



Alternative Dispute Resolution

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Editor's Note

Editor's Note

I am delighted to launch this fourth Volume and the first issue in 2016, of the biennial publication of the Chartered Institute of Arbitrators' (Kenya Branch). This publication is meant to offer the readers a deeper analysis of the issues surrounding the law and practice of arbitration and Alternative Dispute Resolution (ADR) in general. The Journal strives to combine academic excellence with professional relevance and has a strong focus on the African region. The target readership include the professional and academic communities, but the Journal may also appeal to the independent researcher interested in acquiring knowledge in this area. The main purpose of the publication is to bridge the gap between academic knowledge and the practical or professional perspectives in ADR practice.

Understanding the political, social, economic, technological, legal and ecological implications in promotion and implementation of ADR mechanisms in Kenya is important for the full realisation of the benefits of these mechanisms as envisaged in various statutes including the Constitution. It is against this background that the first article in the journal provides documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage.

Recognising that the current Constitution of Kenya has since given traditional justice mechanisms a new lifeline in Kenya, there is within the Journal a debate on the same. The article contributes to the debate by considering the overall suitability of the traditional justice mechanisms for enhanced access to justice for poor and marginalized communities in the country.

Also featuring in the Journal is a discussion on the role that the Chartered Institute of Arbitrators (CIArb) can play in promoting the integration of arbitration practice in Africa. It is argued that due to its strategic position in the training of arbitrators and of professionalising arbitration in Africa and worldwide, CIArb remains at the forefront when compared to other arbitral organisations in the region in facilitating growth and development of arbitration in Africa.

Editor's Note

With the revival of the East African Community, Kenya and the East African region is seeking to trade with the rest of Africa and the world as an economic bloc so as to boost its negotiation power and influence. Thus, this issue has included a discussion on this important topic and the role of international arbitration in enhancing trade and investment. Closely related is an article on some of the challenges a successful party may encounter in seeking the recognition and enforcement of an arbitral award within the East African Community, especially in light of private international law issues that may affect the integration process. There is also a discussion on the connection between the rule of law, Bilateral Investment Treaties (BITS), and the effect of implementing these on a host state's economic development.

The Constitution of a country is the Supreme law of the land, a principle entrenched in constitutions the world over. One of the discussions in this issue is on the interpretation of the concept of constitutional supremacy in light of arbitration practice and its likely implication on arbitration law and practice. It is noteworthy that Alternation Dispute Resolution (ADR) mechanisms apply in a wide range of disputes cutting across different trades and professions. Consequently, the Journal features an article discussing day to day application of ADR mechanisms in the Construction Industry.

Arbitral institutions play an important role in the growth and development of international arbitration the world over. That is why a discussion on the potential of the Nairobi Centre for International Arbitration in promoting effective management of commercial disputes in Kenya and the African region as a whole is also included.

The journal is sponsored by the Chartered Institute of Arbitrators' (Kenya Branch), a dynamic and resourceful professional association of ADR practitioners, to provide a solid grounding in and link to professional practice in ADR mechanisms. The Editorial Team will continue to develop and refine the content to enhance the quality, scope and diversity of this Journal.

The Journal is available online at <http://www.ciarbkenya.org/>

Editor's Note

CIArb-Kenya wishes to thank the contributing authors, editorial team, reviewers and all those who have made this publication possible.

Dr. Kariuki Muigua, Ph.D., FCIArb, (Chartered Arbitrator)
Editor,
Nairobi, March 2016

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A Survey on ADR Strengths, Weaknesses and Policy Gaps: A Case Study of Meru, Isiolo and Nairobi Counties, Kenya

By: Kihara Muruthi*

Abstract

This paper is a result of a baseline survey that was carried out by the author, as a Consultant for purposes of identifying trends in the use of ADR in Kenya, including a description of the types of ADR mechanisms used in the region, identification, and description of linkages between the various institutions engaged in dispute resolution.

The author provides documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage. The issues discussed range from political, social, economic, technological, legal and ecological. Within the discussion, the paper provides viable recommendations and a strategy for the use of ADR in Kenya, coupled with a planning base for advocacy strategies towards the increased use of ADR for improved access to justice in particular, the recommendations also entail ways of strengthening cooperation and coordination between the various legal aid providers and the judiciary. In conclusion, the author outlines the specific recommendations, as suggested by the survey target population and those that flowed from data and information analysis.

1.0 Introduction

Despite historic resistance to Alternative Dispute Resolution (ADR) by many popular parties and their advocates, ADR has gained widespread acceptance among both the public and the legal profession in recent years. In fact, some

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courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried expressly contemplates the so-called "compulsory" mediation.

The main purpose of this study is to identify trends in the use of ADR in Kenya, including a description of the types of ADR mechanisms used in the region, identification, and description of linkages between the various institutions engaged in dispute resolution. This provides a platform for offering recommendations to stakeholders regarding ADR in the region. In this way, the study also provides a planning base for advocacy strategies towards the increased use of ADR and by extension; improved access to justice in particular. The objective of this research is to strengthen cooperation and coordination between the various legal aid providers and the judiciary.

In the wake of the foregoing, this baseline survey on the use of ADR aims to provide documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage. The study was designed to provide recommendations and a strategy for the use of ADR in Kenya.

Article 159(2) (e) of the Constitution of Kenya states that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles... alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted...”

The specific objective of the survey is to provide the following:

- a) Provide input for a national strategy for the use of ADR in Kenya.
- b) Make practical recommendations on the establishment of necessary national policy interventions towards the resourceful utilization of ADR in line with the Constitution.

2.0 Background

This report contains the result of a survey on ADR use in Kenya: “*A Survey on Strengths, Weaknesses and Policy Gaps*” carried out by author, in June 2013.

The broad objective of the survey was to:

- a. Provide documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage.
- b. To provide recommendations that inform policies on the use of ADR in Kenya.

The specific objective of the survey was to provide inputs for a national strategy for the use of ADR in Kenya and to make practical recommendations on the necessary national policy interventions for establishment of an efficient and effective use of ADR in line with the Constitution.

The baseline survey was conducted in three regions in Kenya namely: a) Meru County; b) Isiolo County; and c) Nairobi County.

To achieve the desired output, it was important to conduct a desk review of existing literature on ADR in Kenya including: the Constitution of Kenya, the Miscellaneous Statute Amendment Act, the Arbitration Act, the Civil Procedure Act and Civil Procedure Rules 2010¹, the Draft of the Legal Aid Bill 2012², and the Draft Legal Aid and Awareness Policy 2012³.

¹ Cap 21, Laws of Kenya.

² This version was amended and currently the Legal Aid Bill, 2015 is pending Parliamentary approval.

³ The Legal Aid and Awareness Policy was approved in 2014.

The data and information in this paper was collected through comparative analysis on international best practices, interviews with the Ministry of Justice, National Cohesion and Constitutional Affairs, key stakeholders and institutions dealing with ADR like the Chartered Institute of Arbitrators, field visits to the three counties in Kenya and for consolidating findings, holding focus group discussions in the three regions.

2.1.1 Background to the Study

For thousands of years, Bushmen in the expansive Kalahari Desert in Botswana and Namibia have led traditional lifestyles far away from the concrete jungles that are our cities. The absence of technological refinement disproves sophistication in dispute resolution practices that for eons have evolved without a formal state system, such as courts but are suited to the needs of a collective hunter-gatherer society.

The Bushmen's is not an idyllic existence and disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides. Where tension escalates, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence. If resolution is not reached in the small group, the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been 'talked out'. Economic reality and social dependence preclude the easy resort to violence over individual problems.

Whether we label this as the 'history' of ADR or not, it provides an engaging insight into the individual and collective wisdom of societies responding to difficulties caused by the 'selfish gene'.

The 'ADR Timeline' in the early times begins in 1800 BC when the Mari Kingdom (in contemporary Syria) used mediation and arbitration in disputes

with other kingdoms and ends with the 21st century use of mediation in the Microsoft monopoly cases.⁴

ADR is of two historic types and the traditions vary somewhat by country and culture. First, methods for resolving disputes outside of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. On a whole, ADR includes informal tribunals, informal mediative processes, formal tribunals and formal mediation processes.⁵

In Kenya, ADR has gradually been introduced over the past decades with a two-fold view of; dealing more effectively with growing caseloads and second, to improve citizens' access to the justice system.⁶ While the possibilities for ADR under Kenya's laws and procedures remain limited, many communities have introduced indigenous systems for ADR noting considerable success stories.⁷ Various UN bodies have endorsed the use of mediation and arbitration for the resolution of commercial disputes. The

⁴ Jerome T. Barrett, Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*, (Jossey-Bass, 2004), p. 21.
Available at https://www.academia.edu/2790000/Sejarah_Gerakan_Alternatif

⁵ SADRE Focus, 'Addressing the Needs Of Individuals In Settling Disputes Outside Of The Courtroom,' *The Society for Alternative Dispute Resolution & Education*, Vol. 1, Issue 1-Jan-Mar – 2015, p. 6.
Available at http://www.sadre.org.in/sadre_ejournal_volume1_issue1.pdf

⁶ See Law Reform Commission, *Alternative Dispute Resolution: Mediation And Conciliation*, November, 2010, LRC 98-2010, available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf

⁷ United Nations Office on Drugs and Crime, *Training Manual on Alternative Dispute Resolution and Restorative Justice*, October 2007, p. 5. Available at https://www.unodc.org/documents/nigeria/publications/Otherpublications/Training_manual_on_alternative_dispute_resolution_and_restorative_justice.pdf

United Nations Commission on International Trade Law (UNCITRAL)⁸ has promulgated model laws for domestic adoption and adaptation of UN member states in Arbitration by recognition of arbitral awards and Mediation by making recommendations regarding standardizing enforceability of settlements, impartiality of mediators, and non-admissibility of evidence. International Chamber of Commerce (ICC)⁹, whose rules have been endorsed by UNCITRAL and includes model contract language for commercial arbitration in international and domestic markets. Bilateral trade and investment treaties and free trade agreement often create an international legal context and even new ADR mechanisms. World Trade Organisation's (WTO) Dispute Settlement Body convenes panels, arbitration, good offices and mediation. The WTO dispute settlement system is the backbone of today's multilateral trading regime. It was created by Member governments during the in the conviction that a stronger, more binding system to settle disputes would help to ensure that the WTO's carefully negotiated trading rules are respected and enforced. As such, it has greatly enhanced the stability and predictability of the rules of international trade to the benefit of businesses, farmers, workers and consumers around the world.¹⁰

2.1.2 The Context of ADR

There are several methods available for resolving disputes between two parties. The first and most important method is through the courts. When a

⁸ Available at <http://www.uncitral.org/uncitral/en/index.html> - UNCITRAL was established by the United Nations General Assembly on 17th December 1966 to promote the progressive harmonization and unification of international trade law.

⁹ The ICC is the largest, most representative business organization in the world. Its memberships is drawn from companies in over 180 countries which have interests spanning every sector of private enterprise. ICC has three main activities: rule setting, dispute resolution, and policy advocacy.

¹⁰ A Handbook on the WTO Dispute Settlement System, Cambridge University Press available at https://www.hse.ru/data/2014/04/29/1322753805/Handbook%20DS_E.pdf

dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens.¹¹

ADR is usually considered an alternative to the courts. It can also be used as a colloquialism for allowing a dispute to drop or as an alternative to violence. In recent years, there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, as well as to foster "appropriate" dispute resolution.¹²

In the typical approach, some cases and complaints go to formal grievance, to court, the police or to a compliance officer. But the parties could settle some of these conflicts if they had enough support and coaching. Thus "alternative" dispute resolution usually means a method that is not the courts.¹³

According to Dr. Kariuki Muigua, the phrase ADR refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination,

¹¹ Vinod Agarwal, 'Chapter 1: Alternative Dispute Resolution Methods,' in *Document Series No. 14: Alternative Dispute Resolution Methods*, (United Nations Institute for Training and Research (UNITAR), 2001), p. 3. Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at <http://www.unitar.org/pft/sites/unitar.org/pft/files/DocSeries14.pdf>

¹² Gianina-Anemona Radu, 'Specific Elements Of Alternative Dispute Resolution Found In Criminal Proceedings,' available at <http://www.upm.ro/gidni/GIDNI-01/Law/Law%2001%2009.pdf>

¹³ Shubham Singh & Shobhan Srivastava, 'Pendency of Cases: A Bar On Right to Access of Justice,' available at <http://ail.ac.in/outresearch/Pendency%20of%20Cases%20A%20Bar%20On%20Right%20to%20Access%20of%20Justice.docx>.

arbitration and others.¹⁴ To some writers however, the term “alternative dispute resolution” is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.

The Draft Legal Aid Bill¹⁵ has defined ADR as means of settling a dispute by means other than through the court process and includes negotiation, mediation, arbitration, conciliation and the use of informal dispute resolution mechanisms.¹⁶

ADR is an umbrella term for processes other than judicial determination, in which an impartial person assists disputants to resolve the issues between them. ADR processes may be facilitative, advisory, determinative or a combination of all the above. In a facilitative process like mediation, the ADR practitioner assists parties to identify the issues and reach an agreement about the dispute.¹⁷ Advisory processes, such as conciliation or expert appraisal, employ a practitioner to advise the parties about the issues and/or possible outcomes. Determinative processes, such as arbitration, involve a

¹⁴ Kariuki Muigua, *ADR: The Road to Justice in Kenya*, Paper Presented at the International Arbitration Conference Held on 7th and 8th of August, 2014 at Sarova Whitesands Hotel, Mombasa, Kenya. Available at <http://www.kmco.co.ke/attachments/article/123/PAPER%20ON%20ADR,%20THE%20ROAD%20TO%20JUSTICE%20%20IN%20KENYA.pdf>

¹⁵ The Draft Legal Aid Bill 2015, Section 2(1) (ii) (Government Printer, Nairobi).

¹⁶ *Ibid*, Clause 2.

¹⁷ National Alternative Dispute Resolution Advisory Council (NADRAC), ‘Inquiry into Alternative Dispute Resolution in the Civil Justice System,’ *NADRAC Issues Paper: Response by the Law Council of Australia Alternative Dispute Resolution Committee*, 2009, p. 6. Available at www.lawcouncil.asn.au/FEDLIT/images/Inquiry_into_Alternative_Dispute_Resolution_in_the_Civil_Justice_System.pdf

decision being made by the third party. There are also other types of ADR such as collaborative practice.¹⁸

ADR may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.¹⁹ The definitions above, in a nutshell, suggest that ADR includes all dispute resolution processes where the goal is to resolve the dispute without recourse to adversarial means.

ADR encompasses a variety of methods for the resolution of disputes between the parties. The availability or deployment of any particular method of alternative dispute resolution in any specific case depends on a number of factors.

2.1.3 The various types of ADR mechanisms are as follows:-

a) Negotiation

This is a voluntary and informal process by which the parties to a dispute reach a mutually acceptable agreement. As the name implies the parties seek out the best options for each other, which culminates in an agreement. At their option, the process may be private. Negotiation is a fact of life. Everyone negotiates something every day. It is a back-and-forth communication designed to reach an agreement when you and the

¹⁸ NADRAC, 'Alternative Dispute Resolution in the Civil Justice System,' Issues Paper, March 2009, p. 14, (Commonwealth of Australia 2009). Available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/ADR%20in%20the%20Civil%20Justice%20System%20Issues%20Paper%20March%202009.doc>.

¹⁹ Paul Teague, *Towards Flexible Workplace Governance: Employment Rights, Dispute Resolution And Social Partnership In The Irish Republic*, Studies in Public Policy: 18 (Policy Institute, 2005), p. 16.

other side have some interests that are shared and others that are opposed.

b) Conciliation

Conciliation is an ADR process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement.

A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution. However, a conciliator will not make a judgment or decision about the dispute. Conciliation may be voluntary, court ordered or required as part of a contract. It is often part of a court or government agency process.²⁰

The role of conciliators is similar to that of mediators except that the conciliator may also have specialist knowledge and provide some legal information. They may suggest or provide participants expert advice on the possible options for sorting out the issues in your dispute. Conciliators will actively encourage participants to reach an agreement.

Conciliation is usually held face to face, so participants can talk to each other directly. However, the conciliator may also choose to have separate sessions with the participants. In certain instances, the conciliator may act as a 'messenger' by speaking with the participants separately and communicating ideas or proposals between you. It is also possible to hold conciliation sessions by telephone in some circumstances.

²⁰ See Brocherie, B. (ed), *The Law Handbook: Your Practical Guide To The Law In New South Wales*, (Thomson Reuters (Professional) Australia Limited, 2014), pp. 650-651. Available at http://www.legalanswers.sl.nsw.gov.au/guides/law_handbook/pdf/Ch20_dispute_resolution.pdf

c) Mediation

This is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try and arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but will use various procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without resorting to the court to make a determination.

The term “mediation” is often used interchangeably with “conciliation”. The conciliator plays a more proactive role whilst mediation is a more passive process. Currently there is no national or international consistency of usage of these terms.²¹

d) Early Neutral Evaluation

An Early Neutral Evaluation (ENE) is used when one or both parties to a dispute seek the advice of an experienced individual concerning the strength of their cases. An objective evaluation by a knowledgeable outsider can sometimes move parties away from unrealistic positions, or at least provide them with more insight into their cases' strengths and weaknesses.²²

e) Arbitration

Arbitration is one of the various methods of dispute resolution but undoubtedly the most popular. It is defined in the Halsbury’s Laws of England as: “*A process used by the agreement of the parties to resolve*

²¹ Helen, F.M., et al, ‘Labor relations (Laws, regulations and rules), *Australian Bulletin of Labour*, Vol.31, Iss.2, June 2005, available at <http://www.freepatentsonline.com/article/Australian-Bulletin-Labour/135814200.html>

²² Net Industries, ‘Alternative Dispute Resolution - Early Neutral Evaluation,’ available at <http://law.jrank.org/pages/4275/Alternative-Dispute-Resolution-Early-Neutral-Evaluation.html> Alternative Dispute Resolution - Early Neutral Evaluation

disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award. This procedure for resolving disputes has been accepted internationally as a viable alternative to litigation. The trend worldwide has been to increase its use."²³

Arbitration is also defined as a formal, private and binding process where disputes are resolved by a final award made by one or more independent arbitrators. The role of an arbitrator is similar to that of a judge, though the procedures can be less formal. It should be noted that and an arbitrator is usually an expert in his/her own right. The parties involved in a dispute must consent to arbitration and the arbitrator(s) to be used must be agreed by the parties or nominated by an independent body. The decision of an arbitrator is called an award. It must be written and signed by all arbitrators if more than one and copies must be sent to the parties to the dispute. An award is enforceable as a court order. However it may be set aside for specific reasons contained in statute.

In Kenya, arbitration is governed by the Arbitration Act²⁴ and is widely used to resolve commercial disputes. In recent years there has been a steady rise in the arbitrator appointments made by The Chartered Institute of Arbitrators, Kenya Branch.

f) Med-Arb

Med-Arb is the acronym for mediation-arbitration and is an ADR system that combines mediation and arbitration. First, a mediator tries

²³ Halsbury's Laws of England, 4th Edition Reissue, Vol. 2 No.3, p.2 para. 1

²⁴ The Government Printer, *Arbitration Act*, Chapter 49, Act No. 4 of 1995, Revised Edition 2012 [2010]

to bring the parties closer together and help them reach their own agreement. If the parties cannot compromise, they proceed to arbitration before a different arbitrator, who rarely, is the mediator in the same dispute, for a final and binding decision. Med-Arb is the melding of two well-established processes for conflict resolution into one hybrid process. Med-Arb, is an increasingly popular though Some critics question the compatibility of mediation and arbitration, while others point to the possible abuse of the process if a med-arbiter threatens to move quickly to arbitration, and they worry about the detrimental impact on the final arbitration award of confidential information that emerges through mediation.²⁵

g) Adjudication

Adjudication is a contractual process which provides an interim "quick fix" solution to disagreements between two contracting parties. It involves the appointment of an Adjudicator, normally takes around 35 days to complete and the resulting adjudicators decision is binding between the parties. One of the most obvious examples is the building and construction industry which due to its complex nature, has always suffered major problems with disputes. Deliberate non-payment and slow payment for all manner of excuses were normal characteristics, the problem was rife. As a result the industry always suffered the highest rate of bankruptcies as traditional legal processes such as court and arbitration proceedings are commonly slow, complex, difficult, costly and thus often impractical to use.

The Adjudicator is rather like a football referee; he makes an assessment of the facts and the rules, then makes a decision that cannot be argued with and must be immediately complied with.

²⁵ Megan Elizabeth Telford, *Med-Arb: A Viable Dispute Resolution Alternative*, IRC Press, Queen's University

Adjudications are commenced when there is a dispute between parties. This can be for almost anything, however most adjudications relate to disputes within the complex construction industry.²⁶ Thus, in such a case the decision will reflect whether or not an immediate payment should take place between the parties.

h) Dispute Adjudication Board

This is a more sophisticated form of adjudication in which 3 adjudicators are normally appointed at the commencement of large building and civil contracts. A Dispute Adjudication Board (DAB) comprises a panel of three independent technical experts jointly selected by the principal and the contractor. The DAB is established at project commencement and meets regularly at site briefings dealing with progress and potential issues. The use of a DRB results in saving time, project costs, and legal fees both during and after construction. DAB's are sometimes referred to as Disputes Review Boards or Disputes Resolutions Boards.²⁷

Where an issue is not resolved by negotiation between the principal and the contractor, it is formally referred to the DAB, which is required to present a recommendation within a short period. The recommendation is usually non-binding, but discoverable in any subsequent legal proceedings.

i) Traditional Justice Systems

Customary law and practice is generally known to be the accepted norm of usage in any community. A community may accept certain customs

²⁶ See Construction Industry Response to Bar Council's Views on CIPAA, available at <https://www.cidb.gov.my/cidbv4/images/pdf/ConstructionIndustryResponsetoBARI.pdf>

²⁷ See generally, Jones, D., 'Dispute Boards: Preventing and Resolving Disputes,' DRBF Singapore Conference 16 May 2014, *The Growth of Dispute Boards Around the World*, available at <http://www.drbfconferences.org/documents/Singapore2014/Session%20%20Jones.pdf> at

as binding on them. In Africa, such customary laws or traditional justice systems, may be accepted by members of particular ethnic groups and may be regarded as ethnic customary law. Customary law is unwritten and one of its most commendable characteristics is its flexibility, apart from the fact that it is the accepted norm of usage.

Resolution of disputes was a major function under the indigenous system of governance. The role was taken up by the elders or the chief and was meant to maintain social cohesion. In its operation, African dispute resolution was very much like arbitration in that resolution of disputes was not adversarial. Any person who is concerned that a dispute between the parties threatened the peace of the community could initiate the process. In the process, parties have the opportunity to state their case and their expectation but the final decision is that of the elders. Whereas the western type arbitration is attractive because of its private nature, customary arbitration is not private but is organised to socialise the whole society, therefore, the community is present. Another distinction is that the process is gender sensitive as such women were excluded from male driven communal dispute resolution. Parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced.

Traditionally; different ethnic communities had a structured way of settling disputes either through their chiefs or through a council of elders. The Digos had their *kayas*, *Ker* among the Luos; the Merus had *Njuri Ncheke*; and so on. Two systems of justice exist parallel to each other and they include the western justice system which by its nature is retributive, hierarchical, adversarial punitive and is guided by codified laws and written rules, procedures and guidelines. The African cultural justice system on the other hand is based on customary and unwritten laws, traditions and practices that have been learnt over time and

through experience. They embrace the ‘whole’ person and seek to restore broken relationships in the community.

3.0 Methodology

3.1.1 Methodological Approach

The study collected both quantitative and qualitative data. This involved collection of data from the ADR stakeholders and opinion shapers/leaders in the survey areas. The consultant used a mix of data collection methods, which included Focused Group Discussions (FGD), Key Informant Interviews and Stakeholders Response.

3.1.2 Area of Coverage

The study covered three counties (Meru, Isiolo and Nairobi) and eight Districts namely Imenti North, Tigania West and Meru Central in Meru; Isiolo and Merti in Isiolo and Embakasi, Central Business District and Dagoretti in Nairobi.

3.1.3 Sampling

The sampling approach was controlled non-probability and particularly purposive except for the opinion leaders. Respondents were purposively sampled based on the author’s prior understanding of their projects/programmes in relation to ADR. Focused group discussions targeting opinion leaders in the community were held to provide an in-depth understanding of ADR in diverse settings, the driving factors towards its use and the challenge encountered in the process of using ADR.

3.1.4 Secondary Data

This was collected through desk research and literature review of both legal and institutional documents and papers on ADR in Kenya. Literature review was carried out to provide background information and help in understanding the context of ADR in social, economic, cultural, religious, political and legal environments.

3.2 Constitution of Kenya, 2010

The Constitution of Kenya, 2010²⁸, recognises ADR and raises its status to a judicial principle. Specifically, the Constitution requires the Judiciary to promote alternative forms of dispute resolution, among them reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, as long as they are not repugnant to justice and morality, or are inconsistent with the Constitution.²⁹

The provision for enhanced access to justice and the use of ADR is to be found in article 159 (2). Article 159 (2) stipulates thus:-

“.....in exercising judicial authority, the courts and tribunals shall be guided by the following principlesalternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted.....”

Article 159 (2) also recognizes the place of alternative dispute resolution mechanisms such as reconciliation, negotiation, mediation and arbitration in ensuring access to justice in Kenya.

3.3 The Statute Law (Miscellaneous Amendments) Act 2012 and The Civil Procedure Act, Revised Edition 2012

The Statute Law (Miscellaneous Amendment) Act 2012, which recognized Court-annexed ADR methods in Kenya amended the Civil Procedure Act, Revised Edition 2012³⁰, to provide for mediation of disputes and the

²⁸ The Constitution of Kenya 2010, *The Government Printer, Nairobi*

²⁹ Remarks by the Chief Justice/ President, Supreme Court of Kenya, Dr Willy Mutunga, at the induction retreat for cohesion and integration goodwill ambassadors, Crowne Plaza Hotel, Nairobi August 29, 2010

³⁰ The Civil Procedure Act, Revised Edition 2012 [2010], *Government Printer, Nairobi*

establishment of a Mediation Accreditation Committee. The functions of the Mediation Accreditation Committee are:-

- a) determine the criteria for the certification of mediators;
- b) propose rules for the certification of mediators;
- c) maintain a register of qualified mediators;
- d) enforce such code of ethics for mediators as may be prescribed;
- e) set up appropriate training programmes for mediators.

The Court 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.³¹

Civil Procedure Act mandates that presiding officers can direct parties in civil proceedings to resort to methods such as mediation under circumstances where it is perceived that the dispute can be resolved in a co-operative and non-adversarial manner. This provision is important since a significant portion of pending litigation at the trial level such as rent disputes, property disputes and those pertaining to family matters are best resolved through these methods. Civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and acrimonious civil suits can do irreparable damage to their mutual relationships. Under such conditions, judges can use their discretion to direct the use of ADR methods under their supervision

3.4 The Arbitration Act

Kenya has had laws on arbitration from as early as 1914 when the Arbitration Ordinance was enacted. The Arbitration Ordinance, 1914 was a reproduction of the English Arbitration Act, 1889. The principal attribute of this Ordinance

³¹ The Mediation (Pilot Project) Rules 2015 have since been published vide Legal Notice No. 197 of 2015 dated 9th October 2015.

was that it accorded courts in Kenya ultimate control over the arbitration process in Kenya. Since the court system was at its infancy then, the Arbitration Ordinance, 1914 made little if any headway in promoting resolution of disputes by arbitration.³²

The law of arbitration is based upon the principle of referring dispute to domestic tribunal set to substitute courts. The most unique characteristic about arbitration is that it is built on the basis of an acceptance and agreement of all the parties in case of any disagreement among them which is called arbitration clause. In Kenya, arbitration matters are regulated by Arbitration Act No. 4 of 1995 (Revised Edition 2012). In addition, the Civil Procedure Rules, 2010 allows parties to go for arbitration any time before judgment is passed. This shows that in Kenya arbitration has been recognized as an alternative method of dispute resolution and for parties to go for arbitration they must have the arbitration agreement in writing showing they have agreed to refer the matter for arbitration and if the matter is before court already an application to stay the matter must be made.

The current Arbitration Act is based on a Model of the UNCITRAL which was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. United Nations came up with a model of a statute that has been adopted by many countries. The essence of the Act is that it provides for very broad party autonomy in fashioning the Arbitration process.

4.0 The Draft of the Legal Aid Bill 2012

The current Legal Aid Bill³³ was drafted in June 2012 but later, a validation forum was held that proposed some amendments. Legal Aid is generally

³² James Tugee – An Overview of Arbitration in Kenya (5th September 2012). Sourced on 20th June 2013
http://www.academia.edu/3057430/OVERVIEW_OF_ARBITRATION_IN_KENYA.

³³ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/LegalAidBill2015.pdf>

understood to be the provision of free or subsidized legal services to eligible groups or individuals who are mainly the indigent and the poor and the vulnerable ones in order to strengthen their access to Justice through Legal information and education, Legal Advice and assistance as well as Alternative Dispute Resolution and Legal representation. The Legal Aid Bill of Kenya, 2012, states that Legal Aid includes; Legal Advice and assistance including information in both criminal and civil cases about the relevant law and legal processes, assisting with the drafting of documents other than Instruments prohibited under the Advocates Act, referring matters to advocates, pupil advocates or student lawyers and doing other things that do not constitute legal representation.

The position of Legal aid is well anchored in the new constitution through various indirect provisions. However, the scope of this is in different angles. Legal Aid can be seen through the scope of Access to Justice, fair hearing, fair administrative action, ensuring the Rule of Law is upheld as well as ensuring equal rights between the rich and the poor. The Draft Bill provides for the grant of legal aid in criminal matters, civil and constitutional matters as well. The Bill sets a threshold that litigants will be required to meet in order to be provided with legal aid. Mediation and other alternative dispute resolution systems will also be accessible through such assistance. The Bill has undergone internal review and stakeholder consultations at the Commission for the Implementation of the Constitution (CIC). The CIC is a statutory body that was established under the Commission for the Implementation of the Constitution Act, 2010³⁴ to monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution. It has since wound up operations in December 2015.

³⁴ The Government Printer, *the Commission for the Implementation of the Constitution Act, 2010*

4.1.1 Primary Data

Primary Data was collected by use of different tools. Focused Group Discussion schedules were used to collect information from groups in various counties. Selected case studies focusing on different issues covered by the study were prepared.

4.1.2 Pretesting the Tools

The data collection tools were tested on the first three groups in the field in Meru and modified as appropriate. The areas that required modification were the length of the questionnaire, clarity of language and inclusion of more qualitative questions.

4.2 Specific Methods of Data Collection

4.2.1 Personal interviews

The interviews were conducted using stakeholders' questionnaires and key informant questionnaires. The stakeholders were defined as organizations or institutions that provide ADR directly or through strengthening, regulating or coordinating ADR providers. The definition is not however limited to legal or working definition of organization/institution.

Key informants were defined as individuals who have a greater public influence in policy matters, regulations and or operations. Specifically, the key informants were drawn from Government institutions, departments or Semi-Autonomous Government Agencies (SAGAs).

4.2.2 Focused Group Discussion

This was a structured group (using the then Ministry of Gender, Children and Social Development definition of groups in their various manifestations and organizations) discussion guided by a facilitator involving people with knowledge and interest of ADR either as direct or indirect beneficiaries of the system. The discussions were planned where the participants discussed ADR issues freely and spontaneously.

5.0 Findings

5.1.1. The Conceptual Basis of Alternative Dispute Resolution

There are a number of different theoretical frameworks for analysing disputes. This is based on a multi- disciplinary approach that uses a number of different analytical lenses to examine and develop responses to disputes. In some instances, the line between disputes and conflict is so thin that it is sometimes not possible to resolve disputes without tackling conflicts. In this regard, the above approach has been developed into analysis of disputes in terms of greed, neglect and grievances. While the greed, neglect and grievance framework usually highlights economic, social and cultural agenda in disputes, it is only one of a number of ways of dispute and should be complemented by other analytical lenses, in particular anthropological and gender analysis. Comprehensive dispute analysis should combine an analysis of structures and systems, actors and how they interact with one another.

It is in the same vein that the author has arranged the findings in three broad areas namely:-

- a) To provide documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage.
- b) To provide recommendations , inform policies on the use of ADR in Kenya and the necessary national policy interventions for establishment of an efficient and effective use of ADR in line with the Constitution
- c) Provide inputs for a national strategy for the use of ADR in Kenya.

5.1.2 To provide documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage.

A total of 56 respondents were interviewed at FDG and Key Informant Levels. As far as gender is concerned, there were 32 males representing 57% of respondents and 24 females representing 43% of respondents.

The respondents were divided into a five year age bracket which provided 8 brackets. From the data, most of the respondents were in the age bracket 38-43 years (19.6%), followed by 26-31years(18%) and 56-61years had the lowest respondents at 1.9%.

5.1.3 Awareness about ADR.

There is a rich body of documented information on the use of ADR in Kenya. 77.1 % of the group respondents are aware about ADR and only 22.9% are not aware. While 75% of stakeholders were aware about ADR and only 25% were not, 100% of key informants were aware of ADR.

5.1.4 ADR Components that the respondents have heard.

27.7% of stakeholders have heard of mediation, 34.5% have heard of negotiations, 12.5% arbitration and 6.8% traditional dispute resolution. 33.3% of key informants have heard of mediation, 30.6% have heard of negotiation, 33.3% have heard of arbitration and 2.8% traditional dispute resolution. 34.3% of groups have heard of mediation, 25.7% have heard of negotiation, 34.3% arbitration and another 5.7% traditional dispute resolution. On average, 31.8% of all the respondents have heard of mediation and 30.3% have heard of negotiation while 19.9% have heard of arbitration.

5.1.5 The respondents who have been involved in a dispute in the last 12 months.

77.1% of group respondents have been involved in dispute/conflict in the past 12 months preceding the survey. This is construed to mean that conflicts/disputes are a common phenomenon in Kenyan society.

5.1.6 Types of disputes the respondents were involved in.

On the types of disputes/conflicts that are rampant among the group respondents, familial/domestic was highest at 71.3% followed by land at 14.3%. Debt was third at 8.6% while criminal was 2.9%. Most respondents felt that criminal act was not a dispute and as such should be treated differently.

5.1.7 Where the respondents sought redress.

54.3% of group respondents sought redress to the disputes from chiefs' office, 25.7% sought help from relatives/family, another 17.1% would go to church/mosque and 2.9% would go to court.

5.1.8 Types of ADR Services used in the past 12 months

Negotiation is the mostly used form of ADR among the groups at 42.9% followed by mediation at 37.1%, arbitration at 14.3% and traditional dispute resolution at 5.7%. Key informants indicated that 50% used negotiation as a form of ADR to resolve disputes conflicts, 27% used mediation, and 22.7% used negotiation while none used traditional dispute resolution.

5.1.9 Types of disputes the respondents (FGD) were involved in the past 12 months.

The respondents were involved more in familial/domestic conflicts/disputes (71.3%) in the past twelve months. Land disputes followed with 14.3%, followed with debt at 8.6%. There was a general feeling that crime is not a dispute and should therefore be treated differently.

5.2 Where the services were obtained

Among the groups, ADR services are obtained from different providers with the chiefs' office being the preferred provider at 57.1%, family at 28.6% and church/mosque at 14.3%. Whenever disputes arose, 54.3% of stakeholder respondents went to chiefs' office, 25.7% sought help from family/relatives, 17.1% went to church/mosque and only 2.9% preferred the court. 54% of the groups sought redress at the chiefs' office, 25% sought from

the family or relatives, 17% went to church/mosque and about 3% opted to go to court. More stakeholders (50%) are engaged in mediation, 27% are engaged in arbitration while 22.7% are engaged in negotiation.

On the motivating factors that make citizens to opt for ADR, the stakeholders intimated preservation of relationships and the preservation of reputations as the major factor at 83.3%, lower costs and durability of agreements followed at 75%, likelihood and speed of settlement (66.7%), less complexity and confidentiality (58.3%), flexibility of procedure and practical solutions tailored to parties interest stood at 33.3% each, while parties choice of neutral third party stood at 25%. Among the key informants, 100% cited flexibility of procedure and less complexity respectively as the motivating factor for out of court settlement, likelihood and speed of settlement , practical solutions and low cost (81.8%), parties choice of neutral third parties(63.4%), durability of agreements and the preservation of relationships and preservation of reputations (54.5%), confidentiality (36.6%)

Asked where else they were aware ADR services could be accessed, the respondents thought chiefs office (20.5%), council of elders (16.1%), family (8.8%) and Courts and district peace committee at 4.4%.

5.3 Main Reasons for Higher ADR Uptake in Kenya

The reasons given for the higher ADR uptake in Kenya were given as the following:-

- a) Corruption in Courts
- b) Confidentiality
- c) Cost Effective
- d) Culturally Appropriate
- e) Time
- f) Low Cost

5.4 Charges for ADR services

On the preference to prefer some charges on ADR services , 83. 3% said they did not while 16.7% said they would.

On the ADR charges, all the respondents said there were no official charges; however, some bought tea while others gave out some gifts. This they indicated was a way of appreciating those who dispense the ADR.

5.5 Success Rate

As far as resolving the dispute/conflict is concerned, the respondents (100%) agreed that the disputes can be resolved amicably. All the respondents (100%) observed that the success rate of ADR was between 61-80%.

5.6 Support of ADR by the Legal Framework

The key informants thought that the legal framework was 10% supportive to promote ADR, while the stakeholders thought that the framework was 62.5% supportive to promote ADR in Kenya.

6.0 Conclusions and Recommendations

6.1.1 Conclusions

The author arrived at the following conclusions:

6.1.2 Documented information on the use of ADR in Kenya

1. From the findings, there is enough evidence that there is documented information on use of ADR in Kenya. 77.1 % of the group respondents are aware about ADR, while 75% of stakeholders were aware about ADR and 100% of key informants were aware of ADR. This can be construed to mean that the levels of awareness are at all high ebb.

