contains similar provisions to the convention. See generally, N.Regeru, "Recognition & Enforcement of Arbitral Awards" in G.Muigai (ed) *Arbitration Law in Kenya Law Africa* Nairobi, 2011 p. 121-155; K.Muigua, *Settling Disputes Through Arbitration in Kenya* Glenwood Publishers, Nairobi, 2012. p. 150-164.

³⁰ See generally, N.Regeru, "Recognition & Enforcement of Arbitral Awards" in Muigai G. (ed) *Arbitration Law in Kenya Law, Africa* Nairobi, 2011 p. 121-155.

³¹ J.C Chiu, *op.cit.* p. 69.

ii. Consolidation by the Courts to Compel or not to Compel: Cases from Kenya and Elsewhere

In this part of the paper we shall examine a famous American and a recent ruling in a Kenyan case that illustrate the problems related to the issue of consolidation of arbitration proceedings.

The American case of *Government of the United Kingdom v the Boeing Co*³², marked a turning point in the judicial reasoning of the particular American jurisdiction involved and therefore considers both the path of consolidation and that of party autonomy. The case has also had significant influence on the thinking around the question of consolidation around the world. The recent ruling by Lady Justice Kamau in the case of *Hanif Sheikh v Alliance Nominees Limited and 17 others*³³ illustrates the approach by a Kenyan court in tackling the problem. It may therefore be useful to discuss the cases in some detail.

The story of *Government of the United Kingdom v the Boeing Co*³⁴ begins in 1975 when the Second Circuit of Appeals Court in the case of *Compania Espanola de Petroleos, SA v Nereus Shipping SA*³⁵ gave a ruling that was widely interpreted to have empowered the federal United States courts to consolidate separate arbitration proceedings that included common question of law and

³² *Government of the United Kingdom vs. the Boeing Co* 998 F 2d 68 (2nd Cir 1993).

³³ *Hanif Sheikh v Alliance Nominees Limited and 17 others* [2014] eKLR.

³⁴ *Government of the United Kingdom vs. the Boeing Co* 998 F 2d 68 (2nd Cir 1993).

³⁵ *Compania Espanola de Petroleans, SA v Nereus Shipping SA* 527 F2d 966 2nd Cir 1975).

fact even without the parties agreement to joining the suit.³⁶ The case of *Boeing* revisited the matter and held that the courts must enforce arbitration contracts "...in accordance with the terms of the agreement."³⁷ Though the decision preserved consolidation based on implied consent.³⁸ The court's approach in *Boeing* has been termed the "contractarian" approach to the issue of consolidation as contrasted with the "liberal construction" approach of *Nereus*.³⁹

The facts of the *Boeing case* although concerning the complex matter of a helicopter fuel injection system are simple. Some background information may be useful.⁴⁰ The United States, like Kenya, has a monist arbitration system; both international and domestic arbitrations in the United States are governed by the Federal Arbitration Act (FAA).⁴¹ The act did not contain any

³⁶ Harvard Law Review Recent Case: Arbitration Consolidation of Separate Proceedings 107 *Hav L. Rev* 499.

³⁷ *Government of the United Kingdom v the Boeing Co, Op.cit.*

³⁸ See also M.L DeCamp, "Consolidation of Separate Arbitration Proceedings: Liberal Construction versus Contractarian Approaches United Kingdom of Great Britain v Boeing Co" *J. Dispute Resol.* (1994)

³⁹ M.L DeCamp, "Consolidation of Separate Arbitration Proceedings: Liberal Construction versus Contractarian Approaches United Kingdom of Great Britain v Boeing Co" *J. Dispute Resol.* (1994) adopts this useful terminology distinguishing the two major approaches.

⁴⁰ E.Wallace, "Consolidated Arbitration in the United States" (1993) vol 10 no 4 *J of Int Arb* 5-17.

⁴¹ Arbitration laws may either be monist or dualist. In the former the same law applies to both domestic and international arbitration while in the latter domestic and international arbitration are subject to separate regimes. Kenya, South Africa, The United Kingdom and Netherlands are other examples of monists systems while Canada and Australia offer an example of a dualist system, *South African Commission Report* paragraph 2.275.

provisions relating to consolidation. The FAA authorised Federal courts to enforce arbitration agreements and to compel arbitration “in the manner provided for in [the arbitration] agreement.” The Federal Rules of Civil Procedure authorised courts to consolidate civil cases if the cases involve similar issues of law and fact.⁴² There was however no specific legislation dealing with the issue of consolidation of arbitration proceedings and this was left to the courts.⁴³

Boeing involved three parties: the U.K. Government, Boeing and Textron. Both Boeing and Textron were defence contractors who had long standing relationships with the U.K covered by separate agreements. The one with Boeing was entered into in 1981 and the one with Textron was entered into in 1985. As part of the many arrangements that these parties had, Textron designed and built an engine which was fitted into helicopters built by Boeing. In January 1989 during the ground testing of a new electronic fuel control system an “incident” occurred which gave rise to this suit. We can only hazard guesses as to the nature of the “incident” because, perhaps due to the nature of the project, no further details are given.

The U.K felt it suffered damage as a result of “the incident” and brought proceedings against Boeing and Textron. As indicated above, the U.K. had separate contracts with Boeing and Textron, both contacts contained identical arbitration clauses. Each required arbitration of “any controversy or claim arising out of or relating to this contract” before three arbitrators in New York City pursuant to the Rules of the American Arbitration Association (AAA). In addition, Boeing and Textron had a separate contract between them which defined their respective responsibilities for the U.K helicopter project though it apparently did not contain an arbitration clause.

This “was a fitting candidate for a consolidated arbitration: a dispute over a single incident involving three parties, all of whom had agreed to

⁴² This is standard in most jurisdictions.

⁴³ E.Wallace, “Consolidated Arbitration in the United States” (1993) vol 10 no 4 *J of Int Arb* 5-17.

arbitrate the dispute under the same rules.”⁴⁴ To this may be added the fact that similar issues of law and fact were most certainly involved.

The UK therefore moved to court filing a petition in the US District Court of the Southern District of New York to compel consolidation of the arbitration. The judge of the first instance granted the petition. He however stayed his order pending the outcome of the appeal.

The basic arguments of the UK in defending the decision of the lower court to order consolidation of the arbitration were four fold. Firstly, the UK argued that there was binding precedent in the case of *Compania Espanola de Petroleos, SA v Nereus Shipping SA*⁴⁵ which established that in that circuit the district court had authority pursuant to the FAA and the Federal Rules of civil procedure to consolidate arbitration proceedings that turned on similar questions of law and fact.

The highest court in the United States, the Supreme Court, had not addressed the issue of consolidation. To the contrary, it has rejected petitions to do so. The highest Federal courts that have decided the issue are the US Courts of Appeals, which are just one level below the Supreme Court. There are eleven Courts of Appeal with general jurisdiction, divided among eleven geographic areas called Circuits. The Second Circuit Court of Appeals, based in New York, had considered the issue of consolidation in the *Nereus Case* and had *Boeing* now before it. The trend of judicial decisions both under the federal and state statutes was to allow consolidation and *Nereus* was no exception.⁴⁶

Nereus involved a multi-party dispute over a petroleum shipping matter. The ship owner, a Liberian company, and the charterer, a Venezuelan company, entered into a charter party, or maritime contract of affreightment, which contained a broad arbitration clause. The arbitration agreement provided that “any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration...” A few months later the charterer and a third party, a Spanish oil company, all signed an

⁴⁴ *Ibid.*

⁴⁵ 527 F 2d 966 (2d Cir 1975), cert. denied, 426 U.S. 936 (1976).

⁴⁶ J.C. Chiu, *op.cit.* p.62.

addendum to the charter contract whereby the oil company as guarantor agreed to guarantee the obligations of the charterer if the charterer should default, and to do so “on the same terms and conditions as contained in the Charter Party.” The addendum did not specifically mention arbitration.

Following the oil crisis of the early, 1970’s, the owner declared the charterer in default and commenced separate arbitrations in order to get advantage by having the arbitration with the guarantor decided before the one with the charterer. The guarantor applied for consolidation and this was approved. On appeal, the order was confirmed. The court held, first, that the language of the addendum was wide enough for the parties to have agreed to consolidation and, second, that the “ ‘liberal purposes’ of the FAA required that it be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases...”

The Appeals Court in *Boeing* was of the view that *Nereus* was distinguishable from the present case in that in *Nereus* all the parties signed the addendum which incorporated the provisions of the Charter Party, including the arbitration provisions. In *Boeing* there were two distinct agreements to arbitrate contained in two distinct contracts. Neither contained any provision for consolidation of the arbitration proceedings. The court stated:

*“Boeing never agreed to participate in arbitration with Textron, and vice versa. We simply have no grounds to conclude that the parties consented to consolidated arbitration. The district court was therefore without authority to consolidate the two actions based upon the mere fact that the disputes contain similar or identical issues of fact and law.”*⁴⁷(emphasis added)

Quoting the Supreme Court in *Volt Info. Sciences v Board of Trustees*⁴⁸ the court stated the “[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with the terms.”

Secondly, the United Kingdom argued that even without the contract, the *Nereus* decision allowed consolidation under the Federal Rules of civil

⁴⁷ *Government of the United Kingdom v the Boeing Co*, p.70.

⁴⁸ 489 U.S. 468.

procedure and the “liberal purposes” of the FAA. However, the court pointed out that recent Supreme Court rulings made *Nereus* no longer good law in this respect. The FAA was to be construed narrowly and did not authorise consolidation unless this was also in accordance with the terms of the agreement. Wallace however points out that the Supreme Court authority relied upon by the Appeals court in arriving at this conclusion did not actually support the point, as they were not on all fours with *Nereus*.

