



Alternative Dispute Resolution

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EDITOR'S NOTE

Welcome to this issue of *Alternative Dispute Resolution Journal (Vol.4 No. 2)*, a biannual publication of the Chartered Institute of Arbitrators - Kenya Branch.

The journal is intended to provide a global platform for scholarly discourse and a deep analysis of issues relating to law and practice of Arbitration and Alternative Dispute Resolution (ADR) in general.

The publication is available both in hard copy and online at <http://www.ciarbkenya.org>, ensuring a wide readership worldwide. The audience includes professionals, academic communities and the general reader with an interest in the area of Alternative Dispute Resolution theory and practice.

The journal is peer reviewed and refereed to ensure the highest quality and originality.

This edition contains a rich offering of articles covering diverse themes such as: Resolving Public and Private Partnerships in Kenya, the use of mediation and negotiation in various fields and enforcement of arbitral awards.

The place and role of International Commercial Arbitration has been addressed by various authors with a view to examining the challenges and opportunities relating to the same and how to enhance it so as to build Kenya to the status of a global hub for International Commercial Arbitration.

Alternative Dispute Resolution includes negotiation, mediation, conciliation, adjudication and arbitration. Its use has been recognized in the Constitution of Kenya (2010) as a means of achieving access to justice. Indeed, the Kenyan judiciary has embraced and encouraged the use of ADR and has embarked on a court annexed mediation scheme.

ADR can no longer be ignored. Promotion of ADR has political, social, economic, technological, legal and ecological implications. The authors contribute to the debate on the rise of ADR in this context.

The Editorial team will continue to take on board feedback from the readers and reviewers so as to ensure continuous improvement of the journal in terms of quality, scope and diversity.

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

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

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*Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation:
Dr. Kariuki Muigua*

Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

Dr. Kariuki Muigua*

Abstract

With the promulgation of the 2010 Constitution of Kenya, the use of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts was formalised. The Constitution envisages a situation where conflicts, and specifically the natural resource ones, should first be dealt with using ADR and TDRMs and only resort to court where necessary. Communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. Despite this, there has not been satisfactory evidence of genuine attempts at taking up these processes in managing natural resource conflicts, which are still prevalent and a cause of concern. While singling out negotiation and mediation, the author examines the opportunities that ADR mechanisms, and particularly negotiation and mediation, present in realising the goal of effective management of natural resource conflicts in Kenya, through discussing the advantages associated with the processes, and why they may be the most preferred means of natural resource conflict management.

*Ph.D in Law (Nrb); FCIArb (Chartered Arbitrator); LL.B (Hons) Nrb; LL.M (Environmental Law) Nrb; Dip. In Law (KSL); Dip. In Arbitration (UK); FCPS (K); MKIM; Accredited Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Lecturer at the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and past Chairperson CIArb (Kenya Branch) [June, 2016].

1.0 Introduction

In this paper, the author critically discusses the effective management of natural resource conflicts through the use of negotiation and mediation. The paper contends that the existing national legal and institutional framework for the management of natural resource conflicts has been insufficient to effectively deal with the natural resource conflicts.

With the promulgation of the 2010 Constitution of Kenya, the lawmakers created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.¹ Notably, one of the principles of land policy, as envisaged in the Constitution, is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.² The implication of such provision is that before a matter is referred for court adjudication, communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.³ This is a significant provision, considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.⁴ There have been frequent and well documented reports of violent conflicts over

¹ Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.

² Art. 60 (1) (g).

³ Art. 67(2) (f).

⁴ Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002); See also A.M. Akiwumi, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

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access to, and use of land in Kenya.⁵ For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, there were clashes between the Maasai and Kipsigis in Olposimoru in December 2015, over what is believed to be natural resource related conflict, which resulted in human casualties and displacement.⁶ In Kwale County, there have also been cases of violence related to natural resource exploitation.⁷ In such instances, one may find that a few herdsmen may have been accused of ‘trespassing’ by grazing in another community’s territory and were thus attacked. The resultant chaos in retaliation affects the whole community. For them, it is not about arresting the involved individuals and arraigning them in court. It is about protecting the interests of the whole community and thus, any approaches to managing the conflict must involve

⁵ The Akiwumi Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (31st July, 1999) notes the contribution of the issue of land to violent conflicts in Kenya due to the way it is treated with fervent sentimentality and sensitivity and in many ways, considered explosive. The Report at pg. 53 notes that “Whereas, the constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty two tribes that live within our national borders, appears to have been profoundly undermined by diverse man-made problems that are either directly or indirectly connected to land.”

⁶ Agutu, N., ‘GSU deployed in Narok after two killed in Maasai, Kipsigis clashes,’ The Star Newspaper, Dec. 26, 2015, 3:00 pm, Nairobi, available at http://www.the-star.co.ke/news/2015/12/26/gsu-deployed-in-narok-after-two-killed-in-maasai-kipsigis-clashes_c1265922 [Accessed on 2/01/2016]; see also AfriQua, ‘Narok land disputes threaten water resources,’ 18/03/2015, available at <http://onesafedrop.org/192/narok-land-disputes-threaten-water-resources/> [Accessed on 2/01/2016]; Khamadi, S., ‘Counties struggle to gain control over local natural resources in Kenya,’ Wednesday January 9th, 2013, available at <http://landquest.internewskenya.org/counties-struggle-to-gain-control-over-local-natural-resources-in-kenya/> [Accessed on 2/01/2016].

⁷ Musyoka, A., ‘Kenya: Four Killed at Kinango in Clash Over Grazing Land,’ The Star Newspaper, Dec. 19, 2014, Nairobi, available at <http://allafrica.com/stories/201412190701.html> [Accessed on 2/01/2016]; See also generally, Constitution and Reform Education Consortium (CRECO), *Building a Culture of Peace in Kenya: Baseline Report On Conflict-Mapping and Profiles of 47 Counties in Kenya*, April, 2012, ISBN: 978-9966-21-158-3. Available at https://www.humanitarianresponse.info/system/files/documents/files/CRECO_2012.pdf [Accessed on 3/01/2016].

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the whole community or their representatives, and must address all of their concerns.

Despite the fact that the existence of legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming natural resource conflicts, due to inadequacies within the structure. Natural resource conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the issue of land to violent conflicts in Kenya is due to the way land is 'treated with fervent sentimentality and sensitivity and in many ways considered explosive.'⁸ The emergence of multi-party politics in Kenya was perceived by many communities as a move to marginalize and dispossess them of land. The multi-party politics were thus influenced by tribal considerations, with their roots in economic considerations, making it easier to incite politically based tribal violence.⁹

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources, poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya, and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.¹⁰

It is against this background that the author examines the opportunities that ADR mechanisms and particularly, negotiation and mediation, present in realising the goal of effectively managing natural resource conflicts in Kenya.

⁸ Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

⁹ Ibid.

¹⁰ See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

2.0 Defining Concepts in Conflict Management

Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.¹¹ Notably, conflicts can be managed, transformed, resolved or settled, depending on the approach adopted. While this paper is written with a bias towards conflict management through negotiation and mediation, it is important to explain the other concepts for purposes of clarity.

Conflict management is defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.¹² Conflict management is seen as a multidisciplinary field of research, and action that addresses how people can make better decisions collaboratively.¹³ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.¹⁴ Conflict transformation focuses on long-term efforts, oriented towards producing outcomes, processes and structural changes. It aims to overcome revealed forms of direct, cultural and structural violence, by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships.¹⁵

¹¹ Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

¹² Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization Of The United Nations, Rome, 2005), available at http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniqueforNaturalResourceManagement_FAO2005.pdf [Accessed on 9/01/2016].

¹³ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 17/01/2016].

¹⁴ Ibid.

¹⁵ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

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Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.¹⁶ Settlement is an agreement over the issues(s) of the conflict, which often involves a compromise.¹⁷ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.¹⁸

Settlement may be an effective immediate solution to a violent situation, but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.¹⁹ Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.²⁰

¹⁶ Ibid.

¹⁷ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

¹⁸ Baylis, C., & Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

¹⁹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

²⁰ See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

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Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.²¹ Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.²² It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.²³ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.²⁴ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.²⁵

Natural resource conflicts are defined as social conflicts (violent or non-violent), that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.²⁶ They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural

²¹ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

²² Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

²³ Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' *International Encyclopaedia of the Social & Behavioural Sciences* (Second Edition, 2015), pp. 937–942.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at <https://www.ciaonet.org/attachments/20068/uploads> [Accessed on 10/01/2016].

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resources and factors of human development factors such as population growth and socio-economic advancement.²⁷

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resources (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).²⁸ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.²⁹ Despite this, there are key principles such as, inter alia, participatory approaches³⁰, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.³¹

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.³² To them, justice would mean affording them an opportunity to get what they feel entitled to and nothing less, which means that they resort to other means of possessing the same. This

²⁷ Toepfer, K., "Forward", in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

²⁸ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

²⁹ Ibid.

³⁰ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, PP. 10–17.

³¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

³² FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 07/02/2016].

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way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.³³ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.³⁴

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, it is important to point out that these approaches should not be used in a mutually exclusively way, but instead, there should be synergetic application of the above approaches. Further, conflict management processes are not mutually exclusive and one can lead to another.³⁵ Each of the approaches has their success story where they have been effectively applied to achieve the desired outcome. The scope of this paper is, however, limited only to conflict resolution mechanisms, namely negotiation and mediation.

3.0 Causes and Effects of Conflicts

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflicts. The factors range from internal to relational and contextual factors.³⁶

³³ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

³⁴ See generally, Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

³⁵ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

³⁶ Louis, K., "Factors Shaping the Course of Intractable Conflict," *Beyond Intractability*, Guy Burgess & Heidi Burgess (eds), Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003.
<http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/>.

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It has rightly been observed that in the majority of cases of resource conflicts, one or more of the following drivers are usually at play: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.³⁷ These conflict drivers have contributed to most of the natural resource conflicts in Kenya, and should, therefore, be adequately addressed in managing the conflicts.³⁸

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management. The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct. They also include the nature and degree of integration between adversaries in economic, social, and cultural domains. A conflict between groups that depend on each other's produce will be easy to manage because each party is feeling the strain of the conflict resulting from scarcity of the produce from the other party.³⁹ However, abundance of resources, just like scarcity, can also cause conflicts. The African continent is awash with examples of countries that have suffered from the “curse of natural resources” – where countries with great natural resource wealth tend to grow more slowly than resource-poor countries.⁴⁰

³⁷ The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

³⁸ Campbell, D.J., et al, ‘Land use conflict in Kajiado District, Kenya,’ *Land Use Policy*, Vol.17, Issue 4, October 2000, pp. 337–348; Yamano, T, et al, ‘Land Conflicts in Kenya: Causes, Impacts, and Resolutions,’ *FASID Discussion Paper 2005-12-002*, available at [www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya \(FASID DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land_Conflicts_in_Kenya_(FASID_DP).pdf) [Accessed on 17/01/2016].

³⁹ See Aylinga, R.D. & Kelly, K., ‘Dealing with conflict: natural resources and dispute resolution,’ *The Commonwealth Forestry Review*, Vol. 76, No. 3, 15th Commonwealth Forestry Conference Papers (1997), pp. 182-185.