2. The components/ subtypes of ADR are also clearly understood by all categories of respondents. 27.7% of stakeholders have heard of mediation, 34.5% have heard of negotiations, 12.5% arbitration and 6.8% traditional dispute resolution. 33.3% of key informants have heard of mediation, 30.6% have heard of negotiation, 33.3% have heard of arbitration and 2.8% traditional dispute resolution. 34.3% of groups have heard of mediation, 25.7% have heard of negotiation, 34.3% arbitration and another 5.7% traditional dispute resolution. This is a clear indicator that ADR has been entrenched into the societal and social fabric.
3. Since 77.1% of group respondents have been involved in a dispute/conflict in the past 12 months preceding the survey, it is construed to mean that conflicts/disputes are a common phenomenon in Kenyan society and that they can be resolved amicably.
4. On the types of disputes/conflicts that are rampant among the group respondents, familial/domestic was highest at 71.3% followed by land at 14.3%. Debt was third at 8.6% while criminal was 2.9%. Most respondents felt that criminal act was not a dispute and as such should be treated differently. This is a clear indication that no community is willing to tolerate crime and that crime should not be categorized as a dispute/conflict.
5. ADR is mostly administered by chiefs' office and family/relatives. 54.3% of group respondents sought redress to the disputes from chiefs' office, 25.7% sought help from relatives/family, another 17.1% would go to church/mosque and 2.9% would go to court. From the findings, few Kenyans would go to court at first instance. They explore all other avenues (ADR) before resolving to go to court. This shows that there is documented use of ADR in Kenya.

6. As much as the respondents did not understand (22.7%) negotiation clearly, it is the most used form of ADR among the groups at 42.9% followed by mediation at 37.1%, arbitration at 14.3% and traditional dispute resolution at 5.7%. 50% of key informants used negotiation as a form of ADR to resolve disputes/ conflicts, 27% used arbitration, and 22.7% used negotiation while none used traditional dispute resolution.
7. Among the groups, ADR services are obtained from different providers with the chiefs' office being the preferred provider at 57.1%, family at 28.6% and church/mosque at 14.3% and none of the courts.
8. Whenever disputes arose, 54.3% of stakeholder respondents went to chiefs' office, 25.7% sought help from family/relatives, 17.1% went to church/mosque and only 2.9% preferred the court.
9. 54% of the groups sought redress at the chiefs' office, 25% sought from the family /relatives, 17% went to church/mosque and about 3% opted to go to court.
10. More stakeholders (50%) are engaged in mediation, 27% are engaged in arbitration while 22.7% are engaged in negotiation.
11. On the motivating factors that make citizens to opt for ADR, the stakeholders intimated preservation of relationships and the preservation of reputations as the major factor at 83.3%, lower costs and durability of agreements followed at 75%, likelihood and speed of settlement (66.7%), less complexity and confidentiality (58.3%), flexibility of procedure and practical solutions tailored to parties interest stood at 33.3% each, while parties choice of neutral third party stood at 25%. Among the key informants, 100% cited flexibility of procedure and less complexity respectively as the motivating factor for out of court settlement, likelihood and speed of settlement , practical solutions and low cost (81.8%), parties choice of neutral third parties(

- 63.4%), durability of agreements and the preservation of relationships and preservation of reputations (54.5%), confidentiality (36.6%).
12. Asked where else they were aware ADR services could be accessed, the respondents thought chiefs office (20.5%), council of elders (16.1%), family (8.8%) and Courts and district peace committee at 4.4%.
 13. The respondents were very candid on the main reasons for higher ADR uptake in Kenya. These were:-
 - a) Corruption in Courts
 - b) Confidentiality and non-adversarial nature
 - c) Culturally and family appropriate
 - d) Timely
 - e) Low Cost
 14. On the charges on ADR services, 83.3% of respondents said they did not prefer any charges while 16.7% said they would prefer some charges between 1,000/= and 5,000/= depending on the clients' ability.
 15. Further, all the respondents said there were no official charges; however, some bought tea while others gave out some gifts as a way of appreciating those who dispense the ADR and eating together as a way of reconciliation.
 16. As far as resolving the dispute/conflict is concerned, the respondents (100%) agreed that the disputes can be resolved amicably.
 17. On the issue of legal and institutional framework, key informants thought that the legal framework was 10% supportive to promote ADR; while the stakeholders thought that the framework was 62.5%

supportive to promote ADR in Kenya. This was based on divergent opinion on what constitutes a framework.

6.2 Strengths, Weaknesses, and Gaps on Such Usage.

To identify the strengths and weaknesses, the consultant has adopted the SWOT/PESTEL Analysis Matrix (SPAM) while the gaps are identified through SEGA Effectiveness Matrix (SEGAEM)

6.2.1 Strengths and Weaknesses

1. Political

Strengths: Acceptance of ADR by various political players since it is home grown, home managed and home administered.

Weaknesses: Can easily be manipulated by the political class and therefore may provide a fertile ground for revenge and counter revenge

2. Economic

Strengths: It is affordable since there are no charges preferred. The distances covered are short and therefore accessible. Time spent is short allowing the disputants to continue with their economic and livelihoods activities. There are no confinements and therefore the disputants are free.

Weaknesses: In case of penalties where livestock is used for compensation, encourages raid to redeem. Where land is used to compensate for damages, there is a feeling that ‘we are poor because so and so occupies our land’

3. Social

Strengths: It is socially acceptable and appreciated. It strengthens and preserves social relationships. It brings a sense of social ownership. It provides the social networks/fabric with the much needed goodwill.

Weaknesses: Engenders resentment which if not vented out causes social tension.

Encourages social activism which may breed group psychology that our clan, group or religion is on trial. Is not universal and therefore ideal for homogenous social entities who share common creed, ethos, culture, ethnicity and or livelihood patterns.

4. **Technological**

Strengths: Does not need intensive and extensive technology.

Weaknesses: Due to its informal/non formal nature, may not produce replicable outcomes as a result of weak or lack of documentation. May lack consistency in rulings due to weak points of reference.

5. **Ecological**

Strengths: The disputants come from the same locality and therefore form part of the community. With this in mind, they may hold the key to amicable resolution of the dispute.

Weaknesses: The accused can easily be blacklisted by the community through stigma, tagging or stereotyping.

6. **Legal**

Strengths: Has social structural backing backed by a rich heritage and test of time. Is ingrained in the individual and communal conscience and there can be applied through impulse action or reaction.

Weaknesses: The outcome may not be binding. The credibility of the process may be questioned based on the personality of the ‘judges’, the arguments raised and social interest or disinterest.

6.3 Gaps on the Usage

Performance of ADR: It is evident from the study that the performance of ADR is above average with the respondents giving it a 61% - 80% success.

Decision making Process:

The respondents observed that in most instances the disputants themselves approached the ADR providers. This is evidenced by the fact that ADR is mostly administered by chiefs' office and family/relatives. 54.3% of group respondents sought redress to the disputes from chiefs' office, 25.7% sought help from relatives/family, another 17.1% would go to church/mosque. Although the decisions may not be popular with both sides, there is a general feeling that all parties are involved in the decision making process.

Resources by ADR providers: In most instances, the ADR providers do not have work stations assigned to ADR, rather they 'create room' whenever the cases come. This makes the documentation process both scanty and non-versatile.

Manpower: Most ADR providers do not have permanent staffs for the specific job. Rather they work as ad hoc committees with very limited life span. This lifespan is determined by the workload and on the need to be retained basis.

Money: Since the ADR is not formalized in most institutions, there are some times no operational budget. The finances and other budgetary demands are activity and circumstance driven.

Time: The time allocated for ADR in some institutions is what they call spare time. This is occasioned by the voluntarism concept of ADR. It therefore incumbent upon the disputants and the ADR provider to agree on time.

ADR Justification: ADR traditions vary somewhat by country, community and culture. Its use has been as old as mankind and as ancient as dispute. It has been used by all generations across the world. It is therefore without gain saying is justifiable.

Informing policy and disseminating new knowledge and understanding: ADR is a policy issue. It can be seen from a multi-sectoral approach such as governance, democracy, human rights, peace building, religion, culture and a social service. In this regard, ADR can both be a service and a product. Its delivery can also be a brand. In this context, ADR requires some standardization and universality.

Participatory: All the respondents agree that ADR has an element of participation. However, from the FGDs, this participation is skewed in favor of patriarchy. The women think that ADR is a male court whose decisions are always pre- determined to perpetuate and further their dominance.

Inclusive and responsive to the vulnerable Planning: The respondents agree that ADR is responsive to the vulnerable in planning. This is evident when the opinion of the parties is sought about day, time and place.

Access: The respondents agree that ADR is accessible but in some instances, the access is controlled by taboos, sectarian biases and other inhibitive factors.

Benefits: The benefits that accrue from ADR are both individual and collective (communal). In cases where the feud is familial or clan based, the benefits are seen in terms of continued co-existence, levels of tolerance and productivity.

Appeal: Some processes of ADR have provisions for appeal (*Njuri Ncheke*) depending on hierarchy. Most other forms do not have such room and therefore decisions arrived at are supreme.

Impact of ADR both qualitatively and quantitatively, for individuals, households and more broadly within the community:

There is empirical evidence of both qualitative and quantitative impact of ADR for individuals, households and more broadly the community. The visible levels of tolerance, harmony, co-existence, tranquility and calmness which may not necessarily depict peace can all be attributed to some remnant of ADR. It is therefore appreciated that with all its weaknesses and challenges, ADR is still the way to go.

6.4 Recommendations to inform policies on the use of ADR in Kenya.

To effectively address this, the author reviewed several pieces of literature and materials. Chief among them are; the Miscellaneous Statute Amendment Act, the Arbitration Act, the Civil Procedure Act, the Draft of the Legal Aid Bill 2012 and the Draft Legal Aid and Awareness Policy 2012. Comparative analysis on international best practices on ADR was also undertaken. On the inputs for a National Strategy for use of ADR in Kenya, the author hereby sets foot print path towards a national strategy.

Input 1: Undertake an Operations Research

- a) Employ a sector wide approach in regard to ADR and formulate an integrated mechanism that goes beyond the domestic/familial, debt, land and other civil cases.
- b) Subject the findings to a wider public participation and out of this, document aspirations and Kenyan dreams.
- c) Through forums, identify the dispute dynamics (factors that push people into disputes and factors that pull them out of disputes)

and develop the critical path analysis to ring fence the dynamics and create an exit framework.

- d) Convert the framework into a strategy for ADR use.

Input 2: Improving the Policy and Legal Environment

- a) Harmonization of different pieces of legislation and other legal instruments to provide a fair playing ground for both the ADR practitioners and consumers. This can possibly be done by repealing some statutes and coming up with an all-inclusive and all-encompassing ADR Act.
- b) Regulation and sanitization of ADR practice through development of an ADR curriculum, ADR training manual, ADR code of conduct and ADR reporting templates with an inbuilt monitoring and evaluation framework.
- c) Placement of ADR practice under a specific agency such as the Legal Aid Service for coordination and monitoring.
- d) Provide the Legal Aid Service with a regulatory role and make it a SAGA for roll-out of ADR in Kenya.
- e) Strengthen the institutional and organizational capacity of Legal Aid Service to spread its wings in all the counties for effective regulatory role.
- f) Allow Legal Aid Service to undertake intensive resource mobilization to fund its operations beyond the national purse.

Input 3: Registration and preservation of data of ADR Service Providers.

- a) Develop a minimum requirement package for registration of ADR service providers. These may include NGOs, CBOs, FBOs, SACCOs, Youth Groups, Women Groups, Council of Elders, District Peace Committees, Community Policing Committees, Chiefs Office, Trusts, Foundations, Companies(both limited and limited by guarantee) etc
- b) Through the decentralized systems, design and roll out either District ADR committees or County ADR committees. The committees may incorporate as diverse stakeholders as possible representing the face of the district or county. This is envisioned to eliminate the fear of the minority and the easily marginalized that the ADR is an exclusive club.

6.5 Practical Recommendations on the Necessary National Policy

Interventions for Establishment of an Efficient and Effective Use of ADR in line with the Constitution.

- a) Harmonization of different pieces of legislation and other legal instruments to provide a fair playing ground for both the ADR practitioners and consumers. This can possibly be done by repealing some statutes and coming up with an all-inclusive and all-encompassing ADR act in line with constitution.
- b) Regulation and sanitization of ADR practice through development of an ADR curriculum, ADR training manual, ADR code of conduct and ADR reporting templates with an inbuilt monitoring and evaluation framework.
- c) Placement of ADR practice under a specific agency such as Legal Aid Service for coordination and monitoring.

- d) Development of a minimum requirement package for registration of ADR service providers.
- e) Design and roll out either District ADR committees or County ADR committees.

6.5.1 Recommendations by the Respondents.

- i. Undertake sensitization forums, workshops and outreaches to general public on regular and continuous basis.
- ii. Hold ADR meetings, seminars and workshops within counties and nationwide to create awareness.
- iii. Bring together various stakeholders and come up with way forward
- iv. Appreciate the roles played by the community and cultural organizations such as *Njuri Ncheke* and other council of elders
- v. The community should be trained, guided and counselled to see the appreciate the ADR
- vi. ADR and the systems that support ADR should be strengthened because in some parts of the country the courts are very far i.e. from Meru to Isiolo.
- vii. Courts should not be too keen on fines and the process should be friendly to the accuser and the accused.
- viii. There should be an ADR mechanism that that can work for inter-communities such as Borana- Meru,Somali –Turkana,Samburu – Borana.
- ix. Educate the people who are sought after in the provision of ADR.
- x. Conduct outreach and training for the CPA actors in the Nothern Districts.
- xi. The government should educate the youth on conflict resolution.
- xii. Provide periodic training to those handling ADR.
- xiii. Create more awareness on community peace agreements and let the courts enforce them without going into technicalities.

- xiv. Strengthen community peace mechanisms and let the provincial administration not interfere with community systems.
- xv. Include the elders in payroll for them not to use ADR as a conduit of bribery
- xvi. Organize county forums to popularize the sections of the constitution that talk about ADR
- xvii. Let parliament enact an ADR act to allow the courts to respect the decision arrived at by the parties.
- xviii. Fund peace committees and equip their offices.
- xix. Let every police station have an ADR desk to allow the disputants try and agree on non-criminal cases before they are taken to court.
- xx. Include peace budgets in the national budget. We spend a lot of money buying military hardware but we do not fund peace efforts.

Suitability of Traditional Justice Mechanisms as Alternative Dispute Resolution Mechanisms

*By: Ms. Jemimah Keli**

Abstract

The debate on traditional justice mechanisms has picked up in the recent years all over the world with international organizations like the United Nations Development Program, the World Bank, the UN Women and the International Law Development Organizations commissioning studies on the subject. The debate was a topic for discussion at the Africa Region Centenary Conference by the Chartered Institute of Arbitrators held at Livingstone Zambia in July 2015.

The Constitution of Kenya 2010 gave impetus to the debate in Kenya by formally recognizing and advocating for the promotion of traditional justice as one of the alternative dispute resolution mechanisms by the judiciary. Traditional justice mechanisms are based on customary laws and in some cases are in conflict with written laws and human rights norms. Indeed traditional justice mechanisms have some deep flaws like discrimination of women, can impose inhumane and cruel punishment and run the risk of elite capture. The advantages of the traditional justice mechanisms are many like emphasis on reconciliation and the ease of enforceability of process outcomes.

The advantages outweigh the negatives and justify the continued debate on the subject matter. The article contributes to the debate by considering the overall suitability of the traditional justice mechanisms. It makes a case for promotion of traditional justice mechanisms for enhanced access to justice

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for poor and marginalized communities who without such mechanisms may have no chance of justice.

Key words

Reconciliation, Retributive, Restitution, restorative, arbitrators, tradition, justice

Definition of key words

‘Tradition’

refers to customs and usages that derive their popular authority from practices and beliefs that pre-date the arrival of the modern state. However, ‘tradition’, is not a static or absolute phenomenon but one that is inherently dynamic, fluid and subject to change.¹

Retributive justice

Retributive justice is a system by which offenders are punished in proportion to the moral magnitude of their intentionally committed harms.² It deals with roughly the question of how people who have intentionally committed known, morally wrong actions that either directly or indirectly harm others, should be punished for their misdeeds.³ This is based on the principle that people who have engaged in wrongdoing, or ordered others to do so, should be punished or, at a minimum, must publicly confess and ask for forgiveness. Those who uphold this approach contend that punishment is necessary to make perpetrators accountable for their past actions; deter future crime; counter a culture of impunity and create an environment in which the

¹ Dinnen, S. (2009). ‘Traditional’ Justice Systems in the Pacific, Indonesia and Timor-Leste, www.unicef.org

² Carlsmith, K.M. & Darley, J.M., ‘Psychological Aspects of Retributive Justice,’ *Advances in Experimental Social Psychology*, Vol. 40, 2008, pp. 193-236 at p. 194.

³ Ibid, p. 194.

perpetrators and victims can realistically be expected to live harmoniously. Retributive justice also includes restitution, that is, recovery of losses or compensation to rectify harm. It generally takes the form of a financial payment made to the victim by the offender.⁴

Restorative Justice

Restorative justice is a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future.⁵ The traditional justice mechanisms aim to restore relations in the community through dialogue among the affected parties.

Reconciliation

Reconciliation can mean dialogue, remorse, apology, forgiveness and healing. Reconciliation is about constructing relationships in a way that allows everyone to move forward together. National reconciliation refers to a political form of consensus and interaction among parties and leaders. Reconciliation is seen to be crucial if peace processes are to succeed as it establishes relations among parties after conflict and decreases the risk of further violence.⁶

1.0 Introduction

This article examines the suitability and applicability of traditional justice mechanisms in modern Kenya. Traditional justice mechanisms are part of alternative forms dispute resolution prescribed under the Constitution.⁷

⁴ Anderlini, S.N., Conaway, C.P., & Kays, I. (2005). *Transitional Justice and Reconciliation*, TAVAANA, A project of e-collaborative for civic education, <http://tavaana.org>

⁵ Anderson, A.M.(2003) "Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution" <https://www.ncjrs.gov>

⁶ Anderlini, S.N., Conaway, C.P., & Kays, I. (2005), op cit.

⁷ The Constitution of Kenya, Article 159

Alternative dispute resolution mechanisms refer to any method of settling disputes outside courts.⁸ The Article will review the position of the law on traditional justice mechanisms, the current status of the mechanisms, the characteristics of the traditional justice mechanisms and their suitability as an alternative form of dispute resolution. The author uses the term mechanisms in place of systems as there are no defined traditional justice systems. There are varied traditional justice mechanisms existing in the different cultures in Africa.⁹

Africa was colonized in different ways which affected the manner in which the traditional justice mechanisms operate today. During the colonial era, the British applied a dual system of law under indirect rule in their colonies. The indirect rule allowed customary laws to continue to apply to native populations under the supervision of the British administration save for criminal law.¹⁰ English law applied in all areas to the people of English descent and to Africans who “opted out” of customary law. In several of their colonies for example, Nigeria, Botswana, Zimbabwe, Malawi, South Africa and Sierra Leone, the British created a dual tribunal system, with “customary courts” being given first instance jurisdiction in matters of customary law. Appeal from these customary courts was to the formal judiciary.¹¹ In other countries like Kenya and Tanzania there was no separate customary tribunal

⁸ See online dictionary definition of alternative dispute resolution, thefreedictionary.com

⁹ See Sriram, C.L., et al, *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge, 2010), p.25.

¹⁰ Ibid, pp. 26-30; Kane, M., et al, ‘Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor,’ Arusha Conference, “*New Frontiers of Social Policy*” – December 12-15, 2005, p.5. Available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf>

¹¹ Ibid.

systems created and the formal judiciary adjudicated on matters of customary law. In these countries informal customary justice mechanisms continued to operate parallel to the formal system at village level in the community in several forms including, council of elders, clans or family tribunals or associations.¹² In Uganda, the British recognized the traditional kingdoms and allowed them to exercise judicial power in their courts. However, these kingdoms' judicial tribunals were abolished in 1966 by the post independent government. Customary tribunals in Uganda were reintroduced in 1986 when the National Resistance Movement engaged in armed struggle against the government and set up Resistance Committee Councils and courts at the village level. These courts were later renamed local council courts. Today in Uganda, people can choose to take their civil cases to customary tribunals or the formal court system as both have unlimited jurisdiction in customary law. Other than civil cases, the Local Council courts have special jurisdiction in criminal matters over children for non-capital offences like assault and malicious damage to property.¹³

Indeed the colonial legacy affects how customary law is treated by the Constitution and the written laws of Kenya. The Constitution of Kenya (2010) in Article 159 provides that in exercising judicial authority the courts shall be guided by, among others, the principle of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional justice mechanisms. Article 159(3) qualifies the application of traditional justice system in that its use should not contravene the Bill of Rights, be 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.

¹² Ibid.

¹³ Kane, M., et al, Oloka- Omyango, J., & Cole, A.T. (2005), op cit.

The Constitution recognizes the place of traditional justice systems in land disputes. Among the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹⁴ The Judicature Act¹⁵ provides for the modes of exercise of jurisdiction of the Court of Appeal, the High Court and the subordinate courts. The Act provides that the three courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice, morality or inconsistent with any written law, and shall decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

The subordinate courts are established under Article 169 of the Constitution of Kenya 2010. The Magistrates' Courts Act, 2015¹⁶ in effecting Art. 169(1) (a) & (2) of the Constitution, spells out their powers and jurisdiction.¹⁷ The subordinate courts have jurisdiction and power to handle proceedings of civil nature concerning a claim under customary law.¹⁸ A claim under customary law under the Act means a claim concerning any of the following matters under African Customary Law: “land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children including guardianship, custody, adoption and legitimacy; and intestate

¹⁴ The Constitution of Kenya(2010) Article 67(2)(f)

¹⁵ Chapter 8 laws of Kenya (Revised edition 2012).

¹⁶ Act No 26 of 2015, laws of Kenya. This Act repealed the earlier Magistrates' Courts Act, Cap 10, Laws of Kenya.

¹⁷ Ibid, S. 6-10.

¹⁸ Ibid, S.7(3).

succession and administration of intestate estates, so far as not governed by any written law”¹⁹.

The place of customary law in Kenyan justice system is at the bottom of the hierarchy. The Constitution, whereas promoting traditional justice mechanisms application in the justice system, qualifies it on ground of repugnancy and also inferiority to other laws.²⁰ In comparison, the Constitution of Sierra Leone explicitly states that customary laws are part of the common law of the country giving them same status as written laws.²¹

The traditional justice mechanisms have been affected greatly by urbanization and intertribal settlements. Most traditional justice mechanisms involve ritual performance and do not recognize women as person with own opinions and rights.²² The *Benge* justice mechanism of the Azande people mainly found in western Sudan, Democratic Republic of Congo and the Central African Republic is based on oracles and witchcraft.²³ *Benge* is the poison oracle which involves giving poison to a fowl and its death or survival determines the guiltiness of the accused.²⁴ Such a practice would go against the Christian beliefs and “civilized” persons’ practices.

¹⁹ . 7(3), Act No. 26 of 2015.

²⁰ Article 159(3) (Constitution of Kenya, 2010).

²¹ Anderlini, S.N., Conaway, C.P., & Kays, I. (2005). *Transitional Justice and Reconciliation*, op cit, _2

²² See Loiselle, M.E., ‘Emancipating Rituals: Women’s Empowerment through Customary Justice,’ *Paper Delivered At ‘The Rituals Of Human Rights’ Workshop Centre For International Governance And Justice, Regnet Australian National University Canberra, Australia 25-27 June, 2014.*

²³ Kane, M., et al, Oloka- Omyango, J., & Cole, A.T. (2005), op cit.

²⁴ Kwekudee. (2014). “Azande (Zande) People: Ancient Skillful Knife and Spear Throwing Warriors of North East Africa”. Available at Kwekudee-tripdownmemorylane.blogspot [Accessed 25th April 2015].

It is against that background that this article examines the suitability of traditional justice mechanisms as an alternative form of dispute resolution in Kenya.

2.0 Traditional justice mechanisms in Kenya

Traditional justice mechanisms are in use in Kenya but operating parallel to the formal justice mechanisms. According to an observer, the existence of normative legal systems operating independently or semi independently from the state is an empirical reality in almost every de-colonised country in the world.²⁵ According to Stevens, there are three key factors that help to explain why Africans continue to look to traditional and informal justice forums to resolve disputes: - The vast majority of Africans continue to live in rural villages where access to the formal state justice system is extremely limited; The type of justice offered by the formal courts may be inappropriate for the resolution of disputes between people living in rural villages or urban settlements where the breaking of individual social relationships can cause conflict within the community and affect economic co-operation on which the community depends; State justice systems in most African countries operate with an extremely limited infrastructure which does not have the resources to deal with minor disputes in settlements or villages.²⁶ The position reflects the justice practice in Kenya.

²⁵ Forsyth, M. (2007). "A Typology of Relationships between State and Non-State Justice Systems", *The Journal of Legal Pluralism and Unofficial Law*, Vol. 39 Issue 56. Available at www.tandfonline.com. Accessed on 1-2-2016

²⁶ Stevens. J. (2001) "Access to Justice in Sub-Saharan Africa: The Role of traditional and informal justice systems," (Penal Reform International, November 2000). Available at <http://www.gsdrc.org/docs/open/ssaj4.pdf>

In Kenya, customary law is applicable in matters of marriage, burial and inheritance.²⁷ The *SM Otieno case* remains a land mark case on the place of customary law on matters of personal law. The Court of Appeal in *Virginia Edith Wambui Otieno v Joash Ochieng' Ougo and Omolo Siranga, Civil Appeal No. 31 of 1987* (Nyarangi, Platt and Gachuhi JJA) held that:

“Generally, the personal law of Kenyans is, in the first instance, their customary laws.

The common law is not the primary source but is resorted to if the customary law fails, as

where customary law is repugnant to justice and morality by virtue of the Judicature Act

(cap 8) section 3.;An African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal. The deceased having been born and bred a Luo, he remained a member of the Luo tribe and subject to the customary law of the Luo people, which was patrilineal. It did not matter that the deceased was sophisticated, urbanised and had developed a different lifestyle. A different formal education and urban lifestyle cannot affect one's adherence to his personal law”.

Traditional justice mechanisms also apply in criminal matters, in most cases parallel to the court systems. The Judicature Act only sanctions application of customary law in civil matters.²⁸ However, Article 159(3) of the Constitution does not distinguish the type of cases where traditional justice mechanisms are applicable as long as it meets the set threshold.²⁹

²⁷ The issue of inheritance is largely regulated by the Succession Act and the Lands Act. However in the rural set land is still inherited in accordance with customs in defiance of the written law.

²⁸ Ibid note 9

²⁹ Article 159(3)(a-c)

The court set a precedent in adopting a settlement of a criminal matter under traditional dispute resolution mechanism. In the matter of *R v Mohamed Abdow Mohamed, High Court Criminal Case No. 86 of 2011*, the accused was charged with the offence of murder. He pleaded not guilty to the charge and the matter was set for trial. On the date of the hearing the state counsel indicated to the Judge that the family of the deceased through their lawyer had written to the Office of the Director of Public Prosecutions requesting for the withdrawal of the charge as they had been compensated. The letter reproduced 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.....*”

The State Counsel then proceeded on the instructions of the Director of Public Prosecutions to make an oral application in court to have the matter marked as settled. He cited Article 159 (1) of the Constitution. He urged the court to consider the case as ‘*sui generis*’³⁰. He stressed that each of the parties was satisfied and felt adequately compensated. The Judge allowed the withdrawal of the case and stated, “*I am satisfied that the ends of justice will be met by allowing rather than disallowing the application. Consequently, I discharge the accused*”.

A prominent lawyer, Pravin Bowry, criticized the court decision in the *Mohamed case* for illegality. The lawyer wrote:-

³⁰ A latin word meaning “of its own kind” or unique

“Article 159 (1) of the Constitution it can be surmised does not extend to courts in criminal matters and cannot give power to the Director of Public Prosecution to be privy to settlements without invoking the laid down procedure of plea bargaining or excusing murder suspects. The learned judge and the prosecution further failed to consider the provisions of law as laid down by Article 2(4) of the Constitution which states that the Constitution is the supreme law of the country and “any law including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”. Well established and rudimentary principles of law remain that criminality is a matter between the state and the accused not citizen and citizen.”³¹

The decision is however a precedent. There is no meeting of minds in this matter. In his article on *'Applicability of traditional dispute resolution mechanism in criminal matters'* Kariuki concludes that the *Mohamed case* was a good precedent. He supports his conclusion on the basis of victim compensation and parties' satisfaction. The author does not give weight to punishment as deterrence and the role of the State in punishing crimes.³² The author however gives the test of such settlement as having been met being the three requirements under Article 159(3).³³

In the appellate matter of *Stephen Kipruto Cheboi and others v R*³⁴, Justice Mshila is quoted to have taken the position that alternative dispute resolution

³¹Read more <http://www.standardmedia.co.ke/article/2000085732/high-court-opens-pandora-s-box-on-criminality?>

³² See Chapter by Kariuki, F. (2014), in *Alternative Dispute Resolution*, Vol. 2 Number 1, Chartered Institute of Arbitrators Kenya

³³ Traditional justice mechanisms should not contravene the bill of rights, not repugnant to justice and morality and not inconsistent with the constitution or any written law.

³⁴ High Court Criminal Appeal Case No. 88 of 2010, eKLR 2014

of reconciliation under traditional justice mechanisms is applicable in misdemeanors and not felonies. In the matter the Judge held... “*to encourage reconciliation or any other form of dispute resolution for felonies will not be in the best public interest and also not be in the best interest of justice*”. It is apparent from the foregoing case studies that the jurisprudence on the application of traditional justice mechanisms is not settled.

3.0 Analysis of the suitability traditional Justice mechanisms

In order to gauge the suitability of the traditional justice mechanisms we examine their characteristics.

3.1 The problem/ dispute in traditional justice mechanisms is viewed as relating to the whole community as a group. There is strong consideration for the collective interests at stake in disputes.³⁵ Anderson points out that the mechanisms attempts to repair the damage, re-establish dignity and reintegrate those who were harmed or alienated by the offence. It is based on the assumption that within the society a certain balance and respect exists, which can be harmed by crime. The purpose of the justice system is then to restore the balance and to heal the relationships.³⁶

3.2 Decisions are based on a process of consultation; There is an emphasis on reconciliation and restoring social harmony; Arbitrators are appointed from within the community on the basis of status or lineage; There is often a high degree of public participation; The rules of evidence and procedure are flexible; There is no professional legal representation.; The process is

³⁵ Wojkowska, E., ‘Doing Justice: How informal justice systems can contribute,’ (United Nations Development Programme – Oslo Governance Centre, December, 2006), p. 16. Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>

³⁶ Anderson, A.M.(2003) “Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution” op cit; See also Sullivan, D. & Tiftt, L., *Handbook of Restorative Justice: A Global Perspective*, (Routledge, 2007), p. 162.

voluntary and the decision is based on agreement; They have a high level of acceptance and legitimacy; Enforcement of decisions is secured through social pressure; and the decision is confirmed through rituals.³⁷

3.3 There is no distinction between criminal and civil cases, traditional justice mechanisms often deal with both.³⁸ This means that all matters arising during the disputes are addressed to conclusion.

3.4 The Parties /Players

In examining the suitability of traditional justice mechanism we also look at the players in the dispute resolution. The players are the persons who bring the dispute claim before the elders panel, the elders panel and the offender. In most African societies there is collective ownership concept where the individual is not isolated. Every one belongs to a group commonly known as a clan and a wrong to an individual is a wrong to the entire group. Thus in the dispute resolution the clan has a stake in the claim even when filed by one person.

“...in most African societies, legal rights and duties are primarily attached to a group rather than to individuals... The individual plays a relatively subordinate role. Very often, the members of the group, as individuals, are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole. A law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others, he never stands alone. In the same vein, a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for

³⁷ Op Cit_15, the Bengé ritual of poison

³⁸ Wojkowska, E., ‘Doing Justice: How informal justice systems can contribute,’ (United Nations Development Programme – Oslo Governance Centre, December, 2006), p. 16.

vengeance, for in some vicarious manner, they too have been wronged.”³⁹

Thus the parties under the traditional justice mechanisms are the clans with the individual victim and the offender relegated to small time players. This distinguishes traditional justice mechanism from the formal criminal law practice before the courts where the victim is a mere witness.

3.5 The Arbitrators/ dispute umpires

The arbitrators of disputes under traditional justice mechanisms are elders held in high regard in the society. They hold their position by virtue of their age, inherited status, or influence within the community, and represent the community in articulating the consensus on shared norms and values. Some African communities traditionally had no single head but were ruled by elders of the village. Other communities were ruled by a chief who took advice on judicial as well as political decision-making from elders or councilors.⁴⁰ A point of departure from formal justice system, the arbitrators in traditional dispute resolution cannot be said to be neutral. They belong to clan and indeed may be even related to the parties. What gives them legitimacy is the status they hold in the society and history of wise decision making. According to Stevens their impartiality is secured by cross cutting ties which link them to both parties. Furthermore their personal knowledge of the community, the dispute, the nature of previous settlements and the disputants including their

³⁹ Elias, T.O. (1969). *The nature of African Customary law*, Manchester University Press, page 19

⁴⁰ Ladan, M.T., ‘Towards Complementarity In African Conflict Management Mechanisms,’ in Golwa, J.H.P. (ed), *Perspectives on Traditional African & Chinese Methods of Conflict Resolution*, (Institute for Peace and Conflict Resolution (IPCR), 20130, p. 100. Available at <http://www.ipcr.gov.ng/perspectives.pdf>

personal histories and reputations is vital to the “arbitrators” ability to resolve the case and are expected to use it in doing so.⁴¹

4.0 Strengths of Traditional Justice Mechanisms

Proceedings are quick and take place within walking distance. They are also conducted in the local language and carried out in a manner which everyone understands by people who are socially important to litigants, rather than impersonal state officials.⁴² The procedures are flexible at a traditional hearing, disputants simply tell their stories as they consider relevant. These lengthy oral testimonies have been seen as equivalent to “pleadings” that produce “a ritually sanctioned purge of anger and emotions as well as a complete exposition of the circumstances”.⁴³ As already noted, traditional justice forums also show the greatest reluctance to cut short any member of the public – no matter how irrelevant the contribution may turn out to be – where that person claims to have special knowledge of the facts, or simply desires to comment. Having said that, it does not necessarily follow that traditional arbitrators are indiscriminating in their reception of evidence.⁴⁴ In some traditional societies, when the nature of the evidence is extremely inconclusive, and the determination of the disputed facts are essential to the final ruling, the case may be referred, with the consent of both parties, to a diviner who consults the oracle or administers an ordeal in order to discover the truth.⁴⁵

⁴¹ Stevens. J. (2001) ‘Access to Justice in Sub-Saharan Africa: The Role of traditional and informal justice systems,’ op cit, p. 25.

⁴² Ibid, p. 8.

⁴³ Stevens, J., ‘Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean,’ (Penal Reform International, 1999). Available at <http://www.gsdr.org/docs/open/ssaj13.pdf>

⁴⁴ Stevens. J. (2001) ‘Access to Justice in Sub-Saharan Africa: The Role of traditional and informal justice systems,’ op cit, pp. 28-29.

⁴⁵ Ibid.

The decision arrived at is by consensus. The parties will negotiate until they arrive at a decision acceptable to all parties. This is seen as a reconciliation effort. It also enhances the enforceability of the decision.

Restitution plays a critical role of bringing social harmony in the society. Even where punishment is meted out compensation of the victim must follow. There is high level of compliance with the decision of the arbitrator. The high degree of public participation in reaching a solution to a dispute means that disobeying a final ruling is tantamount to disobeying the entire community and may attract social ostracism. This involves the withdrawal by other members of the community of both social contact and economic co-operation. This separation from one's group in traditional African society has been likened to a "living death".⁴⁶

There is a component of integration of the offenders in the community. The Acholi carry out ceremonies of *mato oput* (drinking the bitter herb) and *nyouo tong gweno* (a welcome ceremony in which an egg is stepped over an *opobo* twig) in welcoming ex-combatant child soldiers home after they have been decommissioned, that is, official stop of using weapons.⁴⁷

According to the International Development Law Organization (IDLO) customary justice systems provide access to justice for the marginalized or

⁴⁶ Ibid, p. 33.

⁴⁷ Quinn, J.R. (2005). Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice, A Paper Presented to the Panel, "Transitional Justice: Local and International Dimensions" at the Canadian Political Science Association Annual Meeting, 2nd June 2005 www.politicalscience.uwo.ca

improvised communities that may otherwise have no other options of redress.⁴⁸

5.0 Weaknesses of Traditional Justice Mechanisms

Traditional justice mechanisms are also characterized by deep flaws. Most traditional and informal justice systems are dominated by men and tend to apply customary or religious norms which discriminate against women and young people.⁴⁹ While it is undeniably the case that very few women preside over tradition and informal justice forums, it is also the case that women are grossly under-represented in formal courts in Africa, as well as other parts of the world. The difference between the formal and the informal systems as regards the equal treatment of women should, therefore, be seen as a matter of degree.⁵⁰

Traditional justice mechanisms are vulnerable to elite capture and may serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups. Traditional leaders who often rule arbitrarily, with few checks and balances on their administration, giving power considerations precedence over equity, fairness and overall justice.⁵¹ Flexible and uncertain rules and the lack of procedural safeguards pose particular risks for vulnerable

⁴⁸ International Development Law Organization (IDLO), 'Customary Justice: Challenges, Innovations and the Role of the UN,' available at http://worldjusticeproject.org/sites/default/files/customary_justice_idlo.pdf

⁴⁹ Stevens. J. (2001) 'Access to Justice in Sub-Saharan Africa: The Role of traditional and informal justice systems,' op cit, p. 2.

⁵⁰ Ibid.

⁵¹ International Development Law Organization (IDLO), 'Customary Justice: Challenges, Innovations and the Role of the UN,' op cit, p. 56.

groups, including women, the youth, people living with HIV/AIDS, and ethnic Minorities.⁵²

IDLO states that most traditional arbitrators are not aware of basic human rights standards and may violate them. As a result, customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions, such as the right to equality and non-discrimination and the right to fair trial, including the right to legal representation, the right to due process of law, the right to protection against self-incrimination or coerced confession, the right to a jury trial, the right to an appeal, and the right to protection against cruel and unusual punishment.⁵³ It is however important to put the issue of human rights standards into context. The violation is not unique to traditional justice mechanism. Formal courts are also faced with such a weakness of fairness like political bias in election offences, delayed justice and lack of access due to exorbitant court fees.