Thirdly, the United Kingdom argued that the Federal Rules of Civil Procedure on consolidation could also be applied to arbitration to the extent that it had not provided for in the arbitration statute, but this was also rejected. The Court held that the Federal Rules of Civil Procedure only applied specifically to court arbitrations under title 9 and could not be extended to private arbitrations. This has to do with the logical objection to applying court rules to private arbitration; as the parties agreed to resolve the dispute outside court, there is no logical reason why they should be obliged to use the court rules in their arbitration in the absence of an agreement to do so.

Finally, the United Kingdom appealed to the court to consider the advantages of consolidation- its efficiency and the possible inconsistency in awards if there was no consolidation. The Appeal court in rejecting this argument as having no legal force stated:

Although these may be valid concerns to the U.K., they do not provide us with the authority to reform the private contract which underlie this dispute. If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are party.⁴⁹

The Appeal court therefore reversed the decision of the lower court in *Boeing* and refused the consolidation.

In Kenya the commercial Courts have had occasion recently to grapple with the issue of consolidation of the arbitrations. In the case of *Hanif Sheikh v Alliance Nominees Limited and 17others*, the commercial Court was faced with an application seeking to have orders that a dispute that had arisen between

⁴⁹ *Government of the United Kingdom v the Boeing Co*, p.74.

the parties in six interrelated trust deeds be referred to a single arbitrator to be appointed by the parties or agreed by the courts.⁵⁰

The Plaintiff asked the court to use the courts power under Sections 1A and 1B of the Civil Procedure Act, 2010 the so called overriding objective clause to allow the consolidation of the arbitration proceedings. The Plaintiff relied on various provisions of the law including citing section 35 of the English Arbitration Act (which grants English Courts power to consolidate where the parties consent). However, in declining to grant the application, Lady Justice Kamau adopted a contractarian approach and noted the provisions of the section 10 of the Arbitration Act limits the role of the court to only those instances that are specifically provided under the Act. As consolidation is not provided for under the Act, the Court had no power to order consolidation.⁵¹

It does not appear that the Plaintiff cited Article 159(2) (c) of the Constitution in support of his argument. It would have been interesting to see what the commercial court would have made of the argument that notwithstanding section 10 of the Arbitration Act, the court is obliged by Article 159 to facilitate arbitration proceedings and that would include exercising a power to consolidate proceedings that should be logically heard together. How else are courts to facilitate alternative dispute resolution?

The *Boeing* and the *Alliance Nominees* cases give good practical illustrations of the problems involved in consolidation of arbitration proceedings. They also illustrate that it may be difficult to get courts to compel consolidation by liberal construction of arbitration legislation and the rules of civil procedure. The courts in Kenya, at least, may follow a contractarian approach.

iii. Legislative and Institutional Responses

⁵⁰ *Hanif Sheikh v Alliance Nominees Limited and 17 others* [2014] Eklr.

⁵¹ But see CIArb practice Guideline 15 on Multiple Arbitrations which suggests that the UNCITRAL Secretariat Explanation on article 5 of the Model law (which is similar to s. 10 of the Kenyan Arbitration Act) gives an example of consolidation as an area where the courts can intervene.

The third solution proposed for the problem of consolidation of arbitral proceedings is that national arbitration legislation could be revised to establish greater power for courts to compel consolidation. In the next part of the paper the author briefly examines some legislative response while in the next part he examines how arbitral institutions have formulated rules that encourage consolidation.

iv. Legislative Responses

A number of jurisdictions have adopted legislation that provides for consolidation where similar issues of law and fact arise though such legislation remains uncommon.⁵²

In *the Netherlands*, the Arbitration Act of 1986 at article 1046 provides that if the subject matter of arbitrations being conducted in the Netherlands is connected then any party may apply to the courts for an order for consolidation of the proceedings. The court may order that the proceedings be wholly or partially consolidated. There is an opt-out provision for the parties. Therefore if the parties agree in their arbitration agreement to exclude consolidation then it may not be ordered as article 1046 provides that consolidation may be ordered “unless the parties have agreed otherwise.”⁵³

Statutes framed in terms similar to the Netherlands Arbitration Act are open to two principle objections. The main objection is that they violate the principle of party autonomy.⁵⁴ It could be argued, in opposition to this, that by selecting a particular jurisdiction the parties agree to its law. The enactment of the legislation provides them with clear notice that they should opt-out if

⁵² J.C. Chiu *op.cit*, p.72. Examples of jurisdictions with such legislation are The States of California and Florida in the United States, Hong Kong and the Netherlands.

⁵³ J.C. Chiu *op.cit*, p. 73.

⁵⁴ South African Law Commission Project 94 Report, “Arbitration: An International Arbitration Act for South Africa,” July 1998, par. 2.70.

they wish to avoid the compulsory consolidation.⁵⁵ Secondly, where courts order consolidation of proceedings without agreement of the parties problems could be experienced with the enforcement of the award under the New York Convention on the basis that the “composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.”⁵⁶

The English Arbitration Act 1996 in dealing with the consolidation and joint hearings provided at s. 35 that the parties are free to agree to consolidation or joint hearing, but the arbitral tribunal does not have powers to order consolidation unless such power is granted to it by the parties. The stress is therefore on party autonomy.⁵⁷ This is also the current position under South African law and the recommended approach of the South African law commission.⁵⁸ The advantage of this sought of approach, as put by the Law Commission is that “there are no hidden traps regarding consolidation and that if the parties want the tribunal to have this power, they must provide for it.”⁵⁹

As seen above, The UNCITRAL Model law does not specifically address the area of consolidation of arbitral proceedings. This is the same position adopted by the Kenyan Arbitration Act, 1995.

⁵⁵ It would therefore be up to those drafting arbitration clauses to examine the jurisdiction to see if there is compulsory consolidation, a very onerous task indeed. See J.C Chiu p. 74.

⁵⁶ Article V (1) (d) New York convention on the Recognition and Enforcement of Foreign Arbitral Awards see South African Law Commission op.cit.

⁵⁷ The DTI Departmental Advisory Committee on Arbitration La, Second report May 1990 examined the issue and determined that it was not appropriate to give courts the power to consolidate proceedings as “the practical difficulties were insurmountable.”

⁵⁸ South African Law Commission Report op.cit par. 2.72.

⁵⁹ *Ibid.*

Considering the problems identified with compulsory consolidation in the national arbitration law, the best level of intervention is through the rules of the institutions. This is perhaps the most promising and least problematic method of approaching the consolidation of arbitral proceedings.⁶⁰ Some institutional responses are examined below.

3. INSTITUTIONAL RESPONSES

While multi-party disputes are often foreseeable, existing model clauses and many institutional rules are based on two-party proceedings.⁶¹ *The Chartered Institute of Arbitrators Kenya Branch Arbitration Rules 2012* fall within this category.⁶² Unfortunately in arbitration proceedings which are founded upon on contractual basis, there exists, in principle, no power of coercion on the part of the arbitrator or the arbitration institution.⁶³

In the absence of express consent for the consolidation by all the parties therefore, the only way in which compulsory consolidation, without court assistance, could be envisaged would be where both arbitrations are being conducted by the same arbitral institution and the institutions rules provide for consolidation. Selection of the institution will mean having agreed to consolidation. Thus if A and B have a contract with an arbitration clause referring arbitration to a particular institution and B and C have a similar clause, and the two arbitrations could be consolidated if similar questions of law and fact arose. If however, B and C's contract contained an arbitration clause referring disputes to a different institution or had no arbitration clause, no consolidation would be possible, without court assistance as the institution

⁶⁰ *Ibid.*

⁶¹ *Ibid*, p.74.

⁶² *The Chartered Institute of Arbitrators Kenya Branch Arbitration Rules 2012.*

⁶³ *Ibid.*

would have no coercive power over C. An alternative would be to seek a stay of the proceedings until the other arbitration was determined but this approach creates problems of its own.⁶⁴

Although consolidation is attractive one major objection to institutions providing for consolidation in their rules is that since it may be perceived as a radical departure from accepted arbitration practice, an institution which adopts it may undermine its appeal to parties that would otherwise wish to designate it to conduct the arbitration.⁶⁵ The arbitral institutions have therefore treaded the path to consolidation quite gingerly.

The ICC Rules prior to 1998, did not have any provisions that expressly dealt with the issue of consolidation of arbitration proceedings.⁶⁶ In 1998, the ICC Rules, in reaction to the *Dutco* decision,⁶⁷ were amended to provide for the consolidation of the arbitral tribunal in the event of multiple parties. Article 10 of the 1998 rules provided:

- i. Where there are multiple parties, whether as Claimant or as respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to article 9

⁶⁴ It is open to the objection that the second tribunal did not apply itself to the dispute but came to a decision based on matters it should not have taken into consideration.

⁶⁵ J. Chiu, *op.cit*, p.75.

⁶⁶ Rules of Arbitration of the International Chamber of Commerce 1998
[http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/see Calvo, Michel A. "The New ICC Rules of Arbitration: Substantial and procedural Changes."](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/see%20Calvo,%20Michel%20A.%20%22The%20New%20ICC%20Rules%20of%20Arbitration%3A%20Substantial%20and%20procedural%20Changes.%22)

⁶⁷ Rules of Arbitration of the International Chamber of Commerce 1998
[http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/Siemens vs BKMI and Ducto, op cit.](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/Siemens%20vs%20BKMI%20and%20Ducto,%20op%20cit.)