⁴⁰ Sachs, J.D & Warner, A.M, ‘Natural Resources and Economic Development: The curse of natural resources,’ *European Economic Review*, Vol. 45, Issues 4–6, May 2001, PP. 827–838 AT P. 827. For instance, there have been internal natural resource conflicts that may be

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It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and control over the resource.⁴¹ They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure rights.⁴² Further, it is asserted that conflicts show transition within societies, which can be positive if it expresses need for change or the ability of institutions to adapt to social, economic and/or environmental conditions. On the other hand, conflicts can have a negative impact if the changes that result from them cause further marginalisation of certain groups of society, such as the poor, women and minorities.⁴³

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered, especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.⁴⁴

attributed to resource abundance: South Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, Congo -Brazzaville, Central African Republic, amongst others; See also generally, G. King & V. Lawrence, Africa, "A Continent in Crisis: The Economic and Social Implications of Civil War and Unrest among African Nations," *EDGE*, Final Spring 2005, June, 2005; see also, M. Jenkins & E. Umoh, Africa in Conflict and Crisis: Critical Perspectives on the Role of Conflict Diamonds and Oil on the Livelihood of Sierra Leone and Nigeria.' Autumn, 2002; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941(2001); Institute for Environmental Security, "What is Environmental Security?" Available at http://www.envirosecurity.org/activities/What_is_Environmental_Security.pdf [Accessed on 17/1/2016].

⁴¹ Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, *Annex C - Summary of Discussion Papers*, available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

⁴² Ibid.

⁴³ Ibid.

⁴⁴ See G. Machel & B. Mkapa, *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

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Conflict also often produces significant environmental degradation.⁴⁵ It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe.

Scholars have stressed that human needs are among the major causes of conflicts. It is argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control, which many find non-negotiable.⁴⁶ As such, if they are absent, the resulting conflict will remain intractable until the structure of society is changed to provide such needs to all. For instance, the need for identity has been described as a fundamental driver of intractable conflict.⁴⁷ Threats to identities often invite very negative responses from people who see the same as a way of protecting their essence.⁴⁸

The clash of interests can take many forms. For instance, it could be over resources such as land, food, territory, water, energy sources, and natural resources.⁴⁹ Such conflicts range from whom the resources should be distributed to, to whether the resources should be distributed, and how the distribution should be undertaken. Conflict could also arise over power and

⁴⁵ Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' *The Journal of Environment & Development*, Vol. 16 No. 4, December 2007, pp. 355-374, p. 367.

⁴⁶ Burton, J., *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Herbert Kelman, *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

⁴⁷ Rothman, J., *Resolving Identity-Based Conflicts* (San Francisco: Jossey Bass), 1997. See also John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace), 1998.

⁴⁸ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' op cit, p. 202.

⁴⁹ Buckles, D & Rusnak, D, 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

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control of the resources.⁵⁰ There are also conflicts over identity.⁵¹ These concern the cultural, social and political communities to which people feel tied. Conflicts over status may arise and have to do with whether people believe they are treated with respect and dignity and whether their traditions and social position are respected.⁵² In addition, the conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.⁵³ Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.⁵⁴ Indeed, this scenario is not new to Kenya, where recently, there was witnessed violence in areas around Kajiado town with, Maasai community seeking to ‘evict foreigners’ in the area.⁵⁵ The alleged foreigners are people who had bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques, considering that there

⁵⁰ Ibid, p. 2.

⁵¹ See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

⁵² EAIM, ‘Peace and Stability Are Prelude to Economic Development and Prosperity,’ available at <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/articlesFeb-2006/1802EAIM06-06EA.html> [Accessed on 10/02/2016].

⁵³ Adamu, A & Ben, A., ‘Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,’ *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

⁵⁴ Armitage, D., ‘Adaptive Capacity and Community-Based Natural Resource Management,’ *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

⁵⁵ Sayagie, G., ‘Tension as different clans from Narok, Kajiado both claim Nguruman,’ Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at <http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html> [Accessed on 10/02/2016]; Daily Nation, ‘Clashes in Kitengela as traders fight over market,’ (Nation media Group, Nairobi, September 8, 2015). Available at <http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html> [Accessed on 10/02/2016].

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are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country.

There is also a school of thought that believes that public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.⁵⁶ A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people forcefully may degenerate into conflicts as witnessed in the Mau forest eviction in Rift Valley Kenya.⁵⁷ There may be accusations of discriminatory relocation by the Government where some communities feel alienated. Indeed, such views may not be alien to the Kenyan scenario. For instance, according to the Business and Human Rights Resource Centre, an independent international human rights organisation, when Kenya discovered oil, there were fears that the legal regime was inadequate to regulate the industry and ensure that it does not fuel conflict within Kenya.⁵⁸ However, with the enactment of the current Constitution 2010, it was expected that this

⁵⁶Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf> [Accessed on 10/01/2016].

⁵⁷Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

⁵⁸ Business and Human Rights Resource Centre, 'Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper,' April 2014, p. 7. Available at <http://business-humanrights.org/sites/default/files/media/documents/eastern-afr-briefing-bus-human-rights-apr-2014.pdf> [Accessed on 19/01/2016].

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would change, as it makes provisions for natural resource management and calls for community participation in the management of natural resources.⁵⁹

In homogenous societies, constitutional provisions on natural-resource ownership are expected to address national development or how natural resources are shared between governments and private interests. However, in divided societies, the constitutional treatment of natural resources is more concerned with how natural-resource wealth is shared among often antagonistic communities.⁶⁰ Conflicts do not occur in vacuum and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies, because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.⁶¹ Natural resource conflicts are also, directly and indirectly, connected to and/or impact human development factors and especially the quest for social-economic development.⁶²

The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security, and peace and security will be at risk without sustainable development.⁶³ The SDGs go ahead to state that the new Agenda recognizes

⁵⁹ Ibid, p. 7.

⁶⁰ Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 8.

⁶¹ Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

⁶² Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

⁶³ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

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the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and State building.⁶⁴ They also call for further effective measures and actions to be taken, in conformity to international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.⁶⁵ Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Within the Kenyan context, one of the most important natural resources is land. The Constitution provides that land in Kenya is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.⁶⁶ This is in recognition of the fact that Kenya is a divided society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Constitution of Kenya 2010, Art. 60(1).

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Further, it has also been observed that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and concomitant demands by some for greater conservation.⁶⁷ Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, that is, independent stakeholders and where stakeholders have influence, which in turn can generate trust between stakeholders.⁶⁸ It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.⁶⁹ Arguably, central governments which are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.⁷⁰ This means taking local communities into confidence and having confidence in them; it means engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.⁷¹ It means being prepared to adjust national policies so that they can accommodate local interests, needs, and norms that are compatible with the long-term preservation of national ecosystems and their biological diversity.⁷²

The Constitution of Kenya requires the States to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and

⁶⁷ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Buckles, D. (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), pp. vii-viii.

⁷¹ Ibid.

⁷² Ibid.

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conservation of the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.⁷³ Further, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁴

It is, therefore, arguable that one of the ways of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful, there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.⁷⁵

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

4.0 Natural Resource Conflicts Management in Kenya

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. Natural resource

⁷³ Constitution of Kenya 2010, Art. 69(1).

⁷⁴ Ibid, Art. 69(2).

⁷⁵ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

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conflicts are unique and require being resolved expeditiously since they involve livelihoods of people. Communities depend heavily on natural resources for their livelihoods.⁷⁶ Renewable and non-renewable natural resources have conflict generating potential. Renewable resources include crop land, fresh water, free wood and fish. Non-renewable resources include petroleum and minerals.⁷⁷ Scarcities of agricultural land, forests, fresh water, and fish are those which contribute to the most violence. This can be partly attributed to lack of effective conflict management mechanisms that are respected by the people who are involved in the use and access to the resources aforesaid. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. The conflicts, if not addressed, can escalate into violence, cause environmental degradation and undermine livelihoods.⁷⁸

There is a legal and institutional framework in Kenya that is supposed to deal with natural resource conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts,⁷⁹ the

⁷⁶ Tyler, S. (ed), *Communities, Livelihoods, and Natural Resources: Action Research and Policy Change in Asia*, (International Development Research Centre, 2006), available at <http://www.idrc.ca/EN/Resources/Publications/openbooks/230-9/index.html> [Accessed on 17/01/2016]; Gomes, N., 'Access to water, pastoral resource management and pastoralists' livelihoods: Lessons learned from water development in selected areas of Eastern Africa (Kenya, Ethiopia, Somalia),' (Food and Agriculture Organization of the United Nations, 2006), available at <ftp://ftp.fao.org/docrep/fao/009/ah247e/ah247e00.pdf> [Accessed on 17/01/2016].

⁷⁷.Gizewski, P (1997) *Environmental Scarcity and Conflict*, Toronto, Canadian Security Intelligence Service p. 1.

⁷⁸ See generally Matiru V. (2000) *Conflict & Natural Resource Management*, Food & Agriculture Organisation (FAO); Buckles D & Rusnak D(1999) "Cultivating Peace: Conflict and collaboration in Natural Resource Management" IDRC/World Bank 1999 p. 3 & 4; Thayer DM (2003) "*Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of Development*" Saratunga Skidmore College-The School for International Training .

⁷⁹ They include the Central Land Appeals Board, under the Land Control Act (Cap 302), amongst others.

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National Environmental Management Authority,⁸⁰ National Environmental Complaints Committee, Environment Tribunal and other various informal community based resource governance bodies.⁸¹ The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes includes the courts of law, both under civil and criminal law,⁸² the National Environment Tribunal (NET),⁸³ National Environmental Complaints Committee (NECC),⁸⁴ Arbitral tribunals,⁸⁵ Statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁸⁶ and customary law systems of conflict management.⁸⁷

Some of the above conflict management mechanisms and institutions have not been very effective in managing natural resource conflicts. Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself, has at times been a source of conflict rather than a conflict solver, since it insists on pursuing personal rights rather than reaching agreed compromise and implementation

⁸⁰ Established under S.7 of the EMCA (Cap 8 of 1999)

⁸¹ Some communities like the Meru, Maasai, Giriama etcetera still have councils of elders who sit and resolve disputes that erupt within their respective communities.

⁸² Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146

⁸³ *Ibid*, Part. XII sections 125-136

⁸⁴ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 20.

⁸⁵ These are mainly established under Arbitration Act, Act. No. 4 of 1995

⁸⁶ Established under Land Adjudication Act, Cap. 284, Laws of Kenya

⁸⁷ Mbote, P.K., Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention, IELRC Working 2005-1, available at <http://www.ielrc.org/content/w0501.pdf> <last Accessed on 01/08/2008>.

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of various laws may also lead to conflicting outcomes.⁸⁸ This is not to say that personal rights are to be ignored for what would be seen as the greater good of the community. However, there are instances where realisation of such personal rights may compromise the general stability of the society.

For instance, in the traditional community setup, there was need to balance community interests with that of individuals, especially where such rights are claimed against the interests of an entirely different community. In such instances, the concerned communities will not look at those rights as accruing to individuals, but to the community as a whole. Even where a threat arises, they perceive it as a threat to the whole community.⁸⁹

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have an insider's grasp of the issues at hand. It is for this reason that this paper advocates for use of conflict management approaches that incorporate public participation. Litigation, which is a state-sponsored approach to conflict management, does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁹⁰

The national legal systems have been associated with a number of limitations which include, inter alia: inaccessibility to the poor, women, marginalized groups and remote communities because of cost, distance, language barriers,

⁸⁸ Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' 2006, available at <http://www.idrc.ca/>

⁸⁹ Ejizu, C.I., 'African Traditional Religions And The Promotion of Community-Living in Africa,' available at <http://www.afrikaworld.net/afrel/community.htm> [Accessed on 10/02/2016]; See also Baland, J.M & Platteau, J.P., 'Compensations and Customary Rights in the Context of the Concessionaire Companies: An Economic Approach,' (International Growth Centre, September 25, 2013).