It is important to note that what leads to human rights challenges lies more in attitudes and power relations than within the type of institution itself. Cultural notions of gender roles, social status, and belief systems drive some of the human rights violations occurring in justice and security provision. However, they cannot be divorced from the socio-economic and power relations that sustain inequality in the first place.⁵⁴

⁵² Harper, E. (2011) *Working with Customary Justice System: Post Conflict and Fragile States*, IDLO. www.idlo.int

⁵³ International Development Law Organization (2013). “customary justice: Challenges, Innovations and the role of the UN”, worldjusticeproject.org

⁵⁴ Chopra, T. and Isser, D. (2011) “Women Access to Justice, legal Pluralism and Fragile States” in Harpers, E., ed, “Perspectives on Involving Non- State and Customary Actors in Justice and Security reform” www.idlo.int

6.0 Conclusion

The paper set out to examine the suitability of traditional justice mechanisms. The article looked into the prevailing practice in Kenya with respect to traditional justice mechanisms. It was found that there is a case for and against the mechanisms. One important issue that comes out clearly is that the traditional justice resolution mechanisms are just as valid as any other alternative dispute resolution mechanism. Secondly the traditional justice mechanisms are well grounded on sound principles of justice which are compatible to a larger extent with human rights norms. Some of the principles in the mechanisms are reconciliation, compensation, being heard under the protection of one's clan amongst others. Most important is that the weakness of the traditional justice mechanisms when put in context fares well in comparison with the formal justice system.

Another notable issue is the resistance to change of status quo in criminal matters. Whereas the High Court in the *Mohammed case* embraced the settlement, other courts and lawyers are skeptical of application of such mechanism in criminal felonies. The lack of emphasis for victim compensation and reconciliation of parties in the formal court system makes the traditional justice system more acceptable.

The traditional justice mechanisms have many challenges which need to be addressed for them to remain relevant in the modern society. Such challenges include the fact that many communities are now cosmopolitan; the conflict with modern religion whereby some rituals and oathing are treated as evil, and the threat of the elite capturing the system to entrench their interests at the expense of the vulnerable.

We emphasize that traditional justice mechanisms, despite the challenges, have the capacity to enhance access to justice in the country especially for the poor and the marginalized. They are much cheaper and more acceptable among such populations. Access to justice in the courts has been impeded by

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continued lack of trust and confidence in the formal courts despite genuine reform efforts, the exorbitant legal costs, language barriers and formalities. In order for the Kenyan citizens to benefit from the gains of the Constitution 2010, the debate on the application of traditional justice mechanisms in dispute resolution must continue.

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The Role of the Chartered Institute of Arbitrators In the Integration of Arbitration in Africa – *The Missing Links*

By: Paul Ngotho*

Abstract

This paper offers insight on the role that the Chartered Institute of Arbitrators (CI Arb) can play in promoting the integration of arbitration practice in Africa. The author argues that due to its strategic position in the training of arbitrators and of professionalising arbitration in Africa and worldwide, CI Arb remains at the forefront when compared to other arbitral organisations in the region in facilitating growth and development of arbitration in Africa. Thus, the CI Arb branches across Africa should do more in promoting arbitration in the Continent.

1.0 Reflections - “Missing Links” and “Messing Links”

Evolutionists often speak of the “missing link”, which is, for instance, the hypothetical ape-man ancestor¹. They believe it is in the fossils out somewhere, awaiting discovery. New missing links are discovered every year. And just when you thought the scientists were done, they announce that a new missing link has been unearthed in a desert in Kenya or South Africa.

If the evolutionists were appearing before me as an arbitrator, and they kept making applications to submit newly discovered evidence, I would be flexible

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1 Source: <https://www.icr.org/article/2709>)

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once or twice, but somewhere down the line I would ban more applications and issue an award on the available evidence.

The links which present challenges to the integration of arbitration in Africa are not “missing”. They are easily identifiable, but they are a little messy and will require some time and effort to tidy up. This presentation outlines the role the Chartered Institute of Arbitrators could, and should, play in the integration of arbitration in Africa.

2.0 The Environment for Integration

Several factors have converged to create just the right environment for the integration of arbitration on the Continent. Firstly, most of Africa is on uniform law of arbitration and enforcement of awards through the UNCITRAL² Model Arbitration Law and the New York Convention³, respectively.

Secondly, the widespread use of English and French on the continent eases communication within - we have come a long way since the days of the silent trade- and without. Europe, Asia and South America do not enjoy this benefit, which we tend to ignore and often moan about. It is worth noting that the English-French language barrier, which is so pronounced in Africa, has not stopped either London or Paris from becoming the world's leading international arbitration centres.

Thirdly, there is renewed Pan-Africanism. Inter-African trade is on the rise. The resultant commercial disputes will require resolution.

Fourthly, investment opportunities are beckoning at a rate unprecedented and unimaginable previously. Dangote and a couple of West African banks have

2 Acronym for United Nations Commission on International Trade Law

³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38.

spread their wings to East and Central Africa. South African investors have also spread their footprint on the continent. Kenya Airways, Ethiopian Airlines, Rwandair and other airliners are doing their bit on the communication front. Some of the investment opportunities are being taken by foreign investors, while Africans are putting their spare funds in investments abroad at low, nil or negative returns. Meanwhile, Africans in diaspora are willing but unable to make serious investments back home due to various bottle-necks.

Fifthly, Africa has a large and growing pool of home-grown professionals while others have excelled in Europe, North America and Australia. This is Africa's real gold.

On the negative side, politics in Africa remains under the threat of the uncertainties and violence surrounding the 5-7 election cycles. There also seems to be a new wave of military *coups* and removal of limits on presidential terms.

3.0 Arbitration Clauses

The typical arbitration clause in Kenya states that, “Any dispute arising from this contract shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch).” Other branches have similar rules, with the appropriate country name inserted. Nothing in the clause says that only members of that CI Arb branch or nationals of that country are eligible for appointment. In other words, it would be lawful for the appointing authority to appoint an arbitrator from a different CI Arb branch or country.

The narrow interpretation of the clause has, of course, served national branches well because their members benefit from the appointments but the future calls for opportunities to expose the members to the world. Obviously, the branches have to do that on reciprocity basis in order to ensure a balance between the inflow and outflow of arbitrator appointments. Such an approach

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could also be appropriate where the notoriety of one or both parties in one country is such that the independence and impartiality of any arbitrator from that country is doubtful.

4.0 Arbitration Courses

CIArb branches abroad are very innovative. In addition to the modules and the accelerated routes, they offer some tailor-made courses for specific target groups. For example, the London and Australia branches have been offering the 9-day residential Diploma in International Commercial Arbitration which is a fast-track option to CIArb Fellowship. The Ireland Branch and Kigali International Arbitration Centre ran in 2015 3-day crash courses leading straight to Fellowship interviews. Rwanda probably managed to run such a course because it does not have a CIArb branch.

The failure rate in such courses is quite high because many candidates do not prepare themselves adequately. However, that is common in all the countries and should not be used to deny African branches the opportunity to run the courses. Currently, interested participants have to travel from Africa to Dublin, Oxford and Kuala Lumpur, at considerable cost, to attend those courses there. Anecdotal evidence suggests that they pass without difficulties. What is the problem here?

5.0 The use of national Arbitration Acts or English Act 1996 in CIArb Courses

The English Act is applicable in England and Wales but could also apply if, by consent, the parties arbitration in other jurisdictions adopt it as the law governing an arbitration or they adopt England and Wales as the seat of the arbitration. It does not apply generally in international arbitration, which is actually governed largely by institutional arbitration rules.

Australia, Canada, China, Germany, Ghana, India, Kenya, OHADA, Nigeria, Uganda, Rwanda and close to 100 other countries worldwide have adopted the UNCITRAL Model Arbitration Law in their national Acts. They use their

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domestic arbitration Acts in teaching the CIArb arbitration courses. Like a Bentley, the English Act is wider and more refined than the MAL Acts, which are, ultimately, the golden standard in arbitration law. A country outside the UK would require an overwhelming reason to teach CIArb courses using the English Act especially if the participants are unlikely to apply that Act in their day to day work as arbitrators and party representatives.

Some African branches even introduce alien conditions in the module and accelerated courses all under the guise of “maintaining high standards”. It brings to mind Chinua Achebe, writing in *Things Fall Apart*, about professional mourners who wail louder than the bereaved at funerals. The branches must uphold the high standards set by London but they should embrace innovation and stop wearing blinkers.

6.0 Removing the Rotten Coconut

A rotten apple can be seen from a distance. Not so with a coconut, which you realise it is rotten after you have paid for it, taken it home and broken it, only to find slimy, smelly mucus inside. Similarly, you discover too late that your arbitrator is inexperienced or incompetent.

The CIArb system of disciplining errant arbitrators is very robust in London. It did not spare a former President of CIArb when he misbehaved in an arbitration a few years ago. Unfortunately, the system has not been devolved to the branches. Offended parties do not wish to complain to London because of the cost implications.

The disciplinary mechanism should be devolved to the branches because they make the arbitrator appointments and they are closer to the action so they can process the complaints efficiently and at minimal cost.

African branches should make their members' information like profiles and detailed CVs available to the public in one online platform or in jointly

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published manual directories, which can be circulated to arbitration consumers worldwide.

7.0 Ad Hoc Vs Administered Arbitrations

CIArb branches popularise *ad hoc* arbitrations. They adopt a hands-free approach, restricting themselves to appointments and have no reporting mechanisms, such that they have no idea if the arbitrator they appointed 5 years ago completed the arbitration.

They should also take a more proactive role in *ad hoc* arbitrations.

Incidentally, *ad hoc* arbitrations have never made a single arbitration organisation great. The branches need to diversify into or even specialise in administered arbitrations in order to train their members, boost user confidence and grow as reputable arbitration institutions. That is how they could evolve into centres of excellence in arbitration.

8.0 What is Francophone Africa Saying?

Organisation for the Harmonization of Business Law in Africa (OHADA) arbitration regime brings together the Francophone African states, which have a uniform Arbitration Act and carry out arbitrations under the auspices of the Common Court of Justice and Arbitration (CCJA).

We could learn a lot on the integration of Arbitration in Africa from OHADA, which must be part of the process. Unfortunately, the OHADA website has for years been in French. The long-promised English option is now available, but 50% of the content is in French! Such an allegation calls for verification, so the readers are invited to visit www.ohada.com to see for themselves.

9.0 An Authentic Afro-centric Arbitration Agenda

African arbitration practitioners need to interact and to discuss African issues. The national and regional arbitration conferences held the last 5 years have been eye-openers. The attendance, participation and presentations have been

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excellent. The CIArb Centenary Conference which was held in Zambia in 2015 was a great success.

Conferences are very costly, especially the international ones. Yet, African branches cannot await another 100 years to hold the next continental event. Continental arbitration conferences should be a regular feature, with a frequency of 2-3 years due to cost. The venue would rotate among African cities.

The mind-set of the membership also needs to change. A CIArb branch could sponsor a few members for arbitration conferences once in a while. It might even pay the travel and accommodation expenses for the speakers. However, requiring sponsorship to attend or speak in arbitration conferences would retard individual arbitrators' careers and impoverish the branches. Members must see the conferences as networking and learning opportunities worth paying for themselves.

10.0 Sleeping on the Job

The African branches have well over 2,000 members and are growing faster than the other branches. Many more people have attended the institution's various courses without formalising their membership. CIArb should consolidate its position as the premier arbitration body, and not merely a trainer, on arbitration in Africa.

Unfortunately, the CIArb branches have become lazy. They have not started chapters or branches in any of their neighbouring countries. Nigeria has not, considering that it does not share a boundary with Ghana, where it has apparently started a branch. Kenya has not started a single branch among its neighbours even though, to be fair, it played a critical role in the establishment of the Nigeria, Zambia and other branches on the continent.

African arbitrators who have the time and energy to join several African branches should be allowed to. London does not promote multiple branch

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memberships, so we need to first convince it that multiple memberships are practical and beneficial.

CIArb remains at the forefront of training arbitrators and of professionalising arbitration in Africa and worldwide. No other arbitration organisation even comes close. At the same time, national pride and rising Pan-Africanism frown upon all things foreign, such that the tag “Kenya Branch” or “Nigeria Branch” is a liability in some fora. CIArb and its African branches must come up with strategies to position themselves appropriately in order to remain acceptable and relevant in Africa.

11.0 Epilogue: CIArb, the Sleeping Giant

Like Baroka in Wole Soyinka's book *The Lion and the Jewel*, CIArb has resources and proven experience. Will it lose Sidi, the ultimate jewel, to the Lakunles of this world, characters who have appeared lately with sweet promises but who are not prepared to pay the bride price, which is the sheer toil of training arbitrators from scratch?

To win, Baroka must listen to Sadiku. His Senior Wife might be a little mischievous but she is loyal. She acknowledges Baroka's “messing link” and skilfully turns it into an asset in order to deliver the jewel.

CIArb Africa branches are the prime mover of arbitration in Africa. They must play a proportionately central role to play in the Integration of Arbitration in Africa.

Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community

By: Francis Kariuki*

Abstract

Regional integration is touted as having the potential to contribute to increased trade and investment. Increased cross-border trade and investment creates odds for more commercial disputes to arise. International arbitration is one of the most appropriate ways of resolving commercial disputes in a regional economic block like the East Africa Community (EAC). International arbitration is, inter alia, efficient, cost-effective, flexible, confidential, neutral, binding and expeditious compared to litigation. Moreover, an arbitral award pursuant to international arbitration is final and binding on parties. Withal, in seeking the recognition and enforcement of a foreign arbitral award, a successful party is likely to face monumental challenges in another member State especially in a regional block, like the EAC, where states have not succeeded in harmonising and standardising their arbitration laws.

This paper examines some of the challenges a successful party may encounter in seeking the recognition and enforcement of an arbitral award within the East African Community. It is posited that failure to adequately address private international law issues in the integration process is likely to hamper the enforcement of arbitral awards.

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Moreover, the countries do not share a common legal history, meaning that their legal systems slightly differ posing serious conflict of laws difficulties. In particular, the countries have different rules and procedures for recognising and enforcing foreign arbitral awards. What is more, the grounds for refusing to recognize and enforce foreign arbitral awards are so wide, creating further uncertainty and unpredictability in the process.

1.0 Introduction

International commercial arbitration affords parties uniform or harmonised procedures in arbitration especially in the enforcement of foreign arbitral awards. Arbitration is a process founded upon the agreement of parties.¹ An arbitration agreement, acts as the primary source of the rights, powers and duties of the arbitral tribunal. Because arbitration mostly arises pursuant to agreement of the parties, party autonomy is one of the most important premise upon which arbitration is anchored. Party autonomy affords parties considerable freedom over the venue, governing law, language, choice of the arbiter and the confidentiality of the process. Such features afford parties great flexibility and neutrality, especially in international commercial arbitration where they come from different countries, and fear being subjected to unfamiliar and foreign judicial systems.² Party autonomy is equally central in international arbitration especially in the enforcement of arbitral awards because an award is the ultimate goal of any arbitration. This spirit is well captured by Redfern and Hunter when they observe that:

‘[P]arties who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that, unless a settlement is reached along the way, the proceeding will end with an

¹ Noussia K, *Reinsurance arbitrations*, Springer Science & Business Media, Berlin, 2014, 195.

² Rana R, ‘The Tanzania Arbitration Act: Meeting the challenges of today with yesterday’s tools?’ 2 *Alternative Dispute Resolution Journal* (2014), 232-233.

*award. They also expect that, subject to any right of appeal or recourse, the award will be final and binding upon them.*³

In addition, a successful party in international arbitration expects the award to be enforceable.⁴ However, enforcement of international arbitral awards is not always easy. It is a complex process that is influenced by multiple factors. For instance, the intercourse between different legal systems in international arbitration requires a developed and harmonized legal infrastructure because enforcement of awards can be subject to a multitude of different legal systems. There is no uniform legal regime governing the recognition and enforcement of international arbitral awards. A good example is the East African region where Partner States have different legal systems and legal traditions. Some municipal laws of Partner States do not conform to the 1958 New York Convention and the UNCITRAL Model Law⁵ on enforcement of arbitral awards. Besides, there are other uncertainties in that under the New York Convention, a state can make reservations to certain provisions of the Convention and denounce its applicability to that state at any time.⁶ Still, the Convention provides for seven grounds upon which a party can rely on to oppose recognition and enforcement of an arbitral award, notable among

³ Blackaby N & Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, Oxford, 2009, 513.

⁴ Opiya R, 'Recognition and enforcement of international arbitral awards: A comparative study of Ugandan and UK law and practice', LL.M Thesis, Oxford Brookes University, 2012, 14.

⁵ 24 ILM 1302 [1985].

⁶ These are found under Article I (3) of the Convention as follows: A State can restrict the applicability of the convention or some Articles thereof to awards made only in the territory of another Contracting State; and, the entitlement to a contracting state to indicate that it will only apply the convention to difference arising out of a legal relationship whether contractual or not 'which are considered as commercial under the national laws of the country making such declaration.

which is the public policy ground.⁷ Some of these grounds have been interpreted rather liberally and broadly by courts to refuse recognition and enforcement of arbitral awards.

What is more, the fact that the law applicable to enforcement may not be definite, a successful party has an uphill task identifying the assets of the losing party and where they are located; deciding swiftly on the best form of execution in a particular situation and consulting and researching on whether a particular country will enforce the award. At times, this may involve seeking advice from lawyers of that country or even engaging them to seek enforcement in the local court if so required.⁸ At times, the assets of the debtor may be scattered and located in different jurisdictions which might involve a multiplicity of enforcement procedures with all the attendant expenses. As such, the successful party has to apply to a local court before the award is enforced. Further, because of the principle of party autonomy, enforcement of a particular arbitral award depends upon the choice of law made by the parties.⁹

Further, the enforcement of foreign arbitral awards is largely dependent on national courts. It is submitted that in international arbitration courts should aim at giving effect to the principle of party autonomy¹⁰ by recognizing and enforcing arbitral awards. Quite often though, courts have not been supportive

⁷ Article V of the Convention.

⁸ Opiya, 'Recognition and enforcement of international arbitral awards', 32.

⁹ Blackaby *et al*, *Redfern and Hunter on international arbitration*. See also Opiya, 'Recognition and enforcement of international arbitral awards', 14.

¹⁰ See Böckstiegel K, "Role of the state on protecting the system of arbitration", CI Arb Centenary Conference, London, 3 July 2015.

and facilitative of international arbitration.¹¹ A good example of this is in East Africa where in spite of the fact that most member states have adopted the UNCITRAL Model Law¹² and ratified the New York Convention, their arbitration statutes and judicial attitude is not pro-enforcement. Municipal courts have interpreted the grounds broadly thus frustrating attempts at enforcing foreign arbitral awards and at times overstepping their mandate.¹³ Instead of national courts and arbitral tribunals having a ‘competitive-collaboration’ relationship,¹⁴ courts have largely been anti-enforcement.

2.0 Brief background on the East African Region

International commercial arbitration plays a crucial role in cross-border trade. Regional integration, which fosters harmonization and standardization of arbitration laws and procedures of enforcement of arbitral awards, can make this process to be even faster. However, there are a number of reasons as to why this has not been possible in the East African region. Firstly, Kenya, Uganda and Tanzania, the oldest members of the Community, inherited a common law heritage from the British while Rwanda and Burundi are civil law jurisdictions. With such a divergence of legal traditions, the process towards harmonization and standardization of arbitration laws is expected to be complex. Secondly, after the countries in the region attained independence, they took different political and economic ideologies. While Kenya was capitalist oriented, and Tanzania took the path of self-reliance and

¹¹ See Allsop CJ, “National courts and arbitration: Collaboration or competition? Courts and arbitration as partners in the international dispute resolution project”, CIArb Centenary Conference, London, 3 July 2015.

¹² With the exception of Tanzania whose Arbitration Act does not reflect the ideals of the Model Law.

¹³ See Böckstiegel, “Role of the state on protecting the system of arbitration,” 2-3.

¹⁴ Allsop, “National Courts and Arbitration.”

socialism,¹⁵ Uganda was under a dictatorship regime. Tanzania's emphasis on socialism, meant that it had little enthusiasm and interest on arbitration until it started to shift to privatization with the rise of capitalism.¹⁶ These ideological differences, amongst other factors, negatively contributed to the fall of the first regional framework, the East Africa Cooperation of 1967-1977. Such differences created suspicion and mistrust amongst member states forcing some to adopt protectionist tendencies.¹⁷ Narrow nationalistic tendencies meant to protect national interests at the expense of wider regional interests,¹⁸ can create an anti-arbitral awards-enforcement environment.

In light of the expected increase in international trade in the region, and possibility of increased disputes, there is need to harmonise arbitration laws to encourage investment by both foreigners and community members. Fostering commerce in the region will go a long way in the integration process by fostering a regional identity, strengthening the capacity of the region to trade competitively with other parts of the world as well as creating a more stable political economy. However, for all this to be achievable, there is need to assure the business community of a legal regime that is predictable and reliable thus providing the necessary certainty for long term investment. Part of this assurance is the knowledge that there is a clearly established mechanism of dispute resolution including that of enforcing international arbitral awards within the region.

¹⁵ Omoke G, 'The legal aspects of regional integration as a tool for development: A critical perspective of the challenges, realities and prospects of success of the East African Community,' 1 *University of Nairobi Law Journal* (2003), 239-240.

¹⁶ Mkata E, 'The recognition and enforcement of foreign arbitral awards: A need for reform of Tanzanian Legislation,' Postgraduate diploma in law thesis, University of Cape Town, 9 September 2014, 8.

¹⁷ Omoke, 'The legal aspects of regional integration as a tool for development,' 239-240.

¹⁸ *Ibid*, 242.

3.0 East Africa's Regional Framework for Recognition and Enforcement of International Commercial Arbitration Awards

3.1.1 East African Community Treaty

The Preamble to the East African Community Treaty¹⁹ indicates a wish by the member states to strengthen cooperation and trade in the region. So as to enhance trade within the region and to strengthen the East African Bloc as a trading region, the Treaty highlights one of the objectives of the Community as being the development of:

*“...policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.”*²⁰

Some of the fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States include mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; the *peaceful settlement of disputes* and co-operation for mutual benefit.²¹ To promote the Treaty objectives Article 5 of the Treaty urges Partner States to take steps to harmonise their legal training and certification; and encourage the standardisation of the judgments of courts within the Community.²² In addition, and through their appropriate national institutions, Partner States are to take all necessary steps to, *inter alia*, harmonise all their national laws (including arbitration laws) appertaining to

¹⁹ Treaty for the Establishment of the East African Community, Adopted on November 30, 1999 at Arusha, Tanzania. Entry into force on July 7, 2000.

²⁰ *Ibid*, Article 5.

²¹ *Ibid*, Article 6.

²² *Ibid*, Article 126 (1).

the Community.²³ Article 47 of the Protocol on the Establishment of the East African Community Common Market further urges partner States to:

“...undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this protocol.”

The Treaty also establishes the East African Court of Justice,²⁴ and gives it jurisdiction to adjudicate over arbitration matters arising out of an arbitration clause in a contract giving the court such jurisdiction, or arising out of a dispute between 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 parties have conferred jurisdiction on the Court.²⁵ Consequently, Rule 32 (3) of the Arbitration Rules of the East African Court of Justice provides that the:

*“Enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.”*²⁶

This provision assumes that member states laws on arbitration are pro-enforcement of international arbitral awards. It also fails to appreciate the divergent legislative approaches to arbitral law and practice. Successful enforcement of arbitral awards as envisaged in Rule 32(3) requires the harmonisation of both the substantive and procedural laws relating to arbitration within the Community.

²³ *Ibid*, Article 126(2) (b).

²⁴ *Ibid*, Chapter 8.

²⁵ *Ibid*, Article 32.

²⁶ Rule 32 (3) of the Arbitration Rules of the East African Court of Justice.

3.1.2 New York Convention²⁷

The New York Convention is the bedrock upon which international arbitration is founded. It is the most important international treaty in the recognition and enforcement of foreign arbitral awards. Most countries within the region have ratified the Convention or enacted legislation that substantially echoes its provisions.²⁸ The principal aim of the Convention is to ensure:

[T]hat foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.'

In addition, Article III of the Convention urges each Contracting States to:

"... recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (...) and that "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Article V (1) outlines the grounds upon which the recognition and enforcement of an award may be refused at the instance of the party against who it is invoked.²⁹ These grounds are that:

²⁷ United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

²⁸ Some like Tanzania and South Sudan have arbitration laws that are largely not in line with the provisions of the Convention.

²⁹ The grounds under Article V (1) are called procedural grounds and they can be raised by the parties. See Azizi R, 'Grounds for refusing enforcement of foreign arbitral awards under

- (a) The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the 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 terms 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.

Further, the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or if the recognition or enforcement of the award would be contrary to the public

the New York Convention (A comparison of the US and sharia law)' April 20, 2010, SSRN <http://ssrn.com/abstract=1616746> on 8 September 2015.

policy of that country.³⁰ Whereas the procedural grounds safeguard the parties against private injustice, the substantive grounds may be used to frustrate the enforcement of foreign arbitral awards in the country's own interests. This is so because a court or the authority presiding over the proceedings has the discretion to raise the substantive grounds to ensure that its national interests are safeguarded, for example on public policy grounds.³¹

Although the New York Convention has seen a remarkable success in the recognition and enforcement of foreign arbitral awards within the region, its ambit is somehow limited. Firstly, a state can make reservations to certain aspects of the Convention and make them inapplicable to it.³² Such reservations can be used to frustrate the recognition and enforcement of an arbitral award. Secondly, some states are not yet parties to the Convention and it might be difficult to enforce an award in those countries. Moreover, even where states have ratified the Convention some have not domesticated it.³³ Thirdly, the convention does not provide a detailed procedure on how recognition and enforcement can be dealt with in domestic courts and leaves that to the mercy of the local laws of a particular enforcing state. A successful party may therefore suffer injustice and even fail to enforce a foreign award where the domestic law is not pro-enforcement.³⁴ Some of the matters not

³⁰ Article V (2). The Article V (2) grounds are called substantive grounds and may be raised by the parties or by the court *ex officio* while Article V (1) grounds are called procedural grounds.

³¹ Opiya, 'Recognition and enforcement of international arbitral awards,' 48.

³² Article 1(3) of the Convention. Uganda for example by way of reservation restricted that it shall only recognise and enforce arbitral awards from member countries of the convention only.

³³ Check current number of member states that are parties to the Convention. See list of state parties at <http://www.newyorkconvention.org/list+of+contracting+states> accessed on 8 September 2015.

³⁴ Opiya, 'Recognition and enforcement of international arbitral awards,' 36.

dealt with by the Convention and that a party seeking enforcement must be informed of include, whether the award will be enforced by a court or which court; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement.³⁵ Such matters involve additional expenses in hiring local lawyers which might occasion unnecessary delay defeating the whole purpose of arbitration in the first place.

3.3 UNCITRAL Model Arbitration Law³⁶

Most of the countries in the region³⁷ have arbitration laws that are based on the Model Law. The Model Law seeks to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration.³⁸ It aims at ensuring that the use of arbitration brings about greater predictability and certainty. To avoid uncertainty in arbitration laws, the Model Law outlines essential elements of a favourable legal framework for the conduct of arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal; jurisdiction of arbitral tribunal; conduct of arbitral proceedings; making of award and termination of proceedings; setting aside an arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement.

³⁵ Rana, 'The Tanzania Arbitration Act,' 234.

³⁶ UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

³⁷ With the exception of Tanzania and Burundi.

³⁸ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, accessed on 8 September, 2015.

3.4 The Washington Convention³⁹

The Convention applies to investment disputes between States and Nationals of other States. It seeks to encourage cross-border investments in developing states by providing an effective means of enforcing contractual rights. All the countries in the region are parties to the Washington Convention. Contracting parties to the Convention commit to enforce arbitral awards issued by tribunals under ICSID as if that award were a final judgment of its own courts. In essence, recognition and enforcement of ICSID awards is left to State parties and the process is to be governed by the local laws of the country in which recognition and enforcement is sought.⁴⁰ Some of the challenges that this might pose are that, firstly, some of the state parties to the convention especially the developing countries may not have up to date legislation to deal with enforcement and recognition of the awards. And secondly, state parties may abuse the discretion left to them to frustrate the enforcement process. It has been suggested that ICSID should develop a framework for the recognition and enforcement of awards instead of leaving it to the local jurisdiction which might lead to unnecessary delays and abuses.⁴¹

A recent decision of the Tanzanian High Court, demonstrates potential risks to parties seeking to rely on the protections of the ICSID regime. In *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company*,⁴² the Tanzanian High Court issued an injunction ordering the parties to an ICSID arbitration against Tanzania to refrain from 'en-forcing, complying with or operationalising' the ICSID tribunal's 'Decision on

³⁹ The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States.

⁴⁰ Article 54 (2) requires a state to designate a court to deal with an enforcement procedure and this might involve budgetary issues to facilitate the personnel of such a court which some states might not be able leave alone willing to expeditiously carry out.

⁴¹ Opiya, 'Recognition and enforcement of international arbitral awards,' 41.

⁴² ICSID Case No. ARB/10/20.

Jurisdiction and Liability' of 12 February 2014. The court's order appears to have violated Tanzania's obligation under the ICSID Convention to enforce any ICSID award as a final judgment of its own courts. If the injunction is not lifted before the tribunal issues an award on damages, there is a risk that the investor will not be able to enforce that award in Tanzania. Such an approach by a court poses serious concerns for potential foreign investors about Tanzania's willingness to comply with its obligations under the ICSID Convention.

3.5 Domestic Arbitral Laws

(i) Tanzania

The main law on arbitration in Tanzania is the Arbitration Act (Cap. 15 Revised Edition 2002). This law is not based on the UNCITRAL Model Law. Tanzania is also party to a number of international instruments on arbitration including the 1923 Geneva Protocol; the Geneva Convention on the Execution of Foreign Arbitral Awards, which came into force on 26 September 1927; the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which came into force on 10 June 1958; and the Washington Convention of 1965. Before the enactment of the Arbitration Act of 2002, arbitration in Tanzania was governed by the Arbitration Ordinance of 1931. The inability of the Ordinance to cope with the increasing demand for arbitration in commercial disputes, provided the basis for its revision by the Arbitration Act of 2002.

In Tanzania, a successful party can enforce a foreign award by relying upon the provisions of sections 17 and 29(1) of the Arbitration Act. These provisions state that a foreign award shall be enforceable in the high court either by action or as if it were a court decree. Therefore, a successful party who is desirous of executing foreign awards in Tanzania is required to request the arbitral tribunal to file the award, or cause it to be filed in court.⁴³

⁴³ Mkata, 'The recognition and enforcement of foreign arbitral awards,' 11.

According to Mkata, the Act has failed in respect of the recognition and enforcement of foreign arbitral awards compared with domestic arbitral awards.⁴⁴ This contravenes Article III of the New York Convention. Makaramba observes that existing legislation including the Arbitration Act and the civil procedure (arbitration) rules, are mainly geared towards domestic arbitrations.⁴⁵ The Arbitration Act does not make a distinction between domestic and foreign awards as it brings their filing, recognition and enforcement under one umbrella creating much confusion among practitioners.⁴⁶ Rashda Rana makes the following observation regarding the Tanzanian Arbitration Act:

“It is unfortunate that despite the recent amendments to the Arbitration Act being brought into effect after the UNCITRAL Model Law was promulgated, the legislature did not see fit to reflect in it the Model Law. Rather the Arbitration Act still contains archaic provisions dealing with the arbitral process, those that have been given up by many jurisdictions in favour of current best practices and more effective means. For example, the Arbitration Act still refers to the Geneva Protocol on Arbitration Clauses 1923...and despite the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 coming into force in 1965 in Tanzania, the Arbitration Act still refers to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927...”⁴⁷

⁴⁴ *Ibid*, 8.

⁴⁵ Makaramba J, ‘Curbing delays in commercial resolution: Arbitration as a mechanism to speed up delivery of justice,’ *The United Republic of Tanzania the Judicial Round Table Discussion*, 20 July 2012, 21.

⁴⁶ *Ibid*, 18.

⁴⁷ Rana, ‘The Tanzania Arbitration Act,’ 229-237.

Problems facing the recognition and enforcement of foreign arbitral awards are largely due to a failure by the Arbitration Act to give force to the provisions of the New York Convention which Tanzania ratified more than 47 years ago.⁴⁸ Some of the problems in enforcing foreign arbitral awards include: First, the fact that the Act provides the grounds for ‘*resisting the enforcement of a foreign award*’⁴⁹ and for ‘*contesting the validity of the award*.’⁵⁰ Having two sets of grounds for contesting foreign arbitral awards has been described as one of ‘the most disturbing aspects of the Arbitration Act,’⁵¹ and is against the New York Convention which has narrowed the grounds for refusing recognition and enforcement of foreign arbitral awards.

The effect of a party successfully resisting the enforcement of the award is for the court either to refuse to enforce the award or adjourn the hearing until after the expiry of reasonably sufficient period of time to enable the party to take the necessary steps to have the award annulled by a competent tribunal.⁵² First, it imposes the burden of proof on the applicant who wishes to execute such awards in Tanzania. It also obliges the applicant who is the successful party in arbitration to tender afresh the evidence upon which he or she relied on in the arbitration on a matter already settled by a competent tribunal, thus occasioning unnecessary delay and expense in the enforcement of foreign arbitral awards.

Secondly, for a foreign arbitral award to be enforced in Tanzania, it must be final in the place it was made meaning that it should not be open to opposition,

⁴⁸ Makaramba, ‘Curbing delays in commercial resolution,’ 18.

⁴⁹ Section 30(1) (a)-(e).

⁵⁰ Section 30(2) (a)-(c).

⁵¹ Makaramba, ‘Curbing delays in commercial resolution,’ 21.

⁵² *Ibid*, 21.

appeal or *pourvoir en cassation* in the country where such forms of procedure exist, or if any proceedings for the purpose of contesting its validity are pending. This imposes a burden on the successful party seeking enforcement in Tanzania to tender prove of a leave of enforcement know as *exequatur*, or any like document issued by the court of the country of origin where such award has been made evidence. Moreover, it affords the unsuccessful party a loophole for obstructing the finality of the award by filing proceedings to contest its validity in the country where it has been made.⁵³

Thirdly, a foreign arbitral award that is to be enforced in Tanzania must not be made contrary to the principles of the law of the forum state.⁵⁴ It is posited that this provision invites Tanzanian courts to engage in a full merits review, in line with substantive laws, to determine whether the award was in conformity with the laws of the United Republic of Tanzania or not.⁵⁵ The fact that an award made in another state has to conform to the law of the forum state creates fora for Tanzanian courts to refuse to recognize and enforce foreign arbitral awards.

Fourthly, for a foreign arbitral award to have legal validity so as to be enforceable in Tanzania, such an award must have been made in pursuance of an arbitration agreement which was valid under the law governed.⁵⁶ However, the current Tanzanian Arbitration Act does not only neglect to stipulate the definition and form of ‘arbitration agreement’, it also does not define other terms, such as ‘foreign awards’, and does not portray how such awards are to conform to the new developments in laws governing commercial arbitration worldwide, especially the Model Law of 2006. The

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Mkata, ‘The recognition and enforcement of foreign arbitral awards,’ 13.

⁵⁶ *Ibid.*

other challenge in Tanzania is whether Tanzanian courts can enforce the provisions of the New York Convention when the same has not been legislated in the Arbitration Act. It is not yet settled whether recourse should be had by Courts to private international law principles to interpret a local statute dealing with private law matters in the course of enforcement and recognition of a foreign arbitral award.⁵⁷

With such an arbitration framework, business people cannot have confidence in dispute resolution processes available to them for the speedy and effective resolution of disputes and enforcement of awards.⁵⁸ One effect of the Tanzanian arbitration law is that it makes it difficult to enforce international arbitral awards,⁵⁹ as it also affords courts great procedural opportunities for interfering with the conduct of arbitral proceedings and the ensuing award. Mashamba argues that court intervention does not amount to an appeal against the decision of the arbitral tribunal because there is no right of appeal to the losing party, but it simply amounts to overturning of the arbitration outcome.⁶⁰ Section 16 of the Arbitration Act makes this point more explicit by providing that:

“Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award.”

⁵⁷ *Ibid*, 17.

⁵⁸ Rana, ‘The Tanzania Arbitration Act’, 236.

⁵⁹ Ringo F, ‘Development of alternative dispute resolution mechanisms in EA: A case for enforceable non-court mediated settlement agreements,’ *The East African Lawyer*, 15 (2009), 18-21.

⁶⁰ Mashamba C, *Alternative Dispute Resolution in Tanzania-Law and Practice*, Mkuki na Nyota Publishers, Dar es salaam, 2014, 152.

In *Tanzania Electric Supply Company Ltd v Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)* Mushi J observed that the intervention by the court in section 16 of the Act ‘is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts.’⁶¹ However, Mushi J dismissed the petition as it sought to resist the enforcement of an ICC award on the grounds, *inter alia*, that its enforcement is contrary to public policy. At page 88 of the judgment, the Judge construed the grounds narrowly so as to enforce the ICC award and noted that:

“...I find it would not be proper for this court to interfere with the findings of the ICC’s Arbitral Tribunal, for, in doing so, it would amount to re-opening and re-arguing of the issues of fact and issue of law that the parties, by their own agreement, submitted to the ICC Arbitral Tribunal for its consideration and decision.”

Further, the judge noted that since the finality and binding nature of arbitral awards is already envisaged under the Tanzanian Civil Procedure Code and the Arbitration Act, the public policy was in favour of finality of arbitral awards. He thus noted as follows:

“Therefore, it is my decided opinion that, it is one aspect of our ‘public policy’ towards the need to having finality of disputes and arbitral commercial awards. It is my hope that, both the parties (and GOT, for that matter) in this Petition, would receive that simple message.”