- ii. In the absence of such a joint nomination and where all the parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the court may appoint each member of the Arbitral tribunal and shall designate one of them to act as chairman...(emphasis added)

It is submitted that the reference to the dispute in paragraph 10(1) envisaged a single arbitration with numerous parties with an impasse in the selection of the arbitral tribunal being solved by article 10(2). It is notable that in *Ducto* there appeared to be no dispute on the matter being determined jointly only on selection of the tribunal.⁶⁸ The wording of article 10(1) of the 1998 ICC Rules leads one to seek to explore who should be regarded as a party to a multi-party arbitration. As Devolvé points out this is a crucial issue because after closer scrutiny one may decide that a person initially believed to be a party to a multiparty arbitration in reality is not and the situation one believed to be multiple actually turns out to be a bipartite.⁶⁹ For example where two co-contractors jointly and severally responsible for works towards an employer on a construction contract should be regarded as forming (jointly and severally) only one party when they have to defend an action in contract brought against them by the employer for defective work, Devolvé argues.⁷⁰ It is submitted that article 10(1) is only useful such multipartite arbitrations that when closely scrutinised are in fact “classically bipartite”.

Article 23 on Conservatory and Interim Measures which provided *inter alia* that “...the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate...” if construed widely enough could allow for consolidation or at least stay of an arbitration pending the outcome of the other. Over time the workload of the ICC has increasingly involved multi party disputes. By 2014, at least 30% of the disputes handled by the ICC involved multiple parties.⁷¹ In response to this trend the 2012 ICC

⁶⁸ *Siemens vs BKMI and Ducto, op.cit.*

⁶⁹ J. Devolvé, *op.cit*, p.200.

⁷⁰ *Ibid.*

⁷¹ Rules of Arbitration of the International Chamber of Commerce 2012 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (accessed on 13th March, 2015).

Rules include rules covering joinder and consolidation of arbitral proceedings under Articles 7-10.⁷² The rules provide:

Article 7: Joinder of Additional Parties

- 1) A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.
- 2) The Request for Joinder shall contain the following information:
 - a) the case reference of the existing arbitration;
 - b) the name in full, description, address and other contact details of each of the parties, including the additional party; and
 - c) the information specified in Article 4(3) subparagraphs c), d), e) and f).The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.
- 3) The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.
- 4) The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

⁷² *Ibid.*

Article 8: Claims Between Multiple Parties

1) In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).
2) Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3) subparagraphs c), d), e) and f).
3) Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, *mutatis mutandis*, to any claim made: Article 4(4) subparagraph a); Article 4(5); Article 5(1) except for subparagraphs a), b), e) and f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

Article 9: Multiple Contracts

Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

Article 10: Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
a) the parties have agreed to consolidation; or
b) all of the claims in the arbitrations are made under the same arbitration agreement; or
c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more

arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

LCIA 1998 Rules⁷³ article 8 run along similar lines to the ICC 1998 Rules rule 10(1). It envisaged a single dispute with multiple disputants rather than separate disputes for consolidation. Article 22.1(h) which allowed "...only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration..." was of greater utility in consolidation. Although it requires the consent of the party being joined –only one of the parties to the arbitration-the applicant-appears to need to consent. It is however dealt with joinder of a party rather than true consolidation of disputes.

On 1st October 2014 the LCIA 2014 Rules came into effect.⁷⁴ Article 8 of the rules provides for arbitration involving three or more parties and states:

8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate "sides" for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.

8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone.

⁷³ The LCIA Rules 1998.

⁷⁴ LCIA 2014 Dispute Resolution Rules

http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx, (accessed on 13th March, 2015)

In addition articles 22.1 of the 2014 LCIA Rules provide that the arbitration panel has powers to amongst other things:

(viii) *to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;*

(ix) *to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;*

(x) *to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators; and*

These are new provisions that did not exist in the earlier 1998 LCIA rules. They reflect the reality of the importance placed on giving the panel the power to consolidate arbitration proceedings.

The UNCITRAL Arbitration Rules are a procedural benchmark for ad hoc arbitrations. The rules were initially formulated in 1976. In 1976 UNCITRAL Arbitration Rules did not have provisions that directly applied to the issues of consolidation of arbitration proceedings.⁷⁵ The UNCITRAL Notes on Organisation of Arbitral Proceedings pointed out certain aspects of multi-party arbitrations that may require special consolidation when organising the arbitral proceedings but this did not provide the tribunal with any powers.

⁷⁵ The Uncitral Arbitration Rules United Nations General Assembly Resolution 31/98.

In 2010 the UNCITRAL Arbitration Rules were revised. The 2010 *UNCITRAL Rules* are updated to reflect changes since the initial rules were drafted. The 2010 *UNCITRAL Rules* include provisions to allow joinder of other parties to the arbitration proceedings⁷⁶ and conclusion of claims against these third parties.⁷⁷

The *London Maritime Arbitrators' Association* (LMAA) has been bolder in its approach and has been provided for joint hearings before the same arbitral tribunal, where disputes under separate arbitration agreements between different parties referred to the Association for arbitration gave rise to similar issues of law and fact. Effectively all parties, by agreeing to arbitrate under LMAA Rules, agree to joint hearing. The disputes are heard by means of a single joint hearing after which the panel issues separate awards between the parties to the original arbitration agreements.⁷⁸

The *Chartered Institute of Arbitrators Rules for Use in England and Northern Ireland* 2000 Edition specifically grant the arbitrators powers under article 7 of the rules to consolidate the arbitration proceedings provided the parties are in agreement.⁷⁹ This is done by indicating that the arbitrator has the powers under section 35 of the English Arbitration Act which deals with consolidation of proceedings and concurrent hearings.⁸⁰

⁷⁶ Unctiral Arbitration Rules 2010, article 17(5).

⁷⁷ Unctiral Arbitration Rules 2010, article 4(2)(f).

⁷⁸ Diamond, Anthony. "Multi-Party Arbitrations: A Plea for Pragmatic Piecemeal Solution" Vol 7 *Arbitration International* 403.

⁷⁹ CIArb Rules (2000 Edition) for Use in England, Wales and Northern Ireland <https://www.ciarb.org>, (accessed on 13th March, 2015).

⁸⁰ See discussion on English law above.

The Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules June 1998 provided the arbitrator with powers to “...allow parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them.”⁸¹

The revised *Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules December 2012* are in similar terms to the 1998 rule 16C (1). No express provision is made giving the tribunal the power to consolidate the proceedings. In view of the fact that the Arbitration Act 1995 of Kenya does not provide specific power to the arbitrator or the courts to consolidate proceedings this presents a major weakness in arbitrations conducted under the *Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules December 2012*. The contractarian approach adopted by the courts as seen in the case of *Hanif Sheikh v Alliance Nominees Limited and 17 others*⁸² means that the parties have few options if the consolidation power is not placed in the rules of the institution. The local branch of the Chartered Institute of Arbitrators should give some thought to including a power to consolidate in its rules.

4. CONCLUSION

The question of consolidation of multiple arbitrations presents the classic conflict between pragmatic and legal considerations.⁸³ Parallel arbitrations would involve the same legal and factual matrix and possibly the same parties. Practical issues- cost, expediency and the avoidance of inconsistency- lean in favour of consolidation of the arbitration proceedings. However, arbitration decision in Kenya and the Arbitration Act do not permit non-consensual consolidation of the proceedings irrespective of the practical considerations. Arbitration is considered a creature of contract and “...irrespective of the inefficiencies associated with multiple arbitrations,

⁸¹ *The Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules June 1998 article 16 C (1)*

⁸² *Hanif Sheikh v Alliance Nominees Limited and 17 others* [2014] eKLR.

⁸³ C.Mustill, *Arbitration International* Vol 7 No 4.

courts and arbitrators lack authority to order participation other than by parties who have specifically consented.”⁸⁴

In the preceding discussion, the author has conducted a brief survey of the court, legislative and institutional responses to the problem of consolidation of arbitrations. It has been seen that there does not appear to be any uniformity in the approaches to this problem at the legislative level. However, solutions at the institutional level appear clearer and have fewer policy implications. It has been seen that the institutional arbitration rules offer the best point to introduce the consent of the parties to consolidation. By selecting the rules the parties implicitly agree to consolidation or joinder of parties. Such an approach resolves both the pragmatic and legal problems of multiple party arbitrations. Unfortunately *Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules December 2012* do not deal with consolidation. Future reviews of the Chartered Institute of Arbitrators Kenya Branch Arbitration Rules should consider this problem and introduce rules of consolidation and joinder in multiple party arbitrations.

⁸⁴ *Ibid.*

COMMUNITY, CUSTOMARY AND TRADITIONAL JUSTICE SYSTEMS IN KENYA: REFLECTING ON AND EXPLORING THE APPROPRIATE TERMINOLOGY

by: FRANCIS KARIUKI*

ABSTRACT

Community, customary and traditional justice systems have been provided for in law in Kenya as if they are similar. The law uses the terms 'traditional,' 'customary' and 'community' in describing the different justice systems interchangeably as if they are synonymous. However, these terms have nuanced meanings, are value-laden and the normative content of the respective justice systems they describe are different to some extent. This paper discusses how the law uses the terms 'traditional,' 'community' and 'customary' in describing the different justice systems. It highlights the conceptual parameters, juridical content, scope, conflicts and overlaps in the use of the mechanisms in law. Further, the paper explores the appropriate terminology in describing informal justice system.

1. INTRODUCTION

Community, customary and traditional justice systems have for a long time operated outside the formal justice system without adequate recognition and protection in law. They have been described using different tags such as indigenous, informal, non-formal, non-state or non-official justice systems. In recent times, these mechanisms have been recognized within the law subject to some limitations. Due to this semi-formalization, it is now not appropriate to describe them by the aforesaid tags. These mechanisms have a huge potential for enhancing access to justice, strengthen the rule of law and bring about development among communities, hence their recognition. They also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded

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from the formal justice system.¹ Their recognition is also borne out of the increasing acceptance of the validity and legitimacy of the adjudicative power of non-state justice systems,² which are home-grown, culturally appropriate and operate on minimal resources and are easily acceptable by the communities they serve.³ Formal justice systems such as courts, employ legal technicalities and complex procedures, are expensive, not expeditious and are located in major towns, and are therefore not easily accessible by a majority of the people particularly the poor.