⁹⁰ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

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political obstacles, illiteracy and discrimination; failure to consider indigenous knowledge, local institutions and long-term community needs in decision-making; use of judicial and technical specialists who lack the expertise, skills and orientation required for participatory natural resource management; use of procedures that are generally adversarial and produce win - lose outcomes; providing only limited participation in decision-making for conflict parties; likely difficulty to reach impartial decisions if there is a lack of judicial independence, corruption among State agents, or an elite group that dominates legal processes; and use of highly specialized language of educated elite groups, favouring business and government disputants over ordinary people and communities.⁹¹

Conflicts need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.

5.0 Alternative Dispute Resolution (ADR) and Natural Resource Conflicts Management

Article 33 of the *Charter of the United Nations* outlines the conflict management mechanisms in clear terms and it forms the legal basis for the application of Alternative Dispute Resolution (ADR) mechanisms in disputes between parties, be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute should, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their*

⁹¹ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

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own choice (emphasis added).⁹² Despite this, ADR mechanisms have not been adequately utilized in management of natural resource conflicts in Kenya.

The phrase ‘*alternative dispute resolution*’ refers to all those decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers, however, the term ‘*alternative dispute resolution*’ is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is arguably not true.⁹³

Alternative Dispute Resolution (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁹⁴

As such, ADR mechanisms allow public participation in enhancing access to justice, as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management. Some, like mediation and negotiation, are informal and not subject to procedural technicalities as the court process is subject to it. They are effective to the extent that they will be expeditious and cost-effective

⁹² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁹³ P. Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52.

⁹⁴ Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

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compared to litigation.⁹⁵ The use of mediation in natural resource conflicts management is especially common in Canada.⁹⁶

ADR Mechanisms are arguably most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way, less disputes will get to the courts and this will lead to a reduction of backlog of cases.

TDRMs include, informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate, it had positive impacts in promoting local people's priorities in natural resource management.⁹⁷ The traditional and customary systems for managing conflict are associated with a number of strengths, which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁸

⁹⁵ Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

⁹⁶ Dorcey, A.H.J. & Riek, C.L., 'Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada,' *Workshop on Political Theory and Policy Analysis*, 1987; Berkes, F., et al, 'Co-Management: The Evolution Of The Theory And Practice of Joint Administration Of Living Resources,' TASO Research Report, Second Series, No. 1, *Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada*, Sept. 26-29, 1991.

⁹⁷ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

⁹⁸ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

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In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in managing certain community disputes, such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice and environmental democracy.

While most of the foregoing ADR mechanisms can effectively be applied in the management of natural resource conflicts management, this paper is biased towards negotiation and mediation and explores at a greater length the application of the two mechanisms in conflicts. This is because the author is not keen on settlement mechanisms, but resolution mechanisms and the two main approaches in resolution are negotiation and mediation.

The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.⁹⁹

Natural resource conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The conflict management mechanisms referred to herein as ADR have certain advantages that make them suitable for use in resolution of natural resource conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of natural resource conflicts.

Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come

⁹⁹ *Ibid.*

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out of the proceedings before such courts and tribunals bitter and discontented. It has been argued that through ADR, multiparty "win-win" options are sought by focusing on the problem (not the person) and by creating awareness of interdependence among stakeholders.¹⁰⁰ This is justified on the fact that among the issues that influence negotiation attitudes, interdependence is of central importance, as actors' attitudes and behaviour are shaped by the fact that they will need to coexist after the period of negotiation.¹⁰¹

Notably, it can be said that the attributes of party autonomy, flexibility, all-inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems and natural resource conflicts. It has compellingly been suggested that mediation, through the intervention of an impartial third party into a dispute, deals well with significant value differences, which are considered extremely difficult to resolve, where there is no consensus on appropriate behaviour or ultimate goals.¹⁰² Further, ADR, drawing on the strengths of mediation techniques such as identification and reframing, can address value conflict, through specific techniques which include: transforming value disputes into interest disputes; identifying superordinate goals (both short- and long-term); and avoidance.¹⁰³

5.1 Negotiation and Natural Resource Conflicts Management

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the

¹⁰⁰ Buckles, D. (ed), *Cultivating Peace Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), p.5.

¹⁰¹ Ibid, p. 110.

¹⁰²Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, p. 82.

¹⁰³ Ibid.

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help of a third party. This refers to a process where parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹⁰⁴ Negotiation is also defined as a process by which states and other actors communicate and exchange proposals in an attempt to agree on the dimensions of conflict termination and their future relationship.¹⁰⁵

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.¹⁰⁶ Positional negotiation is associated with firstly, separating the people from the problem; secondly, focusing on interests, not positions; thirdly, inventing options for mutual gain; and finally, insisting on objective criteria.¹⁰⁷ As such, the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.¹⁰⁸ Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict,

¹⁰⁴ Negotiations in Debt and Financial Management ‘Theoretical Introduction to Negotiation: What Is Negotiation?’ Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [Accessed on 13/12/2015].

¹⁰⁵ Bercovitch, J. & Jackson, R., ‘Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,’ *Negotiation Journal*, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

¹⁰⁶ R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp. xxvi-xxvii.

¹⁰⁷ Roger Fisher & Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in* *Op cit.*, p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, p. 43.

¹⁰⁸ *Ibid*.

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negotiators are encouraged to have a result based on some fair standards independent of the will of either side.¹⁰⁹

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.¹¹⁰

Since the aim of negotiation, as discussed within the context of this paper, is to arrive at "win-win" solutions, positional bargaining is not recommended as the general approach to negotiation, because arguing over hard-line positions may produce unwise agreements, prove inefficient, endanger an ongoing relationship and also lead to formation of coalition among parties whose shared interests are often more symbolic than substantive.¹¹¹

Negotiations are seen as preferable due to their unstructured, often lack of formal procedures, suggesting a format which caters to the uniqueness of each negotiation.¹¹² The import of this is that due to the flexibility nature of the process, it is possible for parties to agree to settle on what works for them in a given scenario. Negotiation affords parties autonomy in the process and over the outcome, for purposes of ensuring that they come up with creative solutions. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties,

¹⁰⁹ Ibid.

¹¹⁰ UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, Accessible at <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [Accessed on 19/01/2016]

¹¹¹ Ibid, p.23.

¹¹² FAO, 'Alternative Conflict Management: The Role of Alternative Conflict Management in Community Forestry,' available at <http://www.fao.org/docrep/005/x2102e/X2102E02.htm>

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making both sides feel like winners.¹¹³ The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.¹¹⁴

As a vital first step in negotiation, it is important that the parties have conceptual clarity of the different issues, especially the difference between ownership issues, regulatory-authority control issues, and issues relating to the treatment of natural-resource revenues.¹¹⁵ Separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.¹¹⁶

With regard to natural resource management, public participation has been described as a form of negotiation, where there is joint decision-making among parties with interdependent yet incompatible interests.¹¹⁷ Principled negotiation has advantages that can facilitate mutual agreement on issues and consequently achieve conflict resolution. Negotiation is hailed as a process that can lead to empowerment of village-level and government participants, and increased awareness of the conflicts and their causes.¹¹⁸ Through participation of communities in decision-making through negotiation,

¹¹³ French, A., *Negotiating Skills*, (Alchemy, 2003), p. viii.

¹¹⁴ Ibid.

¹¹⁵ Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 26.

¹¹⁶ Fisher, R. & Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, op cit., pp. 10-11.

¹¹⁷ Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, pp. 78-79.

¹¹⁸ Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' (Food and Agriculture Organization of the United Nations, 2003), p. 224.

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conflicts can be resolved or averted since each party is afforded an opportunity to raise their concerns in a joint forum where they can all be addressed with the aim of reaching a consensus or compromise.

It has been pointed out that in a conflict-oriented natural resources situation, one must learn and communicate about: technical, legal, and financial issues at hand; procedural issues; perceptions, concerns, and values of the other participants; one's own goals, and those of others; personalities; communication styles; one's own set of options; and relative benefits of different strategies.¹¹⁹ Thus, the lead negotiators ought to have a good grasp of the issues at hand. This is one of the ways that they can adequately address not only their needs and interests but also those of opponents so as to facilitate a win-win situation.¹²⁰

Negotiation may not always work and as such, parties may be required to try another approach by inviting a third party where they have reached a deadlock and cannot work out a consensus or a compromise. The third party comes in to help the parties clarify issues, interests and needs. Negotiation with the help of a third party is called mediation. Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.¹²¹

5.2 Mediation and Natural Resource Conflicts Management

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.¹²² Trained and untrained

¹¹⁹ Ibid, p. 79.

¹²⁰ Ury, W., *Getting to Yes with Yourself and Others*, (HarperThorsons, 2015), pp. 147-148.

¹²¹ Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

¹²² Merrills, J.G., *International Dispute settlement*, (Cambridge University Press, Cambridge, 1991).

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mediators open communications to resolve differences in a non-adversarial confidential manner. It can also refer to a private and non-binding form of conflict management, where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute. It is a structured process where the settlement becomes a legally binding contract.¹²³

Mediation is also defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.¹²⁴ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.¹²⁵

In relation to natural resource conflicts, it is arguable that an approach that seeks to eliminate the root causes of conflict is to be preferred, considering

¹²³ Fenn, P., "Introduction to Civil and Commercial Mediation," op cit p. 10.

¹²⁴ Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

¹²⁵ See generally, Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished*, University of Nairobi.

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the great importance attached to these resources. Human needs and desires are continuous and therefore, there is need to ensure that the unavoidable conflict that is bound to arise is controlled or eliminated altogether. Scholars believe that participatory and collaborative planning is useful in preventing conflicts resulting from government actions or policies.¹²⁶ This view may be validated in relation to Kenya, where the Constitution recognises the significance of public participation in decision-making and governance matters. For instance, among the national values and principles of governance that are binding on all State organs, State officers, public officers and all persons whenever any of them— applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions, include inter alia, democracy and participation of the people; equity, social justice, inclusiveness, quality, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability.¹²⁷

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with, while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court, as opposed to a resolution process, and defeats the advantages that are associated with mediation in the political process.¹²⁸ The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies*

¹²⁶ Ibid.

¹²⁷ Art. 10, Constitution of Kenya 2010.

¹²⁸ Ibid, Chapter4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya; See also Mediation (Pilot Project) Rules, 2015.

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(emphasis added).¹²⁹ This makes mediation a viable process for the actualization of the right of access to justice. While both processes may be recommended for use in resolving natural resource conflicts in Kenya, mediation in the political process is to be preferred due to its obvious advantages, as highlighted above.

Kenya resorted to mediation coupled with negotiation after the post-election conflict through the Koffi Annan initiative¹³⁰. Mediation offers a conflict management mechanism where all parties come to the table and with the help of the mediator find their own solutions. It was ADR that saved Kenya from the brink of total anarchy. However, mediation often works best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.¹³¹

In the Koffi Annan initiative, mediation was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of political conflict in Kenya. A critical look at ADR methods in the resolution of natural resource conflicts is worthwhile, considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management.

¹²⁹ See Maiese, M., "*Principles of Justice and Fairness*," in Burgess, G. and Heidi Burgess, H. (Eds.) Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

¹³⁰ Koffi Annan, the former Secretary General of the United Nations mediated the all-out conflict that was labeled the 'post-election' violence in 2007 – 08 in Kenya. Essentially the long-term causes of the conflict were issues relating to access to and use of natural resources. The initiative resulted in the signing of the peace agreement formalized in the National Accord & Reconciliation Act.

¹³¹ Murray, J.S., et al, *Processes of Dispute Resolution: The Role of Lawyers*, University casebook series, Foundation Press, 1989, p. 47.