It is, therefore, argued that the continued use of the archaic and obsolete provisions of the Arbitration Act and the Civil Procedure (Arbitration) Rules under the Tanzanian Civil Procedure Code continues to contribute to the

⁶¹ High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

narrow scope and nationalistic tendency of the arbitral law with a negative effect on international commercial arbitration.⁶²

(ii) Kenya

Recognition and enforcement of foreign arbitral awards in Kenya is largely regulated by the Arbitration Act and the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The Arbitration Act is based upon the UNCITRAL Model law and thus allows for the recognition of foreign arbitral awards. Sections 36 and 37 of the Arbitration Act of Kenya give equal treatment to foreign and domestic awards in terms of their recognition and enforcement. This is in line with Article III of the New York Convention. Similarly, the grounds for refusal of recognition and enforcement of foreign awards under the Kenyan Arbitration Act are similar to those outlined in the New York Convention. However, under the Kenyan Arbitration Act additional grounds are available for the refusal of recognition and enforcement of arbitral awards if the granting of the award was induced or affected by fraud, bribery, corruption or undue influence.⁶³ Such modifications are not in line with the New York Convention which limits the grounds for refusing to recognise and enforce foreign arbitral awards. They also afford courts more fodder for refusing to recognise and enforce foreign arbitral awards. Withal, the High Court⁶⁴ has opined that the recognition and enforcement of arbitral awards (both domestic and foreign) is automatic under the provisions of section 36 of the Act and can only be refused if the party against whom it is sought is able to satisfy the requirements of section 37 of the Arbitration Act.

In addition, foreign arbitral awards that are against Kenyan public policy cannot be enforced by Kenyan courts. The ambiguity surrounding the

⁶² Makaramba, 'Curbing delays in commercial resolution,' 25.

⁶³ Section 37(1) (a) (vii), Arbitration Act (Chapter 49 Laws of Kenya).

⁶⁴ *Tanzania National Roads Agency v Kundan Singh Construction Limited Miscellaneous Civil Application No. 171 of 2012.*

definition and scope of public policy exception gives municipal courts a blank cheque to refuse the recognition and enforcement of foreign awards. In some instances, courts in the region, like in the case of *Tanzania Electric Supply Company Ltd (supra)* have interpreted the public policy exception narrowly and restrictively so as to enforce an arbitral award. The decision of Ringera J (as he then was) in **Christ for All Nations v Apollo Insurance Company Ltd**⁶⁵ offers useful parameters for assessing whether a foreign arbitral award can be refused recognition and enforcement in Kenya. The learned Judge opined that an award would be inconsistent with the public policy of Kenya if it was shown that it was either:

“... (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.”

Because the Kenyan Arbitration Act unlike the Tanzanian Act is founded on the UNCITRAL Model Law, which puts emphasis on the concept of finality in arbitration,⁶⁶ Kenyan courts have endeavored to avoid interfering with arbitral processes as a matter of public policy. *The principle of finality in both domestic and international arbitration, and limited court interference is*

⁶⁵ [2002] 2 EA 336 (CCK).

⁶⁶ See generally **Article 5** of the UNCITRAL Model Law which provides that ‘no court shall intervene except where so provided in law.’ *Section 10 of the Kenyan Arbitration Act is couched in similar terms.*

illustrated by a number of decisions from Kenyan courts. In **Anne Mumbi Hinga v Victoria Njoki Gathara**,⁶⁷ the Court emphatically made the following observation;

“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act.”

Earlier on in the case of **Prof. Lawrence Gumbo & another v Hon. Mwai Kibaki & Others**,⁶⁸ Nyamu J (as he then was) took the following view:

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally.”

In Kenya Shell Limited v Kobil Petroleum Limited⁶⁹ the court pointed out that the spirit of sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Arbitration Act aims at achieving finality of disputes and a severe limitation of access to the courts. Omolo, Waki & Onyango Otieno, JJ.A thus observed:

⁶⁷ Civil Appeal No. 8 of 2009.

⁶⁸ High Court Miscellaneous No. 1025 of 2004.

⁶⁹ Civil Application Nairobi No. 57 of 2006.

“We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the arbitration Act under which the proceedings in this matter were conducted underscores that policy.”

A common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Act.⁷⁰ The Court of Appeal in *Tanzania National Roads Agency v Kundan Singh Construction Limited* was faced with the issue whether it had 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.⁷¹ 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 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

⁷⁰ See *Anne Mumbi Hinga v Victoria Njoki Gathara* Civil Appeal No. 8 of 2009. See also *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR.

⁷¹ Court of appeal at Mombasa in Civil Appeal No. 38 of 2013, *Tanzania National Roads Agency v Kundan Singh Construction Limited*.

of international arbitral awards, the 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.

Similarly, the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited*⁷² has held recently that none of the parties can appeal against the setting aside ruling of the High Court. Mwera J stated as follows in that case:

“My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators’ award shall be final, it can be taken that as long as the given award subsists it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own (sic). None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so.”

The court appears to be saying that even the decision of the High Court on setting aside is the parties’ and they have an obligation to abide by it to curb the perpetual interference by courts in arbitration through appeals.

⁷² [2015] eKLR.

(iii) Uganda

The Uganda Arbitration and Conciliation Act⁷³ is the principal legislation dealing with domestic and international arbitration including the recognition and enforcement of arbitral awards. The law has been described as out-dated and in urgent need of overhaul as it does not reflect the present circumstance of Uganda's arbitration regime.⁷⁴ Part II and III of the Act provide for the recognition and applicability of New York and ICSID Conventions in Uganda in so far as recognition and enforcement of foreign arbitral awards is concerned.⁷⁵ A New York Convention award is enforceable as if it were a local arbitration award made within Uganda.⁷⁶ Under the Act, an arbitral award is recognised as binding and upon application in writing to the court is enforced subject to the exceptions as provided in the Act.⁷⁷ The procedure for enforcing foreign and local arbitral awards is the same in Uganda.⁷⁸ A party relying on an arbitral award or seeking its enforcement shall furnish the duly authenticated original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it.⁷⁹

(iv) Rwanda

Rwanda began its move towards acceding and adopting laws on international commercial arbitration not so long ago. In fact, arbitration was effectively recognized in 2008 through Law N° 005/2008 of 14/02/2008 on Arbitration

⁷³ Chapter 4 Laws of Uganda, 2000 Edition.

⁷⁴ Opiya, 'Recognition and enforcement of international arbitral awards,' 17.

⁷⁵ *Ibid*, 17.

⁷⁶ See Section 39, Uganda Arbitration and Conciliation Act, 2000.

⁷⁷ *Ibid*, Section 35(1).

⁷⁸ *Ibid*, see generally sections 35 and 42 of the Act.

⁷⁹ *Ibid*, Section 35 (2).

and Conciliation in Commercial Matters. This law is based on the UNCITRAL Model Law. Again on 3rd November 2008, Rwanda acceded to the New York Convention, becoming the 143rd State Party to the Convention.⁸⁰ The Convention entered into force on 29th January 2009.⁸¹ In 2010, the country enacted a law⁸² establishing the Kigali International Arbitration Centre and determining its organization, functioning and competence. And, in 2012 through a Ministerial Order,⁸³ the country formulated arbitration rules for the Kigali International Arbitration Center. Being a party to the New York Convention enables the KIIAC arbitral Awards to be enforced in any other country that is signatory to the Convention.

The country recognizes and enforces awards made in countries that recognize and enforce awards made in Rwanda under the provisions of Article 50 of the 2008 Law on Arbitration and Conciliation in Commercial matters.⁸⁴ Article 50 provides as follows:

“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and without prejudice to provisions of this Article as well as Article 51 of this Law. However, this shall not be respected if the country in which the award was issued does not respect the provisions of this paragraph with reference to cases decided in Rwanda.”

⁸⁰ Available at <http://www.unis.unvienna.org/unis/pressrels/2008/unisl123.html>, Accessed on 16/07/2015.

⁸¹ *Ibid.*

⁸² Law No. 51/2010 of 10/01/2010.

⁸³ No16/012 of 15/05/2012.

⁸⁴ Leonard Sebucensha, national and international arbitration in Rwanda, in Hartmut Hamann and Emmanuel Ugirashebuja (eds.), *Africa Law Study Library Vol. 18, Rule of Law Program for Sub-Saharan Africa*, 2013.

Regarding the procedure for seeking recognition and enforcement of foreign arbitral awards, Article 50 stipulates that:

“The party relying on an award taken or applying for its enforcement shall supply the duly authenticated original award or its duly certified copy, a copy original arbitration agreement referred to in Article 9 of this Law or its duly certified copy. If the award or agreement is not made in an official language of the Republic of Rwanda, the party shall supply a translated copy in one of the recognised languages in Rwanda.”

The grounds for refusing the recognition and enforcement of arbitral awards in Rwanda are similar to the ones listed in the New York Convention.⁸⁵ One advantage with Rwanda is that the judiciary follows a pro-arbitration policy, which includes, for instance, prioritizing arbitration related matters and handling them in a timely manner. This is likely to expedite enforcement of foreign arbitral awards and attract more trade and investments to Rwanda. Rwanda is also regarded as an independent and neutral arbitration venue as it is politically stable with well-functioning institutions, rule of law and zero tolerance for corruption. According to the 2012 Corruption Perceptions Index (CPI), Rwanda was ranked 4th in Africa and 1st in East Africa for fighting corruption and the 3rd easiest country to do business in according to the 2012 ‘World Bank Doing Business’ report.⁸⁶

⁸⁵ See generally Article 51 of Law N° 005/2008 on Arbitration and Conciliation in Commercial Matters.

⁸⁶ Annual Report 2013-2014, Kigali International Arbitration Centre-Efficiency in Disputes Resolution, available at <http://www.kiac.org.rw/IMG/pdf/-5.pdf>, Accessed on 09/09/2015.

4.0 Other Challenges in Recognition and Enforcement of Arbitral Awards

4.1.1 Different Legal Systems and Legislative Approaches

As highlighted elsewhere in this contribution, the countries of the East Africa region have different legal traditions, which is largely due to their colonial history. While Kenya, Tanzania and Uganda follow the common law system, Rwanda and Burundi are civil law systems. This can present difficulties in arbitration. Common law and civil law approaches differ significantly. In arbitration, between a party from a common law country and one from a civil law country, the parties may see disclosure or production of documents differently. The party from a common law jurisdiction is likely to favour a great deal of discovery than the civil law party.⁸⁷

It is argued that difficulties are bound to arise when it comes to settlement of international commercial disputes due to divergence of national legal procedures and practices.⁸⁸ Kariuki argues that differing procedural rules and practices, for example when it comes to the timeframes for approaching the court to set aside an award among the member states are a threat to international arbitration.⁸⁹ In Uganda, the law stipulates that an application to set aside an arbitral award cannot be made after one month has lapsed since the date when the party making that application received the arbitral award.⁹⁰ In Kenya, the Arbitration Act sets the period for a similar application at three months.⁹¹

⁸⁷ Ramsey V, “National Courts and Arbitration: Collaboration or competition? The Courts as Competitors of Arbitration,” CI Arb Centenary Conference, London, 3 July 2015.

⁸⁸ Muigua K, ‘Building legal bridges: Fostering Eastern Africa integration through commercial arbitration’ 3 *Alternative Dispute Resolution* 1 (2015), 45.

⁸⁹ *Ibid.*

⁹⁰ See Section 34(2), Uganda Arbitration and Conciliation Act, 2002.

⁹¹ Section 35(3), Arbitration Act (Chapter 49 Laws of Kenya).

Moreover, a cursory look at the arbitral laws of the countries in the region reveals that not all of them have adopted an attitude that is pro-enforcement of arbitral awards. And although most of them have ratified the New York Convention and have adopted the Model Law, their legislative approaches to enforcement of foreign arbitral awards vary. Moreover, even where the countries have ratified the New York Convention, in most cases it is not implemented and applied in a pro-enforcement manner. It is apparent that the ratification and adoption of the New York Convention without more is not enough, and there is need for domestic courts and judges to be sufficiently informed, educated and willing to apply such rulings in practice.⁹² A party seeking the enforcement of foreign awards must therefore understand the relevant arbitral law and practice in the country of enforcement.⁹³ It is also reported that there are few court decisions on enforcement of foreign arbitral awards.⁹⁴ As pointed out earlier, some of the grounds for refusing recognition and enforcement of arbitral awards are unclear and ambiguous thus offering national courts an opportunity to refuse to recognise and enforce foreign awards. Resultantly, this can put off potential investors and by extension slow down growth and development of international commercial arbitration in the region.⁹⁵

⁹² Böckstiegel K, “Role of the state on protecting the system of arbitration,” p. 3.

⁹³ Finizio S, Morris D and Drage K, ‘Enforcing arbitral awards in Sub-Saharan Africa-Part 1, 7 July 2015
https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/enforcing-arbitral-awards-in-sub-saharan-africa-part-1-lexispslarbitration.pdf on 7 September 2015.

⁹⁴ *Ibid.*

⁹⁵ See for example in the case of Kenya, Muigua K, ‘Role of the court under Arbitration Act: Court intervention before, pending and during arbitration in Kenya,’ 1 March 2010
<http://kenyalaw.org/kl/index.php?id=1923> on 7 September 2015.

In relation to Uganda, the Arbitration and Conciliation Act⁹⁶ makes provision for enforcement of both domestic and foreign arbitral awards. However, even though the Act outlines the grounds for setting aside an arbitral award, it does not provide the grounds on which the recognition and enforcement of an award may be refused.⁹⁷

Diversity and variance in arbitration law approaches is a challenge even to the integration process as it slows down the work of harmonising and standardising the different municipal laws with the Community's spirit. For example, it is asserted in the case of Burundi, that its code does not contain provisions harmonising it with the regional initiatives to reflect Burundi's entry into the Community.⁹⁸ Further, the different procedures and legislative practices in the legal systems give priority to national interests over those of the community. This has been a great impediment to meeting the set timelines.⁹⁹

5.0 Private International Law Problems

Private international law allows for the co-existence of multiple legal regimes and provides dispute resolvers with requisite tools for determining which municipal law to apply in a given context. Private international law comes in

⁹⁶ Chapter 4 Laws of Uganda, 2000 Edition.

⁹⁷ Oppong R, *Private International Law in Commonwealth Africa*, Cambridge University Press, Cambridge, 2013, 414.

⁹⁸ 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. http://unctad.org/en/docs/diaepcb200917ch4_en.pdf on 8 September 2015.

⁹⁹ Agaba S, Regional Harmonization of Commercial Laws: Opportunities and Implementation Challenges, The Network of Reformers Conference, available at https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/steven-agaba-regional-harmonization-of-commercial-laws-opportunities-and-implementation-challenges-_detailed_.pdf on 8 September 2015.

handy in a region that is yet to fully harmonise its arbitration laws. It provides a basis for determining the extent to which a country's municipal laws can engage with other legal systems, municipal and international. Application of private international law will not only provide a level of certainty in commerce and dispute resolution therein, but also a predictable business environment. Nonetheless, Oppong notes that Africa as a whole has not fully participated in the development of private international law compared to other regions of the world.¹⁰⁰ As such, there has not been a real appreciation of the role that it can play in regional integration and especially in dispute resolution and the enforcement of international arbitral awards. This has been experienced in East Africa where despite the ratification and accession to the Treaty, there is still lack of harmonisation of laws to facilitate commerce and dispute resolution.

Some of the challenges facing harmonisation in the Kenyan context include poor coordination at the national level, competing government interests, sectoral interests, inadequate resources and the fact that approximation/harmonisation of laws is not a priority to most government agencies.¹⁰¹ As a result, national courts and the regional tribunals play a more significant role in applying conflict of laws rules in dispute resolution. This state of affairs may also lead to a situation where arbitral tribunals are left with the task of ascertaining applicable laws in arbitration by applying the choice of laws rules of different countries. Application of the choice of law rules of a country may lead to a law that was not intended by the parties thus undermining party autonomy.

¹⁰⁰ See Oppong R, 'Private international law in Africa: The past, present and future,' 55 *The American Journal of Comparative Law* (2007), 677.

¹⁰¹ Okello J, Approximation/harmonization of laws: Kenyan context, EAC Network of Reformers Conference, Arusha, 06-07 August 2012
https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Presentation-on-EAC-Legal-Harmonization-in-Kenya_Johnson-Okello.pdf on 8th September 2015.

6.0 Different Levels of Development

Moreover, the fact that the countries of the region are at different levels of economic and legal development presents a challenge in them harmonising and synchronising their national laws to reap the benefits of integration. There is also the fear among some partner states that uniformity of laws will not be in their national interests. By extension, this affects the practice of international commercial arbitration as individual countries' arbitral laws are seen to adopt a protectionist approach that may favour local investors. Consequently, foreign arbitral awards may not be recognised and enforced if in conflict with local interests.

7.0 Public Policy

Public policy is one of the grounds for setting aside and refusal of recognition and enforcement of arbitral awards under the New York Convention. However, the Convention does not define what public policy is. Uncertainty and ambivalence surrounding the scope of applicability and meaning of this doctrine presents one of the main obstacles to the recognition and enforcement of foreign arbitral awards. According to Buchanan:

*“Public Policy is the final parameter of the law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitutions are silent.”*¹⁰²

It, therefore, follows that public policy issues transcend what is provided in national constitutions and statutes, to matters where the law is silent. There are therefore aspects of public policy that the law may not provide for, yet they are embodied within the concept of public policy.¹⁰³ A court in enforcing

¹⁰² Buchanan M, 'Public policy and international commercial arbitration,' 26 *American Business Law Journal* (1988), 511-513.

¹⁰³ *Ibid.*

foreign arbitral awards has a duty to always adopt a narrow and much stricter approach when interpreting public policy to avoid upsetting cardinal principles of arbitration such as party autonomy and finality of awards. Such a strict and narrow interpretation of public policy issues by courts is informed by the fact that most courts would want to ‘give respect to the enforcement of arbitral awards, party autonomy, sensitivity to the international system and the desire for finality’.¹⁰⁴

Courts have pronounced themselves on the potential difficulties in defining public policy in Kenya.¹⁰⁵ In some jurisdictions, public policy has been defined to include both substantive and procedural matters making it a most broad concept¹⁰⁶ for refusing to recognize and enforce arbitral awards. It remains to be seen how courts in the region will treat public policy in the enforcement of foreign arbitral awards. Some countries such as Rwanda have defined the public policy exception in a broader manner than under the Model Law thus risking encouraging courts to refuse to enforce foreign arbitral awards.¹⁰⁷ Under Rwandan law,¹⁰⁸ courts may refuse to enforce an award that is in conflict with Rwanda’s public security. Public security is not defined and it is unclear the extent to which a court may go in determining whether security matters should act as a bar to enforcement. This creates uncertainty

¹⁰⁴ Choi S, ‘The interaction between national courts and international tribunal’ *New York University Journal of International Law and Politics*, Symposium Issue (1995), 124.

¹⁰⁵ See **Christ for All Nations v Apollo Insurance Company Ltd [2002] 2 EA 336 (CCK)**, discussed earlier.

¹⁰⁶ Whittaker J, ‘Principles relating to public policy in the International Arbitration Act, 29 November 2012 <http://www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/> on 7 September 2015.

¹⁰⁷ Finizio S, Morris D and Drage K, ‘Enforcing arbitral awards in Sub-Saharan Africa-Part 1.

¹⁰⁸ See Articles 47 and 51 of Law No. 5/2008 relating to Arbitration and Conciliation in Commercial Matters.

and ambiguity when it comes to the enforcement of foreign arbitral awards. An investor seeking recognition and enforcement of an award is thus never sure whether a particular municipal court might adopt a reasoning whose effect would be to annul an award or not.

8.0 Arbitrability

Where the subject matter of arbitration is not capable of settlement by arbitration under the applicable law, a court may on its own motion or upon being moved by a party refuse to recognise and or enforce an award on the basis of non-arbitrability.¹⁰⁹ Van Den Berg argues that this ground is superfluous as the arbitrability of a subject matter is generally regarded as forming part of the general concept of the public policy of a country.¹¹⁰ Arbitrability can therefore, afford national courts an opportunity to refuse the recognition and enforcement of foreign arbitral awards. In Kenya, for instance it is argued that the concept of arbitrability has been widened under the Constitution of Kenya 2010 which allows for the use of ADR processes in a wide array of disputes.¹¹¹ Although widening the scope of arbitrability is a welcome thing, defining and setting out clearly the matters that are arbitrable is important to avoid non-refusal of recognition of arbitral awards on grounds of non-arbitrability.

9.0 Role of Courts in the Recognition and Enforcement of Foreign Arbitral Awards

According to Karrer, the success of international arbitration is largely dependent on how well the arbitration law at the seat is applied by the national courts at that seat. It is, therefore, germane to ask the questions: how good

¹⁰⁹ Article V ((2) (a), UNCITRAL Model Law.

¹¹⁰ Van den Berg A, *'The New York Convention of 1958: An Overview'* Year Book Vol. XXIII (2003), 49.

¹¹¹ See Kariuki F 'Redefining 'arbitrability:.' Assessment of articles 159 & 189 (4) of the Constitution of Kenya,' 1 *Alternative Dispute Resolution Journal* 1 (2013), 174-188.

will national courts be? How many national courts may be involved? How long will it take? How experienced will it be for a foreign party to litigate before the state court?¹¹² As already mentioned, courts within the region have not been uniform in construing the refusal grounds. At times, courts have interpreted the refusal grounds broadly to deny the recognition and enforcement of foreign arbitral awards. Nonetheless, there is progressive arbitral jurisprudence from courts within the region which tends to uphold finality of arbitral awards as a matter of public policy.

10.0 International Arbitral Institutions

East Africa is experiencing growth in international trade and investments which has led to an increase in international arbitration institutions. Kenya and Rwanda have already established international centres for arbitration, Nairobi Centre of International Arbitration and the Kigali International Arbitration Centre respectively. The challenge is that most of these centres have been set up by the governments of the respective states and may be seen as promoting national as opposed to international interests. Moreover, their setting up is not coordinated to address issues of international arbitration from a common standpoint. They may thus be seen as competitive rather than collaborative.

The East African Court of Justice is vested with arbitration jurisdiction. The Court has issued rules on the conduct of arbitration.¹¹³ However, it does not provide a robust facilitative regional judicial system for the resolution of cross-border commercial disputes. It faces capacity, outreach and visibility pit falls demonstrated by the low number of commercial dispute references it

¹¹² Karrer P, “The Model Law or Our Own? A choice between two Good things,” CIArb Centenary Conference, London, 9th February 2015, pp. 3-4.

¹¹³ East African Court of Justice, Rules of Arbitration, Arusha, Tanzania, March 2012.

receives.¹¹⁴ It has also not had an opportunity to address conflict of law questions when it comes to enforcement of foreign arbitral awards.

11.0 State Immunity

State Immunity 'is the protection given to a state from being sued in the courts of other states.'¹¹⁵ The doctrine stems from the notion of sovereign equality of states under international law that a sovereign state cannot be compelled to submit to the jurisdiction of and be judged by another state. Although state immunity is not a ground of the refusal under the New York Convention and the Model Law, it is often advanced by unsuccessful parties who are either a sovereign state or a state agency.¹¹⁶ As such, where the unsuccessful party is a sovereign state or a state agency, the defence of sovereign or state immunity can be raised to claim both jurisdictional and immunity from execution as both the New York and ICSID conventions do not prohibit the same.¹¹⁷

12.0 Partner States' being Members of other Regional Groupings

It is, noteworthy, that member states of the East African community are parties to different regional groupings. Membership to a multiplicity of regional groupings can be a threat to regional integration, especially looked from a legal perspective. Being members of different trans-national organizations creates antagonistic tension between the partner states' commitments to the Community and their commitments to these other

¹¹⁴ Byenkya T, Harmonization of commercial laws in the East African Community: East Africa law society perspectives, 6 August 2012, available at https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Presentation-on-EAC-Legal-Harmonization-EALS_Tito-Byenkya.pdf on 8 September 2015.

¹¹⁵ Reilly F, State Immunity and arbitration' Norton Rose LLP Practice Notes available at <http://arbitration.practicallaw.com/2-318-7956?q=&qp=&qe=> Accessed 4/9/2012

¹¹⁶ Blackaby *et al*, '*Redfern and Hunter on International Arbitration*, ' 622.

¹¹⁷ *Ibid*, 666.

regional organisations.¹¹⁸ There can be no satisfactory harmonization of tariff and non-tariff barriers in the Community; when the Partner States are adopting vastly different schemes under other regional frameworks. It is rightly suggested that Partner States ought to come to a consensus whereby they will all be members of the same regional blocks or agree to approximate and harmonize their laws.¹¹⁹ This can ensure that they adopt similar arbitral laws and procedures especially in the recognition and enforcement of foreign arbitral awards. In the case of the EAC states, Tanzania is a member of SADC¹²⁰ while Uganda, Kenya, Burundi, Rwanda and South Sudan are members of COMESA¹²¹ meaning that they have to follow commitments under these schemes.

13.0 Persistent Conflicts

Persistent conflicts in some parts of the East Africa region also portend a major threat to international commercial arbitration, especially the enforcement of foreign arbitral awards. An economy cannot thrive in an atmosphere of conflicts. Similar, regional cooperation including in the area of harmonising laws dealing with arbitration cannot be feasible.

14.0 Conclusion and Way Forward

The paper set out to highlight the challenges a successful party may encounter in seeking the recognition and enforcement of a foreign arbitral award. It is clear from the discussion, that in spite of the role of international arbitration in fostering international trade and investment in the region, arbitration laws

¹¹⁸ Lumumba PLO, 'The East African Community two: Destined to succeed or doomed to fail?' *5 Law Society of Kenya Journal* 1 (2009), 105-132.

¹¹⁹ *Ibid*, 127.

¹²⁰ See the Member states of the Southern African Development Community at <http://www.sadc.int/member-states/>, accessed on 8 September 2015.

¹²¹ See COMESA member states at http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121, Accessed on 8 September 2015.

of countries within the region are not facilitative of international commercial arbitration, especially in recognition and enforcement of foreign arbitral awards. Some countries still apply out-dated and archaic colonial arbitral laws that are not adequate in the 21st century commercial world.

It is also evident that even where countries have ratified the UNCITRAL Model Law and the New York Convention, their arbitration laws do not conform to their letter and spirit. The effect is that national courts have had numerous opportunities to interfere with the arbitral process and to refuse to recognise and enforce foreign awards, negatively affecting the flow of trade and investments. It is recommended that there is need for all countries in the region to base their arbitration laws on the Model Law and to fully implement the New York Convention.

Further, courts have a crucial role in upholding the finality of arbitral awards by recognising and enforcing them as a matter of public interest. Courts, both national and international, hold the sway in promoting arbitration. As pointed out by Chief Justice Allsop courts must be international in outlook, commercial in skill and arbitration sympathetic. An international outlook requires an attitude or state of mind of judges, of court administrators and officers, and of practitioners to welcome and encourage foreign commercial parties to the jurisdiction. The Court must be commercial in its focus, skills and approach. This requires that the judges handling arbitral proceedings (whether support, supervision or enforcement) understand the commerce involved in the substantive dispute. The court must understand arbitration in the sense of not merely knowing about arbitration law and practice but also understanding the perspective and approach that facilitates the smooth working of the arbitral system.¹²² The East Africa Court of Justice offers fora for resolution of commercial disputes in the region. Parties should look at the

¹²² Allsop CJ, 'National courts and arbitration,' 1-3.

advantages and disadvantages of the two methods and choose the one to adopt in a particular case.¹²³

Although international arbitration will be the preferred method in most commercial disputes, there are some disputes that more amenable at the East Africa Court of Justice. There is also need for a cooperative and collaborative relationship between international arbitration and national courts¹²⁴ including the EACJ because it also has jurisdiction to arbitrate disputes.

¹²³ Ramsey V, “National Courts and Arbitration: Collaboration or competition? The Courts as Competitors of Arbitration,” p.9.

¹²⁴ See Oppong R, ‘Private international law in Africa: The past, present and future.’

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua
Constitutional Supremacy over Arbitration in Kenya

By: Dr. Kariuki Muigua*

Abstract

The Constitution of Kenya, 2010 is the Supreme law of the land, a principle entrenched under Article 2 thereof. Kenya has in place an Arbitration Act to define the scope, responsibilities and limitations of arbitral tribunals so as to allow parties determine disputes in a manner consistent with law. Against the backdrop of the constitutional supremacy, the author argues that while Article 159(2) of the Constitution acknowledges the use of Alternative Dispute Resolution (ADR) mechanisms, arbitration practice in Kenya must be carried out in a manner consistent with constitutional principles and values. Any deviation from such manner can potentially be challenged as unconstitutional and thus invalid. This is important in ensuring that arbitration remains relevant even in the current constitutional dispensation. Examined in this paper is the interpretation of the concept of constitutional supremacy by Kenyan courts. This paper examines constitutional supremacy in Kenya and its likely implication on arbitration law and practice, through scrutinizing the existing relationship between the Constitutional Bill of Rights and the rules of Arbitration practice. This is also illustrated through the use of case law. The paper also identifies possible conflict areas between the concept of constitutional supremacy and arbitration law and practice as carried out in Kenya. The author argues that there is a growing need to revisit the essentials of the law and practice of arbitration in Kenya so as to ensure conformity with the concept of constitutional supremacy and ultimately safeguarding the

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Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua interests and rights of those who prefer arbitration to settle their arising disputes.

1.0 Introduction

For a long time, though state-sanctioned, Arbitration generally remained outside the scope of constitutional law. However, this might change in light of the current Constitution of Kenya 2010. Article 159 (2)(c) of the Constitution provides that in exercising judicial authority, the courts and tribunals should be guided by the principles of, inter alia, — alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted, subject to clause (3) requires that traditional dispute resolution mechanisms should not 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.

This paper examines possible implications of the constitutional supremacy clause on Arbitration in Kenya. It identifies possible areas of conflict between the concept of constitutional supremacy and Arbitration and especially with regard to the relationship between the Constitutional Bill of Rights and the rules of Arbitration practice in Kenya.

2.0 Supremacy of the Constitution

Supremacy of the Constitution refers to a situation where the highest authority in a legal system is conferred on the Constitution.¹ The legal norms and/or statutes, institutional structure of the organs of the State and the legislators all rank lower than the Constitution.

This principle of the supremacy of the constitution is commonly believed to have originated from the American jurisdiction. It is believed to have first come up when Alexander Hamilton, while writing the *Federalist Papers*,

¹ Limbach, J., 'The Concept of the Supremacy of the Constitution' *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10 at p.1.

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua argued that there is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.² He further argued that no legislative act, therefore, contrary to the constitution can be valid. He posited that to deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise but what they forbid.³

His argument was that all exercisable powers vested in leaders originate from the people, who by their own, volition delegated the same to those in authority. The leaders must therefore exercise their legislative powers in a way that is consistent with the constitution.⁴

This principle of constitutional supremacy later appeared in the American Constitution under Article 6 section 2 which states, *inter alia*, that ‘the American Constitution shall be the supreme law of the land; that the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the Contrary notwithstanding.’

In the American case of *Marbury v. Madison*,⁵ it was held that it was the duty of the Judicial Department to say what the law is. The Court stated that those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

² See Hamilton, A., *The Federalist No. 78*, The Judiciary Department, From McLean’s Edition, New York.

³ Ibid

⁴ Ibid

⁵ 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

The American Supreme court also *inter alia* held that “...*the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.*”⁶ All laws which are repugnant to the Constitution are null and void.⁷

This historic court case reinforced the concept of Judicial Review or the ability of the Judiciary Branch to declare a law unconstitutional. It has been suggested that there exists three notions of the principle of supremacy of the constitution which are: The possibility of distinguishing between constitution and other laws; the legislators being bound by the constitutional law,⁸ which presupposes special procedures for amending constitutional law; and an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.⁹

It has been argued that ‘*Constitution Supremacy represents a quality of the constitution being in the top of the juridical system of the society....In this way accomplishment of the objectives of the state of right results especially regarding the citizen’s fundamental freedoms and rights(sic).*’¹⁰

It has also been posited that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced

⁶ Ibid.

⁷ Ibid, 1803.

⁸ *Speaker of the senate and another vs Attorney General and 4 others, Advisory opinion reference number 2 of 2013.*

⁹ Limbach, J., ‘The Concept of the Supremacy of the Constitution’ *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10, *op. cit.* p. 3.

¹⁰ Mariana, L., ‘The Constitution Supremacy’ p. 1. Available at http://www.sustz.com/.../Jurj_Liliana_Mariana_2.pdf accessed on 23 November, 2013

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the very definition of tyranny."¹¹ To guard against that accumulation of power, the Constitution has built-in protections.¹²

The supremacy of the Constitution is, thus, seen as one of the fundamental pillars that are important for the realisation of the other constitutional guarantees. It is also important for the implementation and enjoyment of the Bill of Rights and fundamental freedoms. Laws that purport to infringe on any of the constitutionally guaranteed rights would be defeated by the supremacy clause by being declared unconstitutional and thereby invalid.

3.0 Constitution of Kenya, 2010 and the Supremacy Clause

The principle of the supremacy of the Constitution is entrenched in Kenya's Constitution, 2010 under Article 2 thereof.¹³ Clause (1) is to the effect that *the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government*. Clause (3) also provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ. Further, clause (4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. These provisions notably follow Limbach's assertion of the three notions of constitutional supremacy.¹⁴

Article 1(1) of the *Constitution of Kenya, 2010* (hereinafter the Constitution of Kenya) provides that all sovereign power belongs to the people of Kenya

¹¹ Madison, J., *Federalist Papers*, No. 48, From the New York Packet, Friday, February 1, 1788.

¹² *Ibid.*

¹³ The supremacy clause was captured in the now *repealed Constitution of Kenya* (1963) under section 3 thereof, which was to the effect that 'the Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void.'

¹⁴ Limbach, J., *op. cit.* p. 3.

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and should be exercised only in accordance with the Constitution. Clause (2) thereof provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Further, Clause (3) provides that Sovereign power under the Constitution is delegated to the following State organs, which should perform their functions in accordance with the Constitution: Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Clause (4) is to the effect that the sovereign power of the people is exercised at: the national level; and the county level.

Article 159 (1) provides that Judicial authority is derived from the people and vests in, and should be exercised by the courts and tribunals established by or under the Constitution. Article 94(1) provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Further, Article 129(1) provides that the Executive authority derives from the people of Kenya and should be exercised in accordance with the Constitution. Clause (2) thereof further provides that the Executive authority should be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

The foregoing provisions trace the source of the constitutionally conferred powers from the people. This position is also captured in the Preamble which provides, *inter alia*, that in exercising the people's sovereign and inalienable right to determine the form of governance of their country and having participated fully in the making of the Constitution, adopt, enact and give the Constitution to themselves and their future generations.¹⁵ The fact that the Constitutional powers emanate directly from people has been used to justify the supremacy of the Constitution over every other law or law-making body

¹⁵ Preamble, Constitution of Kenya, 2010, Government Printer, 2010, Nairobi.

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in the land. It has been argued that the Constitution is ‘a charter containing the pact that is the social contract....’¹⁶

The constituent power is said to be a primordial power, that is, it pre-exists a constitution. The Constitution thus only comes in to delegate such power.¹⁷ The various national legal and institutional arrangements are thus bound by the Constitution in their application and functioning. Article 3(1) provides that every person has an obligation to respect, uphold and defend this Constitution. The concept of constitutional supremacy has also been subjected to judicial interpretation by the Kenyan Courts. For instance, in the case of *Githunguri vs Republic*¹⁸ the High Court held *inter alia* that it has inherent powers to exercise jurisdiction over tribunals and individuals acting on administrative or quasi-judicial capacity.

In *Albert Ruturi & Others vs A.G & The Central Bank of Kenya*,¹⁹ the High Court held that any law that is inconsistent with the Constitution should, to the extent of the inconsistency, be void and the Constitution should prevail.²⁰ It is noteworthy that the current Constitution of Kenya provides that ‘any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.’²¹

¹⁶ Muigai G., “The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication,” *Constitutional Law Case Digest*, Vol. 2, pp. 159-189 at p. 160 (2005), International Commission of Jurists (Kenya).

¹⁷ *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004)

¹⁸ Criminal Application No. 271 of 1985 (1986).

¹⁹ High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001.

²⁰ s.3 of the repealed Constitution of Kenya.

²¹ Art. 2(4).

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Supremacy of the Constitution was also discussed in the case of *Kamlesh Mansukhlal Damji Pattni and Goldenberg International Limited vs the Republic*.²² The Court held that the High Court has the primary responsibility of safeguarding against contravention of the rule of law and the contravention, particularly with regard to fundamental rights and freedoms. This was also affirmed in the current Constitution of Kenya 2010 which provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.²³

The manner of Constitutional interpretation, being the supreme law of the land, was considered in the East African case of *Republic vs El mann*,²⁴ where the Court held that the Constitution is not different from any other statute and should be interpreted in the same manner. The Court held that the Constitution has to be interpreted according to the intention expressed in the Constitution itself. The Kenyan Courts, however, have since rejected the

²² High Court Misc. Application No. 322 of 1999 and No. 810 of 1999

²³ Art. 23(1), Constitution of Kenya 2010. However, it is noteworthy that Clause (2) thereof provides that Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This has since been achieved through the enactment of the Magistrates' Courts Act, 2015, No. 26 of 2015, which was passed to give effect to Articles 23(2) and 169(1) (a) and (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. S. 8(1) provides that subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

However, clause (2) provides that the applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution. Clause (3) states that nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

²⁴ [1969] EA 357

*Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua holding in the El Mann case.*²⁵ In *Crispus Karanja Njogu vs Attorney General (Unreported)*²⁶ the Constitutional Court stated that “*the Constitution is not an Act of Parliament but it exists separately and it is supreme. Further, when an Act of Parliament is in any way inconsistent with the Constitution, the Act of Parliament, to the extent of the inconsistency, becomes void....It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.*” (Per Oguk, Etyang and Rawal, J.J.J) (Emphasis added).

The Constitutional court in the *Njogu case* ruled that due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution. The *El Mann case* position was also challenged and rejected in another Kenyan case of *Njoya & others vs Attorney General & others*,²⁷ where the Court followed the *Njogu case* and held that unlike an Act of Parliament which is subordinate, the Constitution should be given a broad liberal and purposive interpretation to give effect to its fundamental values and principles.

The supreme nature of the Constitution was also well captured by the Tanzanian Court of Appeal in *Ndyanabo vs Attorney General*²⁸ where the

²⁵ For a further discussion on this, see Thiankolu, M., ‘Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya’ *Kenya Law Reports*, January, 2007, Nairobi, Available at http://www.kenyalawreports.or.ke/Downloads_Other/Landmarks_from_El_Mann_to_the_Saitoti_Ruling.pdf [Accessed on 29/11/2013].