2. LEGAL FRAMEWORK ON COMMUNITY-BASED JUSTICE SYSTEMS IN KENYA

A number of laws apply the terms community, customary and traditional dispute resolution mechanisms interchangeably as if they are synonymous and with the same juridical content.⁴ As will be demonstrated shortly, the various justice processes are not coterminous and are different normatively. First, the Constitution requires courts and tribunals to be guided by the principles of traditional dispute resolution mechanisms in delivering justice.⁵ A limitation is however imposed on the applicability of traditional justice systems, in that they are not to be used in a manner that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.⁶ It is arguable that Article 159(3) of the

¹ E. Hunter, 'Access to justice: to dream the impossible dream?' *The Comparative and International Law Journal of Southern Africa*, Vol. 44, No. 3 (November, 2011), pp. 408-427.

² M. Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' *J. Legal Pluralism & Unofficial L.*, (2007), p.69.

³ D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Harvard International Review*, Vol. 32, No. 2 (Summer 2010), pp.32-36.

⁴ These laws include the Constitution, 2010; Judicature Act, Cap. 8; Marriage Act, 2014; Environment and Land Court Act, 2011 and the National Land Commission Act, 2011.

⁵ Article 159 (2) (c), Constitution of Kenya, 2010.

⁶ *Ibid*, Article 159(3).

Constitution is limited to traditional dispute resolution mechanisms only and does not extend to other community-based systems not based on African customary law. This is erroneous since community-based justice systems not based on African customary law may also violate the imperatives of Article 159(3) of the Constitution.

Second, one of the principles of holding, using and managing land is the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.⁷ Here, the law talks of 'local community initiatives.' It is instructive to note that local community initiatives may not necessarily be based on African customary law. But again, that is not to say that local community initiatives based on African customary law may not be applied. Third, the Constitution⁸ and the National Land Commission Act,⁹ enjoins the National Land Commission, to encourage the use of traditional dispute resolution mechanisms in resolving land conflicts. It is evident that Articles 60 and 67 of the Constitution provides for community and traditional dispute resolution mechanisms in resolving land disputes interchangeably. It is not clear whether the mechanisms envisaged in the two sections are different or not. On its part, the Marriage Act 2014, allows parties to a customary marriage to undergo a process of conciliation or customary dispute resolution mechanisms before the court may determine a petition for the dissolution of the marriage.¹⁰ From these provisions, it is clear that the terms 'customary,' 'traditional' and 'community' in relation to dispute resolution mechanisms are used interchangeably and in a rather reckless and ignorant manner as if they are synonymous. The three terms do not mean one and the same thing. However, from the above provisions we see three key

⁷ *Ibid*, Article 60(1) (g).

⁸ *Ibid*, Article 67(2) (f).

⁹ Section 5(1) (f), National Land Commission Act No. 5D of 2012.

¹⁰ Section 68(1), Marriage Act, 2014.

terminologies being employed in law: 'traditional dispute resolution mechanisms,' 'local community initiatives' or 'community justice systems'; and 'customary dispute resolution mechanisms.' These terminologies are assessed in the ensuing parts of this discussion. The Constitution does not define either of the aforesaid terms. However, in relation to community land, the Constitution provides different bases for holding community land to wit: ethnicity, culture or community of interest.¹¹ The Constitution offers a broader meaning of the term community, and as observed by Kameri-Mbote *et al*:

*"Subjects of community rights lay claims through occupation, long residence and social acceptance by those with earlier claims. Community rights are claimed as the basis for: citizenship, identity or belonging; ensured access to resources and exclusion of perceived outsiders."*¹²

However, Luc Huyse acknowledges that the terminologies used in describing dispute resolution mechanisms in Africa have been and are problematic due to the dynamic nature of disputes, customs and an ethnocentric based methodology in conceptualizing disputes and dispute resolution.¹³ The terminological challenge is further made complex by the fact that customary law is a form of a 'living law' which is not static. It keeps changing, growing, evolving and mutating in time and space. Pimentel notes that there has been a misguided thinking that customary law is static and has to be preserved as derived from the pre-colonial period. He observes that:

¹¹ Article 63(1), Constitution of Kenya, 2010.

¹² P. Kameri-Mbote, *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013), p. 151.

¹³ L. Huyse, 'Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,' in L. Huyse & M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (IDEA: Stockholm, 2008), pp. 7-8.

“Many indigenous systems apply a law reflected in an oral tradition, which is inherently flexible, evolving naturally and almost effortlessly to reflect the changing needs and circumstances of the community.”¹⁴

Despite these difficulties, this paper seeks to highlight the conceptual differences, similarities, overlaps and normative content of the different systems arising from the various terminologies as used in the Constitution and the law.

3. INFORMAL OR NON-STATE JUSTICE SYSTEMS/OFFICIAL & NON-OFFICIAL/FORMAL &NON-FORMAL/STATE & NON-STATE

Traditional, community and customary justice systems have been described as informal, non-state, non-official or non-formal justice systems. For a long time, they have operated at the periphery of the formal justice system.¹⁵ Formal justice systems refer to all those systems set out or recognized by the law and backed by government sanctions such as the judiciary, administrative tribunals, the prisons, police and correction systems. These systems are established, supported, promoted and backed by the State. Informal or non-state systems operate outside state control or in the periphery of the state systems.¹⁶ In Kenya, informal justice systems have been incorporated in law, subject to some limitations. The effect of this incorporation is yet to be seen. Will it formalize the mechanisms, and make them lose their key attribute of informality and flexibility? Or will the state-backing allow them to operate in a way that they retain their flexibility and informality? This discussion is important since the formal-informal dichotomy in discussing justice systems mainly turns on the relationship between the two systems. The relationship vacillates between recognition and adoption by the

¹⁴ D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Op. cit.*, pp.32-36.

¹⁵ M. Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' *Op. cit.*, p. 67.

¹⁶ *Ibid.*

State on one end, and proscription and suppression on the other.¹⁷ Formal state recognition of the informal justice systems may formalize them, though this depends on the nature and extent of State backing. The State may recognize their existence by lending its enforcement and appeal processes. The State may also recognize the informal systems, but fail to actively promote and encourage their use in achieving access to justice.¹⁸ Thus, mere recognition without active State promotion and involvement in advocating for their use cannot contribute to enhanced access to justice to their users.

In Kenya, State recognition and active involvement in informal justice system varies and it is difficult to delineate formal and informal justice systems. The difficulty arises from unequal dispersal and reach of the formal justice system within the country. In some areas, informal justice systems may have the backing of the State while the same system may have little or non-existent State backing elsewhere. For instance, in some areas chiefs work together with village elders. This way, the informal system of village elders gets legitimacy as their decisions may be enforced by the chief and local police officers. In other areas, for example among the Pokot, Turkana, Marakwet and Samburu, village and community elders exercise informal power in customary courts without resort to the formal State enforcement mechanisms.¹⁹ In these courts, obedience is based on goodwill and social pressure from the community. Thus, an informal system such as the institution of village elders may operate independent of the State and remain informal in pastoralist areas while in other areas they are co-opted into formal State systems.

Moreover, the difficulty in delineating informal from formal justice systems also boils down to the nature of conflicts to be resolved. Most

¹⁷ J. Macfarlane, 'Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with Formal Legal System,' *Cardozo Journal of Conflict Resolution* (2006-2007), p. 491.

¹⁸ M. Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' *Op. Cit.*, pp. 67-68.

¹⁹ K. Martin, B. Rabar, R. Pkalya, M. Adan & I. Masinde, '*Indigenous Democracy: Traditional Conflict Resolution Mechanism among the Pokot, Turkana, Samburu and Marakwet*,' (ITDE-East Africa, Nairobi, 2004), pp. v-vi.

communities in arid and semi-arid areas of Kenya are often pastoralists. Most of the conflicts in these areas are mainly about grazing areas, water points, cattle rustling and other problems unique to pastoralist communities.²⁰ Pastoralist conflicts are therefore different from conflicts faced in the rest of the country. Since the formal justice systems and State enforcement institutions' are located far from rural areas, there is increased use of informal justice systems.²¹ Additionally, due to close kinship and communal ties among pastoralist communities, there may be distrust of "external institutions" from the State and hence overreliance on community, customary or traditional dispute resolution systems. This leads to a difficulty in delineating informal and formal justice systems in Kenya.

4. COMMUNITY JUSTICE SYSTEMS

The law allows for the use of 'local community initiatives' consistent with the Constitution in resolving land disputes.²² It acknowledges the need to decentralize dispute resolution power and authority to local areas. It also seeks to promote dispute avoidance/prevention and restorative justice as opposed to retributive justice. Although, the Constitution provides for the use of community-based justice systems, it does not define what a community is. The term 'community' does not render itself to easy definition. It is, however, critical to define a 'community,' as it is the basis for a particular dispute resolution mechanism applying to a particular group of people. Moreover, by defining a community, an individual or group is able to identify with a particular community and gain membership. This is important in modern days where it is possible for one to belong to different communities at a given time and space. For instance, an individual could be a member of a certain

²⁰ *Ibid*, p. 96.

²¹ *Ibid*, p. 94.

²² Article 60(1) (g), Constitution of Kenya, 2010.