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Mediation in the informal context leads to a resolution and in environmental management, it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues. Indeed, it has been observed that natural-resource negotiations are often a high-stakes, high-risk game, and one important role the mediator can therefore play, is to empower the parties by providing them with the knowledge to have the confidence to negotiate.¹³² The import of this is that they must be well versed with mediation as a process but also the needs of each of the parties. This way, they would be able to know the appropriate approaches and skills to put into play.

It is also important to identify the correct interest groups which are regarded as stakeholders in the allocation of resources and the extent of their respective rewards against the overall importance of natural resources to financing national development must be determined.¹³³ It is argued that to be successful, a process will need to engage a broad range of actors, including not only those who have legitimate claims to ownership of the resource, but also those who could be affected by the allocation of authorities over the resource or the distribution of its revenues.¹³⁴ In the case of Kenya, it would therefore mean going beyond the community, especially where the resource in question is of national importance, such as water bodies.

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.¹³⁵ In conflict resolution

¹³² Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 27.

¹³³ Ibid, p. 28.

¹³⁴ Ibid.

¹³⁵ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, No. 3, 2009, pp.802-803.

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processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.¹³⁶

One criticism, however, is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process, thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.¹³⁷ Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.¹³⁸ Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information. However, in *Thakrar V Cir Cittero Menswear plc (in administration)*, {2002} EWHC 1975 (ch), the English High Court held that a mediated settlement was an enforceable contract.¹³⁹ To deal with the problem of unenforceability, it has been affirmed that before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This

¹³⁶ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., ‘Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases’ *Utah Law Review*, No. 3, 2009, pp.802-803.

¹³⁷ See generally, Fiss, O., “Against Settlement” 93 *Yale Law Journal*, 1073 (1984).

¹³⁸ Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (2011)

¹³⁹ As quoted in *Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd* [2012] eKLR, Cause 1365 of 2011.

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final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.¹⁴⁰ The results of mediation must be a mutual agreement between the parties to the dispute.¹⁴¹ To achieve this, the mediator may consider incorporation of consensus building into the mediation, which seeks to build the capacity of people to develop a dialogue with each other, either directly or indirectly, to find a way forward based on consensus which generates mutual gains for all parties with the minimum of compromise and trade-off.¹⁴² This can ensure that even when they reach the final stage, chances of having an outcome acceptable to all sides are enhanced.

6.0 Enhancing the use of Negotiation and Mediation in Natural Resource Conflicts Management in Kenya

Whereas natural resource conflicts may not be fully eliminated, they can be managed in such a way that Kenya avoids the violence that has been witnessed in the recent past in contests involving access to and use of natural resources. Peace can be achieved through the use of negotiation and mediation to facilitate conflict resolution and transformation.

It is also noteworthy that ADR can only work in appropriate cases. There is a need to strengthen the existing legal and institutional framework for the resolution of natural resource conflicts so as to make it effective in the face of the ever increasing natural resource conflicts. Kenya should learn from other jurisdictions that have combined the legal and institutional frameworks with the tenets of ADR and gone on to manage natural resource conflicts effectively.¹⁴³ Kenya can learn and benefit from the case of Rwanda's

¹⁴⁰ *Greenhouse Management Limited v Jericho Development Company Limited* [2015] eKLR, Civil Case 49 of 2015.

¹⁴¹ *Ibid*; See also *Stephen Kiprotich Saina v Francisco Okutoyi Ayot & another* [2014] eKLR, E&L 348 of 2013.

¹⁴² Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *op cit*, p. 16.

¹⁴³ For example, Canada where it is provided under Rule 24.1 for Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

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mandatory mediation framework, where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.¹⁴⁴ The Constitution of Rwanda provides for the establishment in each Sector of a “Mediation Committee” responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.¹⁴⁵ The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.¹⁴⁶

In other jurisdictions, there has been adoption of management approaches which attempts to mitigate resource development conflict involving disputed territory known under several names, such as *co-management*, *joint management*, or *joint stewardship* (emphasis added).¹⁴⁷ Co-management is an inclusionary, consensus-based approach to resource use and development. Through this approach, there is sharing of decision-making power with nontraditional actors in the process of resource management, which nontraditional actors include those other than either state managers or industry, such as local resource users, environmental groups, or aboriginal people.¹⁴⁸ This approach is also lauded for the fact that it stresses negotiation

¹⁴⁴ Mutisi, M., “Local conflict resolution in Rwanda: The case of *abunzi* mediators”, in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 20/01/2016]

¹⁴⁵ Article 159, Constitution of Rwanda, 2003.

¹⁴⁶ *Ibid.*

¹⁴⁷ Campbell, T., ‘Co-management of Aboriginal Resources,’ (Adopted from *Information North*, Vol 22, no.1 (March 1996), Arctic Institute of North America), available at <http://arcticcircle.uconn.edu/NatResources/comanagement.html> [Accessed on 20/01/2016]

¹⁴⁸ *Ibid.*

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rather than litigation as a means to resolve conflict, and also its ability to combine western scientific knowledge and traditional environmental knowledge for the purpose of improving resource management.¹⁴⁹ Arguably, this can create feelings of mutual trust and participation, with room to raise and address concerns from all the involved parties. Natural resource conflicts are thus minimized or eliminated. Indeed, communities have often asserted their rights in natural resource exploitation and participation, and with success.¹⁵⁰ Trust does not however emerge simply through increased interactions (interpersonal trust), but from a genuine willingness to share power, in terms of knowledge and decision implementation, especially in situations where local stakeholders are dependent on and knowledgeable about natural resources.¹⁵¹ Such trust-building, it is argued, requires effort and resources however, as well as developing opportunities for appropriate dialogue between stakeholders to identify shared problems and in turn shared solutions.¹⁵²

Lessons from various jurisdictions can be used to enhance our conflict management capabilities. However, it is noteworthy that currently, there are efforts by the legal fraternity in Kenya to enhance legal and institutional

¹⁴⁹ Ibid.

¹⁵⁰ Loon, J.V., 'Canada Natives Block Energy Projects: 'We Own It All'', *Bloomberg Markets*, January 27, 2014. Available at <http://www.bloomberg.com/news/articles/2014-01-27/harper-collides-with-native-canadians-natural-resources-claims> [Accessed on 20/01/2016]; See also Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

¹⁵¹ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit.

¹⁵² Ibid, p. 202.

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frameworks governing mediation in general.¹⁵³ The *Civil Procedure Act*¹⁵⁴ provides for mediation of disputes.¹⁵⁵ There are also the *Mediation (Pilot Project) Rules, 2015*¹⁵⁶ which are meant to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Judiciary's Pilot Project.¹⁵⁷ The Rules provide that every civil action instituted in court after commencement of the Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.¹⁵⁸

Non-Governmental Organisations (NGOs) have played an important facilitative and capacity building role in other jurisdictions, helping to bridge divergent views between local people and government agencies, and manage

¹⁵³ Mutunga, W., Chief Justice & President Of The Supreme Court Of Kenya, '*Alternative Dispute Resolution and Rule of Law' For East African –Prosperity,*' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at

<http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf> [Accessed on 20/01/2016]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, *People Daily Newspaper*, 10 March, 2015. Available at

<http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/> [Accessed on 20/01/2016]. The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee. The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.

¹⁵⁴ Cap 21, Laws of Kenya.

¹⁵⁵ Sections 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, Government Printer, Nairobi, 2012, at pp.1092-1097.

¹⁵⁶ Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

¹⁵⁷ Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

¹⁵⁸ Rule 4(1).

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conflict within or among communities.¹⁵⁹ NGOs working with local communities often have good will from the local people and hence, it is recommended that where there are negotiation and mediation talks, such organisations can play a major role in enhancing the communities' participatory capacity and boost the chances of reaching a mutually agreed outcome. They can achieve this through enhancing communities' access to information for informed decision-making as well as helping the community to understand the complex aspects of the law.¹⁶⁰

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.¹⁶¹ With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.¹⁶² It is argued that the

¹⁵⁹ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.4.

¹⁶⁰ See Maia, M., 'NGOs as Mediators: Their role in expertise, language and institutional exemption in urban development planning,' Working Paper No. 77, May 1996; See also Ahenkan, A., et al, 'Improving Citizens' Participation in Local Government Planning and Financial Management in Ghana: A Stakeholder Analysis of the Sefwi Wiawso Municipal Assembly,' *Journal of Public Administration and Governance*, Vol. 3, No. 2, 2013.

¹⁶¹ See generally, Hazen, S., Environmental Democracy, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

¹⁶² Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.

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state must learn to better work with the people who use and care about the land, while serving their evolving needs.¹⁶³ In *The Matter of the National Land Commission [2015] eKLR*, the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people, thus giving more fulfilment to the concept of democracy.¹⁶⁴

Sustainable development will need to draw upon the best knowledge available from the relevant scientific and stakeholder communities.¹⁶⁵ Public participation is required as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.¹⁶⁶ However, there should be fairness in public participation which means that all those affected by certain decisions are represented and, importantly, that procedures enable them to have an input into the format and content of discussions.¹⁶⁷

Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

¹⁶³ Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

¹⁶⁴ In *The Matter of the National Land Commission [2015] eKLR*, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

¹⁶⁵ Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' *op cit*, p. 4.

¹⁶⁶ Ibid, p.4.

¹⁶⁷ Young, J.C., *et al*, 'The role of trust in the resolution of conservation conflicts,' *op cit*, p. 197. Young, J.C., *et al*, argue that in situations where values or interests conflict, for example over conservation objectives, two aspects of fairness are important: 'independence' and 'influence.' In the context of conservation conflicts, they define an 'independent' participatory process as one which is unbiased, i.e. where certain participants are not

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The traditional approaches, which were mostly based on top down resource management approaches, may leave out the necessary elements of meaningful public participation. This is because, they provide for formal public participation process in which it is assumed that a government agency makes decisions and the general public can give their comments without necessarily affording them a meaningful opportunity to do so.¹⁶⁸ An example of such approaches is what is provided in the Environmental Management and Coordination Act, 1999 (EMCA).¹⁶⁹ These include such tools as the use of Environmental Impact Assessment (EIA)¹⁷⁰ in environmental management and conservation efforts. While acknowledging that an EIA can be a powerful tool for keeping the corporate, including corporations, in check, the general public should be empowered through more meaningful and participatory ways such as negotiation and mediation. This is the only way that the affected sections of population appreciate their role in conflict management and decision-making processes. The general public should also be involved in Strategic Environmental Assessment (SEA), which is the process by which environmental considerations are required to be fully integrated into the preparation of policies, plans and programmes and prior to their final adoption.¹⁷¹ The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by

imposing their interests at the expense of others. They define 'influence' as a process that allows those involved to have an input that has a genuine impact on the process and outcomes of participation, one potential outcome being conflict resolution (p. 297).

¹⁶⁸ Ibid, p. 4.

¹⁶⁹ Act No. 8 of 1999, Laws of Kenya.

¹⁷⁰ EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development (N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.)

¹⁷¹ Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 26/10/2015].

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contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.¹⁷² Public participation in Strategic Environmental and Social Assessment (SESA) ought to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.¹⁷³ These exercises, where conducted properly, should not be done as a mere formality and paper work.¹⁷⁴ The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community. Engaging them through negotiation and mediation where necessary, would avert future

¹⁷² Ibid; see also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

¹⁷³ Notably, the proposed law, *Energy Bill, 2015*, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment. If fully implemented, this is a positive step towards achieving environmental security for all.

¹⁷⁴ See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at <http://www.unep.ch/etu/publications/textONUbr.pdf> [Accessed on 10/02/2016]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 10/02/2016]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

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conflicts and allow any developmental activities enjoy social acceptance in the community. Thus, government activities and policies would not clash with the community expectations.