²⁶ High Court Criminal Application No 39 of 2000.

²⁷ [2004] 1 EA 194.

²⁸ [2001] 2 EA 485, p. 493.

Court stated that firstly, the Constitution is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with lofty purposes for which its makers framed it. The Court asserted that so construed, the instrument becomes a solid foundation of democracy and the rule of law. Secondly, the provisions touching on fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that the people enjoy their rights, the democracy not only functions but grows, and the will and dominant aspirations of the people prevail. The Court stated that restrictions on fundamental rights must be strictly construed.

The current Constitution of Kenya, 2010 provides that the Constitution should be interpreted in a manner that: promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.²⁹ The Constitution has also provided for the general principles and national values of governance which must guide the application of all laws as well as the operation of all state organs and persons. Article 10(1) thereof provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³⁰ To promote the observation of such values and principles in the area of human rights, Chapter Four of the Constitution (Articles 19-59) has

²⁹ Art. 259(1), Constitution of Kenya 2010.

³⁰ Art. 10(2), Constitution of Kenya, 2010, has laid out such principles and national values as follows: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua been dedicated to The Bill of Rights and Fundamental freedoms that must apply to all law and bind all State organs and *all persons*(*Emphasis added*).³¹ Article 19(1) provides that the Bill of Rights and fundamental freedoms is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. This, therefore, means that all the necessary measures must be put in place to ensure that it is promoted and protected for the wellbeing of general populace.

To avoid any interference with constitutional supremacy, the Constitution provides for the procedure to be followed in its amendment.³² Article 255(1) of the Constitution provides that a proposed amendment to the Constitution should be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to *inter alia* such matters as: the supremacy of the Constitution; the sovereignty of the people; the national values and principles of governance referred to in Article 10 (2) (a) to (d); and the Bill of Rights.

4.0 Arbitration Practice under the Kenyan law

Kenya has a law on arbitration whose scope is to define the scope, responsibilities, and limitations of the arbitral tribunals, to allow parties to determine disputes in a manner consistent with law. Arbitration in Kenya is governed by various laws which include the Constitution, *The Arbitration Act* 1995³³ (hereinafter the *Arbitration Act*), the *Arbitration Rules, Civil Procedure Act*³⁴ and the *Civil Procedure Rules* 2010³⁵.

³¹ Art. 20(1).

³² Chapter sixteen (Art. 255-257).

³³ No. 4 of 1995(As amended in 2009), Laws of Kenya.

³⁴ Cap 21, Laws of Kenya.

³⁵ Legal Notice No. 151 of 2010, Rules under Section 81, Cap 21, Las of Kenya.

Section 59 of the *Civil Procedure Act*³⁶ provides that all references to Arbitration by an order in a suit, and all proceedings thereunder, should be governed in such manner as may be prescribed by rules. Further, Order 46 of the *Civil Procedure Rules* provides, *inter alia*, that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the Court for an order of reference wherever there is a difference.

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act attempts to define the scope of the Act and defines “Arbitration” to mean any Arbitration whether or not administered by a permanent arbitral institution. The Act thus applies to a wide range of Arbitration matters.

The *Arbitration Act* defines the extent of Arbitration tribunals’ operation in Kenya, as well as the point to which courts may intervene in Arbitration.³⁷ Arbitration among parties is instituted by a contractual agreement.³⁸ The parties select one or more neutral, qualified arbitrators to hear the dispute and then agree to be bound by whatever decision is rendered. The arbitrators scrutinize existing evidence and testimony, and then make conclusions based upon legal principles specified in the Arbitration agreement.³⁹

Several benefits have been attributed to Arbitration as an alternative dispute resolution mechanism. Firstly, Arbitration accords the parties a considerable amount of control over the proceedings. Unless parties agree otherwise in an Arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, Arbitration is a private and consensual

³⁶ Cap 21, Laws of Kenya

³⁷ S. 10, No. 4 of 1995

³⁸ S. 4, No. 4 of 1995, Arbitration Agreement

³⁹ S. 32, No. 4 of 1995

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process. For instance, they can select one or more neutral arbiters to hear their dispute.⁴⁰

For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure. Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In Arbitration agreements, parties can spell out certain procedural changes to the operation of the tribunal, lay down the level of formality of discussion, and most notably, oblige arbitrators to follow their choice of law.⁴¹ Thirdly, since parties can exercise control and because proceedings tend to be less formal than in court trials, Arbitration often creates a less tense atmosphere for dispute settlement. Lastly, awards arising out of Arbitration can be binding or nonbinding on the parties, depending on the Arbitration agreement. The *Arbitration Act* allows Arbitration parties to resort to courts only where the parties have agreed that an appeal can be filed.⁴² In the absence of such an agreement the arbitrators' decision will be binding on the parties and enforceable by courts. In *Nyutu Agrovat Limited v Airtel Networks Limited*,⁴³ one of the issues was whether in the absence of an express provision of a right of appeal in an arbitration agreement a party to arbitral proceedings has a right of appeal to the Court of Appeal from a decision of the High Court given under section 35 of the Arbitration Act, 1995. It was held that the right to appeal was expressly granted by law and not by implication. And a party had to show which law donated the right of appeal intended to be exercised. The Court also held that the principle on which arbitration was founded, namely that the parties agree on their own, to take disputes between or among them

⁴⁰ See Muigua K., *Settling Disputes Through Arbitration in Kenya*, pp.3-4, (Glenwood Publishers Ltd, Nairobi, 2012)

⁴¹ S. 20

⁴² S. 39

⁴³ *Nyutu Agrovat Limited V Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61of 2012.

from the courts for determination by a body put forth by themselves and adding to all that as in the instant case, that the arbitrators' award had to be final. It could be taken that as long as the given award subsisted it was theirs. But in the event it was set aside as was the case, that decision of the High Court was final. The High Court's decision was final and must be considered and respected to be so because the parties voluntarily choose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that had been achieved. Despite the loss or gain either party might impute to, the setting aside remained where it fell. The courts, including the Court of Appeal, should respect the will and desire of the parties to arbitration.

Arbitration practice in Kenya has increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration.⁴⁴ This has had the effect of seeing more matters being referred to the national Courts due to the disputants' dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the Arbitration. Recourse to Courts may be necessary due to some unique characteristics of Arbitration which, though positive, may also adversely affect the certainty of one party to access justice. These include lack of a harmonized framework for supervision or accountability of arbitrators,⁴⁵ a relaxation of evidentiary rules, decreased opportunities for thorough discovery,⁴⁶ insufficient or nonexistent explanations of arbitrators' reasoning in decisions,⁴⁷ and limited protections for vulnerable parties.

Despite the holding in *Nyutu case*, arbitration tribunals are however subject to certain restrictions imposed by the courts. Further, the court has the power,

⁴⁴ Muigua K., *Settling Disputes through Arbitration in Kenya*, op. cit. p. 10.

⁴⁵ Supervision is mostly Institution-based.

⁴⁶ Limited timeframes are usually allocated for this.

⁴⁷ Parties may agree on whether they will expect an award with reasons thereof or otherwise.

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on application from one or more of the parties, to remove an arbitrator on grounds of bias, lack of qualifications or physical or mental capacity, or a refusal or failure to conduct proceedings properly.⁴⁸ A court may determine a question of law which it finds “substantially affects the rights of one or more of the parties” upon application from a party involved in the Arbitration proceedings and upon the agreement of all parties or the Arbitration tribunal.⁴⁹ A court may also issue orders confirming, varying, or setting aside awards granted by the tribunal, after one party makes an application to the court.⁵⁰ In *Nyutu Agrovet Limited v Airtel Networks Limited*, it was held that the salient features of section 35 underline the deliberate policy of the Act to limit intervention by courts in arbitral proceedings. The serious nature of the grounds recognized to justify setting aside an arbitral award serves, to eliminate run-of-the mill complaints, grievances and disaffections as basis for intervention.

Arbitration process is one of the administrative actions by tribunals contemplated under the current Constitution of Kenya. Although the foregoing does not provide the exhaustive list of the ways in which a court can supervise and regulate Arbitration tribunals in the Kenya, it illustrates that courts can keep Arbitration panels in check, and ensure they do not act unconstitutionally.

Article 159(2) (c) of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, Arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Notable are the provisions of the Clause (3) which are to the effect that Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are

⁴⁸ S. 13, No. 4 of 1995.

⁴⁹ S. 39(3)(b), No. 4 of 1995.

⁵⁰ *Ibid*, s. 39(2)(b)

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof may be challenged as being unconstitutional and thus invalid. In the Ugandan case (which has been upheld by Kenyan courts) of *Zachary Olum and Anor vs Attorney General*,⁵¹ it was held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and effect of the impugned statute or section thereof; if the purpose was not to infringe a right guaranteed by the Constitution, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the Statute or section in question would be declared unconstitutional. If the government creates a statutory regime to facilitate Arbitrations, then it has an obligation to ensure that the regime does not violate any of the constitutional principles and values.⁵² While acknowledging the need for finality of arbitral processes, it is important to bear in mind procedural fairness of the processes as this is one of the commonest grounds upon which the arbitration process and outcome may be challenged in court.

5.0 Arbitration and the Constitution of Kenya, 2010

The law of Arbitration in Kenya has not been one without challenges as to its unconstitutionality due to alleged violation of the rules of natural justice. One such instance, occurred in the case of *EpcO Builders Limited v Adam S. Marjan-Arbitrator & Another*⁵³ where the Appellant had filed a constitutional Application under sections 70 and 77 of the Constitution of Kenya⁵⁴, section

⁵¹ (1) [2002] 2 EA 508

⁵² Chotalia, S. P., '*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*' p. 67. Available at <http://www.ejournals.library.ualberta.ca/.../constitutional.../8499> Accessed on 24/11/2013]

⁵³ Civil appeal No. 248 of 2005 (unreported).

⁵⁴ Repealed by the Constitution of Kenya, 2010.

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3 of the *Judicature Act* and section 3A of the *Civil Procedure Act*. The Applicant argued that their constitutional right to a fair Arbitration had been violated by a preliminary ruling of the arbitrator. The Applicant argued that it was unlikely to obtain fair adjudication and final settlement of the dispute before the arbitral tribunal due to the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who would have allegedly played an important role as witnesses in ensuring fair and complete settlement of the matters before the Tribunal. Counsel for the Chartered Institute of Arbitrators-Kenya Branch (CIArb), an interested party, submitted that while CIArb did not refute the application under section 77(9) of the Constitution, it argued that the procedure laid down under the *Arbitration Act* should be exhausted first before such an application.

Justice Deverell, while supporting the view of the majority stated:

If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the Arbitration hearing, resulting in lengthy delays in the Arbitration process, the use of alternative dispute resolution, whether Arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during Arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an Arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the *Arbitration Act* 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR.⁵⁵

⁵⁵ Ibid.

Justice Deverell's assertion was, therefore, that Alternative Dispute Resolution should be encouraged while reducing the instances where disputants sought court's intervention. This was supposedly to make the process 'expedient'. The dissenting judge, Justice Githinji, was however of the opinion that Arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the Appellant was seeking a public remedy for a dispute in private law.⁵⁶

The foregoing argument may not be compelling under the current *Constitution of Kenya 2010* and specifically the Bill of rights. The repealed Constitution was fundamentally different from the current Constitution of Kenya with regard to such matters as fundamental rights and freedoms, with the latter having substantive and elaborate provisions on the same. The current Constitution provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.⁵⁷ The law cannot restrict itself to those disputes that only involve public law but must also protect the constitutionally guaranteed rights of even those transacting under the sphere of private law.⁵⁸ The Constitution guarantees every person's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.⁵⁹ Further, *Fair Administrative Action Act, 2015*⁶⁰ which is meant to give effect to Article 47 of the Constitution, applies to all state and non-state agencies, including any person-exercising administrative authority; performing a judicial or quasi-judicial

⁵⁶ Ibid

⁵⁷ Art. 19(3).

⁵⁸ See Cherednychenko. O.O., 'Fundamental rights and private law: A relationship of subordination or Complementarity?' *Utrecht Law Review*, Volume 3, Issue 2 (December, 2007).

⁵⁹ Art. 47(1).

⁶⁰ No. 4 of 2015, Laws of Kenya.

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function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.⁶¹

A stance similar to Justice Githinji's opinion that private matters cannot be decided in the sphere of public law would, therefore, probably not hold under the current Constitution of Kenya. For instance, Article 10(1) provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them *inert alia*: enacts, applies or interprets *any* (emphasis ours) law; or makes or implements public policy decisions. This clause binds all persons and demands that any law (including private law) must be consistent with its provisions. The Bill of Rights and Fundamental Freedoms binds all persons and applies to all law⁶² and requires equal treatment of every person⁶³ including *persons/parties to a private law governed dispute settlement process* (Emphasis added).

Apart from facilitating and giving effect to private choice, the law must also protect the interests of all the members of the society.⁶⁴ Failure to do so may create the impression of selective application of such law.

Article 22(1) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. With regard to the *Arbitration Act*, section 5 provides that a party who *knows* that any provision of this Act from which the parties may derogate or any requirement under the Arbitration agreement has not been complied with and

⁶¹ Ibid, S. 3.

⁶² Art. 20(1), See also Art. 2(4) of the Constitution.

⁶³ Art. 27 on Equality and freedom from discrimination.

⁶⁴ See Burnett, H., *Introduction to the legal system in East Africa*, East African Literature Bureau, Kampala, 1975, pp267-412

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yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object. This provision is well meaning for ensuring expediency and fair play in an Arbitration. However, the wording of the section has not ousted the jurisdiction of the constitutional Court. It deals with situations where such an aggrieved party was reasonably expected to have known or was well aware of such derogation or statutory requirements under the Act. Where does that leave those who were genuinely ignorant of the foregoing?⁶⁵ They could justifiably raise objections especially where fundamental rights and freedoms are concerned, notwithstanding the time limit prescription.

5.1 Principles of Natural Justice

In the English case of *Ridge v Baldwin*,⁶⁶ the watch committee had sacked Ridge, the chief constable of Brighton, after he had been acquitted on charges relating to corruption. On appeal, he won since Police Regulations had set down a procedure that should have been followed and the fact that there was lack of natural justice; he had neither been told of the reasons for dismissal nor given the opportunity to put his case to the watch committee. The House of Lords held that the decision to dismiss Ridge was void because the watch committee had not observed the principles of natural justice. The court of appeal had held that the committee was acting merely in an administrative capacity but, the House of Lords differed by holding that the committee had not wholly observed the rules of natural justice and therefore its decision was void.

In the case of *Breen Vs Amalgamated Engineering Union*⁶⁷ the court noted that ‘as regards the right to a hearing, the crucial question seems to be not

⁶⁵ Though ignorance of the law is no defence (*Ignorantia juris non excusat* or *Ignorantia legis neminem excusat*)

⁶⁶ [1964] AC 40; (1964) HL

⁶⁷ (1971) 2 QB 175.

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whether a person is or is not an office holder but whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of a right to a hearing.’ It held that ‘...[I]f he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive without a hearing, or reasons given, then these should be afforded him according as the case may demand.’

The principles of natural justice entail the right to be heard (*Audi alteram partem*)⁶⁸ and the right to a fair and unbiased administrative process (*Nemo judex in re causa sua*).⁶⁹ The common law rules of natural justice or procedural fairness ensures that administrative decision makers follow a fair and unbiased procedure when making decisions.

Natural justice requires that the decision maker must provide sufficient opportunity for the affected person to present their case and respond to the evidence and arguments being advanced by other side or in the knowledge of the decision maker.

Lord Hewart, in *Rex v Sussex Justices; Ex parte McCarthy* had earlier expanded the scope of natural justice by holding that “... *it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*”⁷⁰

The current Constitution of Kenya has taken the foregoing standards a notch higher by incorporating natural justice principles into the Bill of rights and fundamental rights. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice. This provision is not biased towards

⁶⁸ Latin for ‘hear the other side; hear both sides.’

⁶⁹ Latin for ‘no man should be a judge in his own cause’

⁷⁰ ([1924] 1 KB 256, [1923] All ER Rep 233)

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people dealing with public law only but also protects those dealing with private law.

A number of reasons justify the need for constitutional regulation of administrative tribunals. These are: they are at times held in private so the basic requirements for justice may be ignored; parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions; and the officials do not act impartially in most of the cases.⁷¹

In the case of *David Onyango Oloo vs The Attorney general*,⁷² it was held, *inter alia*, that rules of natural justice apply to an administrative act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit application of a law. This was affirmed in the *Nyutu Agrovot* case, where the Court held that the grounds upon which the courts may set aside an arbitral award are of a pretty serious nature, such as incapacity of a party; illegality of the arbitral proceedings; *breach of the rules of natural justice*; excess of jurisdiction; fraud; bribery; corruption; undue influence and breaches of public policy.

A decision maker must also discharge their administrative duties in an independent and unbiased manner.

5.2 Fairness in Administrative Processes

Article 50 of the Constitution provides for the right to a fair hearing. Clause (1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such persons or parties to a dispute also have a right to *inter alia* have

⁷¹ ICJ Kenya, 'Strengthening Judicial Reforms in Kenya: Public Perceptions of the Administrative Tribunals in Kenya' Vol. VI, p. 6, 2003.

⁷² [1987] K.L.R 711.

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adequate time and facilities to prepare a defence and to adduce and challenge evidence. The information disclosed to the person must be satisfactorily accurate to facilitate the person to properly present his or her case.

Section 19 of the *Arbitration Act*, dealing with equal treatment of parties, provides that the parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present their case. This provision would be subject to Articles 27 and 50 of the Constitution on equality and fair hearing respectively. Justice Deverrel's argument in the *Epcoco case* that the *Arbitration Act* conclusively provides that 'parties shall be treated with equality and each party shall be given full opportunity of presenting his case' and thus application for upholding of constitutionally guaranteed rights should not be 'easily' allowed could be challenged. It is noteworthy that the *Arbitration Act*'s provision on fair trial does not in itself suffice to guarantee this right. Any provision on fair and/or equal treatment that apparently contradicts other provisions therein renders it ineffective in realisation of justice. The Constitution requires that such a hearing must be guided by *inter alia* transparency, rule of law, inclusion, human rights and non-discrimination.⁷³ Any deviation from such may subject it to challenge on grounds of unconstitutionality.

One cannot give up their constitutionally guaranteed rights and fundamental freedoms. If Arbitration is to be regarded as one of the options or means to access justice as guaranteed under Article 48 and 159 of the Constitution, then it must conform to the general principles of fairness, impartiality and equality, to mention but a few. Justice requires that both substantive and procedural aspects of the administrative process demonstrate fairness. Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is similar to delegation of legislative authority, something that would normally be subject to Constitutional scrutiny.

⁷³ Article 10, Constitution of Kenya 2010

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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 through on limited grounds. One such possibility is where the *Arbitration Act* expressly provides for intervention of the court under section 10.⁷⁴ The other instance is where the Court intervenes on grounds of public interest if substantial injustice is likely to be occasioned. While the State should continue to respect the role of private Arbitration and the need to avoid recourse to the courts in private dispute settlement, they must not permit private arbitrators to use laws that are likely to violate constitutional principles. The Rule of law is the foundation of democracy in Kenya.⁷⁵

In the case of *Sadrudin Kurji & another v. Shalimar Limited & 2 Others* the Court held *inter alia* that:

"...Arbitration process as provided for by the Arbitration Act is intended to facilitate a

quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration.

*Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."*⁷⁶

⁷⁴ S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'

⁷⁵ Preamble, Constitution of Kenya, 2010

⁷⁶ [2006] eKLR

Law making bodies must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions. A limit on Constitutional rights must be clearly determinable. A limit must set an intelligible standard. Limitations on rights cannot be left to the unregulated discretion of administrative bodies, in this case arbitral tribunals.⁷⁷ Indeed, Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including *inter alia*: the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation;...and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is however important to note that Article 25 provides for those rights and freedoms that may not be limited under any circumstances. These are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. It therefore follows that the rights contemplated under Article 25 must be upheld and promoted in all proceedings and instances including Arbitration.

One of the advantages of Arbitration is that private parties are entitled to choose the Arbitration law to govern their private relationships. The Act assumes that the parties have equal bargaining power and therefore disregards the likelihood of violation of any constitutional rights in the process. However, it is already settled law that persons cannot contract out of constitutional and human rights protections.⁷⁸

⁷⁷ Chotalia, S. P., '*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*' op. cit. at p. 68.

⁷⁸ Article 19(2) provides that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to

5.3 Fundamental Freedoms

The Bill of Rights and fundamental freedoms applies to all irrespective of status and thus, and no one, unless clearly authorized by law to do so, may contractually consent to shelve its operation and in so doing put oneself beyond the scope of its protection. The Bill of Rights and fundamental freedoms must therefore be observed and promoted in all situations and by all persons.⁷⁹

6.0 Arbitrator's notes and access to Information

Generally, arbitrators are not under legal obligation to supply their arbitrator's notes to the parties. Any party who wishes to have the proceedings of the Arbitration must hire a stenographer at their own cost. The constitutional question that arises here is the right of the parties to obtain information necessary for realization of justice. Article 48 of the Constitution obligates the State to ensure that justice is done and the same is not defeated by a requirement for any fee to be paid. Article 35(1) of the constitution provides that every citizen has the right of access to: information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Would the arbitrator be thus compelled under this constitutional provision to provide a copy of the arbitrator's notes to any party who insists of his or her right to access information as a constitutionally guaranteed right?

Article 165(3) of the Constitution defines the High Court's jurisdiction and provides that subject to clause (5),⁸⁰ the High Court shall have *inter alia*:

promote social justice and the realisation of the potential of all human beings.' Clause (3) further provides that 'the rights and fundamental freedoms in the Bill of Rights: belong to each individual and are not granted by the State;....and are subject only to the limitations contemplated in this constitution.'

⁷⁹ See Chapter 4 (Arts. 19-59).

⁸⁰ Art. 165(5) 'The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)'

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua
jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;⁸¹ and jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.⁸²

Article 165(6) further provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Clause (7) thereof is to the effect that for the purposes of clause (6), the High Court may call for the *record of any proceedings*(emphasis added) before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Going by the wording of clause (7), the record of proceedings would probably include the arbitrator's notes. Further, section 6(1) of the *Fair Administrative Action Act, 2015* provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

Arbitration and ADR generally, has undoubtedly been gaining popularity especially the court-annexed Arbitration. Arbitration has been recognised under various statutes and most importantly under the Constitution as a viable option for settlement of disputes. Its higher degree of formality as compared to other mechanisms under the ADR makes it closely resemble litigation and thus requires law's intervention to ensure that the rights of all parties are not

⁸¹ Art. 165(3)(b)

⁸² Art. 165(3)(d)

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua only upheld but also promoted. This is because it is susceptible to the procedural rules and technicalities that are synonymous with courts. Indeed, Arbitration is not merely a mechanism to provide for private dispute settlement, but rather, is a means of providing quasi-judicial, comprehensive dispute management.⁸³ Arbitration proceedings may arguably be subjected to the foregoing provisions particularly Article 165.

7.0 Arbitrator's fees and Access to Justice

Section 32B of the *Arbitration Act* 1995 provides for the Arbitration Costs and expenses in an Arbitration proceeding. Subsection (1) is to the effect that unless otherwise agreed by the parties, the costs and expenses of an Arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the Arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5). The arbitral tribunal is thus mandated to determine their fees.

Arbitration fees are mostly determined by the arbitral tribunal and where the Arbitration is institutional, there exist institutional guidelines on how this should be done. The parties thus have little if any say on the amount to be charged. Lately, there have been concerns on the actual cost effectiveness of Arbitration with some arguing that Arbitration is becoming more expensive than litigation.⁸⁴

⁸³ See *Bremer (Handelsgesellschaft mbH) vs. EtsSoules* [1985] 1 Lloyd's Rep160; [1985] 2 Lloyd's Rep 199. Sir Nicolas Browne-Wilkinson V-C *inter alia* stated: "...On appointment, the arbitrator becomes a third party to that Arbitration agreement, which becomes a trilateral contract....Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

⁸⁴ Daily Nation, *Business Daily*, "Is Arbitration of disputes better than litigation?" Sunday, March 24 2013, Available at <http://www.businessdailyafrica.com/Is-Arbitration-of-disputes-better-than-litigation/-/539546/1729318/-/rm6n5az/-/index.html> Accessed on 25 November, 2013; See also International law Office, *Arbitration may no longer be viable as an ADR method*, August 09 2012,

The *Constitution of Kenya* provides under Article 48 that in accessing justice, if any fee is required, it shall be reasonable and shall not impede access to justice. The problem comes in when Arbitration involves persons who do not have the financial muscle as against a party who would not have any problem settling their share of the fees charged as the Act requires. A good example is where an individual person enters into Arbitration with a body corporate. There is the risk of one party failing to access justice due to lack of finances. Indeed, section 32B (3) provides that (3) the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. The question that arises is whether Article 48 applies selectively and who determine the reasonableness of the arbitrator's fees as some of them are fixed by the particular institutions involved. It is noteworthy that arbitrators are paid on hourly basis and according to their level of experience and/or expertise.

Would withholding of the award in absence of proper determination of the 'reasonableness' of the fees charged amount to violation of the constitutional right of access to justice? Subsection (4) thereof provides that if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the Arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined. This provision makes it even harder for the aggrieved/affected party to access justice if the Court comes in *after* payment into court of the fees and expenses demanded by the arbitral tribunal. What if a party failed to pay the moneys due to lack of the same? Arbitration then becomes expensive and violates the right of access to justice since such a person, if litigating in courts, would probably have access to pauper brief scheme.⁸⁵

Available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=70d89bd9-87cc-45e4-a73d-b740f96797d0> [Accessed on 25/11/2013]

⁸⁵ No legal aid scheme is available in Arbitration

This remains a contentious issue as to how it should be approached since it seems to be beyond the parties' autonomy in the process if section 32B (7) is anything to go by. The provisions of this section are to the effect that the provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.

Would a group/class of persons be allowed to join forces and enter into Arbitration especially where corporations are involved so as to do cost sharing? If not, how is the power imbalance to be handled in order to facilitate access to justice for the weaker party? In the American case of *American Express Co. et al. v. Italian Colors Restaurant et al.*,⁸⁶ it was held that The *Federal Arbitration Act* (FAA) does not permit courts to invalidate a contractual waiver of class Arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.⁸⁷ The plaintiffs in *American Express* had claimed that American Express used monopoly power in the market for charge cards to extract higher rates for processing American Express credit cards. When American Express moved to compel individual Arbitration pursuant to the Arbitration agreement, plaintiffs had protested, alleging that a class action was essential because the costs of their expert reports alone would run into the hundreds of thousands of dollars, and each individual merchant could hope to recover only a fraction of that amount. A class action thus was essential, plaintiffs argued, to "effectively vindicate" their claims. This argument was rejected by the Supreme Court and had observed that one could not be coerced into class litigation in absence of agreement to that effect.

The effect of such a decision, though in foreign jurisdiction would be incapacitation of vulnerable persons to access justice especially where they would be seeking justice against large corporations or companies. It is

⁸⁶ Certiorari to the United States Court Of Appeals for the Second Circuit, No. 12–133, Argued February 27, 2013—Decided June 20, 2013

⁸⁷ *Ibid.*, Pp. 3–10.

Constitutional Supremacy over Arbitration in Kenya: Dr. Kariuki Muigua therefore unlikely that an individual would afford the costs of Arbitration with companies and especially where purportedly ‘estopped’ from seeking justice through courts due to an Arbitration clause in a contractual agreement.⁸⁸

8.0 Conclusion

There is need to ensure that even as parties enjoy autonomy and other advantages that are associated with Arbitration, the ‘weaker’ party’s interests in the process are protected. Anything less would only delay the process through court applications especially in case of breach of procedural fairness, the very problem that ADR seeks to cure, as the party would resort to constitutional court to seek justice. The *Arbitration Act* needs to be reviewed to seal such loopholes and/or vacuum as relating to the procedural fairness and the manner of conducting the Arbitration process. It is important to note that in this era of human rights as well as the supreme constitution of Kenya 2010, any law, practice, or conduct including *Arbitration Act* which does not reflect the gains made in the constitution would easily be challenged in Court as being unconstitutional. In a society that is increasingly becoming litigious, it is important that such concerns be addressed. Otherwise, references from Arbitration would not only be on the now common ground of public policy but would perhaps see new cases being based on the Bill of rights and alleged violation of fundamental freedoms.

Arbitrators and ADR Practitioners must be cognizant of the constitutional rights of the parties that appear before them. The Constitution of Kenya reigns supreme over Arbitration and its practice. The *Arbitration Act* does not have satisfactory procedural and substantive safeguards against violation of the constitutional Bill of rights and fundamental freedoms. The Supremacy clause in Article 2 of the Constitution means that application of any law in violation of the national values and principles of governance as well as the Bill of Rights and fundamental freedoms would be challenged in Court and even held unconstitutional.

⁸⁸ Ibid. ‘An agreement between American Express and merchants who accept American Express cards, demands that all of their disputes be resolved by Arbitration and provides that there “shall be no right or authority for any Claims to be arbitrated on a class action basis.”

The constitution of a nation state has been said to be the Supreme Act within the hierarchy of regulatory instruments and must thus reign over all other laws.⁸⁹

Arbitrators must be fair, observe the rules of natural justice and comply with Constitutional provisions that guarantee parties rights. Constitutional supremacy over arbitration in Kenya is a reality that cannot be wished away.

⁸⁹ Tanchev, E., 'Supremacy of Constitutions in the Context of Constitutional Pluralism' p. 1, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Evgeni%20Tanchev.pdf> Accessed on 14/11/2013

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*Alternative Disputes Resolution (ADR) Procedures:
Inter Related and Concurrent Application in Specific Industries in Kenya
By: Eng. A. Okelo Rogo*

**Alternative Disputes Resolution (ADR) Procedures:
Inter Related and Concurrent Application in Specific
Industries in Kenya**

By: Eng. A. Okelo Rogo*

Explanatory Abstract

This Article was original conceived and presented as a paper to a Construction Dispute Resolution Course in Nairobi.

It was intended to internalize Alternation Dispute Resolution (ADR) process for day to day application in the Construction Industry. It was also intended to bring out the fact that ADR processes do not exist in a vacuum; they exist within a large spectrum of Dispute Resolution methods, which are suitable for particular stages and Situations of commercial transactions.

More importantly the Article was intended to bring out the fact that various ADR Methods can be applied at particular stages and even concurrently for a single Dispute. Where ADR processes fail, there are provisions for Litigation, and interestingly there also provisions to revert to ADR even while Litigation is underway. This kind of flexibility makes ADR a key tool for Construction Industry Dispute Resolution; as this is an Industry where Disputes occur through all stages involving not only Kenya Parties but also International Parties.

1.0 Definitions

Alternative Resolution to what?

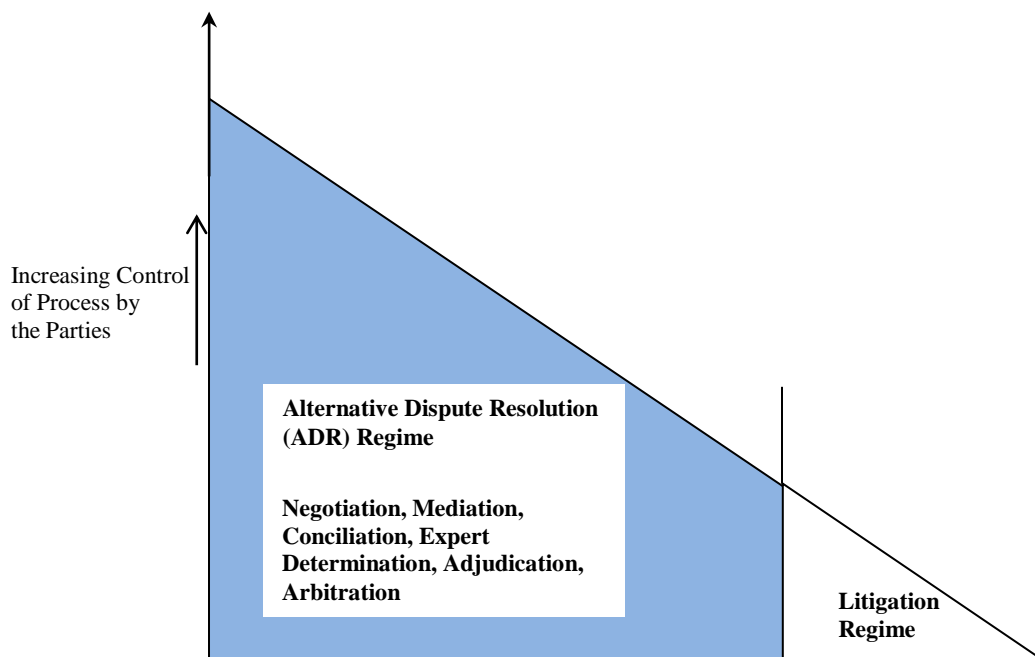
This is the first question that comes into mind at the mention of Alternative Dispute Resolution Process (ADR).

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It is a fundamental and relevant question as to the definition of ADR Process. The definition that gets universal acceptance can be obtained from key features of ADR Process, which are:

- i. Parties control of the process
- ii. Informal and minimal bureaucracy
- iii. Minimal legalistic procedures



Parties Control of Dispute Resolution Process

However the key characteristic is increased Parties control of the Dispute Resolution process in comparison to Litigation. This, therefore, forms a basis

for a universally acceptable definition of the ADR. Thus, all Dispute Resolution processes shown in the Diagram above which are not Litigation are defined internationally as Alternative Dispute Resolution Processes.

The Alternative Dispute Resolution Processes therefore include:

- i. Negotiation
- ii. Mediation
- iii. Conciliation
- iv. Case Conference
- v. Early Neutral Evaluation
- vi. Mini Trials or Executive Tribunals
- vii. Expert Determination
- viii. Disputes Review Boards
- ix. Adjudication
- x. Court Annexed ADR
- xi. Arbitration

2.0 ADR Processes

It is worth noting that although ADR Processes are grouped together, there are variant characteristics that need to be specified as below.

- i. Negotiation
- ii. Mediation
- iii. Conciliation
- iv. Case Conference
- v. Early Neutral Evaluation
- vi. Mini Trials or Executive Tribunals
- vii. Expert Determination
- viii. Dispute Review Boards
- ix. Adjudication
- x. Court Annexed ADR

- xi. Med – Arb
- xii. Arbitration

Although the above methods fall under the generic title of ADR, there are some definite characteristics which are described here below:

i. Negotiation

Negotiation is a process whereby each party enters into agreement with the other party or modifies its demands to achieve a mutually acceptable compromise. It is usually the first step in an attempt to settle a dispute and is sometimes overlooked or bypassed. It will by itself, if used effectively often yield positive results. In negotiations, the parties carry out discussions without third party involvement.

ii. Mediation/Conciliation

Mediation is negotiation facilitated through intervention of a neutral third party: the Mediator. The Mediator merely assists in enhancing the negotiations between the parties. He does not decide, adjudicate or judge between the parties. He is just a facilitator but helps the parties to reach a consensus by listening, suggesting and brokering a compromise. The parties have to be willing to come to some form of settlement.

Conciliation is sometimes used as a synonym to Mediation. However, there is a school of thought that conciliation is slightly closer to adjudication and that the role of a conciliator is more active and proactive intervention.

iii. Early Neutral Evaluation

If parties be made to see their strengths and weakness at an early stage, this may catalyze an early settlement of the dispute. The parties appoint a neutral third party (usually with a legal background) who is supposed

to objectively study the respective contentions of the parties and predict possible outcome if the dispute went to Arbitration or Litigation.

The parties may then decide their options as to whether to proceed or settle.

iv. Expert Determination

This is similar to early neutral evaluation as above but in an overwhelmingly technical dispute, an expert is engaged by the parties to assess the relative strength and weakness of their technical arguments and give his evaluation of the same.

v. Mini Trials or Executive tribunals

This is similar to many of the other ADR approaches but with a proviso that Senior Executives from each side submit their contentions before a neutral third party. The Executives so present must have decision – making powers and power to settle. The idea is to ensure that there is direct involvement of most senior management in the resolution of the dispute and that they are made aware of the consequences of not doing so.

vi. Dispute Review Board (DRB)

This is an in – situ dispute resolving Tribunal established on basis of Adjudication principles, and empowered by a Contract. It is given the jurisdiction by the parties to hear and advise on resolution of the disputes as they unfold on site. The major difference with other forms of ADR is that the DRB, usually comprising of three independent/impartial experts, is appointed at the commencement of the project. It undertakes regular visits to site and is actively involved throughout on continuous basis. In this way disputes are defused before they spiral into longer and more complex issues. The process minimizes possibilities of various issues compounding to large claims. The

concept of DRB has now been embraced by the new FIDIC and World Bank Construction Contracts provisions. The DRB was successfully applied in the Channel Tunnel Rail Link Project between France and England.

vii. Med – Arb

The name comes from the amalgamation to the words Mediation and Arbitration. The idea is to commence the resolution of a dispute through Mediation. If Mediation fails then being a voluntary non – binding process, it may be deemed to be wasted time and costs. The suggestion is that since the Mediator is already aware of the issues he is best placed to arbitrate the matter. His award is then binding and enforceable. If the Mediation is successful, the parties’ agreement is then converted into a consensus award of the Mediator – Arbitrator.

viii. Adjudication

Adjudication is where a neutral third party gives a summary interim Decision which is binding on the parties for the duration of the contract. The contract would normally stipulate the adjudication as a mandatory first step before proceeding with any further action. The Adjudicator’s Decision is final and immediately enforceable .It may be overturned at a later stage by an Arbitration Award on an appeal by a Party to the Contract. Adjudication is considered to be a quick solution and is intended to diffuse arguments, maintain civility between the parties and ascertain uninterrupted progress of Works. It provides a scenario for early warning and solution of disputes before hardening of attitudes of the parties.

ix. Arbitration

Arbitration is a process whereby formal disputes are put to a private tribunal of the parties’ choice for a final, binding and enforceable decision. It has a major advantage over other ADR methods of

enforceability of Awards and can be flexible, speedy, confidential and cost – effective process.

3.0 ADR Processes Utilization

The above characteristics/definitions make ADR processes suitable for Dispute resolution for particular Situations, Trades, Industries, For example;

Mediation/Conciliation process is common in Industrial/Labor Disputes.