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group based on his ethnicity, but also on the basis of practicing a particular culture, for example, pastoralism, farming *et cetera*, belong to another community. Further, the same individual could be a member of another community based on certain common interests or purposes, not based on ethnicity or culture at all. The dispute resolution mechanisms that may be used in the different communities the individual is a member may not necessarily be the same. Moreover, defining a community is essential since by belonging to diverse communities, issues of loyalty and allegiance to the different communities may arise considering that in most of Africa strong allegiance is owed to ethnic or tribal groupings as opposed to any other grouping. A community can be defined variously. It can be described as a group of people with a similar place of residence,²³ independent of traditional state structures such as provinces, districts, divisions, locations, counties or sub-counties. Others describe it as a group with an identifiable organizational purpose or as a process rather than a place.²⁴ Sheldon Berman defines a community as:

*"...a group of people who acknowledge their common purpose, respect their differences, share in group decision making as well as in responsibility for the actions of the group, and support each other's growth."*²⁵

Wood and Judikis describe a community as a group of people with a sense of common purpose(s) and/or interest (s), for which they assume mutual responsibility, acknowledge their interconnectedness, respect individual differences among members, and commit themselves to the

²³ D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework* (Criminal Justice, 2000), p.327.

²⁴ See G.S. Wood Jr & J.C. Judikis, *Conversations on Community Theory* (Purdue University Press, 2002), pp.2-10.

²⁵ S. Berman, 'Educating for Social Responsibility,' *Service Learning, Paper 43* (1990), available at <http://digitalcommons.unomaha.edu/slceslgen>, Accessed on 02/02/2015.

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wellbeing of each other and the integrity and wellbeing of the group.²⁶ However, Wood and Judikis emphasize that in order to be regarded as a community ‘...a group must exist long enough to demonstrate with its membership and to its membership that it is a community.’²⁷ The above definitions are useful in the discourse on dispute resolution within a community context. They emphasize on the interconnectedness, mutual responsibility and commitment of a community which are vital for dispute resolution and enforcement of group decisions. They also go beyond the view that a community must share ethnicity, language, religion, region or common interests.

The Constitution of Kenya, 2010 defines a community on the basis of ethnicity, culture or community of interest.²⁸ From the earlier discussions on what a community is, the three bases for defining a community in the Constitution can be limiting. For example, ethnicity as a basis of defining community applies in describing tribal groups with a common ascendancy, ancestry or origin. People of the same ethnic origin have similar culture, language and lifestyle, and may be living in the same region. However, ethnocentrism in the discourse on justice systems is problematic, in view of recent social integration, where rural-urban migration has forced different ethnicities to co-exist together in urban areas. This explains the use of ‘culture’ and ‘community of interest’ as other bases for defining a community.

Culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation,²⁹ and therefore cultural communities are inevitable in the countries development prospects. The Constitution guarantees every person the right to participate in the cultural life of his

²⁶ G.S. Wood Jr & J.C. Judikis, *Conversations on Community Theory*, *Op. cit*, p.12.

²⁷ *Ibid*, p. 83.

²⁸ Article 63(1) of the Constitution of Kenya, 2010.

²⁹ *Ibid*, Article 11(1).

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choice,³⁰ meaning that one can maintain membership in different cultural communities. A person belonging to a cultural community has the right with other members of that community to enjoy his culture, form or join and maintain cultural associations.³¹ There is a duty on the State and any person not to discriminate directly or indirectly against another person on the basis of culture.³² It is instructive to note that even though culture may refer to the lifestyle and way of life of a particular ethnic group, learned and passed from one generation to another, new cultures can evolve over time that have nothing to do with the valorization of culture as either savage or archaic or civilized.³³ Culture as the traditional lifestyle and livelihood of a people is seen in the definition of a 'marginalised community.'³⁴ A marginalised community is defined in the Constitution as:

"...(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
(d) pastoral persons and communities, whether they are –
(i) nomadic; or

³⁰ *Ibid*, 44(1).

³¹ *Ibid*, 44 (2).

³² *Ibid*, 27(4) & (5).

³³ See generally, what is Culture? Available at http://www2.warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global_pad_-_what_is_culture.pdf. Accessed on 02/02/2015.

³⁴ Article 260, Constitution of Kenya, 2010.

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(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole..."

It is notable that in defining a marginalized community there is reference to the tradition or indigeneity of the community which reinforces ethnocentrism in defining a cultural community.

Ramsey and Beesley define a 'community of interest' not by space, but by some common bond-like feeling of attachment or sense of belonging to an entity or group. They say that a 'community of interest' connotes a sense of belonging, coming together for a common purpose, and feelings of closeness.³⁵ However, Kameri-Mbote *et al*, writing on community land opine that a community of interest can be acquired through occupancy, long residence in a given locality and social acceptance.³⁶ Although, this view is in consonance with the definition proffered by Wood and Judikis which emphasises on longevity and membership in defining a community, space and longevity alone cannot be the defining factors of a community. A group of people can also self-treat or regard itself as a community.³⁷ Community of interest does not require the people to be of the same ethnic or tribal origin, only similar or shared interests. Often, people living in a community have same living conditions and face similar social problems. Likewise, they face similar challenges and struggles in accessing justice. Therefore, when disputes arise they would be well managed through locally established, home-grown,

³⁵ D. Ramsey & KB. Beesley, 'Perimeteritis' and rural health in Manitoba, Canada: perspectives from rural healthcare managers,' *Rural and Remote Health*, Vol. 7: 850 (2007).

³⁶ P. Kameri-Mbote, *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, *Op. cit*, p. 151.

³⁷ See generally, M.D. Steinberg & H.J. Coleman, *Sacred Stories, Religion and Spirituality in Modern Russia* (Indiana University Press, 2007), p. 12.

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culturally appropriate justice systems, that operate on minimal resources and embraced by the communities they serve.³⁸

The above discussions on what a community is are critical, since an effective community influences how conflicts are viewed and handled. An effective community is able to deal with disputes effectively because of certain attributes inherent in a community such as developed trust; acceptance and belonging even in times of conflict; strong valued relationships; community's response to crisis; new growth and perspectives results in the discovery of new perspectives and feelings, and the fact that communities are built upon diversity may make conflicts complex but also increases the ability and creativity to resolve conflicts.³⁹

In Kenya today, people from different ethnic backgrounds co-exist together, especially in urban and peri-urban areas, where they are faced with similar social-cultural problems. These include problems of access to basic services like water, education, health, security and general poverty which hinders their access to formal justice systems. Similar challenges face people in rural areas. Based on the concept of 'community of interest' communities have been able to come up with frameworks for peace building, problem-solving, dispute resolution, improving community's way of life, community crime prevention, community policing and community defense.⁴⁰ These communities could benefit a lot from locally-developed justice mechanisms that are sensitive to their plight, easily accessible and that dispense justice expeditiously. It is reported that communities living in the informal settlements of Kibera and Mukuru slums have formed their own dispute resolution mechanisms that are independent of the state's formal dispute

³⁸ D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Op. cit*, pp.32-36.

³⁹ Available at www.calvin.edu/.../Creating%20a%20Community.doc, Accessed on 02/02/2015.

⁴⁰ D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework*, *Op. cit*, pp. 323-329.

resolution mechanisms.⁴¹ Dispute resolution mechanisms based on community of interest can also be developed in areas where different ethnic communities share vital resources such as pastures and water as in pastoralist areas. A good example is the Isiolo Peace and Reconciliation Committee was created to resolve disputes among different ethnic communities and clans around Isiolo.⁴² Where a community of interest comprises of people from different ethnicities, certain cultural aspects from the diverse ethnicities, may easily find their way into the community, where they may be adopted wholly or with modifications. Therefore, dispute resolution in the two contexts may not differ very much, thus creating difficulties in delineating justice systems based on ethnicity and community of interest.

Community justice systems, anchored on ethnicity or tribe, may also be described as traditional or customary justice systems, if the tribal customs and traditions that have existed since time immemorial are applied in dispute resolution. The law fails to appreciate the overlap between traditional and community justice systems, by not subjecting community justice systems to the test in Article 159(3) of the Constitution. The limitation in the said Article is specific to traditional justice systems. Although, some have argued that the use of the term 'community' in describing community justice systems is the best alternative as it can be adaptive to change and avoid ethnocentrism.⁴³ However, this should not be taken to mean that it is only community justice systems based on ethnicity that can be repugnant to justice and morality.

5. CUSTOMARY JUSTICE SYSTEMS

⁴¹ FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya* (FIDA Kenya, 2008), p. 4.

⁴² *Ibid.*

⁴³ L. Huyse, 'Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,' *Op. cit.*, pp.7-8.

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Customary justice systems refer to all dispute resolution mechanisms that develop from the customs and other customary practices of a group of people.⁴⁴ Therefore, what customary justice systems are, is dependent on the meaning of the term 'custom.' A customary justice system may be based on tribal custom (that is African customary law) or modern custom.⁴⁵ Their nature is thus, dependent on an understanding of the term 'custom.' Sapir describes a 'custom' as the totality of behaviour patterns carried by tradition and lodged in a group.⁴⁶ Some customs can be explained in historical terms, by focusing back to remote antiquity. These are customs that have been practiced by communities since time immemorial, gained the force of law and are generally regarded as customary law. Customary law is described as a body of general rules within African tribal communities that govern personal status, communal resources and local organization of the people.⁴⁷ Each tribal community has its own customary law. Customs therefore, differ from community to community and serve to preserve cultural aspects of the people. In customary justice systems anchored on customary law, the later becomes a critical part of its normative content and in the development of tribal/customary law jurisprudence. In this regard, it is argued that customary law provides a better methodology in delivering justice to the people in tribal court adjudication.⁴⁸ However, in most of Africa, formal laws have been

⁴⁴ E. Henrysson & SF. Joireman, 'On the Edge of the law: Women's Property Rights and Dispute Resolution in Kisii, Kenya,' *Law and Society Review*, Vol. 43, No. 1, (2009), pp. 39-41.

⁴⁵ *Ibid.*

⁴⁶ E. Sapir, "Custom," *Encyclopaedia of the Social Sciences* (New York, 1931), pp. 658-662.