Under Principle 10 of the Rio Declaration, the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. Access to justice through litigation is also a potent remedy when access to environmental information or public participation have been wrongly denied or are incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.¹⁷⁵ The Rio Declaration in principle 10 emphasises the importance of public participation in environmental management through access to justice thus: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant

¹⁷⁵ See Akech, M., “Land, the environment and the courts in Kenya,” *A background paper for The Environment and Land Law Reports*, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at <http://www.kenyalaw.org> [Accessed on 09/01/2016]; *The Fair Administrative Action Act, 2015* (No. 4 of 2015) which an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) 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 s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person’s right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the proposed law, *Access to Information Bill, 2015*, seeks to to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines "private body" to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

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level.... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁷⁶ Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.¹⁷⁷

The provision of effective avenues for resolution of natural resource conflicts is thus far, the most practical way of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.¹⁷⁸

Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment. However, it has been observed that the success of customary natural resource management strategies in managing conflict often depends on the enforcement capacities of traditional authorities. When the authority of traditional elite groups is declining, the capacities of those groups to render or enforce a decision may also be reduced.¹⁷⁹ It is also argued that customary practices institutionalized within broader national legal frameworks may provide a good starting point to enhance traditional authorities' ability to deal with the challenges of contemporary natural resource management.¹⁸⁰ With regard to this, Kenya may be better positioned

¹⁷⁶ United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

¹⁷⁷ Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

¹⁷⁸ *Ibid*, p.16.

¹⁷⁹ FAO, 'Negotiation and mediation techniques for natural resource management,' *op cit*.

¹⁸⁰ *Ibid*.

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due to the Constitutional recognition for the application of TDRMs.¹⁸¹ This may, therefore, help reposition the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Art. 60(1) (g) of the Constitution, is concerned.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts, preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context, and not as a legal process.

In the informal set up, mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily embedded in the way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context, in which case it is influenced by factors such as the *actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves* (emphasis added).¹⁸² It is thus not a linear cause-and-effect interaction, but a reciprocal give-and-take process.¹⁸³ Legislation should not kill mediation by annexing it to the court system and making it a judicial

¹⁸¹ Art. 159.

¹⁸² United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

¹⁸³ See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at <http://www.mediate.com/articles/eilermanD5.cfm> [Accessed on 10/02/2016].

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process, but should instead strive towards creating a more conducive environment to make it more effective and receptive to the needs of the people. Informal mediators may still have a big role to play in making mediation work in Kenya especially in relation to resolution of natural resource conflicts.

It has been suggested that government policies can create opportunities for mediation during disputes.¹⁸⁴ However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security, if situations deteriorate.¹⁸⁵ It is also contended that the community also needs the authority of the state to strengthen its ability to deal with large and powerful external interests, such as multinational corporations.¹⁸⁶ This is why there is need for the informal conflict mechanisms to work in synergy with the formal systems, to ensure that the parties engage constructively. For instance, it has been observed that national legal systems may carry with them the following strengths: use of official legal systems strengthens the rule of State law, empowers civil society and fosters environmental accountability; they are officially established with supposedly well-defined procedures; they take national and international concerns and issues into consideration; they involve judicial and technical specialists in decision-making; where there are extreme power imbalances among the disputants, national legal systems may better protect the rights of less powerful parties because decisions are legally binding; and decisions are impartial, based on the merits of the case, and with all parties having equity before the law.¹⁸⁷

¹⁸⁴ Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.

¹⁸⁵ Ibid.

¹⁸⁶ Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit.

¹⁸⁷ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

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It has been observed that the role, tasks, required skills, and modus operandi of a successful mediator will depend on the specific context of any dispute.¹⁸⁸ However, there is need for the mediators to acquire broad scale skills to enable them handle a wide range of issues in natural resource conflicts. The crucial characteristic of an effective mediator-facilitator in natural resource conflicts is said to be credibility with the main parties in the dispute, whether that credibility comes from technical expertise, professional experience, social status, kinship, or wisdom ("authority" is usually a poor criterion for selecting mediators).¹⁸⁹

As for negotiation processes, it is also important to enhance capacity building within the communities. Capacity building is believed to be integral to developing a level-playing field, so less powerful stakeholders can participate equitably in a process of consensual negotiation.¹⁹⁰ It has been noted that successful problem-solving is a satisfying experience on a human level. Since the intended outcome of the negotiation is a win-win result,' the accomplishment of creating an innovative solution that maximizes joint as well as individual gains can be shared with the other side.¹⁹¹ The process of reaching this goal is psychologically unifying, rather than divisive. Negotiation is thus an enjoyable and challenging personal experience, rather than a highly stressful battle of wits and words.¹⁹²

¹⁸⁸ Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit, p. 272.

¹⁸⁹ Ibid, p. 273.

¹⁹⁰ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 30.

¹⁹¹ Murray, JS, 'Understanding Competing Theories of Negotiation,' *Negotiation Journal*, April, 1986, pp. 179-186 at pp. 183-184.

¹⁹² Ibid.

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Communication is seen as capable of only taking place within an interactive process of participation that brings together those holding different standpoints.¹⁹³ In Kenya, devolution was designed and has been hailed as capable of opening channels for rural dwellers to communicate their priorities to government decision-makers and in some places improved community-government relations.¹⁹⁴ However, it has been observed that more powerful actors in communities tend to manipulate devolution outcomes to suit themselves.¹⁹⁵ As such, checks and balances need to be in place to ensure that benefits and decision-making do not become controlled by élites.¹⁹⁶

Participatory approaches for environment and sustainable development decision-making should extend beyond the realms of advocacy, academic focus and institutional discourses into the realm of real life implementation.¹⁹⁷

7.0 Conclusion

Sustainable development is not possible in the context of unchecked natural resource conflicts. As a recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective,

¹⁹³ Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ op cit, p.12.

¹⁹⁴ Shackleton, S., et al, ‘Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?’ op cit., p.2; See also Muigua, ‘Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,’ *Paper Presented at the CI Arb Africa Region Centenary Conference 2015*, held on 15-17 July, 2015 at Victoria Falls Convention Centre, Zambezi Sun Hotel, Livingstone, Zambia, (www.kmco.ke)

¹⁹⁵ Ibid, p.1.

¹⁹⁶ Ibid, p.1.

¹⁹⁷ Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ op cit, p.15.

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accountable and inclusive institutions at all levels'.¹⁹⁸ It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.¹⁹⁹ Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource conflicts and ensure that Kenyans achieve sustainable development. Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.²⁰⁰

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. As already pointed out, national legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.²⁰¹ Further, decisions are more likely to be based on national legal norms applied in a

¹⁹⁸ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

¹⁹⁹ Ibid, Goal 6b.

²⁰⁰ Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 08/01/2016].

²⁰¹ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

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standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.²⁰² In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.²⁰³

Even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation, in managing natural resource conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development. The Government efforts evidenced by bodies such as the National Cohesion and Integration Commission²⁰⁴ should actively involve communities in addressing natural resource conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource conflicts in Kenya. Alternative Dispute Resolution mechanisms (ADR) and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource conflicts. They are expeditious, cost effective, participatory and all-

²⁰² Ibid.

²⁰³ See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

²⁰⁴ This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g)).

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inclusive and thus, can be used to manage natural resource conflicts in way that addresses all the underlying issues affecting the various parties.

Natural resource conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource conflicts and environmental problems as it has many limitations and is also faced with many challenges. However ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance in natural resource conflicts has been recognized in the constitution.²⁰⁵ They are mechanisms that enhance Access to Justice. Some mechanisms such as mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.²⁰⁶ This is especially so where natural resource-related conflicts are involved, unless the same are intractable and violent conflicts, where the coercive mechanisms, such as court system, may come in handy. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.

²⁰⁵ See Art. 60(1) (g); Art. 159.

²⁰⁶ Constitution of Kenya, Art. 159(2).

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Managing natural resource conflicts in Kenya through the enhanced use of negotiation and mediation is an exercise worth pursuing for the sake of attaining Environmental Justice and ultimately sustainable development.

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Resolving Public Private Partnerships Disputes in Kenya: A Comparative Analysis

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Abstract

In this article, the author critically examines the nature of public private partnerships' disputes and their effective resolution through various mechanisms, including Alternative Dispute Resolution mechanisms (ADR). The discussion contains a comparative analysis of Public Private Partnerships (PPP) dispute settlement mechanisms across jurisdictions such as Kenya, Ghana and India. There is emphasis on the need to choose an effective dispute settlement mechanism that avoids formal adversarial proceedings so as to preserve business relationships, avoid escalation of disputes and prevent disruption of services.

1.0 Introduction

Governments are faced by an increasing need to find sufficient funds to develop and maintain infrastructure. Growing populations bring about a host of challenges such as increasing urbanization, rehabilitation requirements for aging infrastructure, the need to expand networks to new populations, and the goal of reaching previously unserved or underserved areas.¹ In light of this, many economies are turning to off-balance-sheet financing, bringing the public and private sectors together, not only to

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¹ Ndonge, H.N., et al, 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya,' *European Journal of Business and Management*, ISSN 2222-1905 (Paper) ISSN 2222-2839 (Online), Vol.6, No.39, 2014, p. 145-166 at p. 145.

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control budgetary expenditure, but also to pool these two sectors' specific know-how.² This form of cooperation is commonly referred to as Public Private Partnership (PPP).³

PPPs have lately been embraced worldwide. A number of emerging economies are redefining their PPP policy in a bid to enhance economic development.⁴ The strategy employed has been to improve the domestic environment so as to encourage investors and by extension, boost development. These changes have been accompanied by institutional reforms to strengthen the role of the public sector. In Kenya, the PPP Policy⁵ was adopted by the government in 2010. PPP's are not a new phenomenon in Kenya. The Mtwapa and Nyali Bridges Concessions were signed in 1959.⁶

There is no single agreed definition of PPPs. The Reference Guide Version 2.0⁷, which was jointly developed by the World Bank, the Asian Development Bank and the Inter-American Development Bank, has defined a PPP as “....a long term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.” In Section 2 of Kenya's

² Ibid.

³ Alinaitwe & Ayesiga, 'Success Factors for the Implementation of PPPs in the Construction Industry in Uganda,' *Journal of Construction in Developing Countries*, Vol. 18, No.2, 1–14, 2013.

⁴ See Winch, G.M., et al, 'Taking Stock of PPP and PFI around the World,' (The Association of Chartered Certified Accountants, February 2012), p. 109. Available at <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/public-sector/rr-126-001.pdf> [Accessed on 15/06/2016]; See also, Infrastructure Journal & IFC, 'Emerging Partnerships: Top 40 PPPs In Emerging Markets,' 2013. Available at <http://www.ppiaf.org/sites/ppiaf.org/files/publication/emerging-partnerships.pdf>

⁵ *The Government of Kenya PPP Policy Statement*, (Government Printer, Nairobi, November, 2011).

⁶ Ibid.

⁷ Public-Private Partnership in Infrastructure Resource Center (World Bank). Available at <http://ppp.worldbank.org/public-private-partnership/library/public-private-partnerships-reference-guide-version-20>

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Public Private Partnerships Act 2013⁸ ('the Act'), a PPP is defined as an arrangement between a contracting authority and a private party, under which a private party undertakes to perform a public function or to provide a service on behalf of the contracting authority. The private party in turn receives a benefit from performing a public function by way of compensation from a public fund, or fees collected by the private party from users or consumers of a service provided to them, or a combination of both.

Let us first establish the various stages in a PPP project before we look at the dispute resolution mechanisms applicable to PPPs:

1.1 Identification

In conceptualizing, identifying and prioritizing potential projects under the Act, a contracting authority should consider the strategic and operational benefits of entering into a public private partnership arrangement compared to the development of the facility or provision of the service by the contracting authority.