Expert Determination is common in Assets/Equipment Valuations, Accounting, Shares, Shipping/Maritime, and Aviation Industry Disputes.

Adjudication/Dispute Adjudication Boards have prevalence use in Construction, Industrial/Labor disputes.

A few of the above mentioned ADR processes are “crosscutting” and are commonly utilized in all areas of Disputes.

These are:-

- a.** Negotiation- being a basic starting point of dispute resolution by the Parties.
- b.** Arbitration- being a process which is usually specified in Agreement/Contracts and is statutory provision of Dispute Resolution.

4.0 ADR Practice in Kenya

a. Definition of ADR

In the recent past, definition of ADR in Kenya had incorporated issues of Statute, whereby Arbitration whose procedures are based on Arbitration Act was considered non-ADR.

As explained earlier, the basic internationally accepted definition of ADR has basis on Parties control of Process. The current definition of ADR in Kenya has also been revised to be based on Parties Control of Process, and therefore all procedures which are not Litigation are regarded as ADR.

b. ADR Procedures in Statutes

It is surprising that there have been Statutes related to ADR in Kenya for a long time, however many Kenyans do not appreciate the fact that they have been solving their Disputes through ADR for ages.

Such Statutes are in existence as Labor/Industrial Relations Act, Water Act, Insurance Act, Lands Act, Income Tax Act, Customs Act, Banking Act and VAT Act, among others.

As an example, situation of Land Tribunals dealing with Land disputes in Kenya are as old as Kenya; Kenya Lawyers are very well versed with the processes whereby the Tribunals Rulings are usually enforced through High Courts.

Another common example are Labor /Industrial related disputes that are usually dealt with through Mediation and Conciliation Tribunals.

The Water Act 2002 has many provisions on Water Resources utilization Disputes among Communities and Industries being handled through Mediators, Conciliators and Adjudicators.

c. Construction Industry

Construction Industry in Kenya has international linkage by its nature as far as Financing, Procurements, Practice and Specifications/Standards are concerned. In view of the fact that the Industry involves relatively massive international investments/capital which are contractually restricted to specific periods for disbursements, disputes arising are rarely solved through Litigation. Moreover, Litigation procedures are peculiar to each State; therefore internationally acceptable Dispute Resolutions procedures (ADR) have evolved in construction industry, and they now are in use in Kenya. The ADR processes are mostly based on Negotiation, Expert Determination, Adjudication and Arbitration. The processes are standardized and are provided for in Standard International recognized Contracts/Agreements for Construction Works.

It is therefore incumbent upon Kenya's Institutions and Professionals to learn understand and apply these processes in their day to day assignments.

d. Court Annexed ADR

Even before promulgation of Kenya's new Constitution in 2010, Proposals/Rules for Court Annexed ADR were being drafted by the Judiciary in consultations with Stakeholders, such as the Chartered Institute of Arbitrator (Kenya Branch).

The new Constitution now has specific provisions for Court Annexed ADR in Kenya's Judicial System. It is therefore becoming more urgent for ADR practitioners in various Professions to be trained to acceptable

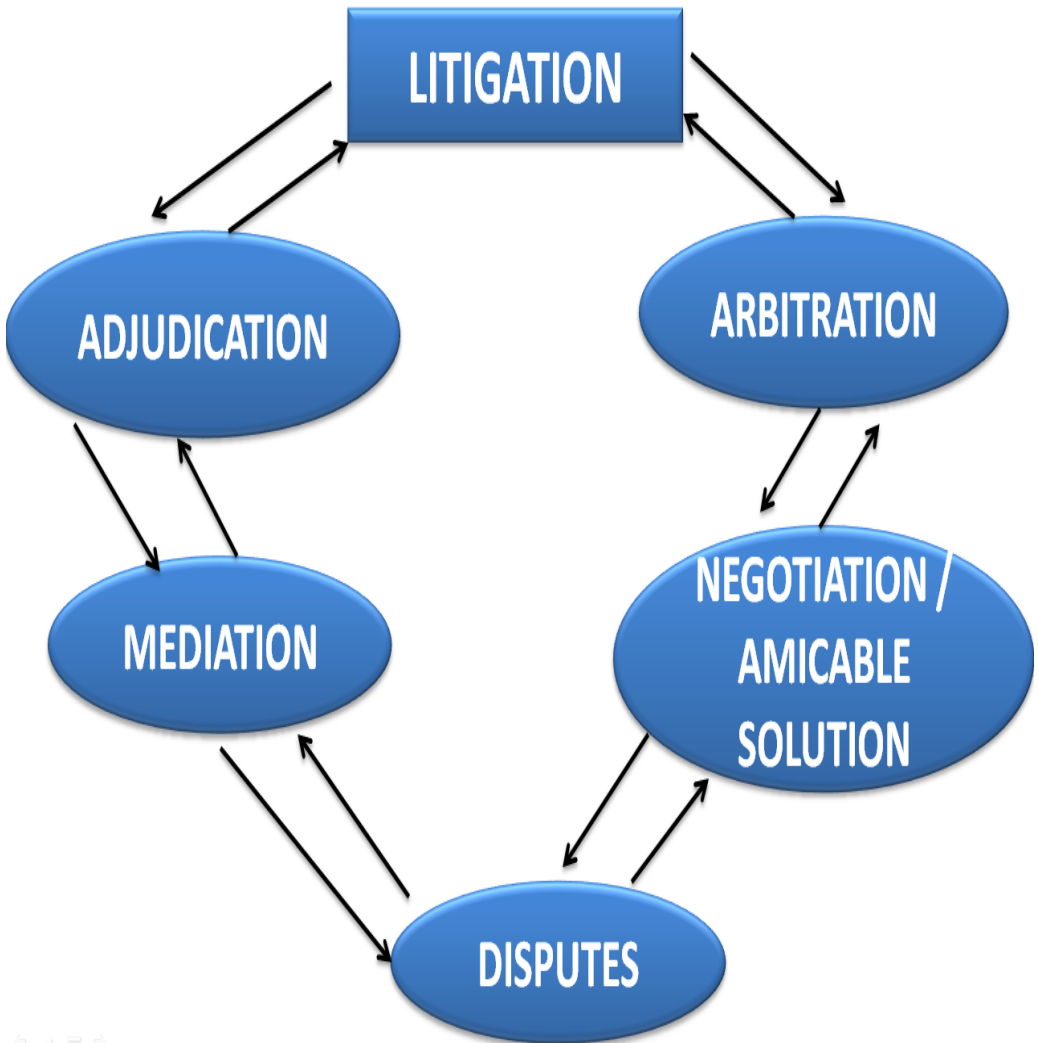
levels for services in the Court Annexed ADR cases all over the Republic.

e. Attitude

There has been an attitude by various professionals in Kenya to treat ADR as nonexistent, not relevant or not worth studying. However, by its practical, non-bureaucratic, non-legalistic, less costly and international nature, ADR is now receiving wide acclaim and usage all over the World in Investments, Banking, Maritime, Aviation, Tourism, Sports and Construction Sectors. ADR is specified for Dispute Resolution in all transactions in these sectors and Kenya cannot be an exception if it has to prosper.

Moreover, Investors now look for and prefer countries where ADR Institutions are totally accepted/practiced. Kenyans from all disciplines, including Lawyers have no option but to learn ADR Procedures in order to be effective, relevant and current in their professions for the full benefit of their Clients and Country.

Key Inter Relationship between ADR and other Dispute Resolution Methods



a) Inter relationship between ADR and other Dispute Resolution Methods

ADR's key attribute is versatility in processes of Disputes Resolution. This is not only as far as ADR and non ADR methods are concerned, but also as regards in between ADR Methods.

(See the above Diagram)

Inter relationship in -between ADR Methods

All ADR Processes have provisions for in between inter relationship for example;

A Dispute being resolved can shift in between Amicable Settlement (Negotiation), Adjudication, Arbitration and back to Amicable Settlement; so long as the Parties consent is given. It is within the Parties powers to agree on method of Dispute Resolution at any time that is suitable to their circumstance.

Any resolution to a Dispute arrived at by the Parties through whichever ADR Method used can be recorded in form of an Agreement which is binding and enforceable.

Inter relationship between ADR and Non ADR Processes

Disputes under resolution through ADR processes have provisions for ending up in Litigation/High Court eventually.

During Litigation, Parties usually seek and get permission to try Amicable Settlement or any other ADR processes.

High Courts are required to encourage Parties to try ADR or Amicable Settlement of Disputes; and such settlements are adopted as High Court Rulings. However if the Parties fail to resolve their Disputes through ADR, there are provisions for them to move back to Litigation/ High Court.

5.0 Conclusion

The new Constitution of Kenya gives significance to ADR, in addition there are moves for Legislation of ADR/Adjudication process, thus other ADR process, apart from Arbitration, will soon receive statutory status.

For Construction Industry, even before Legislation of ADR, International Conditions of Construction Contracts specify mandatory ADR procedures for Dispute Resolution, prior to Litigation.

Clear understanding and usage of ADR in Construction is therefore mandatory for all those who are Project Managers, whether Engineers, Accountants, Lawyers, Architects, Quantity Surveyor, Bankers and Administrators.

Rule of Law, Economic Development and Investment Arbitration under Bilateral Investment Treaties (BITS)

By: Njoki Mboce*

Abstract

This paper examines the connection between the rule of law, Bilateral Investment Treaties (BITS), and the effect of implementing these on a host state's economic development. The paper demonstrates that BITS and the concept of the rule of law share common tenets. The author proffers an argument that proper implementation of the core principles under BITS goes a long way in demonstrating a host-state's adherence to the rule of law. The author further argues that this leads to consistency and predictability of investor treatment, boosting a host state's foreign investments and thereby boosting its economic development. As to the extent of a host state's benefit under the BITS, this is a discussion for another day. This paper will however briefly examine arguments against investment arbitration under BITS.

This discourse is premised on the fact that despite many Sub-Saharan countries, including Kenya, implementing in the recent years aggressive business-climate reforms to attract international capital, Sub-Saharan Africa is still considered one of the uncertain regions to do business. It is suggested that a key reason for this perception is that Sub-Saharan Africa countries are inconsistent in their actions when it comes to reforming the BITS.

This paper briefly examines a relevant recent (March, 2015) award by an arbitral tribunal in an international case. In this case, Canada lost to an American investor upon being found to have breached its obligations under the BITS principles. This demonstrates that aside from losing out on potential investments, non-compliance with existing BITS obligations leads to financial liability of a host state.

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1.0 Introduction

Do Bilateral Investment Treaties (BITS)¹ enhance or impede the excellence of domestic rule of law? Does this have an impact on economic development of a host state? It is arguable that such influence depends heavily on the specific legal, political, and social contexts of individual countries.² Rule of law is debatably one of the most contested concepts in legal discourse.³

2.0 General Nature of BITS

A BIT in its very nature generally affords a qualifying investor certain protections and rights in respect of its investment in a state with which its own state of nationality or domicile has concluded a BIT. Some of the basic protections under BITS for investors are: compensation for expropriation; national and ‘most favoured nation’ treatment; freedom from arbitrary, unreasonable or discriminatory measures impairing their investment; fair and equitable treatment; the sovereign's commitment to honour and uphold its obligations under the treaty and free capital repatriation. The rights include that of a foreign investor to claim against the host state in the event of breach of BITs. Majority of these BITS contain alternative dispute resolution clauses,

¹ A BIT is an agreement between two countries that sets up “rules of the road” for foreign investment in each other’s countries. See US China Business Council, ‘Bilateral Investment Treaties: What They Are and Why They Matter,’ June 2014. Available at https://www.uschina.org/sites/default/files/2014%20USCBC%20BITS%20-%20What%20They%20Are%20and%20Why%20They%20Matter_0.pdf access date February, 2016; See also Juillard, P., ‘Bilateral Investment Treaties In The Context Of Investment Law,’ OECD Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe 28-29 May 2001, Dubrovnik, Croatia. Available at <http://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf> access date February, 2016.

² Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, *International Law and Politics*, pp.1152-1200, p.1153.

³ See David Collier, et al, ‘Essentially contested concepts: Debates and applications,’ *Journal of Political Ideologies*, Vol. 11, No.3, 211–246, October, 2006; Richard H. Fallon, Jr, "The Rule of Law" as a Concept in Constitutional Discourse,’ *Columbia Law Review*, Vol. 97, No. 1 (Jan., 1997), pp. 1-56.

especially arbitration provisions, allowing investors to bring claims against states for treaty violations, often referred to as investor-state arbitration (ISA).⁴

3.0 The Effect of Rule of Law, Bits and Economic Development in Kenya

While many Sub-Saharan countries, including Kenya, are in the recent years implementing aggressive business-climate reforms to mobilize domestic investment and attract international capital, Sub-Saharan Africa is still considered one of the uncertain regions to do business.⁵ It is suggested that a key reason for this perception is that Sub-Saharan Africa countries are inconsistent in their actions when it comes to performing their BITs dispute settlement mechanism and inconsistent decisions by the arbitral tribunals.⁶ National investment laws and international treaties make it possible for private investors to initiate arbitration proceedings against host states even when there is no contractual agreement between an investor and a host state. This paper demonstrates that in the absence of the rule of law, it would be almost impossible to find a proper implementation of BITS. This is demonstrated through the sharing of core tenets between the two. Host states that breach their obligations under their respective BITS suffer not only from a lack of investor confidence, but are also subjected to settling of hefty arbitral awards.

It is therefore necessary for Kenya to enter into BITS and to honour its BITS obligations by adhering to the rule of law.

⁴ Franck, *supra* note 4, at 53-54. These investor-state dispute mechanisms grant private investors, corporations, or individuals the right to sue a sovereign state in an international tribunal and receive binding awards of compensation from the state. Isabelle Van Damme, Eighth Annual WTO Conference: An Overview, 12 J. INT'L ECON. L. 175, 176 (2009).

⁵ Source: World Bank, 2010 Doing Business Indicators, cited at Benjamin Leo, *Where are the BITS? How U.S. Bilateral Investment Treaties with Africa Can Promote Development*, centre for global development essay, August 2010, accessible at www.cgdev.org/content/publications/detail/1424333.

⁶ Uche Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?* (12 October, 2014).

4.0 Definition of the Rule of Law and its place in BITs from a Domestic Perspective⁷

Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

The core purpose of BITs is to protect investments made by nationals of one signatory state in the territory of the other signatory state.⁸ BITs typically require that investments be treated on a non-discriminatory basis.⁹ This is assessed both by reference to domestic investors (national treatment) and investors from other countries (most-favoured nation)¹⁰, joined by several absolute standards, most notable is the requirement of “fair and equitable

⁷ The United Nations definition of the Rule of Law as stated in a Presentation at ICCA 2016 Congress Roadshow Johannesburg, 28 July 2015, by Claire de Tassigny Schuetze, Legal Counsel and Permanent Court of Arbitration Representative in Mauritius: Investor-State Arbitration and the Rule of Law. http://www.arbitration-icca.org/media/3/14388535080960/investment_arbitration_from_a_rule_of_law_perspective_de_tassigny_schuetze.pdf access date February, 2016.

⁸ Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, International Law and Politics, pp.1152-1200, p.1154.

⁹ DiMascio, Nicholas, & Joost Pauwelyn, “Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?” *The American Journal of International Law* Vol. 102, No. 1 (Jan., 2008), pp. 48-89.

¹⁰ *Ibid.*

treatment.” The precise content of the “fair and equitable treatment obligation is a hotly contested issue, in its various permutations, fair and equitable treatment demands that states act in a predictable and non-arbitrary fashion, in good faith, transparently, and/or in keeping with due process of law. ¹¹

5.0 International Perspective on Enforcement of BITS within the Rule of Law¹²

The decision by the arbitral tribunal in the case of Claytons and Bilcon of Delaware Inc.-vs- the Government of Canada (2015) examined three principles under BITS which have a common thread with the concept of the rule of law as discussed in this paper: national treatment, most-favoured nation treatment and minimum standard of treatment. ¹³ The arbitration pertains to the alleged governmental conduct that relates to the management and operation of the Claimant’s investment and the administration and implementation of the EA.

In this arbitral reference, the claimant, Claytons and Bilcon of Delaware Inc., (Bilcon) were U.S. investors who own and control shares in a Canadian subsidiary named Bilcon of Nova Scotia to operate the Whites Point project, the purpose of which was to provide a reliable supply of aggregate for Bilcon of Delaware and the Clayton Group of Companies. Bilcon entered into a partnership with a Nova Scotia company, Nova Stone Exporters, to develop a quarry and marine terminal at Whites Point Quarry. The partnership was acquired entirely by Bilcon in 2004.

¹¹ Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, *International Law and Politics*, pp.1152-1200, p.1155.

¹² This summary on the arbitral tribunal’s decision in the case of Claytons and Bilcon of Delaware Inc.-vs-. the Government of Canada (2015) accessed on <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng> access date February, 2016.

¹³ This case is being governed by the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitral Rules). Kenya has heavily adopted the UNCITRAL Arbitral Rules in her arbitration rules.

The Claimants alleged that the Environmental Assessment (EA) that was undertaken by the Government of Canada and the Government of Nova Scotia for the Whites Point project, along with the administration and conduct of the EA, were arbitrary, discriminatory and unfair. The Claimants did not dispute the fact that EAs were required before construction and operating of industrial projects was to begin, although they allege that Canada's environmental regulatory regime was applied to the project in an arbitrary, unfair and discriminatory manner.

The governments of Canada and Nova Scotia jointly conducted the EA for the Whites Point project from 2003 to 2007. As the governments jointly determined that the project engaged widespread public concern and the possibility of significant adverse environmental effects, the EA was referred to a Joint Review Panel (JRP), which was comprised of three professors from Dalhousie University.

The JRP gathered information on the environmental effects of the Whites Point project, held public hearings, and issued a recommendation to government decision-makers that the Whites Point project should not be permitted to proceed because it would have a significant and adverse environmental effect on the "community core values" of the Digby Neck. "Community core values" were defined by the JRP as shared beliefs by individuals in a group that constitute defining features of the community. Nova Scotia and the federal government rejected the project in late 2007. The Government of Canada specifically concluded, under the former Canadian Environmental Assessment Act, that the project was likely to cause significant and adverse environmental effects that were not justified.

5.1 Award on Jurisdiction and Liability

In its March 17, 2015 Award on Jurisdiction and Liability, the Arbitral Tribunal found Canada liable for having breached its obligations under Articles 1105 and 1102 of the North American Free Trade Agreement

(NAFTA)¹⁴. A majority of the Tribunal found Canada liable for having breached its minimum standard of treatment obligation under Article 1105(1) of the NAFTA. This provision requires that investors of NAFTA Parties be treated “in accordance with international law, including fair and equitable treatment and full protection and security” and prescribes the customary international law minimum standard of treatment of aliens as the applicable standard. The majority’s findings were based on the fact that the JRP’s recommendation relied on the application of a standard, “core community values,” that was not found in Canadian law and therefore that there was a lack of due process because the proponents were not given an opportunity to make a case based on this criterion.

The majority also found Canada liable for having breached its National Treatment obligation under Article 1102. This provision requires Canada to accord NAFTA investors treatment no less favourable than that which it accords, in like circumstances, to domestic investors. The majority’s finding was based on the fact that the standard applied by the JRP had not been applied in other environmental assessments and the government had not shown any legitimate non-discriminatory reason for such difference in treatment.

As at present, following the issuance of the Award on Jurisdiction and Liability, the arbitration has moved into a damages phase, where the parties will submit evidence and argument to the Tribunal concerning the quantum of a compensation award. On June 16, 2015, Canada filed a notice of application in the Federal Court of Canada for the setting aside of the Tribunal’s award of March 17, 2015. In the setting aside proceedings, Canada was arguing that the Award on Jurisdiction and Liability contains decisions on matters beyond the scope of the submission to arbitration, contrary to Article 34(2) (a) (iii) of the Commercial Arbitration Code as enacted and set out in the Schedule to the Commercial Arbitration Act and is in conflict with

¹⁴ North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993).

the public policy of Canada contrary to Article 34(2) (b) (ii) of the Commercial Arbitration Code.

6.0 Arguments against Investment Arbitration under BITS

A key challenge to investment arbitration under BITS is inconsistent decisions by the arbitral tribunals. Critics of investment arbitration under BITS in developing countries argue that investment arbitration undermines local governance because its unpredictability and inconsistency expose developed countries to unknown potential litigation risk every time they attempt to exercise their sovereign legislative and regulatory powers.¹⁵ They argue that investment arbitration under BITS diverts government funds from the public to cover administrative fees, legal fees, and provide for typically large monetary compensations that can and have been awarded to investors by the arbitration tribunals.¹⁶ The opportunity costs of losing a claim are much higher for developing rather than developed nations.¹⁷

¹⁵ See Joshua Boone, footnote 50: ‘...Grant Kesler, Metalclad’s former CEO, said that ‘the arbitration process is too...indeterminate’. ‘...This was said after the same arbitration awarded his company over 16.5 million in compensation. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000); Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 9-10 (2005)’; cf. Trakman, Leon, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?* (January 26, 2012). *Journal of World Trade*, Vol. 46, No. 1, 2012, pp. 83-120; UNSW Law Research Paper No. 2012-1; See also Paulsson, Jan. "Avoiding unintended consequences." *Appeals Mechanism in International Investment Disputes* 241 (2008), 244.

¹⁶ Joshua Boone, *How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 *Global Bus. L. Rev.* 187 (2010-2011), p.192; See Pia Eberhardt & Cecilia Olivet, ‘Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom,’ (Corporate Europe Observatory and the Transnational Institute, November, 2012).

¹⁷ Kevin P. Gallagher and Elen Shrestha, *Global Development And Environment Institute Working Paper No. 11-01: Investment Treaty Arbitration and Developing Countries: A Re-Appraisal* (May 2011), p.9.

Arguably, past decisions by arbitration tribunals regarding violations of investment treaties have been vastly inconsistent.¹⁸ Such inconsistencies inhibit the developing host state from making informed decisions about regulations and legislations that effect investment treaty provisions because there is no consistent, predictable interpretation regarding the scope or application of the BITs provisions.¹⁹

This unpredictability and inconsistency stems from the fact that these arbitration proceedings have been highly secretive, and therefore, one tribunal would not have any idea what another tribunal's decision was or the reasoning behind it.²⁰ This prevents any legal precedent to form and forces an already

¹⁸ Joshua Boone, (How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, 1 *Global Bus. L. Rev.* 187 (2010-2011), pp190- 191 at footnote 51: ‘...For example, Mr. Lauder, a U.S. Citizen, brought a claim against the Czech Republic under the U.S./Czech Republic BIT, but he has his investment restructured under a Dutch Investment group. Upon the alleged violation of the Czech Republic Mr. Lauder and the Dutch firm each brought a separate claims under the applicable BIT. These identical claims resulted in different conclusion on all but one point. *Id* at 60-61.’; See also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *Fordham L. Rev.* 1521 (2005).

¹⁹ See Joshua Boone, footnote 52: ‘...For example, the terms "investment" and "investor" are not properly defined and have often been understood to have broad definitions thereby allowing for a vast array of potential claims to be brought against a sovereign’; See also Susan D. Franck, ‘The Nature And Enforcement Of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future,’ *University of California, Davis*, Vol. 12, No. 47, 2005, 47-99.

²⁰ See Joshua Boone, footnote 53; See also Steffen Hindelang, ‘Study of Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law,’ available at https://publixphere.net/i/salon/page/STUDY_ON_INVESTORSTATE_DISPUTE_SETTLEMENT_ISDS_AND_ALTERNATIVES_OF_DISPUTE_RESOLUTION_IN_INTERNATIONAL_INVESTMENT_LAW_BY_PROF_DR_STEFFEN_HINDELANG_LLM_1; See also Susan D. Franck, ‘The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,’ *Fordham Law Review*, Vol. 73, 2005, 1521-1625, 1611.

ad hoc tribunal to make *ad hoc* decisions without any guidance.²¹ Furthermore, ISA forces developing countries to divert funds from use for public benefit to payment of administrative fees, legal fees, and dispute settlement awards.²²

According to a report by the United Nations Conference on Trade and Development on implication of ISAD to developing countries as well as related literature as discussed by Joshua Boone, administrative fees and legal fees on their own can reach into the millions.²³ For instance, in the situation of Argentina, arguably one of the largest defaults in history, the claims aggregated in the multi-billions.²⁴ These claims not only direct needed public funds towards non- public interests, but also any potential benefit that a developed country may have received from the additional FDI brought in by the BIT could be easily nullified by one large award.²⁵ This, therefore, makes

²¹ See Joshua Boone, footnote 54; See also Susan D. Franck, 'The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,' *Fordham Law Review*, Vol. 73, 2005, 1521-1625, 1613.

²² See Joshua Boone, footnote 55; See also Pia Eberhardt & Cecilia Olivet, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom,' (Corporate Europe Observatory and the Transnational Institute, November, 2012); See also Claire Provost & Matt Kennard, 'The obscure legal system that lets corporations sue countries,' *The Guardian*, available at <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>

²³ See Joshua Boone, footnotes 56-60.

²⁴ See Joshua Boone, footnotes 56-60; See also John Muse-Fisher, 'Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds,' *California Law Review*, Vol. 102, Iss. 6, 2014, 1671-1726.

²⁵ See generally, Kevin P. Gallagher and Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal,' *Global Development and Environment Institute Working Paper No. 11-01*, 2011; See also 'Chapter 4: Who guards the guardians? The conflicting interests of investment arbitrators,' (International Trade, 2012), *Corporate Europe Observatory*, available at <http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators>

a BIT essentially prejudicial as opposed to beneficial to developing host states.²⁶

7.0 Conclusion

As argued by Professor Schuaer on consistency and precedent, there is a concern to “treat like case alike” and that failure to treat similar cases similarly “is arbitrary, and consequently unjust or unfair.”²⁷ This argument as demonstrated in this paper exemplifies a nexus between the core principles of the rule of law and BITS.

This discussion seems to reach a consensus on the need for consistency and predictability among both proponents and opponents of investment arbitration under BITS. Consistency would likely promote the conception of fairness across the system, while inconsistency may lead to the opposite result. Although those who win specific cases are unlikely to complain about the result, inconsistencies adversely impact others immediately affected by the result as well as future users of the system.²⁸

The discussion demonstrates that BITS a proper implementation of BITS in line with the rule of law principles gives a standard of treatment of foreign investors within a host state. This gives a predictability of treatment of foreign investors. Predictability is a long accepted pillar of the rule of law.²⁹

²⁶ See Joshua Boone, page 194; See also generally, Valentine Nde Fru, *The International Law on Foreign Investments and Host Economies in Sub-Saharan Africa: Cameroon, Nigeria, and Kenya*, (e-book, LIT Verlag Münster, 2011). Available at https://books.google.co.ke/books?id=Y9uig70i64cC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

²⁷ Franck, S.D., at p. 65; See also Aranguri, Cesar. "The Effect of BITs on Regulatory Quality and the Rule of Law in Developing Countries." (2010).

²⁸ Ibid, at p. 65.

²⁹ Franck, S.D., *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, University of California, Davis [Vol. 12:47],

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Consistency leads to predictability of an outcome and this would facilitate economic development of a host state.

2005, pp.47-99, at 63. <http://jilp.law.ucdavis.edu/issues/volume-12-1/franck1.19.pdf>
accessed on 21/09/10.

Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration

By: Dr. Kariuki Muigua* & Ngararu Maina**

Abstract

Arbitral institutions play an important role in the growth and development of international arbitration the world over. They are tasked with promoting and safeguarding the discipline, both through ensuring development of sound legal framework and facilitating the practice of arbitration and other Alternative Dispute Resolution mechanisms. While international arbitration is ‘international’ in nature, various regional blocks have developed arbitral institutions that target particular economic areas and take care of commercial disputes in that area. While these institutions have been established under various legal regimes, they strive to maintain professional standards that correspond to the international best practices in arbitration. The authors, in this paper, critically discuss the potential of the Nairobi Centre for International Arbitration in promoting effective management of commercial disputes in Kenya and the African region as a whole. The paper offers recommendations on how to tackle the potential challenges that the Centre is likely to encounter in discharging its statutory mandate of facilitating and encouraging the conduct of international commercial arbitration in accordance with the Act, and administering domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

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1.0 Introduction

One of the key features of international and regional trade is the need for effective framework for the management of commercial disputes. This is because disputes are considered to be inevitable in the international business world.¹ Considering the transnational nature of international trade, national courts and legal systems in general do not appeal to the international commercial community due to the uncertainties that may come with resorting to them for commercial disputes management.² One of the main contentions against the use of national legal systems in international commercial disputes is that they may not be sensitive to the expectations of disputants from different national and legal backgrounds. The general international law as well may not be adequate to deal with cross-border commercial transactions.³ While there are those who argue for a third legal order to be *lex mercatoria*,⁴ international arbitration has gained popularity as the primary way through which international companies resolve their transnational problems. It is associated with advantages which include: flexibility and adaptability of procedure; the ability to customize the process; party participation;

¹ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *William Mitchell Law Review*, Vol. 21, Iss. 3, Art. 23, 1996, pp. 942-987 at p. 942.

² Maniruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" *American University International Law Review*, Vol. 14, no. 3 (1999), 657-734.

³ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 658.

⁴ See Maniruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" op cit. It is important to point out that this is a highly contentious issue especially with regard to its relationship with international commercial arbitration. *Lex mercatoria* is defined as an international law system applied by international merchants based on commercial rules and principles. It is noteworthy that this legal system (*Lex mercatoria*) is not enforced by any national law and is not contained in an international agreement. See Güçer, S., 'Lex Mercatoria in International Arbitration,' *Ankara bar Review*, Vol. 1, 2009, pp.30-39 at p. 34; See also Sweet, A.S., 'The new Lex Mercatoria and Transnational Governance,' *Journal of European Public Policy*, Vol. 13, No.5, August 2006, pp. 627-646.

predictability; expertise of arbitrators; procedural and evidentiary advantages; finality of decisions and awards; enforceability of awards; speed and efficiency of arbitration; cost savings; privacy; and fairness and accountability.⁵

It has been observed that international commercial arbitration has been successful in recent decades among international traders as an alternative to national courts for the settlement of disputes.⁶ The growth in international commercial arbitration is mainly attributed to globalization and the impracticability of traditional justice systems. However, the tremendous expansion of international commerce and the recognition of [our] global economy has also played a significant role.⁷ Also important is the fact that the growth in international arbitration has seen a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.⁸

It is against this background that this paper focuses on the Nairobi Centre for International Arbitration (NCIA) and how the institution can effectively contribute to management of commercial disputes in the East African region

⁵ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 948; cf. Burton, S.J., "Combining Conciliation Arbitration of International Commercial Disputes", *Hastings International and Comparative Law Review*, 18, (July, 1995), 637.

⁶ Croff, C., 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' *The International Lawyer*, Vol. 16, No. 4 (Fall 1982), pp. 613-645, p. 613.

⁷ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 945; 947; See also Perlman, L. & Nelson, S.C., 'New Approaches to the Resolution of International Commercial Disputes,' *The International Lawyer*, Vol. 17, No. 2 (Spring 1983), pp. 215-255; See also Burstein, H., 'Arbitration of International Commercial Disputes,' *Boston College Law Review*, Vol. 6, Iss. 3, Art. 13, 1965, pp. 569-577.

⁸ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

and Africa as a whole, for increased efficiency in regional and international trade. This is because arbitral institutions are an important part of the contributing factors in growth of efficacious international arbitration which in turn facilitates deepening of international trade.

1.1 The Nairobi Centre for International Arbitration

One of the most recent international arbitral institutions in the African region is the Nairobi Centre for International Arbitration (NCIA), based in Nairobi, Kenya. NCIA is a regional centre for international commercial arbitration set up pursuant to the Nairobi Centre for International Arbitration Act (the Act),⁹ alongside an Arbitral Court, with its headquarters in Nairobi, Kenya. The Act provides for the functions of the Centre, the Centre's administrative Board of Directors and their functions, establishment, composition and jurisdiction of the Arbitral Court, amongst others. The Centre is supposed to, *inter alia*: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; develop rules encompassing conciliation and mediation processes; organize international conferences, seminars and training programs for arbitrators and scholars; maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; provide advice and assistance for the enforcement and translation of arbitral awards; provide training and accreditation for mediators and arbitrators; educate the public on arbitration as well as other alternative dispute resolution mechanisms; enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives; and provide facilities for hearing, transcription and other technological services.¹⁰

⁹ No. 26 of 2013, Laws of Kenya, Preamble. This Act is also binding on the Government (s. 26).

¹⁰ S. 5, No. 26 of 2013.

The Centre has since discharged some of these functions, such as developing rules encompassing conciliation and mediation processes.¹¹ However, there still lies an uphill task ahead and for the Centre to effectively discharge most of its statutory functions. There are potential challenges that it will arguably have to overcome for it to secure a place among the World's most successful arbitration centres. This paper critically analyses the challenges that are likely to characterize this journey to establishing Kenya as an international arbitration destination. Through highlighting the international best practices in international arbitration, the authors proffer solutions on how the Centre can help make Kenya and the East African region as a whole, the preferred destination for arbitration by the business community around the world.

2.0 Hitting the Ground Running: Key issues in International Arbitral Institution

The Nairobi Centre for International Arbitration (NCIA) was established in the wake of increased regional arbitral institutions across the African continent and beyond, some of which have been around long enough to win the confidence of the international business community. For instance, it is recorded that the International Chamber of Commerce ("ICC") Court of Arbitration was created shortly after World War I by business people who wrestled with the practical difficulties of resolving disputes with merchants of different national backgrounds.¹² NCIA became the second regional arbitral institution to be set up in the Eastern African region, after Kigali Centre for International Arbitration in Kigali, Rwanda. However, the competition for business extends beyond the region and indeed Africa, to such areas as the Middle East and the United Kingdom where there are a number of globally competitive arbitral institutions which have been getting much of

¹¹ See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255, *Kenya Gazette Supplement No. 210*, 24th December, 2015; Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253, *Kenya Gazette Supplement No. 205*, 18th December, 2015.

¹² Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 944.

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the arbitration business from this region.¹³ The established institutions include, inter alia: American Arbitration Association (AAA); International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); Lagos Regional Centre (the RCICAL); and Permanent Court of Arbitration (PCA).¹⁴ While it may be expected that NCIA may face challenges in the initial stages, there are key issues that ought to be addressed to catapult the Centre to internationally accepted standards to make sure that all that remains is marketing the institution and the country as a whole. The next section, evaluates key elements from the NCIA Act as well as the NCIA institutional arbitration rules with a view to highlight the potential opportunities and pitfalls that may hinder the blossoming of the Centre.

2.1.1 Seat of arbitration and place of hearings.

Rule 18(1) states that the parties may agree in writing on the seat of arbitration. However, unless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya.¹⁵ The Arbitral Tribunal may also, on considering all the circumstances, and on giving the parties an opportunity to make written comments, determine a more appropriate seat.¹⁶ The Rules are flexible on physical location as they give the Arbitral Tribunal the power to, with the consent of all the parties to the arbitration, meet at any geographical location it considers appropriate to hold meetings or hearings.¹⁷ Where the Arbitral Tribunal holds a meeting or hearing in a place other than the seat of

¹³ Lew, J.D.M., 'Comparative International Commercial Arbitration,' p.237, [London: Kluwer Law International, 2003].

¹⁴ See Blackaby, N., et al, *An Overview of International Arbitration*, in *Redfern & Hunter on International Arbitration*, (Oxford University Press, 2009), pp. 1-83 at pp. 59-69.

¹⁵ Rule 18(2).

¹⁶ Rule 18(3).

¹⁷ Rule 18(4).

arbitration, the arbitration is to be treated as arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.¹⁸ Thus, the change in geographical location may only offer physical comfort and satisfy parties' aesthetic preferences rather than have any legal implications on the *lex arbitri*, that is, law of the seat of arbitration.¹⁹

Rule 19 of NCIA Arbitration Rules states that the law applicable to the arbitration shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat. It has been observed that since it is the law of the seat that governs how the arbitral proceedings are to be conducted, the choice of seat can affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease by which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.²⁰

It is, therefore, important for the NCIA to actively coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation. This is one of its main functions as provided for by the establishing Act and it is one of the most important roles since it will help in enhancing the competitiveness of the Centre in the region. If there is a negative perception about Kenyan courts' willingness to enforce and uphold arbitral awards, then the effectiveness of

¹⁸ Rule 18(5).

¹⁹ See generally, Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' *Singapore Academy of Law Journal*, 26, 2014, pp. 886-910.

²⁰ Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p.2. Available at https://www.ashurst.com/doc.aspx?id_Content=9363 [Accessed on 4/03/2016].

NCIA would be affected. The Centre must ensure that the country remains globally attractive by way of having in place laws, policies and institutions that support ADR and arbitration in particular. In the Kenyan case of *Nyutu Agrovet Limited v Airtel Networks Limited*,²¹ the Court, in supporting limited role of national courts, stated as an *Obiter*: “Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in *Prof. Lawrence Gumbo & Anor –v - Hon. Mwai Kibaki & Others*, High Court Misc. Application No. 1025/2004 referred to as; “A Pariah state and could be isolated internationally (emphasis added).”

It is believed that the success of an arbitration institution is dependent on a number of factors that range from its pricing strategy to the overall quality of the legal system of the host state.²² NCIA must therefore take up the challenge and aggressively play its expected role of selling Kenya as the preferred destination for international arbitration. It must work with the other stakeholders to ensure that the national legal system offers support rather than a sabotaging international arbitration.

2.1.2 The enforcement of the award

The fact that Kenya is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),²³ will

²¹ *Nyutu Agrovet Limited V Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61of 2012.

²² Gadelshina, E.R., ‘What plays the key role in the success of an arbitration institution?’ *Financier Worldwide Magazine*, February 2013. Available at http://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.Vt_n_dA4Q7o [Accessed on 02/03/2016].

²³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.

make it easy for arbitral awards to be enforced in states that have reciprocity agreements with Kenya. This may, therefore, help in achieving certainty and predictability that is vital in international arbitration. Also noteworthy is the express provision in the East African Court of Justice Arbitration Rules, 2012 that enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.²⁴

It has been argued that "overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings."²⁵ The Kenyan Courts have demonstrated goodwill in recognizing and enforcing international arbitral awards especially under the New York Convention. In the Kenyan case of *Nyutu Agrovets Limited V Airtel Networks Limited*,²⁶ the Court affirmed its intention to support arbitration by holding, inter alia, 'no court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that had been adopted by many nations had to be respected. The parties herein had agreed that the Arbitrators decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant was an unjustifiable attempt to wriggle out of an agreement freely entered into and

An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. (United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [Accessed on 03/03/2016].