⁴⁷ E. Henrysson & S.F. Joireman, 'On the Edge of the law: Women's Property Rights and Dispute Resolution in Kisii, Kenya,' *Op. cit.*, p. 40.

⁴⁸ M.L.M Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence,' *13 Mich. J. Race & L.* 57 (2007), p. 61.

accused of subjugating, expropriating and subverting African customary law,⁴⁹ thus undermining its utility and applicability in the justice sector.

There are other types of customs, which are not traditional in the sense of being archaic, but may develop from current social practices such as in trade, business or profession, and thereafter gain legal recognition. Additionally, in the international law arena, some practices and laws gain notoriety and become international customary law through usage and practices. Thus, conceptually, for an unwritten custom or practice to become customary, it must be practiced widely by a group of people, whether the group is ethnic-based, business or otherwise, and it must gain notoriety. Although, African customary law is critical in adjudicating disputes within tribal courts, the law that will govern dispute resolution in a modern 'customary' dispute resolution forum is not clear. Is it the modern 'customs' developed by the people? Or is it the formal laws codified in statutes? If customary justice systems, are aimed at giving people the power to adjudicate disputes locally and culturally, one would argue that it is the developed customs that should apply subject to the Constitution and other formal laws. It is also arguable that such customs should apply only where the law allows for their specific application.

Customs, whether remote in antiquity or modern, are dynamic and can change according to new trends and social norms.⁵⁰ This dynamism of customs and their change over time leads to a dichotomy of dispute resolution mechanisms, such that there can be pre-modern or traditional and modern justice systems. Customs that survive over time and are passed from one generation to another become customary law, while modern or new 'customs' operate as informal justice systems since they have not gained enough public notoriety to be recognized as customary law. Thus, informal justice systems amongst people living in informal settlements would remain informal since they have not gained acceptance by the law.

⁴⁹ H.W.O, Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,' *University of Nairobi Law Journal Vol. 1 (2003)*, pp.107-117.

⁵⁰ M. Zurstrassen, 'Customary Dispute Resolution Project: Final Report,' *Pacific Judicial Development Programme*, (2002), p.4.

6. TRADITIONAL DISPUTE RESOLUTION MECHANISMS

Although, the term 'customary' is close in meaning to 'traditional,' they are not coterminous.⁵¹ 'Tradition' refers to practices and usages that derive their authority from practices and beliefs that are ancient, old or pre-modern. The term 'tradition' may mean or emphasize that a certain practice is old, ancient or not modern. In this sense, traditional dispute resolution mechanisms may refer to those mechanisms that have been practiced by communities since time immemorial and passed from one generation to the other. The mechanisms must have had a long, tried and tested history. Consequently, traditional dispute resolution mechanisms can be regarded as a subset of customary dispute resolution mechanisms as they are based on customary laws of a particular ethnic group practiced since time immemorial. However, a 'tradition,' is not a static or absolute phenomenon, it is inherently dynamic, fluid and subject to change. Since customary law is dynamic, traditional dispute resolution mechanisms can also keep evolving. They can be influenced by developments over time, changing some aspects and retaining others.⁵² In effect, some have questioned, whether it is justified to use the term 'traditional' if traditional justice systems are susceptible to change. Moreover, doubts have been expressed as to whether it is appropriate to describe them as 'traditional' after years of neglect and suppression by formal laws.⁵³

Some scholars have opined that it is possible to invent traditions. This arises where certain practices based on and developed out of tradition in a

⁵¹ L. Huyse, 'Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,' *Op. cit.*, pp.7-8.

⁵² E. Henrysson & S.F. Joireman, 'On the Edge of the law: Women's Property Rights and Dispute Resolution in Kisii, Kenya,' *Op. cit.*, pp. 40-41.

⁵³ D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Op. cit.*

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given society are enacted into law.⁵⁴ The fact that something appears to be traditional, but nevertheless has been enacted in law suggests that there can be modern traditions or alternative modernities. As such, the term traditional can marry recent enactments with traditions that have existed since time immemorial.⁵⁵ Because, traditional justice systems can respond to current circumstances, they cannot be classified as being purely traditional.

Traditional dispute resolution, like the wider customary resolution mechanism, differs from one ethnicity or tribe to another. There may have been similar structures across most ethnic communities, for example the council of elders. However, they have had different names across different tribes and their roles and mechanisms of resolving disputes were subtly different according to the circumstances of individual tribes. Examples of names for council of elders include the *kokwo* of the Pokot,⁵⁶ *Nabo* of the Samburu and Marakwet,⁵⁷ *tree men* of the Turkana,⁵⁸ *Njuri Ncheke* of the Meru, and *Kiama* of the Kikuyu.

The mechanisms used to resolve disputes under traditional justice fora include negotiation, mediation, conciliation, settlement, consensus approach and restoration. These mechanisms focus on restoring peace and maintaining social bonds. Since traditional or primitive societies have complex relationships, the social bonds and social capital help dispute resolution institutions such as council of elders or tribal chiefs to enforce the dispute

⁵⁴ M.O. Hinz, 'Traditional governance and African customary Law: Comparative observations from a Namibian Perspective,' available at www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf, Accessed on 02/02/2015.

⁵⁵ *Ibid.*

⁵⁶ K. Martin, B. Rabar, R. Pkalya, M. Adan & I. Masinde, 'Indigenous Democracy: Traditional Conflict Resolution Mechanism among the Pokot, Turkana, Samburu and Marakwet,' *Op. cit.*, p. v.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

resolution decisions.⁵⁹ Thus, traditional dispute resolution mechanisms may be stronger in communal societies such as rural areas compared to urban areas where the dispute resolution mechanisms are individualistic, self-interested and are not aimed at maintaining relationships.

7. COMMUNITY, CUSTOMARY & TRADITIONAL JUSTICE SYSTEMS: OVERLAPS, DIFFERENCES AND SIMILARITIES

In as much as the paper states that community, customary and traditional dispute resolution mechanisms are different, there exist similarities, differences and overlaps between the three. All the three justice systems are localized, home-grown, culturally appropriate systems operating on minimal resources and can be easily embraced by communities. As stated elsewhere, they can contribute to enhanced access to justice, as they build on existing resources within a community such as trust amongst members, interconnectedness, commitment, acceptance and belonging, diversity, mutual responsibility and common purposes. A community, in one sense means a group of people based on ethnicity, culture or community of interest. A community justice system can therefore, be premised on the customary law of the different ethnic groups in a country. On the other hand, a customary justice system can be based on culture or ethnicity. The normative content of justice systems based on ethnicity will most likely be African customary law. However, and as argued elsewhere in this contribution, the normative framework of justice systems based on culture or community of interest will not necessarily be African customary law. For certain cultures are modern with no attachment to any ethnic traditions or customs. This perhaps explains why the Constitution, subjects only traditional justice systems to the repugnancy test. Thus, there is an overlap between community justice systems not based on customary law and those that are based on culture and ethnicity. Moreover, the line between community of interest, where people resolve disputes or prevent disputes based on their interest(s) and modern cultures is very blurred. Despite these overlaps, a hierarchy among the three justice systems is discernible. First, community justice systems are not subjected to the repugnancy test in Article 159(3) of the Constitution. It therefore appears that they rank higher than customary and traditional justice systems.

⁵⁹ FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya*, *Op. cit*, p. 2.

Secondly, community justice systems are broad as per the Constitution which suggests that a community can be based on ethnicity, culture or community of interest. Community justice systems, therefore encompass, customary and traditional dispute resolution mechanisms. Similarly, customary dispute resolution is wide enough to accommodate traditional dispute resolution. However, Article 63 of the Constitution, in providing for the three bases for holding community land, starts with ethnicity, culture and then community of interest implying that a community based on ethnicity ranks in priority in comparison to the other communities.

Additionally, there is an overlap between customary dispute resolution and traditional dispute resolution mechanisms. Most, customary dispute resolution mechanisms are ethnic-based and have developed over a long period, gaining notoriety within a particular ethnic group. Similarly, traditional dispute resolution mechanisms can be based on traditions practiced by communities over a long period in a particular ethnic group. However, customary dispute resolution mechanisms are broader than traditional dispute resolution mechanisms. This is because there can be modern customs and some customary dispute resolution mechanisms may not fall under traditional dispute resolution mechanisms.

Even within traditional justice mechanisms, there are evident overlaps when one distinguishes 'modern' and 'pre-modern' traditions. Whereas the normative content for the pre-'modern' traditional justice systems is the African customary law, the normative content for 'modern' traditional justice systems may not necessarily be African customary law. The limitation in the use of traditional justice systems in the Constitution seems to appear to the 'pre-modern' traditional justice systems only as they are the ones premised on African customary law.

8. CONCLUSION AND WAY FORWARD

The paper has discussed the terminological challenges that are likely to arise from the typologization of informal justice systems as either community, traditional or customary in Kenya. It has been argued that the term 'community' is broad and all-encompassing, as it includes the traditional and customary justice systems. A hierarchy of sort is also discernible from the way the law typologizes and uses these justice systems. One can argue that the traditional dispute resolution mechanisms form the lower rungs, followed by customary dispute resolution and at the apex is community justice system.

Article 159(2)(c) of the Constitution highlights the principles that are to guide courts and tribunals in the exercise of judicial authority. One of the principles is the promotion of traditional dispute resolution mechanisms subject to Article 159(3). Article 159(3) states that traditional dispute resolution mechanisms are not to be used in a way that contravenes the Bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any other written law.