1.2 Full feasibility

Section 33 of the Act states that a contracting authority should undertake a feasibility study of the project it intends to implement under a PPP, for the purpose of determining the viability of undertaking.

1.3 Procurement

Part VII of the Act is a guide to the step by step procurement process which culminates in the selection of the preferred bidder.

The need for dispute resolution arises mostly during the contract management stage. However, the possibility of a dispute arising cannot be ruled out even prior to that, say at the stage of procurement, where the award of project may be challenged at the PPP Petition Committee, a tribunal established to review administrative processes during procurement. At the contract management stage, disputes essentially relating to the validity, enforceability, interpretation or non-performance of a contractual

⁸ *The Government Printer*, The Public Private Partnerships Act, 2013

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obligation, or those seeking injunctive relief, compensation, specific performance, etc., may come up. However, litigation is not preferred as a mode of dispute settlement, presumably due to factors like potential delay and the need for specialised knowledge. Kenya's PPP law is relatively new and so are the statutes of most developing countries. It would therefore be necessary to take a glance at a couple of statutes from other jurisdictions and compare the dispute settlement procedures adopted thereto.

2.0 The Public Private Partnerships Act, 2013

Under the Act, there are two instances where settlement of disputes is addressed. In the first instance, Section 67 establishes the Public Private Partnerships Petition Committee, a statutory tribunal, which considers all petitions and complaints, submitted by a private party during the process of tendering and entering into a project agreement under this Act. Such a petition for the review of a decision should be made within 15 days from the date of the administrative decision. The Petition Committee is akin to the Public Procurement and Administrative Review Board, established under the Public Procurement and Asset Disposal Act, 2015, which is the forum that determines disputes arising from traditional procurement processes. The disputes filed before the Petition Committee are ordinarily completed and a decision delivered within a month. In its review process, the Petition Committee relies almost entirely on documentary evidence as the procurement process is a documented process.

Although section 67(5) states that the decision of the Petition Committee should be final and binding on both parties, it is arguable that the intention of parliament was not to restrict a party that would wish to seek judicial review in the ordinary courts.

In the second instance, Section 62 of the Act states that the parties to a project agreement should specify the minimum contractual obligations required to be met by the parties as set out in its Third Schedule. The Third Schedule relates to minimum contractual obligations required to be specified in a PPP project agreement. Condition Number 18 requires the agreement to include a mechanism for dispute settlement, including settlement of disputes by way of arbitration or any other amicable dispute resolution mechanism. No particular format or template has been made available by statute or other regulations, and the contracting authority has been left to adopt a dispute resolution clause that best suits the parties. In most PPP

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contracts, FIDIC⁹ (the International Federation of Consulting Engineers) Conditions are adopted by the parties.

Under the FIDIC Contracts, prior to submitting the dispute to arbitration, the Dispute Adjudication Board (“DAB”) first delivers a decision after reference by the parties. The DAB comprises of one or three persons appointed by the parties to resolve the dispute. However, disputes adjudicated upon by the DAB are not final and binding. If a party is unhappy about the decision of the DAB, that party is free to refer the matter for determination by arbitration.

In PPP projects, the contracting authority executes a contract with the private party through a Special Purpose Vehicle (‘the SPV’), which is an organization incorporated by a consortium for the sole purpose of the project. It is unlikely that a single entity would have the desired capacity or expertise to deliver in a PPP arrangement. Several key players join hands in the form of a consortium. The SPV, in turn, shall enter into contracts with several other private parties for the sole purpose of driving the project. These other parties include the off-taker, lenders, insurers, subcontractors, EPC (Engineering, Procurement and Construction) contractor, suppliers, etc.¹⁰ The contracts between the parties that make up the SPV contain Alternative Dispute Resolution (ADR) clauses. There is no hybrid dispute resolution clause but parties adopt a clause that would be appropriate in the circumstances.

2.1 Ghana

On 3 June 2011, the Government of Ghana adopted a national policy on public private partnerships (PPPs). The Ghana Public Private Partnership Bill 2013¹¹ has a chapter relating to dispute resolution. Part 7 on Complaints Mechanisms and Settlement of Disputes, outlines the procedures related to handling of complaints. Section 108 specifies that a bidder who has suffered, or is at the risk of suffering a

⁹ International Federation of Consulting Engineers, see <http://fidic.org/>.

¹⁰ See generally, Quium, A., *Public-Private Partnership in Infrastructure Development: A Primer*, (Transport and Tourism Division UNESCAP, Bangkok, Thailand, February 2008). Available at http://www.unescap.org/ttdw/ppp/ppp_primer/PPP_Primer.pdf.

¹¹ Ghana Public Private Partnership Bill, Revised Draft No.2, May 2013, available at http://www.mofep.gov.gh/sites/default/files/docs/pid/PPP_Law_Draft%20.pdf.

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loss or damage as a result of a breach of Act or in any procurement process, should lodge a complaint within 21 days. Section 107(3) of the draft Bill provides that a complaint about the award of a PPP contract cannot be lodged or entertained 21 days or more after approval of the award, or if the PPP Agreement has been signed, whichever is earlier. This provision is likely to encourage stakeholders to rush to sign the PPP Agreement immediately on deciding to make the award, in order to avoid having to deal with complaints by aggrieved bidders. This is akin to the Kenyan Act which limits the lodging of a complaint with 15 days of the event leading to such suffering or risk thereof. Interestingly, the same section has given the aggrieved party the choice to seek any redress in a court of competent jurisdiction. This leeway is not permissible under the Kenyan statute. The Bill sets up the PPP Complaints and Appeals Panel¹², whose decision is final but can be reviewed by a court. This Panel has a similar mandate to the mandate of the Petition Committee of Kenya and only resolves procurement disputes.

As regards post-contract disputes, the Bill states that such disputes should be settled through the dispute settlement mechanisms agreed upon by the parties in the PPP Agreement, or failing such agreement, in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798)¹³. Research has established that in Ghana, there are three categories of dispute resolution processes which the parties agreed to at the contract stage and eventually utilized regularly. These were engineers' determinations, negotiations (amicable settlement) and international commercial arbitration (ICA). The second category of dispute mechanisms were agreed upon by the parties at the contract stage but were rarely used. These were mediation, dispute adjudication boards and expert determination. There was also a third category of dispute resolution mechanisms which were not agreed to as between the parties but were ultimately utilized to resolve disputes, namely litigation and informal third party interventions.¹⁴

¹² Ghana Public Private Partnership Bill 2013, Clause 108.

¹³ Alternative Dispute Resolution Act, 2010 (Act 798),
http://www.wipo.int/wipolex/en/text.jsp?file_id=339485.

¹⁴ *Joseph Mante Resolving Infrastructure-Related Construction Disputes In Developing Countries: The Ghana Experience available at*
<http://www.arcom.ac.uk/docs/proceedings/e9c239a312539d0ed43df45e055a2d32.pdf>.

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2.2 India

India is currently seeking public participation on a bill for the resolution of all forms of disputes in public contracts, including public private partnerships. The Public Contracts (Resolution of Disputes) Bill, 2015¹⁵, proposes the establishment of a tribunal which is conspicuously comprised of sitting or retired judges. This has left the tribunal deprived of technical expertise which would otherwise come from non-jurist personnel. This is despite the fact that the need for expert adjudication in issues arising out of infrastructure projects has been emphasised by the Supreme Court of India in *UPSEB v. Banaras Electric Light & Power Co. Ltd*¹⁶.

The act gives the tribunal the mandate to adjudicate upon disputes and differences connected with or arising from public contracts.¹⁷ This, by extension covers both traditional procurement contracts and PPP contracts. The tribunal, under the proposed law, has the power to refer a dispute to arbitration, irrespective of whether the contract between the parties contains an arbitration clause. However, the parties are free to exclude the tribunal only if they enter into an arbitration agreement prior to the filing of the dispute at the tribunal. Section 38 brings finality to the decisions of the tribunal, save on a point of law which can be the subject of an appeal to the Supreme Court upon being granted leave to appeal.

This Bill is calculated to tie in with the Public Procurement Bill, 2012¹⁸, which also provides for a dispute settlement mechanism with respect to public procurement (including PPPs). The Public Procurement Bill, 2012, addresses the pre-contract scenario which would ordinarily deal with procurement complaints through what is known as Redressal Committees, whilst this Bill addresses the post-contractual scenario.

¹⁵ Available at https://www.mygov.in/sites/default/files/master_image/Dispute_bill.pdf.

¹⁶ (2001) 7 SCC 637.

¹⁷ Section 16(a).

¹⁸ Available at <http://www.prsindia.org/uploads/media/draft/Revised%20Draft%20Public%20Procurement%20Bill,%202012.pdf>.

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3.0 Conclusion

One of the cardinal principals in choosing an effective dispute resolution mechanism for PPP projects, is generally to avoid formal adversarial proceedings. These are generally ineffectual for settling most disputes in PPPs and project finance. Secondly, provision ought to be made for special contractual mechanisms that preserve the business relationship, avoid escalation of dispute and prevent disruption of services.

Project disputes are an unfortunate fact of life in most infrastructure developments, but they need not balloon into major conflicts that result in expensive, time-consuming arbitration or litigation. The key is to spot disputes in their early stages and be prepared, through advance planning and proper controls and oversight, to resolve them as quickly as possible. In weighing dispute resolution options, parties to a PPP contract need to consider the pros and cons of the various dispute resolution processes in light of their particular case and the jurisdiction.¹⁹

¹⁹ See PwC, 'Resolving Capital Project Disputes: Adopting a business case approach,' September 2014. Available at <https://www.pwc.com/gx/en/capital-projects-infrastructure/publications/assets/pdfs/pwc-resolving-capital-project-disputes.pdf>.

Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute

Wilfred A. Mutubwa*

1.0 Introduction

It has been advanced that confidentiality of arbitration proceedings and awards is perhaps one of its most hallowed attractions as a dispute resolution mechanism. In fact, some scholars and commentators have opined that confidentiality even comes ahead of flexibility, as an attribute of Arbitration, over traditional Court litigation.¹ Many contracting parties, therefore, choose arbitration so as to secure privacy and confidentiality in the resolution of their disputes. International merchants and business people who value trade secrets and desire to avoid negative publicity of their disputes also prefer Arbitration due to its perceived privacy or confidentiality.

Confidentiality in Arbitration, principally, takes two forms. First, and perhaps less controversial, is the privacy of Arbitral proceedings. Proceedings tend to be restricted to the Arbitrator, parties, party representatives and any other persons admitted therein with the parties' consent. Second, is the confidentiality of the documentation produced or relied upon in the proceedings (submissions or statements of case and counterclaim) transcripts, pleadings, rulings, directions and awards published by the Arbitrator. The first limb of confidentiality seems to be

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¹ See for instance Dr. Kariuki Muigua FCIArb, *Settling Disputes through Arbitration* (Nairobi: Glenwood Publishers Limited, 2012) P.14, Also see Laura Kester, *Confidentiality in U.S Arbitration*, (spring 2012) NYSBA New York Dispute Resolution Lawyer Vol.5 No.1 at .23.

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more readily acceptable (except in the context of the right to fair hearing) but the latter, which largely involves documentation, is somewhat circumspect.