²⁴ Rule 36(3).

²⁵ Sweeney, J.C., 'Judicial Review of Arbitral Proceedings,' *Fordham International Law Journal*, Vol. 5, Issue 2, Art. 3, 1981, pp. 253-276 at 276.

²⁶ [2015] eKLR, Civil Appeal (Application) 61 of 2012.

Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration: Dr. Kariuki Muigua & Ngararu Maina had to be rejected (emphasis added).' This denotes a positive step and a bright future for parties that choose to enforce arbitral awards in Kenya.

3.0 Language

Language is an important aspect of the process and it can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.²⁷ As such, it has been observed that parties should not only choose the language, but also they should do it with due consideration. This is because choice of the “wrong” language may imply the need to resort to translation and interpretation for most of the conduct of the proceedings and this may, on one hand affect the costs and the duration of the proceedings and, on the other, may not be very accurate.²⁸

Rule 20(1) of the NCIA Arbitration Rules states that the initial language of the arbitration shall be the language of the arbitration agreement, unless the parties have agreed in writing otherwise. The Rules also provide that in the event that the arbitration agreement is written in more than one language, the Centre may, unless the arbitration agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the arbitration.²⁹ The Rules further provide that upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language of the arbitration, the Arbitral Tribunal shall decide upon the language of the arbitration, after giving the parties an opportunity to make written comments and after taking into

²⁷ Faienza, V., ‘The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?’ *Kluwer Arbitration Blog*, available at <http://kluwerarbitrationblog.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/> [Accessed on 4/03/2016].

²⁸ Ibid.

²⁹ Rule 20(3), *Nairobi Centre for International Arbitration (Arbitration) Rules*, 2015.

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account—the initial language of the arbitration; and any other matter it may consider appropriate in all the circumstances of the case.³⁰

Rule 20 (5) provides that if a document is expressed in a language other than the language of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or, if the Arbitral Tribunal has not been formed, the Centre may direct that party to submit a translation in a form to be determined by the Arbitral Tribunal or the Centre, as the case may be.

Art. 17 (1) UNCITRAL Arbitration Rules provides that the arbitral tribunal shall determine the language of the arbitration ‘promptly after its appointment’. The *Arbitration Rules of the Singapore International Arbitration Centre*³¹ also provide that where unless the parties have agreed otherwise, the Tribunal is to determine the language to be used in the proceedings. There are those who argue that in view of the extreme significance of the language issue in international commercial arbitration, where the parties usually come from different countries and speak different languages, this rule should generally be followed in international arbitration, even if the proceedings are not conducted under the UNCITRAL Arbitration Rules.³² It has rightly been observed that party autonomy is particularly important here since the choice of the language affects the parties’ position in the proceedings and the expediency and costs of the arbitration.³³ If the parties have reached an agreement on the language to be used in the arbitration, due to the principle of the priority of party autonomy, the tribunal has to accept

³⁰ Rule 20(4).

³¹ Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules (5th Edition, 1 April 2013), Rule 19.

³² Ibid.

³³ Principle No. XIII.3.4 - Language of the arbitration: "Commentary to Trans-Lex Principle, available at <http://www.trans-lex.org/969050>" [Accessed on 26/02/2016].

the determination by the parties.³⁴ NCIA may, therefore, need to have in its list, arbitrators who are knowledgeable in a number of major languages. It is to be appreciated that translations may not always capture the original intent of the parties. Arbitration proceedings may also have on board parties, as witnesses, who were not parties to the original contract. Understanding more languages may help the arbitrator gather important information directly from the witness during proceedings as opposed to translated proceedings.

3.1.1 Choice of Rules of Procedure

Rule 3(1) of NCIA Arbitration Rules provides that the Rules shall apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration. It has been noted that if institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration.³⁵ If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.³⁶

In recognition of this, the NCIA Act provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.³⁷ Further, Rule 3(3) states that nothing in the Rules shall prevent parties to a dispute or arbitration agreement from naming the Centre as the appointing authority without submitting the arbitration to the provisions of these Rules. This, therefore, ensures that flexibility and autonomy of parties

³⁴ Ibid.

³⁵ Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p. 1.

³⁶ Ibid.

³⁷ S. 23, No. 26 of 2013, Laws of Kenya.

is retained especially where the Centre is expected to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties, as provided in its mandate. It has been observed that the adaptability and flexibility parties have in choosing or shaping their own arbitral process is one of arbitration's strengths.³⁸ It is important to guarantee both national and international parties that their autonomy and flexibility in the process, being one of the key advantages of international arbitration, would not be lost should they settle on NCIA as their preferred choice for institutional arbitration or even appointing authority.

3.2 Confidentiality

Rule 34(1) of the NCIA Arbitration Rules states that unless the parties expressly agree in writing to the contrary, the parties must undertake to keep confidential all awards in their arbitration, as well as all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not in the public domain, except where disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. Further, the deliberations of the Arbitral Tribunal are confidential to its members, except where disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under rules 12, 14 and 30.³⁹ The Centre also commits also not to publish an award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.⁴⁰

Safeguarding the confidentiality of the arbitration process and outcome is important for the international arbitration parties who may wish to maintain

³⁸ Fischer, R.D. & Haydock, R.S, "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," *William Mitchell Law Review*, op cit. at p. 948.

³⁹ Rule 34(2).

⁴⁰ Rule 34(3).

business interests and secrets. It is however noteworthy that confidentiality may be lost in case of appeal to national courts.

3.3 The Role of National Courts during the Arbitration Proceedings

The NCIA Act provides for the establishment of a Court to be known as the Arbitral Court, to be presided over by a President; two deputy presidents; fifteen other members all of whom shall be leading international arbitrators; and the Registrar.⁴¹ The Court is to have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law.⁴² Further, a decision of the Court in respect of a matter referred to it is to be final.⁴³ Rule 33 of the NCIA Arbitration Rules provides that the decisions of the Centre with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal.

The NCIA Act is not clear on the role of the Arbitral Court and its relationship with national courts as far as jurisdiction in arbitration matters is concerned. While this may be attractive as far as arbitral independence is concerned, it is also likely to cause confusion especially when considered in light of Kenya's Arbitration Act, 1995⁴⁴ which provides for the role of the national courts in arbitration proceedings. The Arbitration Act provides for limited role of the court in arbitration as stated as follows: '*Except as provided in this Act, no court shall intervene in matters governed by this Act* (emphasis added).'⁴⁵

The role of the national courts as provided in the Arbitration Act, 1995 is limited to: appointment of a tribunal as provided for under section 12 of the

⁴¹ S. 21.

⁴² S. 22(1).

⁴³ S. 22(2).

⁴⁴ Act No. 4 of 1995, Laws of Kenya.

⁴⁵ S. 10, Act No. 4 of 1995, Laws of Kenya.

Arbitration Act, 1995; Stay of legal proceedings as provided for under section 6 of the Act; power of the High Court to grant interim orders for the maintaining of the status quo of the subject matter of the arbitration pending the determination of the dispute through arbitration (s. 7); application by a party to challenge arbitrator or arbitral tribunal (s.14); assistance in taking evidence for use in arbitration (s.28); and setting aside of an arbitral award (s.35). The legal provisions on intervention by the two courts (national courts and arbitral court) are mainly found in the Arbitration Act, 1995 and the NCIA Arbitration Rules. The role of national court as provided for in the Arbitration Act, however, is divided between the Arbitral tribunal and the arbitral court in the NCIA Act.

Most of the foregoing instances where national courts can intervene fall within the jurisdiction of the arbitral tribunal in NCIA Act.⁴⁶ While the NCIA Act is silent on the specific role of the Arbitral Court, the NCIA Arbitration Rules provides for a number of instances where the jurisdiction of the court may be invoked. Rule 11(3) provides that a party who intends to remove an arbitrator shall, within fifteen days of the formation of the Arbitral Tribunal or on becoming aware of any circumstances referred to in paragraph (1) and (2)⁴⁷, send a written statement of the reasons for requiring the removal, to the Arbitral Court, the Centre, the Arbitral Tribunal and all other parties. The Arbitral Court is to make its decision on the removal of an arbitrator within fifteen days of receipt of the written statement, unless—the arbitrator resigns from office; or all other parties agree to the removal of the arbitrator.⁴⁸

⁴⁶ See Rule 27 of NCIA Arbitration Rules on Interim and conservatory measures.

⁴⁷ Rule 11. (1) A party may require the removal of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. (2) A party may remove an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which the party becomes aware after the appointment has been made.

⁴⁸ Rule 11(6).

While the creation of an independent arbitral court and an arbitral tribunal with expanded mandate is laudable as a positive step towards encouraging international arbitration in Kenya, there is the potential of dissatisfied parties, especially of Kenyan nationality, challenging the same on grounds of ousted jurisdiction of national courts. While international commercial arbitration mostly takes place in a country that is neutral, it may not be uncommon to have nationals taking part. The most likely challenge would be where an arbitration is international by virtue of the subject matter being in a foreign country, while both parties may be locals. In the Tanzanian case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v. Tanzania Electric Supply Company Limited (Tanzania)*,⁴⁹ it was held that the intervention by the national courts is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts. Such a position by Kenyan courts is likely to interfere with the functions of NCIA. From the NCIA Act, it appears that the national courts shall only come in during recognition and enforcement of the arbitral award, although this is likely to create confusion especially in case of dissatisfied party (ies).

It is, therefore, important for the NCIA to trend this ground carefully so as to safeguard its independence from domestic interference. This is especially important if the Centre is to compete with other regional independent institutions. For instance, the East African Court of Justice Arbitration Rules, 2012 provide under Rule 36 for finality and enforceability of Award. It states that subject to Rules 33⁵⁰, 34⁵¹ and 35⁵², the arbitral award shall be final. It also states that by submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay. It is noteworthy that the East African Court

⁴⁹ *Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539.

⁵⁰ Rule 33: Interpretation of the Award.

⁵¹ Rule 34: Correction of the Award.

⁵² Rule 35: Additional Award and Review of the Award.

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of Justice is independent of any national laws as far as its activities are concerned, and the only instance where national courts may come in would be during recognition and enforcement of its awards, as foreign or international arbitral awards. There are those who believe that the tribunal can handle contested issues of arbitral procedure and the courts of the seat be available for supportive and supervisory action if the parties require, in accordance with the *lex arbitri*.⁵³ Others argue that the typical statute governing arbitration provides for cooperation between the judicial and arbitral processes, limits judicial supervision of awards, and perhaps most importantly divests courts of the jurisdiction to hear matters submitted to arbitration in recognition of the legitimate exercise of contractual rights between parties.⁵⁴

NCIA must scrupulously maintain a reputation of independence and non-ambiguity in the guiding laws and regulations. The possible confusion in the role of court may therefore need to be clarified so that it will be clear to the parties, from the onset, what they are submitting to.

4.0 NCIA and ADR Mechanisms

The NCIA Act provides that nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms.⁵⁵ NCIA may benefit from teaming up with other local and regional institutions that specialize in ADR mechanisms, for cooperation in training and building capacity in the region. This is important if the Centre

⁵³ Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' op cit, p. 910; See also Lew, J.D., Does National Court Involvement Undermine the International Arbitration Process? *AM. U. INT'L L. REV.*, Vol. 24, 2009, pp. 489-537.

⁵⁴ Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

⁵⁵ S. 24.

is to achieve some of its main functions: to provide training and accreditation for mediators and arbitrators; to educate the public on arbitration as well as other alternative dispute resolution mechanisms; 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.⁵⁶

Building capacity in all the major ADR mechanisms is important to ensure that those who approach the Centre in need of other services other arbitration have confidence in the institutional capacity. There are those who believe that parties to international contracts often fail to face squarely the issue of whether they really want arbitration rather than either court litigation or nonbinding procedures such as conciliation and mediation.⁵⁷ This may be attributed to an ambiguous arbitration agreement or clause or the nature of the subject matter, especially in light of arbitrability.⁵⁸ It is also possible to combine conciliation and international arbitration where circumstances so demand.⁵⁹ Indeed, the International Chamber of Commerce Court of Arbitration provides for optional conciliation in its rules.⁶⁰ Even if the NCIA Arbitration Rules do not have such express provisions on conciliation, it can

⁵⁶ S. 5, No. 26 of 2013.

⁵⁷ Park, W.W., 'Arbitration of International Contract Disputes,' *The Business Lawyer*, Vol. 39, No. 4 (August 1984), pp. 1783-1799 at p. 1783.

⁵⁸ See Curtin, K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws,' *Defense Counsel Journal*, April, 1997, pp. 271-284 at p. 271.

⁵⁹ See van den Berg, A.J. (ed), *New Horizons in International Commercial Arbitration and Beyond*, (Kluwer Law International, 2005), pp. 480-481; Schneider, M.E., 'Combining Arbitration with Conciliation,' available at <http://www.nigerianlawguru.com/articles/arbitration/COMBINING%20ARBITRATION%20WITH%20CONCILIATION.pdf> [Accessed on 10/03/2016].

⁶⁰ 'Rules for the ICC Court of Arbitration,' *Berkeley Journal of International Law*, Vol. 4, Issue 2, Article 17, pp. 422-432 at pp. 422-424.

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still exploit the provisions of NCIA Act which require the Centre and Court to adopt and implement ADR mechanisms.⁶¹

It is also commendable that the institution already has in place the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.⁶² The Mediation Rules are to apply to both domestic and international mediation proceedings.⁶³ Thus, parties to a domestic or international commercial contract may choose to engage in mediation to resolve their dispute under NCIA. It is also possible to employ both mediation and arbitration in a contract as conflict management mechanisms, since the rules do not restrict parties from doing so. Under the doctrine of party autonomy, it is possible to exploit the advantages of both mechanisms where necessary. NCIA should take advantage of this possibility to afford parties the best option to their dispute.

It may therefore be important to ensure that NCIA is well equipped in offering services in the various ADR mechanisms.

5.0 Opportunities for Nairobi Centre for International Arbitration

It has convincingly been argued that arbitration involving parties from developing countries will only work effectively if it is tailored to satisfy the needs and legitimate expectations of all parties.⁶⁴ The belief comes from the perception that many developing countries view existing forms of international arbitration as mechanisms which primarily serve the interests of Western entities. Thus, unless the developing countries are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized in the developing world. NCIA, in collaboration with other

⁶¹ S. 24, S. 26 of 2013.

⁶² Legal Notice No. 253, *Kenya Gazette Supplement No. 205*, 18th December, 2015.

⁶³ *Ibid*, Rules 4 & 5.

⁶⁴ Mclaughlin, J.T., 'Arbitration and Developing Countries,' *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 231.

regional institutions can take up the challenge and offer tailor made services for the regional and international clientele. It is arguable that they are in a better position to understand and address the interests and expectations of the locals, without necessarily appearing like they are favouring them in the process.

The familiarity with the cultural setting may boost the chances of acceptance or recognition of award by parties thus saving on time. It may also inform parties' choice of ADR mechanism to be employed, and NCIA Act contemplates such a situation. It has been argued that culture can profoundly affect a dispute resolution process. This is because far from being merely a function of practical and procedural efficiency contemplated by disputing parties, the choice of a dispute resolution mechanism -- whether mediation, arbitration or litigation -- within the forum of a certain society is strongly influenced by the peculiarities of tradition, culture, and legal evolution of that society.⁶⁵ Thus, it is possible to argue that NCIA is likely to get most of the clients in need of other ADR services, apart from international arbitration, from the local business community. They may take advantage of the proximity (thus saving on costs), and the feeling that the experts in NCIA are more likely to appreciate the nature of their dispute in local context, either out of having lived around the same area or having interacted with the local circumstances.⁶⁶

⁶⁵ De Vera, C., 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,' *Columbia Journal of Asian Law*, 18, 2004, p. 149. Cf. Barkett, J.M. & Paulsson, J., *The Myth of Culture Clash in International Commercial Arbitration*, *FIU Law Review*, Vol. 5, No.1 (2009).

⁶⁶ See Kohler, G.K. & Kun, F., 'Integrating Mediation into Arbitration: Why It Works in China,' *Journal of International Arbitration*, Vol. 25, No. 4, 2008, 479–492; See also Goldsmith, J.C., et al, *ADR in Business: Practice and Issues Across Countries and Cultures, Volume 2*, (Kluwer Law International, 2011); See also LeBaron, M., "Culture and Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <<http://www.beyondintractability.org/essay/culture-conflict>>. [Accessed on 10/03/2016]; 'International Construction Arbitration: When Cultures Collide,' *Trust the Leaders*, Issue 1, Fall 2002. Available at

Maintaining international standards is key if NCIA is to rise above the perceptions that typify the legal institutions in this region and country, namely, inter alia: unprofessionalism, corruption, institutional incapacity and lack of goodwill. While it is expected that the Centre will receive financial and technical support from the State and its machinery, this should not interfere with its functioning or discharge of its statutory duties. It should retain its independence as far as neutrality, predictability, professionalism and competitiveness are concerned. Foreigners as well as locals should be able to approach the institution for arbitration services without any reservations.⁶⁷

One of the ways that NCIA can establish and maintain international standards is through forging strategic partnerships with other players in the sector-national, regional and international. Locally, it can liaise with such institutions as the Chartered Institute of Arbitrators (Kenya branch) (CIArb-K), Centre for Alternative Dispute Resolution (CADRE), Kenya National Chamber of Commerce and Industry, Strathmore Dispute Resolution Centre (SDRC); and the Universities. While institutions such as CIArb-K, CADRE, SDRC and Universities may not be institutional arbitrations in the strict sense of the word, they can play a major role, through collaborative activities, in facilitating training, accreditation and making available a pool of competent practitioners. They can also be useful in creating public awareness on ADR mechanisms and international arbitration. This is besides collaboration with other regional and international arbitral institutions such as the Kigali International Arbitration Centre, Mauritius International Arbitration Centre (MIAC-LCIA), Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the

http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl1/594/ [Accessed on 10/03/2016].

⁶⁷ See Kirby, M., 'International Commercial Arbitration and Domestic Legal Culture,' Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009, p. 2. Available at http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2419.Speech_Acica_Conf.Melbourne_December_2009.pdf [Accessed on 10/03/2016].

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KLIRCA); and Lagos Regional Centre (the RCICAL) amongst others. Such collaborations and cooperation can go a long way in boosting NCIA's profile as well as the other institutions'.

The relationship between the national courts and the arbitral Court established under NCIA Act, also ought to be clearly defined so as to promote predictability and confidence in the Centre. The international business community may only trust the institution where they are assured that national courts will not unnecessarily interfere with the process. The Centre's administrative Board ought to ensure that the Centre will not be associated with the perceived court inefficiencies as this may adversely affect its development and growth. The Centre should seek to paint a better image, one associated with efficiency, neutrality and general professionalism.

6.0 Conclusion

Kenya is hoping to become a middle-level income economy by the year 2030 and one of the ways through which it can achieve this is increased regional and international trade.⁶⁸ As already pointed out, this often comes with commercial disputes which must be dealt with if trade is to thrive. As such, it is important for the country to have in place effective conflict management mechanisms. This presents NCIA a good opportunity to establish itself and the country as the preferred destination for international arbitration. With support from the relevant stakeholders such as the Government, Judiciary, practitioners, amongst others, NCIA has the potential to achieve all its statutory obligations and even surpass the expectations to join the world's most respected international arbitral institutions. NCIA has the potential to become the one stop shop for the effective management of commercial disputes.

⁶⁸ Vision 2030, Republic of Kenya, (Government Printer, Nairobi, 2007). *Vision 2030* is based on three main pillars: economic, social, and political.

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Arbitration in Kenya: Facilitating Access to Justice by Identifying the Role of the Advocate in Dispute Resolution:

By: Nguyo Wachira Patrick*

Abstract

Solving Disputes at any level should be encouraged by creating mechanisms that resolve disputes fast and with least cost to the disputants. Access to dispute solving mechanisms should be simple and quick. With the current economic growth and development in Nairobi, Nakuru and Kericho courts in these counties are struggling with case management. The challenges include; case backlog¹, few judges and magistrates to hear cases, lack of judicial facilities and the lack of access to those facilities where available. This then clogs access to the court justice system, increases legal costs and the citizens are left to despair and their hearts cringe when they have to go and seek justice in court.²

The citizen should not be left to despair in the pursuit of justice but instead the legal institutions/facilitators should create an enabling environment that enhances the delivery of justice at any forum. It would be very noble if members of a society would take the responsibility of resolving their own disputes by creating a system of justice that fosters arbitration. This is a

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¹ The sitting of the court of appeal circuit at Nakuru 8th – 12th Feb, 2016 confirms a serious backlog where the appeals being heard were filed in the year 2010 and before. Eg Nakuru Civil Appeal No 27 of 2008, Nakuru Civil Appeal No 72 of 2010, Nakuru Civil Appeal No 59 of 2005, Nakuru Civil Appeal No 97 of 2010, Nakuru Civil Appeal No 36 of 2009, Nakuru Civil Appeal No 241 of 2009, Nakuru Civil Appeal No 269 of 2009, Nakuru Civil Appeal No 128 of 2010 and Nakuru Civil Appeal No 187 of 2009 and it's worth noting that despite waiting for more than 5 years for the above listed suits to be heard none of the above listed matters proceeded to substantive hearing since some of the parties had passed on while others had settled their differences since it wasn't worth waiting for five years for justice.

² Ibid.

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system that delivers justice outside the formal court justice framework. Arbitration removes the emphasis on procedure and compliance with legal technicalities. This is unlike the formal court justice framework which is time consuming and tedious to the masses where the middle and low income commercial and civil disputes are in plenty.

This paper seeks to unravel the challenges that hinder the society from using arbitration, and proffers recommendations on how to ensure that arbitration becomes accessible; to ensure disputes can be disposed of timely and without delay.

This paper arose as a result of the collection of data from Nairobi, Nakuru and Kericho Counties in Kenya, to identify the challenges that face the litigants and legal professionals in access to arbitration. At the conclusion, there is an evaluation of challenges hindering the arbitration process and possible solutions are recommended to ameliorate the challenges identified.

1.0 Introduction

The driving factor in this paper is that no one can accurately say why Kenyans prefer court justice system to arbitration. However, from the initial literature available, there has been minimal use of arbitration.³ The research that culminated in this paper was premised on the fact that no field data has previously been collected to determine the challenges faced by those intending to use arbitration. The focus is working on proposing ways of alleviating the challenges in the practice of arbitration, thus, identifying the role an advocate plays in the development of arbitration. The proposed ways of alleviating the challenges will be helpful towards access to justice within societies in Kenya and specifically Nairobi, Nakuru and Kericho.

The data collected has been analyzed critically with a view to highlighting the identified challenges which hinder access in the sample sites as a representative of the whole country.

The paper also reviews the developments and gains in the practice of arbitration in Kenya. Some research in this field has been done by other organizations.⁴ Via the findings in this research it can be seen that what has been covered in the field of access to justice via arbitration ought to have been greater and there is big room for improvement especially since Kenya is celebrating fifty years since independence and practice of the rule of law.⁵ The specific example is the link between the data available showing increased number of cases and longer periods of resolving them affecting the delivery of justice?⁶ Finally very little empirical data has been collected linking arbitration *vis a vis* access to justice.

Arbitration is the most common branch of alternative dispute resolution mechanism that has been emphasized in our country and the most used in the three sample study counties Nairobi, Nakuru and Kericho.⁷ How parties settle their disputes has a co-relation with development in that society and thus, this research arose out of the need to promote dispute settlement in Nairobi, Nakuru and Kericho especially in private contracts. Eventually, it is believed that there will be a promotion in the rule of law leading to enhanced access to

⁴ See the website of The Judiciary Kenya, International Commission of Jurists, The Open Society for East Africa, Kenya Human Rights Commission, The Kenya Law Reform Commission and The Kenya Dispute Resolution Centre (DRC) all discussed in the literature review.

⁵ Kenya has had arbitration laws prior to the independence in 1963. However the writer seeks to prove that the citizens have not enjoyed the full benefits of arbitration.

⁶ The Judiciary Kenya, *State of the Judiciary Report, 2012 - 2013. The Second Annual State of the Judiciary and Administration of Justice Report* (2015). www.judiciary.go.ke. This is an informative report on the delivery of justice in Kenya. Of specific importance is chapter two which show the figures of the cases filed and the courts where the cases were filed. It also points out the developments that have been noted in the administration of justice e.g. the pace of delivery of judgments and the concluded cases and within what period.

⁷ Kyalo Mbobu, 'Efficacy of Court Annexed ADR: Accessing Justice through ADR'. (2014) *ADR Journal* ISBN 978-9966-046-02-4 at p. 1.

justice.⁸ In Kenya Arbitration is anchored in the Constitution. Article 159 provides:⁹

159. (2) (c) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.....

*(c) alternative forms of dispute resolution including reconciliation, mediation, **arbitration** and traditional dispute resolution mechanisms shall be promoted*

(emphasis mine)

The above Constitutional provision proves that Kenyans have approved arbitration at all levels of dispute resolution. The fact that arbitration has been provided for in the Constitution have a likelihood of increasing the number of disputes that will be settled via arbitration. The two levels of government have also been mandated by the Constitution to first attempt to settle disputes between them using alternative dispute resolution, where arbitration is one of the options.¹⁰ This may have the effect of obtaining a speedy resolution of matters pertaining to development anchored on devolution, and thereafter, faster delivery of services to citizens.

2.0 Historical Back Ground of Arbitration in Kenya

Arbitration has been used by mankind since the ancient times which includes King Solomon's wisdom which he used to resolve the issue of the two women and the baby.¹¹ In recent past, disputes in most African societies were settled

⁸ Kariuki Muigua & Francis Kariuki, 'ADR Access to justice and Development in Kenya'. Available at www.kmco.co.ke at page 1, 2; Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'Governance Matters III Governance Indicators for 1996-2002,' (The World Bank, 2003).

⁹ Article 159 of the Kenyan Constitution 2010 emphasizes on the sources of judicial authority in the Kenyan legal system.

¹⁰ Constitution of Kenya, 2010, Article 189 (4)

¹¹ 1st Kings 3;16-18, Holy Bible, (Biblica), available at <http://www.biblica.com/en-us/the-niv-bible/>

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through councils of elders who adjudicated over the disputes by hearing parties and coming up with settlements that were widely seen to satisfy each party. A good example can be found in the writings of Chinua Achebe where he discusses the Igbo community.¹²

Jacob Gakeri argues that arbitration existed in Africa and in Kenya as a form of dispute resolution mechanism in the pre-colonial era.¹³ He cites resolution of disputes by a council of elders as a form of dispute resolution. The idea is founded on the fact that the council of elders had the power to determine a dispute with finality. In most instances, the parties had to take an oath of confidentiality before they engaged in the dispute resolution and settlement forum.

2.1.1 Early Formation of arbitration in Kenya

In considering whether arbitration existed in African customary law, the operative words are “consensual” and “agree to present their disputes to a third party”. It is unlikely that the parties under African customary law had a choice as to who would hear and determine a dispute. This was mainly a preserve of the community elders. Therefore, the issue of consent and willingness challenges the assumption that this form of dispute resolution was arbitration. However, it was a form of dispute resolution closer to litigation since parties seldom had choice of the forum/community elders to resolve their dispute.

2.1.2 Kenyan Legal Framework of Arbitration

The practice of arbitration in Kenya has been predominantly practiced and supported via two main Acts of parliament; The Arbitration Act¹⁴ and The

¹² Achebe, Chinua. *Things Fall Apart* (New York: Anchor Books, 1994) ISBN 0385474547

¹³ Jacob Gakeri, ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’ (June 2011), *International Journal of Humanities and Social Science*, Vol. 1 No.6, page 1 – 2.

¹⁴ Cap 49 of the Laws of Kenya Act No. 4 of 1995 (2009).

Civil Procedure Act.¹⁵ The main framework for transferring cases from the court litigation process to an arbitration forum is laid down in The Civil Procedure Rules at Order 46 Rules 1 and 2.¹⁶

The Arbitration Act and the newly enacted Nairobi Centre for International Arbitration Act¹⁷ lays the Kenyan framework and principles that parties to domestic or international arbitration shall apply. Both Acts have rules enacted through which parties facilitate the process of arbitration in Kenya.

Arbitration in Kenya is further underpinned by the legal provisions to be found in: The Investment Disputes Convention Act,¹⁸ Employment Act, the Arbitration Act as amended in 2009 and the Arbitration Rules.¹⁹ Additional provisions may also be found in the Civil Procedure Act and the Civil Procedure Rules²⁰ and the recent Nairobi Centre for International Arbitration Act.²¹ These laws provide for arbitration in general practice within the labour, investment and the land law areas.

Despite the ideal arbitration legislation, legal practitioners and litigants in Nairobi, Nakuru and Kericho, just like the rest of Kenya, have not fully

¹⁵ This process is commonly referred to as Court Annexed Arbitration; see Kyalo Mbobu, 'Efficacy of Court Annexed ADR: Accessing Justice through ADR,' (2014) *ADR Journal*, ISBN 978-9966-046-02-4.

¹⁶ Kenya Gazette Supplement No. 65 (10th September, 2010), Legislative Supplement No. 42 Legal Notice No 151.

¹⁷ Acts No. 26 of 2013 of 2013 and the rules promulgated in December, 2015 by the Chairperson.

¹⁸ Chapter 522 of the Laws of Kenya.

¹⁹ Legal Notice, *No. 58 of 1997*.

²⁰ Chapter 21, Laws of Kenya, section 59.

²¹ Act No. 26 of 2013, Laws of Kenya.

embraced arbitration at the expected pace, leading to few disputes being referred to arbitration.²² The rate at which court cases are being filed is increasing tremendously. However, the use of arbitration in the settlement of disputes in Nairobi, Nakuru and Kericho cannot be said to have increased in equal measure.²³

Justice delayed is justice denied. This saying has gained notoriety in our justice system because of the fact that it is usual to have a case determined after about four to six years from the date of institution/filing.²⁴ As the writer, I have watched litigants pass away as they wait for their matters to be determined.²⁵ It is this puzzle that this paper seeks to unravel by proposing how arbitration can be developed to solve disputes of a wide genre expeditiously in Kenya. There are several published judicial reports and other nongovernmental surveys on the topic Access to Justice in Kenya. These reports in their recommendations conclude that the actors in the justice sector need to find other alternatives to the court justice system to settle disputes.²⁶ Among the most convincing recommendations that have been made towards enhancing access to justice, is the creation of ADR Mechanisms, Traditional

²² Paul Ngotho, 'Challenges Facing Arbitrators in Africa'. East Africa International Arbitration Conference Nairobi. page 8. The writer notes that arbitrators in Europe have 100-500 arbitrations under their belt each while their African counterparts with 10-20 are considered gurus.

²³ J K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR', *International Journal of Humanities and Social Sciences*, 2011 Vol 1 No 6 June page 219.

²⁴ Aisha Onsando, Is Arbitration of Disputes Better than Litigation? Benson Wambugu, Arbitration Cuts on Backlog in Courts. Business journal, 23rd June, 2008, p. 2 Nairobi. Accessed on 9th April, 2015; note 1 above.

²⁵ Supra note 1. Specific reference to the following matters filed at the court of appeal by litigants and when their matters were fixed for hearing (several years after filing) they had passed on and their appeals had abated.

²⁶ Patricia Kameri Mbote and Migai Akech, *Kenya Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa* (March 2011) page 174 – 176.

Justice Systems and through the local administration. This is affirmed in the extract here below:²⁷

Many Kenyans pursue their grievances and conflicts through alternative justice systems. They include traditional systems, peace or reconciliation forums, Islamic courts and interventions of the local chiefs. The latter are part of the provincial administration and they are mandated to maintain law and order in their communities. They employ statutory as well as customary or informal conflict resolution methods to resolve conflicts. Kenyan law does not formally recognize the role played by non-state justice systems. In most of the rural parts of Kenya, justice is sought through the use of non-state justice systems such as a council of elders or extended family members and religious institutions. Cases which are most commonly brought to these institutions include matters to do with land disputes, livestock disputes, marital and domestic matters as well as domestic violence. Some crimes such as assault and sexual violence are also referred to the elders for resolution. The legal system acknowledges only Kadhi courts as the only religious courts in Kenya. Other examples of non-state justice systems include: Initiatives such as the 'peace elders initiative' in Laikipia district, which are working to make dispute resolution processes more inclusive, by bringing in youth and women as 'elders'; and Chiefs and assistant chiefs who are appointed by government as local administrators. They take on a significant role in settling disputes in areas where access to police and courts is restricted. They preside over, and record proceedings of, cases in which elders chosen by the disputing parties make the final decision. Chiefs and their assistants also hold positions of authority in their clans, sometimes on the basis of popular elections.

..... These non-state and traditional judicial systems apply some of the principles and guidelines on the right to a fair trial and legal assistance such as:

²⁷ Ibid, p. 173.

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Generally, there is no effort to formalize these courts from the central government. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process.

With the above extract it can be confirmed that there is need to facilitate ways to enhance access to justice irrespective of the forum but with the approval of the parties to the dispute.

3.0 Characteristics of Arbitration: Advantages of arbitration

Satisfaction; unlike the court proceedings which are imposed on a party and may further be dragged by either party the arbitration process is a creature of the parties by agreement and thus a concept of acceptance of the process.

Clarifies Issues; arbitration allows parties to point out issues and explain themselves unlike court procedures where time is limited and parties end up complicating issues and considering the new developments parties are now being demanded to file submissions thus reducing the parties abilities to elucidate issues before the judge.

Flexibility; arbitration proceedings may be concluded faster than the court process as parties determine the pace at which they want the courts to be heard by the arbitrator.²⁸

Outcome of the matter is confidential; Unlike court procedure, the outcome/award is confidential and only known to the parties who may choose to publish it or file it in court.

²⁸ Githu Muigai and Jacqueline Kamau, 'The Legal Framework of Arbitration in Kenya' in Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 6

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Allows communication; Parties can easily communicate to each other unlike court process where there is too much tension that cannot allow informal communication.²⁹

Party Centered; arbitration places the attention on the parties and the resolution of the dispute at hand. In the court process most of the attention is on the judge or magistrate. The other attention in court is to the adherence of the legal process and law. This is referred to as party autonomy.³⁰ Flexibility; Parties are allowed to conduct the arbitration process in a manner they feel fit unlike court process where they are forced to come to court on certain days, file documents within time frames and they cannot control how long the dispute will take to settle.

Finality of arbitration decisions; parties cannot appeal an arbitration decision. They may however move to court to have it executed.³¹

3.1.1 Disadvantages of arbitration

Negotiation Power; During arbitration one party may have a higher ability to negotiate (by having better representation) than the other party hence the weaker party may feel over powered.

No precedents; There are few published arbitration awards and the few cannot be relied upon in a new case. Arbitration decisions do not form precedents that can be used in future since the decisions are confidential.

²⁹ Steven Gatembu Kairu, 'The Conduct of the Arbitral Process' in Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 60, 61 and 62

³⁰ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi) 127

³¹ *Supra* note 131 at pp. 6 and 7.

No Lawyers Involved; for arbitration proceedings it is not mandatory to have lawyers represent parties.³² This disadvantages the tribunal when it comes to the interpretation of the legal issues arising considering that interpretation of the laws and regulations forms a major part in dispute settlement.

4.0 Research Methodology

The main research instrument was the questionnaire.³³ The questionnaire was a blend of restricted and unrestricted format. The population sample in every category was a comprehensive representation of the relevant group.³⁴

In order to get an experience on what challenges exist before the formation of an arbitration tribunal sitting it was necessary to peruse a wide array of the arbitration awards, proceedings and other research reports that have been conducted in this area by other organizations.³⁵ This gave a true reflection of the observations, frustrations from the parties and practitioners on the overall environment relating to arbitration access. The sample population was selected randomly within each stratum but proportionally from the other strata.

The questionnaires were circulated within the court premises to the litigants. The advocates were pursued to their chambers and within the court premises. The litigants mainly targeted were the business community since they are likely to have had commercial disputes. The advocates/practitioners of law are the ones carrying on their practice in Nairobi, Nakuru and Kericho. However, in Nairobi more advocates were sampled than in Nakuru and Kericho since Nairobi is a more robust commercial centre in Kenya compared

³² Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference. Nairobi (July, 2014) Available at <http://www.ngotho.co.ke>

³³ See appendix 2 and 3.

³⁴ Mugenda and Mugenda, *Research Methods – Quantitative & Qualitative Approaches*, (Acts Press Nairobi 2003)

³⁵ The proceedings shall include pleadings, proceedings notes and the arbitral award.

with the other Kenya towns. The identification of an objective survey sample was crucial. The survey sample could not have been open to all and sundry but must be limited to only those who have an exposure of arbitration and/or knowledge in issues of access to justice.

A model of Data Analysis Procedure and Presentation was adopted since the data collected was both qualitative and quantitative. The qualitative data was graded and presented on tabular format since the answers to the questions can be relayed on a scale. This scale shall be indicative from the lowest integer to the highest indicator.³⁶ There is a reliance of the words very good, Good, Fair, Poor and Very poor where 1 represents the best and 5 is very poor or worse. The reason for the choice of these counties is because they experience a vibrant legal practice evidenced by the presence of busy High Court and magistrate courts Stations.³⁷ These counties also have a blend of urban, semi urban, semi-rural and rural lifestyles of the citizens living there.

Kericho was chosen because in accordance with the last census it has a high rural population with an easy access to a commercial town setting with a court set up.³⁸ This would be ideal in comparing the attributes of arbitration in both

³⁶ See page 1 of the questionnaire, The Key. There has been a developing trend and legal discourse in legal research known as Empirical Legal Research ELR. This field deals with the research that was predominantly used in the economics and social sciences but now being focused on pure law theorems. See the Journal for Empirical Legal studies launched in (2004) Cornell law School.

³⁷ A way of identifying a vibrant legal practice station is the availability of a High Court station with the Environment and Land Court and Employment and Labour Relations Court.

³⁸ <https://www.opendata.go.ke/facet/counties/Kericho> Accessed on 19th September, 2015.