A question that arises is whether the framing of Article 159(2) (c) and (3) was deliberate or an oversight. From the typology, we have seen that of the three mechanisms, traditional dispute resolution mechanisms are the most restrictive. Thus, a reading of Article 159(2)(c) would exempt the application of community and customary dispute resolution mechanisms that are not traditional. It would also mean that community and certain customary dispute resolution mechanisms not based on African customary law, may not fall into the traditional pigeonhole and are therefore not subject to the limitation under Article 159 (3) of the Constitution. A similar limitation in the use of community justice systems is not available in law, save that in the use of 'local community initiatives' in dealing with land disputes they are to be used in a manner that is consistent with the Constitution. Thus, non-traditional justice systems may continue to operate with minimal control of the formal State systems in so far as they are consistent with the Constitution.

In conclusion, the terms 'community,' 'traditional' and 'customary' have been used as if they are synonymous, with far reaching ramifications as explained above. A careful analysis of the terminologies used in describing them reveals that they are different conceptually, juridically and there is a hierarchical order in their typologization. Community justice systems are broader and encompass customary and traditional justice systems. The normative content of community justice systems may not be African customary law. However, the normative content for traditional and certain customary justice systems is the African customary law of the different ethnic groups. This is the reason why the law subjects traditional justice systems to the repugnancy test. Moreover, a community justice system, as explained above, may be made up of modern heterogeneous and multi-ethnic neighbourhoods, while in most cases traditional and customary justice systems may be made up of homogenous and ethnic-based groups. It is also my submission, that in terms of a conceptual framework, the community justice systems represent the broader framework, while customary and

traditional justice systems are subsets within that wider framework. This being the case, Article 159 (2)(c) of the Constitution is restrictive, narrow, limited and does not cover the whole spectrum of community justice systems as envisaged in the Constitution. Similarly, the imperatives of Article 159(3) of the Constitution seem to apply only to traditional justice systems leaving out other community-based justice systems which may also go against the values outlined therein. The paper concludes that the phrase 'community justice systems' is the most appropriate in describing all the informal, local, culturally appropriate and home-grown justice systems in Kenya.

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ENHANCING ACCESS TO JUSTICE IN KENYA: THE IMPERATIVE OF ADOPTING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

by: EMMAH KHISA SENGE WABUKE*

ABSTRACT

'Access to Justice' is perhaps one of the most quoted phrases in all legal discourse. Yet, its meaning and application is easier said than done. Nowhere is this clearer than in Kenya, where the judicial system, despite numerous shake-ups and renovations, is still pestered with procedural technicalities and is viewed with disdain by the citizens. This has called for many to call for Alternative Dispute Resolution (ADR) Mechanisms to cater to the inadequacies of the former.

This paper is a short but inquisitive work into the contrasting approaches taken by ADR and litigation by way of identifying specific characteristics of each while examining their impact on access to justice for peoples in Kenya.

Key Words

Alternative Dispute Resolution (ADR), Litigation, Access to Justice, Traditional Dispute Resolution Mechanisms

1. INTRODUCTION

An ounce of mediation is worth a pound of arbitration and a ton of litigation!¹

Although ethical preoccupations stimulated its development, the phrase 'access to justice' has historically been regarded as a means to ensure

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¹ Quote by J. Grynbaum, available at < <http://www.themediationcentre.co.za/quotes-of-note>> (Accessed on 30 August 2014).

accessible, affordable and comprehensible justice to all people. Indeed, this principle has found its way into the Constitution of Kenya, 2010 vide Article 48 which mandates the state to ensure ‘access to justice for all persons’. Irrespective of this, the problems that bedevil the justice sector in Kenya persist. These problems, which vary in depth and substance, have a common origin: overreliance on litigation as a conflict resolution mechanism. Although not inherently problematic, litigation is handicapped with procedural problems such as backlog of cases and undue technicalities.

A call has now been made to seek for alternative (or dare I say, more appropriate) dispute resolution mechanisms to enable realization of the right to access to justice. Alternative Dispute Resolution (ADR) refers to all decision making processes other than litigation, including but not limited to negotiation, mediation, arbitration, conciliation and Traditional Dispute Resolution Mechanisms.² ADR is well-enunciated in both municipal and international law, as evidenced in Article 159 of the Constitution of Kenya and Article 33 of the United Nations Charter respectively.

This paper discusses the various ADR mechanisms and how they can enhance access to justice in Kenya. Herein, the author argues that ADR plays a critical role in enhancement of access to justice in Kenya as, contrary to litigation, they are flexible, expeditious, voluntary and easy to comprehend. This paper commences with a discourse on various ADR mechanisms in Kenya and the understanding of the term ‘access to justice’ before proceeding to examine the interface between these two concepts. It shall then conclude with a recommendations section on how best to foster a healthy marriage between these two principles of law.

2. ADR MECHANISMS IN KENYA: NOMENCLATURE AND ATTRIBUTES

The promulgation of the Constitution of Kenya in 2010 marked a watershed moment in many an aspect of the Kenyan judicial system,

² K. Muigwa, *Settling Disputes through Arbitration in Kenya* (2nd ed, Glenwood Publishers, Nairobi, 2012), p. 1.

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including ADR, which now found pronouncement in the supreme law of the land. Article 159 of the Constitution provides that one of the guiding principles in exercise of judicial authority is ADR which includes reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

Essentially, ADR mechanisms may be divided into three: facilitative, evaluative or determinative processes.³ Facilitative processes occur where parties are assisted in identifying issues in dispute and in coming to an agreement about the dispute.⁴ In evaluative processes, the third party is more actively involved in advising the parties about the issues and various possible outcomes.⁵ Conversely, in a determinative process, after the parties have presented their arguments and evidence of a dispute, the third party makes a determination.⁶ This definition, however, is unsatisfactory as it leaves out the quintessential form of ADR: negotiation.

Negotiation occurs where parties meet to identify and discuss issues at hand so as to arrive at mutually acceptable solutions without the help of a third party.⁷ It is a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in

³ K. Muigua & F. Kariuki, 'ADR, Access to Justice and Development in Kenya' (Strathmore Annual Law Conference, Nairobi, July 2014).

⁴ Z. Xie, 'The Facilitative, Evaluative and Determinative Processes in ADR' (2011) <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652> (Accessed on 1st September 2014).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ K. Muigua (n 2), p.11.

relation to a particular area of mutual concern.⁸ The aim in negotiations is to find a zone of possible agreement by creating options that satisfy both mutual and individual interests. An obvious advantage of negotiation is its flexibility and voluntary quality.

Facilitative processes include **mediation**, which is in essence a continuation of the negotiation process in the presence of a third party.⁹ 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 disputants.¹⁰ Mediation is favoured as a flexible, confidential, cost-effective and speedier process of settling disputes. It is also widely acceptable as it affords the disputants autonomy over the mediator, fora and outcome.¹¹

An example of determinative processes is **arbitration**. This is a private consensual process where parties in dispute agree to present their grievances to a third party (an arbitrator) for resolution.¹² An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them and arbitrators are so

⁸ M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi, 2006),p.115.

⁹ K. Muigua (n 2) p.12.

¹⁰ C. Greenhouse, 'Mediation: A Comparative Approach' (1985) 2 Royal Anthropological Institute of Great Britain and Ireland 90.

¹¹ M. Mwangi (n 8) p.116.

¹² K. Muigua (n2), p. 3.

called because they have arbitrary power.¹³ Arbitration has a number of attributes, including privacy and confidentiality, parties' autonomy over selection of arbitrator, consensual, flexibility and minimization of emphasis on formality.¹⁴ On the converse, arbitration also endures negative attributes including practicability restrictions.¹⁵

Other forms of ADR include **early neutral evaluation** (an informal presentation by the parties to a neutral with respected credentials for an evaluation of the parties' positions);¹⁶ **fact-finding** (an investigative process in which a neutral fact-finder independently determines facts for a particular dispute usually after the parties have reached an impasse)¹⁷ and **private judging** which is an approach midway between arbitration and litigation and involves presentation of the case to a judge in a privately maintained courtroom with all the accoutrements of the formal judicial process.¹⁸

One form of ADR demands a special mention: **Traditional Dispute Resolution Mechanisms**. TDRM includes institutions, principles, values and traditions of conflict resolution which existed in Africa before the advent of colonialism.¹⁹ Whenever a conflict arose negotiations could be done by the

¹³ B. Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques* (Sweet and Maxwell, London, 1997) 282.

¹⁴ K. Muigua (n2), p. 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p.17.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ K. Muigua, 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010' (2011) <<http://www.kmco.co.ke/index.php/publications/111-traditional->

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disputants. In other instances the Council of elders or elderly men and women could act as third parties in the resolution of the conflict.²⁰ Moreover, disputants could be amicably reconciled by the elders and close family relations and advised on the need to co-exist harmoniously.²¹ They have been now recognized in Article 159 (2) of the Constitution of Kenya, 2010. TDRM enjoy numerous advantages, including close geographical proximity with the people and easily comprehensible to the locals.

In general, ADR has many advantages. It is a simple, quick, flexible and accessible dispute resolution system compared to litigation. Its emphasis on win-win situations for both parties increases access to justice and improves efficiency.²² It is also expeditious and a cost-effective means for dispute resolution that fosters parties' relationships.²³ ADR mechanisms are applicable to a wide range of disputes including commercial, land, and intellectual property, family, and succession, criminal and political

[dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010](#) (Accessed on 10 September 2014).

²⁰ *Ibid.*

²¹ *Ibid.*

²² S. Mishra, 'Justice Dispensation through Alternate Dispute Resolution System in India' (2011) <<http://www>.

²³ F. Kariuki, 'Redefining Arbitrability: Assessment of Articles 159 and 189 (4) of the Constitution of Kenya' (2013) 1 *Alternative Dispute Resolution Journal* 175-189.

disputes.²⁴ ADR and traditional justice systems strengthen the Rule of Law and contribute to development.²⁵

3. ACCESS TO JUSTICE: DEFINITION AND APPLICATION

‘Equality before the law’ is a common term embellished in legal discourse the world over. Yet this confident proclamation stands in contradistinction with the reality of the judicial system. Thousands of would-be complainants are inhibited from accessing the courts due to varied challenges, including financial handicaps and physical inaccessibility of the courts. Therefore, it may be rightly pointed out that the quest for access to justice for the ordinary citizenry is the greatest challenge of the contemporary judicial system.