In 2010, Kenya promulgated its current Constitution.² The Constitution was received with a lot of anticipation and palpable excitement.³ This Constitution has been hailed by many as being progressive and heralding a new dawn. In many respects, the Constitution of Kenya 2010 creates a brand new legal infrastructure and architecture hitherto unknown in the social political and economic existence of Kenya. For instance, its Bill of Rights is variously described as most forward looking and responsive to emerging and third generation rights that define the twenty first century. In the wake of the new Constitutional dispensation, came the increased significance of Arbitration and other forms of dispute resolution, commonly referred to as Alternative Dispute Resolution (ADR). ADR now finds a firm footing and express recognition in the Constitution.⁴ However, most importantly is that the Constitution of Kenya, 2010 also expanded the fundamental civil liberties, rights and freedoms enjoyed by

² On 27 August, 2010

³ G.O. Oraro (postscript) quoted in Dr. PLO Lumumba and Dr. Luis Franceschi, *The Constitution of Kenya 2010: A Commentary*(Nairobi: Strathmore University press, 2014)

⁴Articles 159 and 189 (4) of the Constitution of Kenya. The relevant portions of Article 159 and 189, read: “159 (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under this constitution.

(2) 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...” 189(4) National Legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration”

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Kenyans.⁵ It also specifically made these rights and freedoms justiciable.⁶ It also speaks to and underwrites national values such as public participation of the people⁷, good governance and accountability⁸, right to access to information⁹, fair administrative action¹⁰, fair hearing¹¹, and transparent and open government.¹² In so doing, there is now a legitimate expectation in both the public and private lives of Kenyans to live up to these values and principles. Every action, undertaking and decision is therefore viewed under the lenses and prism of these legal realities. Every legislative, administrative, judicial and quasi-judicial function or expression must, therefore, conform and be consistent with the high calling that are these Constitutional values and principles. Arbitration and Arbitral tribunals are therefore no exception.

⁵The expanded Bill of Rights, Chapter Four of the Constitution, now includes access to information, economic and social rights, environmental, cultural and consumer rights which did not exist in the repealed Constitution.

⁶The Bill of Rights is now enforceable in Courts pursuant to Articles 22 or 23 of the Constitution. The previous or repealed Constitution was roundly criticized and condemned for its lack of enforcement mechanisms or system of guarantee of fundamental rights and freedoms. It was also criticized for its lack of expression of Kenya's national values. See for instance A.W.Munene, *The Bill Rights and Constitutional Order; A Kenyan Perspective*, (2002) I AHRLJ 135-159 and Kathurima M'inoti "The Reluctant Guard; *The High Court and the Doctrine of Constitutional Remedies in Kenya*" in Kivutha Kibwana (ed) Readings in Constitutional law and politics in Africa, A case study of Kenya;

⁷Article 10(1), Constitution of Kenya 2010.

⁸ *Ibid*, Article 10.

⁹ *Ibid*, Article 35.

¹⁰ *Ibid* Article 47.

¹¹ *Ibid* Article 48.

¹² *Supra*, note 7.

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This article thus explores and interrogates the place of the concept of confidentiality in Arbitration under the Kenyan Arbitration Act, 1995 in light of the Constitution of Kenya 2010, with a view to establishing whether the said Constitution has eroded, furthered or complemented confidentiality as a principle of Arbitration, and what that portends for Arbitration in Kenya. This discourse is important more so now that Kenya seeks to position its capital, Nairobi, as the regional hub for international commercial Arbitration.¹³

2.0 Constitutional and Statutory Underpinnings of Arbitration in Kenya

Article 159(2) of the Constitution of Kenya 2010 specifically recognizes arbitration, among other dispute resolution mechanisms, and aims to promote it. Article 159(1) thereof vests judicial authority “in Courts *and tribunals*” (read-arbitral tribunals) and that the said authority is exercised on behalf of the people of Kenya, from whom ultimate sovereign authority is derived.¹⁴ The Judicial authority exercised by Courts and tribunals (including Arbitral tribunals) is, therefore, delegated to them by the people of Kenya.

¹³ Various efforts towards this end are seen in the establishment of the Centre for Alternative Dispute Resolution (CADR) by the Chartered Institute of Arbitrators (Kenya Branch) and the establishment of Centre for International Arbitration (NCIA) through an Act of Parliament the Nairobi Center for International Arbitration Act, (No. 26 of 2013). Other efforts include the Law Society of Kenya proposed Arbitration Centre.

¹⁴ Under Article 1(2) of the Constitution of Kenya, 2010 sovereignty is vested in the people of Kenya who either exercise it directly or through their elected representatives. This sovereignty is also delegated to Courts and tribunals established by or under the Constitution to exercise Judicial authority on behalf of Kenyans.

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Under the repealed Constitution of Kenya, Arbitration, and ADR in general, was not expressly recognized, but was only the creature of statute, mainly the Arbitration Act (No. 5 of 1995).¹⁵

Currently, Arbitration in Kenya is formally regulated by the Arbitration Act, 1995, the Nairobi Centre for International Arbitration Act, 2013 and the respective rules made thereunder or any other institutional rules adopted by parties.¹⁶ It may also be said that pursuant to Article 2 of the Constitution of Kenya, which now formally recognizes international law as forming part of Kenyan law, international conventions which Kenya has ratified, and which regulate international Arbitration, also regulate Arbitration in Kenya.¹⁷

The Arbitration Act, 1995 does not expressly provide for confidentiality in Arbitrations conducted thereunder. However, Section 15 of the Nairobi Centre for International Arbitration Act, 2013 enjoins directors, officers, employees, agents or any person who in the course of interaction with the Arbitration Centre established thereunder gets access to any record, material, information or documents relating to the business of the Centre,

¹⁵ As amended in 2009 by Act No. 11 of 2009.

¹⁶ Both the Arbitration Act, 1995 and the Nairobi Centre for International Arbitration Act, 2014 in Section 20 and 23, respectively empower parties or the tribunal to elect the use of Arbitration Institution rules. For instance, the often used Chartered Institute of Arbitrators (CI Arb) Arbitration Rules, 2012 issued by the Kenyan Branch of the CI Arb, provide under Rule 10 and 11(7) for the confidentiality of the Arbitrator's notes and award.

¹⁷ Direct recognition of general rules of International Law and treaties or conventions rectified by Kenya as part of Kenyan law is now found in the Constitution 2010 Article 2(5) and (6). Also see Section 36(2) and (5) of the Arbitration Act, 1995 which provides for enforcement of International Arbitration awards in accordance with the New York Convention of 1958, or any other convention to which Kenya is signatory and relating to arbitral awards. For discussion on the new found pre-eminence of international Law in Kenya under the 2010 Constitution see N.W. Wasonga Orago, *The 2010 Kenyan Constitution and hieratical place of international law in the Kenyan Domestic legal system. A comparative perspective* AHRLJ volume 13 No. 2 2013 45-440.

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which such person acquired in the performance of his duties or the exercise of his functions, to divulge such information only under circumstances enumerated under the said provisions.

These circumstances or exceptions to the confidentiality, include, as may be required ‘under any law’ (not necessarily Kenyan law), for performance of his duties or the exercise of his functions under this Act, and when lawfully required to do so by a Court of law”. The said Section 15 then provides for criminal sanctions to anyone who contravenes the confidentiality clause.¹⁸ The Act, like all laws, is also subject to the Constitution and its qualifications.

3.0 Lifting The Veil of Confidentiality in Arbitration

3.1 Access to Information

Article 35 of the Constitution guarantees every Kenyan citizen the right to access to information held by the state and any other person, only if the same is for the use by such citizen, in protection of any right or fundamental freedom.¹⁹ For information held by the State, this right seems only to be subject to limitations under Article 24 of the Constitution. The citizen is also entitled to a correction or deletion of untrue or misleading information which affects him.²⁰ The said provision also requires the State to publish and publicize any important information affecting the nation.²¹

¹⁸ An offence for which on conviction the offender is liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three years or to both.

¹⁹Article 35(1) (a) and (b).

²⁰ Article 35 (2)

²¹Article 35(3)

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The above provision is, therefore, explicit that this right is only available to Kenyan citizens. It, therefore, follows that it may not be available to a non-citizen. This distinction is crucial, particularly in assessing whether this right can be asserted by third parties and/or a member of the public, for instance, to documents in an Arbitration and by a person who is not a Kenyan citizen, in the context of an international Arbitration whose juridical seat is Kenya.²² Article 35 aforesaid seems to be unavailable to or excludes such an applicant. It must be recalled that the Arbitration Act, 1995 also regulates international Arbitration in the Kenyan context.

Similarly, the Nairobi Centre for International Arbitration Act, 2013 is founded on the need to promote Kenya in general, and Nairobi in particular, as a preferred seat for international Arbitration in the region, and to regulate the same.²³ The Nairobi Center for International Arbitration Act, 2013 also regulates international Arbitration. Large domestic contracts involving international corporations and governments which favour arbitration as a means of dispute resolution often involve foreigners or foreign companies. It is, thus, inevitable that the above cited two regimes of law will have foreigners as their consumers.

²² Section 2 of the Arbitration Act, 1995 is succinct that the Act applies to both domestic and international Arbitration and defines International Arbitration under Section 3(3) as an Arbitration in which parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, or the juridical seat of the arbitration is determined by or pursuant to the arbitration agreement as outside the state or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place within which the subject matter of the dispute is most closely connected; or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

²³For the objectives of the Nairobi Centre for International Arbitration Act, 2013 see Section 5 thereof. For purposes of this paper, see, particularly Section 5(a) which provides “The functions of the centre shall be to... promote, facilitate and encourage the conduct of International commercial arbitration in accordance with this Act”.

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It is, thereupon, apparent that the right to access to information held by any other person is available only to a Kenyan citizen who seeks to enforce, exercise or protect any right. Strictly read, it is not even necessary for an applicant to show that the rights or freedoms sought to be enforced, exercised or protected relate to the applicant's own rights or freedoms. As to information held by the State, Article 35 of the Constitution seems to give a *carte blanche* to any citizen, without the qualification of whether such citizen requires it for enforcement, exercise or protection of any right or fundamental freedom. This becomes all the more worrying if seen in the context of an Arbitration in which the state is a party. Confidentiality clauses or agreements in an Arbitration can, therefore, be ousted on an application by a citizen who at least shows that the access to evidence, transcripts, proceedings and awards in a domestic or international Arbitration, whose juridical seat is Kenya, will be used to further a right or freedom. Such rights may include the right to access justice by using such documents to file suit in court²⁴ The same can be said of an applicant who seeks correction of what he deems or perceives as untrue or misleading information that affects him. Perhaps the most open-ended provision is that which permits any citizen to require the state to publish and publicize “*any important information affecting the nation.*”²⁵ The Pandora’s Box is left wide open. Perhaps the saving grace for the concept of confidentiality in Arbitration are the limitations under Article 24(1) (d) which are discussed in deeper detail in part 3.3 of this paper.

3.2 National Values and Principles of Governance

It is now trite law that under the Kenyan Arbitration Act, an Arbitral award can be set aside or refused recognition and enforcement by the

²⁴ Access to justice is a right enshrined in Article 48 of the Constitution of Kenya 2010.

²⁵ Article 35(3) Constitution of Kenya, 2010.

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High Court, on grounds of offending public policy.²⁶ Public policy as a concept has been said to be amoebic or amorphous. In the words of the Court of Appeal in its oft-quoted decision, in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*:²⁷

...public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the state's powers are exercised.

A further attempt by the High Court (Onyancha J) in defining public policy as a term of art, is found in its decision in the case of *Glencore Grain Limited v TSS Grain Millers Limited*:²⁸

“A contract or arbitral award will be against public policy, in my view, if it is immoral or illegal or that it would violate in clearly unacceptable manner, basic legal and/or moral principles or values in the Kenyan Society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or acts that are void. “Against public policy” would also include contracts or contractual acts or awards which would offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive”.