It indicates that from the 2009 census conducted in Kenya, county of Kericho had an urban population of 38.7%. This indicates that majority of the people in Kericho live a rural lifestyle but with an easy access to an advanced court justice system. This makes it different from Nakuru County which was recorded to have a higher urban population. Nakuru was recorded to have 45.8% of its population being urban. The Nakuru population is also more active in commerce sector than Kericho and also enjoying a good access to the court justice system with courts two. High Court station at Nakuru town and Naivasha town and three magistrate court stations. Concerning the Nairobi city County its population is 100% urban recorded in the same census survey. This population has an easy access to the whole structure of the court

big commercial cities like Nairobi and a smaller town like Kericho but with vibrant business community.³⁹ Nakuru demonstrated to have a good mix of both urban and rural population with access to a modern commercial setup. The litigants were also sampled since they are in a position to say what they expect regarding their satisfaction from court in view of disputes they have filed. The litigants were also to give a feedback in regard to the dispensation of justice from the current short comings they have experienced as they litigate in court.

The questionnaire was also distributed at court premises. Randomness was guaranteed since it was not known or expected which lawyers, litigants or clerks we expected to find in court that day and which side of the court premises they would be found and thus be sampled. Some criminal law practitioners also filled the questionnaires. It was a unique realization of the different ways the public prosecutor *vis a vis* the private defence counsel for a criminal filled the questionnaire.

Legal clerks in law firms and judicial officers were also sampled. The judicial officers including legal clerks in law firms play a crucial role in the dispensation of justice. They are the ones who are responsible to the preparation of the litigant and his documents before he files them in court or before he sees an advocate or the litigant files the case in court. In some few cases interviews were conducted. These interviews were conducted guided by the questionnaire. However, during the actual data collection some respondents requested some clarifications and discussions would ensue leading to the interviews being conducted. During the circulation of the questionnaires it emerged that some of the interviewees were willing to share

justice system in Kenya. In relation to the whole Kenyan population of 38,610,097 according to the same census, the Average percentage that consists of the urban dwellers is 32.3% making a total of Kenyan urban population of 12,487,375. This would also help draw the inference if arbitration is affected by the susceptibility to urban or rural exposure.

³⁹ Note above

their experiences in the field of arbitration than merely filling up the questionnaire. Some of the interviewees had different handicaps/disabilities as they could not read the questionnaires or fill up the questionnaires and thus offered their feedback orally through an interview.⁴⁰ All the responses were noted beside the mandatory questions contained in the questionnaire. The remarks made beyond the questionnaire consisted of personal experiences.⁴¹

5.0 Data Analysis and Observation from the Feedback

5.1.1 Respondents Understanding of Arbitration

The first question in the questionnaire that was administered to the advocates asked the question “What do you know about arbitration in Kenya?” This question was open ended and was intended to establish the extent of the respondent understanding of arbitration. From the manner the question was answered there was a very high score that majority of the advocates understood what is arbitration and how it is practiced. Majority went as far as discussing the laws governing arbitration in Kenya. This leads to a conclusion that majority of advocates understand the arbitration process and if they wanted to invoke it, they knew what guidelines and regulations to follow. However, a number of them answered in a manner that indicated that arbitration was similar to mediation or conciliation.

The advocates’ exposure to arbitration was also sought. Question number 2 asked if the advocate has ever used arbitration. It was a closed question requiring a ‘yes’ or ‘no’ answer. Majority of the advocates seem to have used arbitration. Out of the 97 filled and returned, 95 answered this question. Out of the 95 who answered this question, 82 have been engaged in an arbitration forum before while 13 have never taken part in any arbitration forum. The question confirmed the above preposition that that majority of advocates

⁴⁰ An example was an advocate who had difficulties with his sight. He requested that he be assisted in the filling the questionnaire as we discussed the questions. The same was encountered with a disabled litigant.

⁴¹ See the case studies in the conclusion paragraph.

understand the arbitration process and if they wanted to invoke they knew what guidelines and regulations to follow. Below is a tabular representation of the same. Table 1

Advocates who have used arbitration

Advocates who have ever used arbitration	95
Advocates who have never used arbitration	2
Total Respondents	97

5.1.2 Effectiveness of Arbitration

Majority having used arbitration they all had varying outcomes regarding the effectiveness of the arbitration process. The levels of satisfaction on the outcome from an arbitration process have a subjective measure depending on what transpired during the respective sessions and the type of dispute that was being resolved. This led to the effectiveness of arbitration in dispute settlement being rated in a manner to suggest that arbitration has been effective. The rating score sheet had a scale with the value 1 being very good while 5 being very poor.⁴² The respondents averaged a score of 2.1298 out of 5. This confirmed that the respective arbitration tribunals attended to functioned properly leading to resolution of the dispute at hand in a manner that was satisfactory to the parties. Below is a tabular representation of the same. Table 2

⁴² Refer to appendix 4 the key in each questionnaire

Category	Rating	Score
Very Good	13	
Good	46	
Fair	13	
Poor	5	
Very Poor	0	
Total respondents	77 out of 97	
Abstaining respondents	20	
Average score		2.1298
Highest expected score		1
Lowest probable score		5

How effective was arbitration?

1 very good and 5 indicating very poor

5.1.3 Referral to arbitration

Question number four asked if the ‘advocate often suggests arbitration his clients as a dispute settlement mechanism for arbitration out of the 97 advocates’ respondents 92 answered the question. It would seem that 5 advocates polled work in positions where they do not have an option to advice the client which means of disputes settlement to use.

At the analysis we noted that out of the 92 respondents 73 advocates replied that they often suggest arbitration to their clients. The remainder 19 usually do not recommend their clients for arbitration. A further look at their questionnaires indicates that the advocates who normally do not refer their clients for arbitration have good and valid reasons for not referring their clients for arbitration. The reasons vary from experience in the practice of arbitration or a perceived perception about the conduct of arbitration. It should also be noted that referring a client to arbitration is dependent upon

the client accepting advice and opting not to go to court. Below is a tabular representation of the same. Table 3

Do you often suggest arbitration to your clients?

Yes	73	
No	19	
Abstaining respondents	5	
Total respondents	92 out of 97	

Among the leading reasons given was that their clients have a preconceived mind that they want to have the dispute determined via the court justice system. The client going for dispute settlement seems to have a mindset that the only way to have their matters determined is via the court justice system and not any other form where they can compromise their claim.

Some advocates also seem to have the opinion that arbitration is not a means to an end in the dispute settlement.⁴³ They were of the opinion that there is no need to pursue arbitration and thereafter end up in court again pursuing implementation of the award.⁴⁴ This opinion was also amplified by some advocate who stated that “clients typically prefer to litigate in court for a final determination”.⁴⁵ And “some clients are not agreeable to the same and prefer the normal court process”.⁴⁶ This clearly shows that the clients want to settle the matter with finality and therefore any forum that indicates that the matter will not be dealt with conclusively will not be accepted. However the advocates’ in-depth analysis and/or understanding of arbitration on this

⁴³ See the response by A10

⁴⁴ See the response by A50

⁴⁵ See the response by A36

⁴⁶ See the response by A49

response was wanting since in arbitration there will be no appeal and the challenges that can be put forward to challenge an arbitration are limited.

The advocates who have also used arbitration seem to have an opinion that arbitration is expensive and they cannot use it for some type of claims especially the small claims. This also applies where the client may not afford the arbitration fee. A look form the recommended deposit for an arbitrator to take up your matter shows that an amount of approximate (on the lower scale) Kenya shillings 200,000.00 is needed for a good arbitrator.⁴⁷ This amount is colossal and majority may not afford. This is unlike the court fees which normally don't exceed Kenya shillings 10,000.00 for a dispute which is non-liquidated.

5.1.4 How often do judges and magistrates suggest the use arbitration to parties in court?

This was a closed question where the respondent was asked if the magistrate, judge or any judicial officer ever suggested that you use arbitration. This was a closed question with two answer options 'yes' or 'no'. This question was asked to the advocates and litigants. The respondents to this question were 93 out of a total of 97 advocates' respondents. 9 out of the 93 indicated that the judges or magistrates they have appeared before have never suggested the use of arbitration to them towards the resolution of any matter. This is a concern since the minimum expectation would be that at least an advocate has had a matter where the court ought to have suggested an alternative dispute settlement model. However 9 respondents' advocates have never been advised by the judge or magistrate to pursue dispute resolution via arbitration. 84 respondents' advocates indicated that they have been referred by the judge or magistrate for the settlement of a matter via arbitration. This shows that

⁴⁷ See the Remuneration, Appointment Fees and Other Charges from the Chartered Institute of Arbitrators Kenya dated 17th April, 2013 giving the guidelines for arbitrators remuneration where Chartered Arbitrator can charge a high of Kenya Shillings 25,000.00 per hour while the cheapest rate was for an Associate Arbitrator who is recommended to charge a low of Kenya shillings 7,500.00 per hour.

majority of the judges and magistrates prefer having a matter being settled via arbitration instead of litigation. Below is a tabular representation of the same.

Table 4

Has the magistrate, judge or any judicial officer ever suggested that you use arbitration in any case? ‘yes’ or ‘no’

Yes	84
No	9
Total respondents	93 out of 97

This resonates with the conclusion that there needs to be an emphasis by judges and magistrates on the need to be analyzing all the matters before them and then making an opinion addressed to the parties if they can have the matter referred to ADR more so arbitration.⁴⁸

It is worth noting that the paper will discuss the extent to which state actors, magistrates and judges facilitate arbitration.

5.1.5 The role of judicial officers and clerks in arbitration

The other category of the sample population was the judicial officers and clerks. They were sampled because they are actively involved in the dispensation of justice in the community and in the absence of a judge, magistrate or advocate you will always find a judicial officer or a court clerk at work in court or at advocates’ chambers. More often they take the brief to the advocate for further advice or to the magistrate for determination. During their handling of the brief at the preliminary level the litigant may engage the clerk or judicial officer for their opinion in the matter or during the period of continued litigation. They play a crucial role because they sift the issues presented by the litigant before the decision on the merits of the case can be assessed by the advocate or judge/magistrate. Some have mellowed in their understanding of the law and they draft pleadings for approval by the advocate. Their opinion is thus important in the dispensation of justice.

⁴⁸ See the recommendations to the Kenyan Judiciary in chapter 5

As a result judicial officers and court clerks were asked if they normally recommend arbitration to litigants. This was a closed question requiring a ‘yes’ or ‘no’ answer. Out the 30 respondents only 5 responded that they do not refer parties to a dispute for arbitration. 4 respondents abstained from answering this question while 21 answered that they normally recommend arbitration. The table below is a representation of the results. Table 6

Do you normally recommend arbitration to litigants?
‘yes’ or ‘no’

Yes	21
No	5
Respondents who abstained from answering this question	4
Total respondents	30

The above question was followed with the question if the judicial officer or clerk has ever witnessed a judge, magistrate or advocate refer a dispute for arbitration. This was a closed question requiring a ‘yes’ or ‘no’ answer. It is necessary to appreciate that majority of the litigants with small claims or a dispute will approach any person with a legal understanding for purposes of an advice on the position of the law as a result the opinion of the judicial officer or court clerk is crucial. The table below is a representation of the results. Table 7

Have you ever witnesses a judge, magistrate or advocate refer a dispute for arbitration?
‘yes’ or ‘no’

Yes	17
No	7
Respondents who abstained from answering this question	6
Total respondents	30

This clearly indicates that the judicial officers with their limited understanding of the law would still refer a dispute for determination through arbitration or ADR. In the questions that followed they recommended that sensitization be conducted for so that more people can be made aware of arbitration. One noted “that majority of Kenyans have no knowledge about arbitration exists in Kenya”.⁴⁹

5.1.6 Knowledge of arbitration forums and Institutions

A question was asked to the advocates sampled if ‘they knew of the existence of the Chartered Institute of Arbitrators Kenya’. This was a closed question with a ‘yes’ or ‘no’ answer. They indicated that they knew the existence of the Chartered Institute of Arbitrators Kenya. This question was asked for purposes of confirming if an advocate needs to institute an Institutional Arbitration proceedings, is he aware of an institution he will approach or the procedure he will engage. Out of all the advocates sampled only 2 did not know of the existence of the institution.

This also confirms that the institute has advertised itself adequately within the potential members and the practitioners of law. Below is a tabular representation of the same.

Table 9

Are you aware of the existence of the Chartered Institute of Arbitrators Kenya?

⁴⁹ See the response by C5 (with the grammatical error) C22, C23 and C15

Yes	95
No	2
Abstaining respondents	0
Total respondents	97

5.1.7 Reference to arbitration through the arbitration clause in an agreement

Among the most common ways a commercial dispute can be referred to arbitration is through the inclusion of a clause in the agreement that refers any dispute emanating from that agreement for arbitration. In recognition of the fact that most agreements are drawn by advocates the questionnaire asked the question “Do you include the arbitration clause in any agreement or contract for your clients?” This was a closed question with three replies that is ‘always’, ‘occasionally’ and ‘never’. This question also sought to know if advocates normally advance arbitration as a settlement model in commercial disputes since an advocate who would include the arbitration clause in an agreement would also refer a commercial dispute for arbitration.

Majority of the respondent’s advocates confirmed that they indeed include the arbitration clause in the agreements they draft. Out of the sampled 97 advocates, 72 indicated that they always include the arbitration clause in any contract they drew. 17 indicated that they occasionally included it while 8 do not include it. This shows that majority of the advocates will most certainly want a dispute sorted out via arbitration. This can be also interested to indicate there is potential to have more disputes solved via arbitration. A response from the sampled advocates is shown below in a tabular representation.

Table10 below.

Do you include the arbitration clause in any agreement or contract for your clients?

‘Always’ occasionally’ or ‘never’

Always	72
Occasionally	17
Never	8
Total respondents	97

An advocate indicated that he used to but he no longer does it.⁵⁰ This is despite the fact that the question was closed and answers required were either of the three noted above. He included his own narrative which read “used to, I no longer’. This implies that he used to include the clause but he later stopped. The respondents who answered never were expected to qualify their answers. In qualifying his answer he indicated that “I have lost faith in arbitration”. Further below he discussed about the fact that there is need to eradicate corruption in arbitration.⁵¹

Two court clerks were also of the same opinion that an arbitrator may use the dispute settlement forum for their own gain. They indicated that they may lack faith in the arbitrator.⁵²

Another advocate respondent who answered this question in a unique manner and in a way that suggested there is high potential in arbitration responded that “this is standard clause in most government of Kenya contracts of a commercial nature”. This response was from the questionnaires circulated among government advocates. This clearly shows that the government is eager to settle disputes using arbitration. The same should also be noted along

⁵⁰ See the response by A33

⁵¹ This response confirms the writings by; Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference. Nairobi (July, 2014) at page 4 – 8. Available at <http://www.ngotho.co.ke> where notes that corruption is one of the challenges in arbitration

⁵² See the response by C21. Note that this was an experienced court clerk as observed via her age of 59 years and the response by C26.

the fact that there was a government sponsored bill which was assented to law establishing the Nairobi Centre for International Arbitration. This is a recent Act of parliament legislated for purposes of creating institutional arbitration under the auspice of the law.⁵³ This act indicates there will be an office of a registrar of the Nairobi Centre for International Arbitration and a secretariat. The office will thereafter admit disputes that will be heard through the appointed arbitrators.

It is also notable that among the reasons why parties to a dispute prefer arbitration is due the fact that the court process is slow. However the parties answering this question also indicated that the arbitration process is expensive and thus the court would be a good and cheap option. One respondent indicated that “the court system is more open, less expensive and has generally reformed”.⁵⁴ This answer indicated that there are advocates who are confident to pursue litigation avoiding arbitration and with valid reasons. In answering why she would not use arbitration one advocate indicated “the cost and length may be as long as and more tedious than litigation”.⁵⁵

6.0 Conclusion and Recommendations

The first set of recommendations are geared towards the general public and private practitioners of law. They can only be enforced if there is a general understanding between the justice sector player institutions and the interested parties within the general public.

6.1.1 Enhancing Training and Awareness in Arbitration

Among the lawyers the most notable recommendation was that training be conducted to enhance knowledge in the field of arbitration. This opinion was raised at the final part of the questionnaire which asked for what the

⁵³ Kenya Gazette Supplement No. 40 (Acts No. 26 of 2013). Date of Commencement: 25th January, 2013 and the rules promulgated thereunder.

⁵⁴ See the response by A16

⁵⁵ See the response by A10

respondent would want done for purposes of developing arbitration in Kenya.⁵⁶ The notable answer phrases included the word “*creating awareness*” “*sensitization*” and “*advertising arbitration*”. One advocate discussed arbitration as “available mostly in Nairobi and not rural areas.” In another question he commented that “it is mostly centered in Nairobi since that is where there is sufficient sensitization of the arbitration option.”⁵⁷ This response is identical to the findings in the paper by Musili Wambua.⁵⁸

Some of the lawyers however in their discussions defined arbitration as mediation. They answered suggesting that the duties of an arbitrator include bringing the parties to in disputes together for the negotiations on the dispute towards finding a middle ground. They also indicated that in the process of arbitration parties are expected to cede their positions to facilitate an amicable settlement. These are attributes inherent in mediation and not arbitration.

This issue can be addressed by conducting continuous trainings on ADR to judges, magistrates’ lawyers and the general public.⁵⁹ Some of the fears and biases towards arbitration could also be addressed through continued periodic training and conferencing. It noteworthy to point out that one of the advocates interviewed was fearful that injunctive orders could not be adequately addressed through an arbitration forum.⁶⁰ There was also the lack of

⁵⁶ Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference (Nairobi - July, 2014) Available at <http://www.ngotho.co.ke> At page 9 and 10

⁵⁷ See Questionnaire number A45

⁵⁸ Musili Wambua ‘Broadening Access to Justice in Kenya through ADR; 30 years on’ Kenya Journal of Alternative Dispute Resolution’ (Vol 3 No1 2015)

⁵⁹ There was a consistent display of lack of knowledge in the field of arbitration and the procedure of getting parties to solve a dispute via arbitration. Advocates also made comments like need to be trained in arbitration procedures. Few advocates showed a well-grounded understanding of arbitration.

⁶⁰ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition Glenwood Publishers Ltd. 2012 Nairobi) 134 - 138

confidence that an injunction by an arbitrator can be enforced. However the issue at hand was the failure by counsel to acknowledge that a party may proceed to the courts of law and obtain an injunction pending the start of the arbitral proceedings. The writer also acknowledges that arbitration may not have developed in leaps and bounds like litigation to facilitate granting of orders similar to Mareva injunctions and Anton Piller orders.⁶¹

The consistent recommendation made by advocates which is the creation of awareness (partially highlighted above) and training is emphasized by the writer.⁶² There is need for advocates to appreciate that there is no written down procedure for conducting proceedings before an arbitrator. The core procedure is about rules of natural justice. It may also be agreed by the parties on what procedure to follow. This aspect of the lack of understanding that it is the parties to an arbitral tribunal who set their procedure was demonstrated by the feedback obtained. Other advocates admitted lack of knowledge in arbitration.⁶³

The justice sector institutions need to also consider enhancing training to the general public on arbitration.⁶⁴ Specifically, the public needs to understand that an arbitrator is a private judge who can deliver justice and issue binding and compelling orders to the parties. From the feedback obtained some of the litigants who knew the existence of arbitration did not comprehend the finality of an arbitral award. Some held the view that if dissatisfied with an

⁶¹ *Mareva Compania Naviera SA v International Bulk carriers SA*, [1975] 2 Lloyd's Rep 509 (C.A. 23 June 1975)., [1980] 1 All ER 213 and *Anton Piller KG v Manufacturing Processes Ltd & Others* [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975)

⁶² Ibid. noted above

⁶³ However this lack of knowledge would be addressed to the bench or the parties to the dispute.

⁶⁴ The justice sector players may consider conducting this training on the wider ADR and traditional dispute resolution mechanisms for an effective multi sector approach.

award they would set it aside or appeal at the courts of law which will exercise an appellate jurisdiction to the award.⁶⁵

The litigants should also be made to understand that it is important to sit down on a round table with the other disputing party in the presence of an arbitrator. This is because litigants displayed an attitude that the reason why they filed the dispute in court is because of; “I need to punish this other party” and “I have taken a hard line position and I am not bulging”. Such instructions by litigants to the advocates give little chances in changing the clients’ perception to accepting arbitration as a dispute resolution mechanism.

Here are some of the responses from advocates why they do not pursue arbitration. One of the respondents advocate indicated the *‘unwillingness of the clients’* as one of the reasons for not using arbitration. Another advocate indicated *‘my clients refuse this option’* clearly indicating that a large number of litigants refuse ADR as a way of settling disputes. Along this line there was another response that *‘the clients are not agreeable to it, they believe the courts have the ultimate solution’*.⁶⁶

These training forums would also act as an advertisement of the availability of the arbitration channel to dispute settlement.

6.1.2 Recommendations to the Kenyan Judiciary

The research questions that had been posed have all been answered by the following findings. The following list of recommendations will answer the first and second questions that asked “what challenges are faced by those intending to settle a dispute via arbitration in Kenya” the second question that has also been answered is “what limits access to arbitration in Kenya.” The respondents have given valid reasons that should be considered in the answer

⁶⁵ These were sentiments from a few advocates

⁶⁶ These are some of the answers to question 6 (the second part) and question 15 of the questionnaire to advocates. See appendix 4 - II

to the questions and that should be considered in the development of arbitration.

The majority of the advocates, court clerks and judicial officers interviewed confirmed that judges and magistrates do recommend the solving of matters before them via arbitration. However this emerged to be an individual responsibility of the magistrate but not as a directive issued by the judiciary. The judiciary has done little to facilitate the use ADR to resolve disputes.⁶⁷

6.1.3 Including ADR in Performance Measurement to Judicial Officers

There have been several recommendations by the various judicial committees and task forces formed that the judiciary needs to use ADR to settle disputes.⁶⁸ However the wide spread implementation has not been actualized. The judiciary has not done much in the use of arbitration to settle disputes. Trainings and recommendations have not done much leading to a show of frustration by the Chief Justice on how there has been a low uptake of ADR in Kenya.⁶⁹

From this paper I would recommend that among the performance targets the judicial service commission should delegate to judges and magistrates is that judicial officers to ensure that; recommend arbitration and arbitrate in cases where the litigants accept. The judiciary can easily make a follow up since the case can be brought up after a while to confirm the progress of arbitration in that single case.

⁶⁷ See the recommendations of: The Judiciary Kenya, *Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya* (November, 2005) www.kenyalaw.org (The Justice Onyango Otieno committee)

⁶⁸ See the note above and appendix 1 - Reports by committees/commissions/tribunals and policy papers

⁶⁹ Dr. Willy Mutunga, Chief Justice and President of the Supreme Court while opening new Gatundu Law Courts, Kiambu County on 25th March 2014. "You can use elders, churches or mosques to settle disputes. I have even told the people of Kitui where I come from to turn to witch doctors to resolve some issues". James Macharia, 25th March, 2014 2pm <http://www.reuter.com/article/idUSBREA2011U20140325> (Accessed on 12th July, 2014 at 1700hours)

Although arbitration has not been fully embraced to be used in the criminal justice system, the magistrates have actively been using it.⁷⁰ Among the offences which magistrates normally refer for arbitration are the simple crimes; assault, offences of creating disturbance and ‘petty criminals’. The practice directions for arbitration should also consider some guidance to the magistrate and prosecutor on the type of offences that the magistrate may refer for arbitration.⁷¹

The use of ADR in criminal matters would also require the engagement of the Office of the Director of Public Prosecutions. The Director of Public Prosecutions should also issue policy directions to the State Counsels working under him how ADR will be conducted once the complainant is willing to forgive the offender/criminal. During the interview with a state counsel at the Office of the Director of Public Prosecutions I was informed that the state counsel is not supposed to suggest to the parties the option of them settling the case. Any settlement should emanate from the parties to the dispute.⁷² The role of counsel should only be to encourage the parties and not take part in the negotiations.

6.1.4 Recommendations based on Proceedings and Conduct of the Arbitration Process

The Kenyan Act has tried in many ways to foster development in the arena of international commercial arbitration.⁷³ What follows here below are recommendations linked to the court annexed arbitration. However more still

⁷⁰ *Republic Vs Mohamed Abdow Mohamed Nairobi* HC CR Case 86 OF 2011

⁷¹ There is a deliberate use of the words ‘practice directions’ instead of ‘rules’ or ‘procedure’ that will govern referral to arbitration. Reference is also made to the Chartered Institute or Arbitration Rules which are very simple and easy to adhere to during the conduct of arbitration. <http://www.ciarbkenya.org/publications.html>

⁷² Questionnaire number A93

⁷³ Since its modeled along the UNCITRAL model law

need to be done, among the recommendations and changes that I propose include;

6.1.5 Publishing of more details to enhance institutional arbitration

The Chartered institute of arbitrators should publish more information for those willing to conduct institutional arbitration through the institute. Their rules, mode of appointing arbitrators registered with the institute, expected expenses, available experts in the various fields, available stenographers should be information that can be accessed online without going through the institute.

This should also be read together with the recommendation made by a respondent that Kenya lacks a developed framework for the development of arbitration.⁷⁴ Despite the fact that the arbitration clause is standard clause in the government contracts institutional arbitration as noted is opaque having provided little information to that party who is contracting with the government.

This publishing will also help in the development of quality control which is lacking. All institutional awards should be published after a period of about six months so that the other players in the field can scrutinize the basis of any award. This will also reduce the susceptibility of corruption since the veil that will cover corruption may be uncovered through publishing.

6.1.6 Timely delivery of rulings and awards concerning arbitrations

The civil procedure rules provide that a ruling or judgment can take sixty days to deliver.⁷⁵ This should be different if the ruling has an effect to arbitration proceedings. Once the ruling of interlocutory applications filed by parties to arbitration in court is expedited, the delivery of justice is also facilitated at the arbitral tribunal.

⁷⁴ Questionnaire number A96

⁷⁵ See order 21 rule of the Kenyan Civil Procedure Rules 2010

To facilitate timely disposal of cases there may be the need to harmonize the workings of the Arbitration Act and the civil procedure rules regarding arbitration.⁷⁶ The existence of the two *modus operandi* in the referral of court cases to an arbitration forum injures the development of international commercial arbitration in Kenya. This conflict arises.

6.1.7 High arbitration fees

This topic is well discussed by J B Havelock in his article titled “Costs and Interest”. He starts off by noting that arbitration is not cheap, there are fees to be paid to the arbitrator, expert witness costs, arbitration rooms to be hired, services of a stenographer and other related costs. As a result arbitration appears as an expensive option.⁷⁷ There ought to be an exploratory research on the need to have arbitrators charge affordable fees. This should end with making the arbitral process more affordable.

The issue of high arbitration fees was raised by an advocate interviewed. The advocate explained her case scenario as follows;⁷⁸ Her client wanted to settle a matter out of court since it was a simple dispute. The advocate wrote a letter to the Chartered institute of arbitrators Kenya requesting for the appointment of an arbitrator and one was appointed. The parties held preliminary meetings and thereafter the arbitrator demanded a deposit which was colossal and the parties to the dispute could not afford. The parties to the dispute had no choice but to abandon the arbitration forum since she/party to the dispute could not raise the initial deposit. The most astonishing fact is that the arbitrator to date is still demanding the amount for the time spent during the preliminary meeting via fee note. This is despite the fact that no substantive hearing took place.

⁷⁶ See Cap 21 at order 46.

⁷⁷ J B Havelock, ‘Costs and Interest’ in Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 157.

⁷⁸ Questionnaire number A7

This concerned advocate summarized the interview that she no longer refers her clients for arbitration and that she advises them to use the court justice system since it is affordable.

The issue of high arbitration fee can be noted that it is a phenomenon existing in arbitration world over. The Hong Kong Arbitration Center has published its fees.⁷⁹ The fee schedule does not indicate that arbitration is cheap but it confirms that high costs may deter the settlement of a dispute via arbitration. A claim being filed at the centre that does not exceed 400,000.00 Hong Kong Dollars (HKD) is charged an administrative fee of 19,800 HKD. This is approximately 5% of the disputed amount (if the disputed amount is 400,000.00 HKD).⁸⁰ This figure may increase if you include the items listed by J B Havelock.⁸¹

6.1.8 More resources should be invested in the field of arbitration by the justice sector players

An effective justice system is one that; is accessible, dispenses justice without delay and in accordance to law and equity. It acts as a tool that aids in the creation of a cohesive society. These can be provided with an effective arbitration system. The justice sector government players in conjunction with the judiciary, private institutions of arbitration should be brainstorming on the development of arbitration. Very little has been invested in the identification

⁷⁹ <http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013/schedule-of-fees-2015>

It would be necessary if the Kenyan Chapter of the Chartered Institute of Arbitrators would publish the arbitral charges that the party intending to commence arbitration through it would incur. A party willing to pursue an institutional arbitration via Kenyan Chapter of the Chartered Institute of Arbitrators cannot make an informed decision since the information cannot be obtained free. These are some of the reasons which reduce the enhancement of making Kenya an attractive and viable arbitration dispute settlement centre. The lack of information may be a hindrance to any objective party to a dispute.

⁸⁰ 1 HKD = 13.31 Kenya Shillings on 12th October, 2015

⁸¹ J B Havelock, 'Costs and Interest' in Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) page 157

how each institution can promote arbitration by referral of disputes training or otherwise. What the institutions have done is merely indicate that ADR needs to be promoted without a guideline or work formula on how to do it.

The resources may include the hiring of arbitrators by justice sector players. A number of people keep off from arbitration since they fear that they may not afford the fee quoted by arbitrators. If the fee issue was looked into with an intention of lowering or cost sharing it, the number of cases pursued via arbitration would increase.

6.1.9 Few advocates prefer arbitration

The number of cases referred to arbitration is not encouraging. Advocates seem to prefer the court litigation process since they are familiar and used to it or the client lack of finances to pursue arbitration. This can be noted from the fact that not all advocates would include an arbitration clause in an agreement which would be instrumental to refer a matter for arbitration if the parties disagreed.

During one of the interviews an advocate also noted that it would be ideal for advocates to refer matters which have a definite known amount referred for arbitration or an ADR session of conciliation. He indicated when a client approaches an advocate with instructions that he owes a third party an amount that is known and that he requires more time to settle the amount an injunction is sought in the first instance. The injunction more often spin into years of litigation and the debtor misuses it and spends more money on litigation which was not expected. The course of action more often changes once it is realized that the claim can be set aside or challenged. This leads to the debtor being convinced that he can challenge the whole amount which he owed the third party leading to more time being spent in court litigation. This scenario was also confirmed by a different advocate respondent.⁸² This advocate observed that an advocate who stated that legal practitioners mislead clients to pursue arbitration since they prefer arbitration.

⁸² See questionnaire A82 and A97

6.1.10 Training of Arbitrators with diverse educational and professional backgrounds

An accountant would be more comfortable appearing before an arbitrator (or judge) who has studied and understands accounting. The same would also be ideal for a doctor, engineer or any other professional. The multi professional training will enhance cultural backgrounds that will develop arbitration and arbitrators. This will also bring in competition and quality assurance standardization in the field of arbitration since the regulation and misconduct of a professional member arbitrator can be taken up by his professional association. This will reduce the controversial arbitral awards and decisions.

What needs to be done is to ensure that the training to the multi professional practitioners ensure the standards of fair judicial practice and the right for a fair hearing and trial to any party to a dispute are maintained. This may promote arbitration while reducing the consistency in the arbitration practice.

This argument is further substantiated by Justice Torgbor in his recent paper “Opening up International Arbitration in Africa”.⁸³ He notes that the model law which has been domesticated world over does not preclude any person from acting as an arbitrator. He writes;

..... 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. (emphasis mine)

This confirms that everyone can participate in arbitration. It is a field that is supported by; agreement of parties, UNCITRAL model law and there is no standard acceptable procedure other than the rules of natural justice being the

⁸³ Justice Edward Torgbor ‘Opening up International Arbitration in Africa’. ADR Journal (2015) Vol 3 Nairobi ISBN 978-9966-046-04-8 pp. 21 and 23.

guiding light. It is therefore necessary to make individual efforts to support delivery of justice via arbitration.

6.1.11 Further areas of Research

There is need to conduct further in-depth research in the area. Due to the geographical spread of counties in the country the problems prevalent in Nakuru and Kericho may not be exactly similar to the ones present in the counties of Wajir and Garissa and thus, there may exist unique challenges in the inculcation of arbitration within the counties.

More justice sector players should also be involved extensively in this research. Justice is a collective responsibility. The Non-Governmental Organizations and governance sector players should also be approached to give and input. Attaining justice is a pooled action for a better nation.

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Book Review: Endoo Dorcas Chepkemei

Book Review

By: Endoo Dorcas Chepkemei*

Alternative Dispute Resolution and Access to Justice in Kenya.

Kariuki Muigua

Glenwood Publishers, Nairobi (2015).

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Alternative Dispute Resolution and Access to Justice in Kenya has been authored by Dr. Kariuki Muigua, a Chartered Arbitrator and an accomplished mediator. He seeks to offer a better understanding of the relationship between Alternative Dispute Resolution Mechanism (ADR) and Access to Justice, and all its relevant elements, in Kenya.

The book comprises of ten chapters. It commences with an introduction to conflict management and ADR, clarifying all the relevant concepts, so as to offer the relevant background to those who may perceive the book as an unfamiliar terrain. The relevance of the chapter is to enable the reader to understand the basis of the application of ADR in access to justice, as a means to an end. In this chapter, the author clearly explains the underlying components in conflict and how they influence conflict management. This fundamental understanding of the elements of social conflicts and conflict management mechanism informs the choice of conflict management, for the desired outcome.

* The reviewer holds LLB (Hons) from Kenyatta University and Diploma (HRM) from University of Nairobi. She has completed her Advocacy Training Programme from the Kenya School of Law and has enrolled for Masters Program. Her areas of interest include but are not limited to; ADR and Access to Justice, mooting, legal Research, women, governance and development, environmental law and international law. She has participated in several fora that touch on pertinent developmental issues affecting West Pokot County and Kenya at large.

Chapter two of the book provides a quick guide on the various ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDR) and elaborates on the merits and demerits of each of the mechanisms. Thus, it offers a quick reference for ADR and TDR in Kenya to researchers and practitioners. This is an important chapter in the flow of the book as it helps in demystifying the various mechanisms, how they relate to each other, if at all, and their applicability in aiding access to justice.

Chapter three of the book offers the much needed discussion on understanding the foundations of ADR, generally. The chapter seeks to clarify the myth that ADR is alternative to litigation and also perceived inferiority of these mechanisms when compared to litigation. The author traces the application of ADR and TDR from indigenous communities in Kenya and around Africa in general. He highlights some of the common conflicts in these communities which were successfully, managed through ADR and TDR mechanisms. The discussion in this chapter culminates in affirmation of the pluralistic nature and application of law on ADR and TDR, as far as formal and informal justice systems are concerned.

Chapter four builds on chapters two and three of this book, offering a more elaborative discussion on the legal and policy framework of ADR in Kenya. The chapter makes an attempt to trace the often elusive link between the formal court process and the application of TDR and ADR mechanisms. The chapter challenges the policy makers and legislators to actualize Article 159(2) of the Constitution of Kenya 2010 on ADR and TDR mechanisms.

Chapter five is equally and importantly an appropriate chapter as it critically analyses ADR under the court process, as conceived under most of the statutes in Kenya as well as the Constitution. In this chapter, the author also discusses some of the challenges that are likely to face legal implementation of the two main ADR processes, arbitration and mediation, as envisaged in law. It is probable that these challenges will affect the incorporation of ADR and TDR in Kenya. This chapter is, therefore, useful to the policymakers and

legislators in ensuring that the help in capturing and realizing the aspirations of the Kenyan people as captured in the current constitution.

After taking the reader through ADR and TDR mechanisms, their merits and demerits as well as where they are to be found in law, the author introduces the topic which forms the crux of the book: *ADR and Access to Justice*. The chapter establishes the link between access to justice and each of the mechanisms under the rubric of ADR and TDR. Based on the discussion offered in chapters one, two and three of this book, chapter six convincingly demonstrates the relationship between the two concepts: ADR and access to justice.

Chapter seven is a discussion on whether ADR practice should be formally regulated and if so, how it should be done. The author further explores the various reasons as to why ADR practice, globally and Kenya in particular, should be regulated. While not expressly opposing regulation of ADR practice, the author makes a case for the need to strike a balance that ensures that the perceived advantages of ADR mechanisms are not lost and at the same time, ADR practitioners do not take advantage of the lacuna to perpetuate injustice through ADR.

One cannot gainsay the important and indispensable role that lawyers play in conflict management in any given society. While it is true that most of their work is mostly associated with courts, chapter eight of this book introduces the reader to the other face of the lawyer as a negotiator, mediator and pacemaker in society. For lawyer to remain relevant and key player role in all spheres of social conflict management, the author in this chapter proffers relevant skills and competencies relating to ADR that lawyers should consider acquiring. The discussion in this chapter perceives a lawyer as the social engineer, in the context of the larger society and not just the immediate client. Chapter nine is written against the background of Article 159 of the constitution of Kenya and the numerous statutes that seek to entrench the use of ADR and TDR mechanisms in Kenya. Thus, the chapter explores some of

the key areas in the practice of ADR that should be looked into to secure efficacious application of ADR and TDR in Kenya, in future.

The book concludes at Chapter ten by offering a recap of the discussions in chapters one through chapter nine and affirms the need to undertake the use of ADR and TDR as a means facilitating realization of the right of access to justice for the Kenyan people.

Although this book adopts a simple and easy to understand approach that enhances the reader's grasp of the concept as discussed regardless of their backgrounds, this should not be confused with simplistic approach. The chapters in this book build on each other, offering a concrete understanding of the topic. The author takes the reader through this journey by adopting understandable language as opposed to a technical or legal approach. The use of case law and statutory provisions has helped in contextualizing the discussion in this book, thus, further enhancing the reader's understanding of the issues.

This book, therefore, offers a simple yet deep read on the subject of ADR and Access to Justice in Kenya, especially in light of the current Constitution of Kenya. It is a worthy piece of literary work for students, lecturers, practitioners, policymakers and researchers in the areas of ADR and access to justice in Kenya. Getting yourself a copy is definitely worth it

Call for Submissions

Alternative Dispute Resolution is a publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to alternative dispute resolution mechanisms to our ever growing readership.

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.

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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.

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