The term **Access to Justice** is not defined in international law and has been used in different ways in different contexts. Traditionally, the term refers to opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.²⁶ This is because the triangular obstacles to access to justice in Kenya are non-knowledge of the rights; physical and financial difficulties and fear of the courts due to the common-law adversarial system. **Access to justice** has, thus, two dimensions: procedural access (having a fair hearing before a tribunal) and also substantive

²⁴ K. Muigua & F. Kariuki (n 3),p.4.

²⁵ J. Michel, ‘Alternative Dispute Resolution and the Rule of Law in International Development Cooperation’ (2011) Justice and Development Working Paper Series 2.

²⁶ Available at < <http://www.justice.gov/atj/>> (Accessed on 10th September, 2014).

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justice (to receive a fair and just remedy for a violation of one's rights).²⁷ It refers not only to the courts, but also to civil and administrative processes such as immigration review or state compensation funds.²⁸ Further, protection of rights must continue through all stages of the legal process, from the time of reporting a crime to the police, to following the grant of a remedy by the court to make certain that it is enforced.²⁹

Thus, 'access to justice' includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.³⁰

Access to justice has been recognised by the law, including Article 48 of the Constitution of Kenya and Article 8 of the Universal Declaration of Human Rights which provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Therefore, in a very literal way, irrespective of the problems in nomenclature and

²⁷ *Kenya Bus Service Ltd v Minister of Transport & 2 others* (2012) eKLR.

²⁸ M.T. Ladan, 'Access to Justice as a Human Right under the ECOWAS Community Law' (2009) <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2Fwww.abu.edu.ng%2Fpublications%2F2009-07> (Accessed on 10 September 2014).

²⁹ *Ibid.*

³⁰ *Dry Associates Limited v Capital Markets Authority & anor* Nairobi Petition No. 358 of 2011 (unreported).

actualization of this right, it is now well settled that access to justice is a fundamental freedom owed to all persons.

4. ADR AND ACCESS TO JUSTICE

Due to the heterogeneous nature of contemporary society, a single compact dispute resolution mechanism that can deal with all injustices and produce a just ordering of society has remained elusive. This notwithstanding, the justice sector has only emphasized on legal formalism, that is, litigation to the neglect of all other forms of dispute resolution.³¹ Litigation has been seen as the only viable option to attainment of justice, a belief that is quite apart from the truth. Courts comprise only one hemisphere of the world of regulating and disputing.³² In every society a large number of legal and non-legal, formal and informal, contemporary and customary principles, methods and institutions exist to rectify wrongs and promote remedies,³³ thus, litigation ought to be looked at as one fraction of this continuum rather than the sole format of justice attainment.

Overemphasis on litigation has had detrimental effects on access to justice. These challenges include high cost, delays, geographical location, complexity of rules and procedure and the use of legalese.³⁴ Further, procedural technicalities, at the expense of substantive aspects of the matters in question, have often resulted in the perpetuation of injustice.³⁵ In addition,

³¹ S.S. Faruqi, 'Justice Outside the Courts: Alternative Dispute Resolution and Legal Pluralism' (2011) <<http://www.nadr.co.uk/articles/published/ADR/ADRandLegalPluralism.pdf>> (Accessed on 9 September 2014).

³² *Ibid.*

³³ *Ibid.*

³⁴ L.H. Reiling & A. Di Giovanni, *Justice Sector Assessments: A Handbook* (World Bank, New York, 2007).

³⁵ *Ibid.*

a poor disputant who cannot afford the high fees for hiring a lawyer is denied an opportunity to seek judicial enforcement of his/her rights.³⁶

ADR Mechanisms help in overriding many of these challenges enhanced by the process of litigation. First, by allowing for party autonomy, these mechanisms leave room for parties to find their own lasting solutions to their problems. In environmental conflicts, for example, mediation encourages public participation in management of environmental resources.³⁷

Second, ADR Mechanisms encourage voluntariness among the parties which not only gives parties wider roles in decision making but also ensure compliance with the outcome.

Further, ADR ensures effectiveness and quick disposal of disputes due to its informal nature and its distaste for procedural technicalities. These mechanisms are, thus, effective to the extent that they will be expeditious and cost-effective compared to litigation.

5. ADR AND ACCESS TO JUSTICE: CHALLENGES AND OPPORTUNITIES

ADR is by far the best solution to ensure access to justice for all persons. However, one must not be deceived to think that application of ADR is without any challenges. There are still many troubles that face the implementation of ADR. Major challenge remains lack of awareness and recognition of ADR Mechanisms .This may be due to the lack of the link between the formal court process and ADR Mechanisms. ³⁸

³⁶ *Ibid.*

³⁷ K. Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' (2013) <<http://www.kmco.co.ke/index.php/publications>> (Accessed On 9 September 2014).

³⁸ *Ibid.*

Therefore, a legal and policy legal structure should be developed to effectively link these mechanisms with the formal court process.³⁹ Awareness among judicial officers on the effectiveness of ADR mechanisms coupled with civic education to the populace will go a long way in promoting the acceptance of these mechanisms into the ubiquitous judicial process.

In addition, a framework should also be formulated providing that before the parties file a case in court, they should first exhaust TDRM and ADR processes so as to ease backlogs in courts.⁴⁰ Further, Court Annexed Arbitration must also be promoted beyond the civil procedure sphere in order to facilitate quick disposal of proceedings.

Another problem that faces ADR in Kenya in facilitation of access to justice is lack of research and development in this area. Although ADR is taught in Kenyan law schools, the method of delivery is impersonal, failing to put it within the context of difficulty in accessing justice for peoples in Kenya. Therefore, I posit that to enhance access to justice, there is need to engage in research and development that will illuminate the complex relations between formal dispute resolution forums and informal forums such as ADR and TDRM.

6. CONCLUSION

The right to access to justice is far from being realized in Kenya. However, with continued acceptance of ADR mechanisms as part of the justice process in Kenya, the manifestation of this right has received a significant boost. After all, there is some truth that an ounce of mediation is worth a pound of arbitration and a ton of litigation!

³⁹ *Ibid.*

⁴⁰ *Ibid.*

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Book Review
BOOK REVIEW

Dr. Kariuki Muigua.

Resolving Conflicts through Mediation in Kenya, by Dr. Kariuki Muigua, (Glenwood Publishers, 2012) ISBN 978-9966-046-01-7, 182 pages.

Book review by Kihara Muruthi

Kenya and other African countries have faced challenges in the administration of justice due to excessive dependence on the courts in the resolution of disputes. This is the case even where the courts are not the best option and where other forms of dispute resolution would be more appropriate. It is not in dispute that our courts are overwhelmed by their caseloads and by extension access to justice is hindered. It is often the case that outcomes of court proceedings do not satisfy the interests of the parties involved.

When elections triggered widespread violence in Kenya in early 2008, mediation was successfully used to resolve the conflict. The mediation efforts culminated in a power-sharing agreement that ended the political crisis and led to the formation of a broad-based Coalition Government.

It is against this background that Kenya has embarked on legal reforms to integrate Alternative forms of Dispute Resolution (ADR), as well as Traditional Dispute Resolution mechanisms—in the administration of justice. Article 159 of the Constitution provides that Alternative forms of Dispute Resolution, including Conciliation, Mediation, Arbitration and Traditional Dispute Resolution mechanisms, shall be promoted. The Constitution therefore has given emphasis to Alternative Dispute Resolution mechanisms as a means of resolving disputes other than the courts.

The development of Mediation in Kenya appears to have blossomed in recent years. It is now regarded by many as a genuine method of resolving disputes and managing conflict both in the commercial and private domain.

Dr. Kariuki Muigua's book on mediation is more necessary now than ever. This book covers an introduction of all forms of ADR, but as you might expect from the title of the book, its primary focus is on mediation. The book is written in a clear and forthright way, maintaining throughout a high standard of intellectual rigour.

The book opens the readers mind to the various forms of ADR and then crystallizes to mediation. You will find a nexus between conventional

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mediation and traditional conflict resolution methods. For the aspiring or established practitioner the author has driven the journey from commencement to conclusion of the mediation process. Although the techniques a mediator improvises during the mediation process can be his or her own idea, a chapter on mediator's techniques and ethics for the potential mediator could have been more than welcome. All in all the book is easy to grasp and at the same time comprehensive. Of interest are the author's recommendations on the way forward. For those who wish to delve deeper in to the subject, the author has extensively made available references to various academic articles which can enrich the reader's appetite.

Dr. Kariuki's book will provide an invaluable reservoir of resources for practitioners of mediation, lawyers, court users committees, university students and persons who generally engage in the conflict resolution spectrum. You do not need to take my word for it - instead get a copy and indulge yourself.

Mr. Kihara Muruthi is an ADR practitioner and a Fellow of the Chartered Institute of Arbitrators.

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Alternative Dispute Resolution is a publication of the Chartered Institute of Arbitrators, Kenya engineered and devoted to provide a platform and window on relevant and timely issues related to alternative dispute resolution mechanisms to our ever growing readership.

Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution mechanisms.

Articles should be sent as a word document, to the editor (editor@ciarbkenya.org) and a copy to the editorial group (adrjournal@ciarbkenya.org). Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Tuesday 5th May, 2015. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor receives and considers each article received but does not guarantee publication.

Guidelines for Submissions

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The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

Each submission:-

- Should be written in English
- Should conform to international standards and must be ones original writing
- Should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered
- should include the authors name and contacts details
- should include footnotes numbered
- must be relevant and accurate
- should be on current issues and developments

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