²⁶ Sections 35(2) (b) (iii) and 37 (1) (b) (ii) of the Arbitration Act, 1995.

²⁷ [2009] eKLR.

²⁸ [2002] 1 KLR 606 at p. 626 Also see the position in *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR citing with approval Ringera J in *Christ For all Nations v Apollo Insurance Co. Ltd* [2002]2 EA 366

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Whereas, like many matters legal, public policy as a concept defies universal definition, its frontiers seem to have been judicially delimited. Public policy finds abode in policy documents, statutes and ultimately, in the Constitution. The Constitution of Kenya is, therefore, the Grundnorm of the expression of Kenya's public policy.

Article 10(1) of the Constitution of Kenya expresses what the collective national values and principles of governance in Kenya are. The national values, as expressly set out in Article 10(2) of the Constitution, include “...*(c) good governance, integrity, transparency and accountability...*” The said provision enjoins and binds all state organs, state officers, public and private persons who, while applying and interpreting the Constitution, enacting, applying or interpreting, and/or making or implementing legislation and public policy decisions, should observe the said principles. By dint thereof, Parliament, tribunals (private or public - including Arbitrators), courts as state organs, and judges (as public officers) and “all persons” are thereby required to enact, interpret and implement legislation, policies, awards, decisions, rulings and Judgments that reflect national values and principles.

The supremacy of the Constitution cannot be overemphasized. Any law, policy, decision and Judgment that runs contrary to the Constitution is null and void to the extent of its inconsistency, and any act in contravention of the Constitution is invalid.²⁹

On the one hand, a process such as Arbitration that is private, confidential, and not open to the public, particularly where it involves state officers, public corporations and public funds, can be said to be run afoul the national values and principles of transparency and accountability enunciated in Article 10 of the Constitution. In light of

²⁹ Article 2(4) of the Constitution of Kenya 2010

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Article 2(4) of the same, it can be argued that confidential Arbitration proceedings in Kenya, including an award therefrom, are unconstitutional illegal, null, void and invalid.

On the other hand, it can also be safely argued that the very same Constitution of Kenya recognizes, under Article 31, the right to privacy. It can, therefore, also be validly argued that this right extends to private Arbitration proceedings. A contemporaneous and complementary reading of Articles 2(4), 10 2(c), 31 and 159(2) (c) of the Constitution may invite the conclusion that private or confidential dispute resolution mechanisms may very well be valid, and are contemplated and provided for under the Constitution.

It can also be validly argued that transparency, accountability, scrutiny of confidential proceedings, such as Arbitration, as contemplated under Article 10(2)(c) can be achieved through the various processes of challenge and enforcement of Arbitral awards specifically provided for under the Arbitration Act.³⁰

3.3 Fair Hearing

Article 50(1) of the Constitution guarantees fair hearing by Courts and *tribunals* over any dispute that should be resolved by application of the law. This, in essence, includes Arbitration. The said provision underscores that such fair hearing involves a fair and *public hearing*. The inclusion of the words “public hearing” connotes that such hearing should not be in camera, private or confidential. The import or purport of the use of the words “public hearing” may arguably be construed to outlaw any hearing by a Court or tribunal which is not public. Confidential agreements, such as in some rape cases, divorces and criminal cases such as in a Court Martial, like hearings in camera in Court can, therefore, be

³⁰ Sections 35 and 37 of the Arbitration Act, 1995.

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found to be unconstitutional by virtue of its apparent breach of the express provisions of Article 50(1) of the Constitution.

It is, however, debatable whether the right to a “*fair hearing*” under Article 50(1) is an absolute right. Under the Constitution, some rights can be limited under Article 24. Limitation of rights are, however, subject to qualifications. The said Article 24(1) requires that any limitation of rights can only be obtained under the law, and should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It should also take into account relevant factors, inter alia, that the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others,³¹

Article 25 of the same Constitution enumerates rights which are absolute and not subject to any limitation whatsoever. The right to fair trial is one such absolute right. Article 25(c) read together with Article 24 and Article 50 seems to suggest that the right to fair trial may not be synonymous to the right to fair hearing.³² Though used interchangeably, the words *fair hearing* as used in Article 50(1) and the words *fair trial* as used in Article 50(2) and Article 25, seem to be different. The difference is that Article 50(1) does not confine the right to fair hearing to a criminal trial or trial of an accused person. It is my view, therefore, that the right to fair hearing referred to in Article 50(1) serves both civil and criminal processes, while the right to fair trial covers only criminal trials.

³¹ Article 24(1) (d) of the Constitution of Kenya 2010.

³² The relevant provision of Article 50 reads:
“*Fair Hearing*”

50(1) 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 court or, if appropriate, another independent and impartial *tribunal or body*.

(2) Every accused person has the right to a *fair trial*...” (Emphasis added).

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I belabour the above distinction so as to demonstrate the point that the right to fair trial, which cannot be limited by statute or any other law, is confined to criminal trials. Indeed, it is my view that the use of the words “*fair trial*” in Article 25(1) of the Constitution is deliberate so as to coincide or be in tandem with Article 50(2).

It follows, from the above interpretation, that the right to fair hearing can be limited by law, as envisaged by Article 24 of the Constitution. Such limitations may include a limitation through statutory provisions as to confidentiality and rules of Arbitration institutions, which recognize privacy in Arbitration to the extent that such limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equalities and freedom. The concept of confidentiality in arbitration proceedings is not inconsistent with democracy, equality or freedom.

It can also be argued, and quite persuasively at that, that the constitutional right to privacy includes the right of private parties, corporate citizens and disputants to settle their disputes in private. The right to privacy is provided for under Article 31. This can also be seen as one of the legal limitations to the right to a public hearing as recognized under Article 24(1) of the Constitution. Indeed, this limitation resonates with Article 24(1) (d), which limits enjoyment of rights to the enjoyment by others of their rights. In essence, the right to a public hearing, particularly with regard to civil disputes, should be viewed in light of the rights of the disputants to privately resolve their disputes.

3.4 Claw-Back Provisions In The Arbitration Act, 1995

The Arbitration Act, 1995 by its very frame, presents challenges to the principle of confidentiality in Arbitration. One need only consider at least two provisions of the Act to vividly see that Arbitral proceedings and documents become public, when a party or third party moves the court

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for interim orders of protection or for stay of proceedings.³³ Such filings then become part of the Court record. It is difficult to see how any matters may remain confidential, bearing in mind that the Court process is a public process with persons not parties to the Arbitration being allowed to access Court records. This is more so in light of Article 35 of the Constitution as discussed hereinabove.

Furthermore, the Act provides for instances where the Arbitrator's appointment can be challenged in Court.³⁴ The procedure for challenge of an Arbitrator, as stipulated in the Act, includes an appellate or review process to the High Court.³⁵ The challenged Arbitrator is required to be a party to the appellate or review proceedings, or to at least be heard on the application and grounds upon which his removal is sought.³⁶ The grounds for such challenge include, inter alia, the existence of circumstances *that may give rise to justifiable doubts as to his impartiality and independence*. Invariably, the Arbitrator's rulings, decisions and directions are subject to challenge in Court.

As such, the Arbitrator's response and the party's challenge will, of necessity, include documents, transcriptions of proceedings, rulings and directions with a view to demonstrate actual or perceived bias or lack of impartiality or independence of the Arbitral tribunal. The tribunal or the opposing party will similarly be at liberty to rebut or controvert such evidence by placing documents and records of proceedings before Court. This will lead to the eventual piercing of the cloak of confidentiality.

³³ Sections 6 and 7 of the Arbitration Act, 1995 provide for applications to Court to stay legal proceedings filed in breach of an Arbitration Agreement and for interim orders of protection pending Arbitration, respectively.

³⁴ Section 13 and 14 of the Arbitration Act, 1995.

³⁵ *Ibid* at Sections 14(5) and (6).

³⁶ *Ibid* at Sections 14(4).

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Similar circumstances abound on an appeal from the tribunal's decision on its jurisdiction,³⁷ or on a party's application to the High Court seeking assistance to enforce the tribunal's interim orders or reliefs,³⁸ and/or the Court's assistance of the Arbitral tribunal in taking evidence³⁹, and challenge of the Arbitral award⁴⁰. All these processes require the filing of confidential Arbitration documentation, including the award, in Court, thereby rendering such documents public records and exposing them to the public, thus severely negating the essence of confidentiality of the arbitral process.

4.0 Comparative Perspectives

4.1 The English Arbitration Act, 1996

Apart from being the parent law in common law jurisdiction, the English Arbitration Act, like its Kenyan counterpart, substantially borrows from the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration⁴¹

³⁷ Section 17 of the Arbitration Act, 1995. Amended by Section 14 of Act No 11 of 2009. The doctrine of *Kompetenz Kompetenz*, the tribunal has the first right to decide on its jurisdiction. Section 17(6) escalates the decision of the Arbitrator on a preliminary objection to its jurisdiction to the High Court.

³⁸ Section 18 of the Arbitration Act, 1995 as amended in 2009, empowers the arbitrator or a party with the Arbitrator's approval to seek assistance from the High Court in exercise of the tribunal's powers to make interim measure of protection or to provide security for the claim, part thereof or costs and the court in so doing shall have the same powers or jurisdiction as the Arbitral tribunal.

³⁹ Section 28 of the Arbitration Act, 1995.

⁴⁰ Section 35 of the Arbitration Act, 1995.

⁴¹ 1985 with amendments adopted in 2006.

www.uncitral.org/pdf/english/texts/arbitration/m/-arb/07-86998 (Accessed on 3 October 2014).

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Another similarity between the two Arbitration regimes is that confidentiality of the process, documents and award is not expressly provided for in the respective national Arbitration statutes. This is perhaps explained by the adoption, *mutatis mutandis*, of the UNCITRAL model International Commercial Arbitration law, which similarly, also does not contain an express confidentiality provision. It is for these similarities and contextual coincidences, that a brief comparative anatomy of the English and Kenyan Act, with respect to the principle of confidentiality in Arbitration, *vis a vis* various constitutional provisions, that this discourse finds merit.

The position in England seems to be one which recognizes confidentiality in Arbitral proceedings, whether the same is provided for in the Arbitration agreement or not. In England, confidentiality in Arbitration is said to be implied⁴². It is also acknowledged as a very important characteristic of Arbitration, which sets it apart from such other dispute resolution mechanisms such as litigation.⁴³ English law accords confidentiality of Arbitration proceedings, documentation thereof, transcripts and even awards, the status almost of a sacrosanct ingredient (perhaps even more important than the other attributes of Arbitration) that attracts particularly commercial persons to Arbitration. It is for this

⁴² See court of Appeal decision in *Dolling-Baker v Merrett* 2 All E.R-890 (Eng C.A.1991) Also see *Hassneh Insurance Co. of Israel v Mew*.2.Lloyds Rep. 243(Q.B.1993) followed the rationale in *Dolling Baker* and a further exception where disclosure is required to establish a cause of action in another dispute. *Ali shipping corp v shipyard and Trogir*, 1 Lloyd's Rep. 643, 2All ER 136 (Eng. C.A 1998) also re-asserted the position in *Dolling-Baker*.

⁴³ Will Francis "Confidentiality: a Fragile Principle" <http://ukpracticellaw.com/6-501> (Accessed on 3rd October 2014)

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reason, that English courts have tried, as much as possible, to maintain the confidentiality of Arbitral proceedings.⁴⁴

However, the warm embrace with which English Courts have welcomed the notion of confidentiality in Arbitration is not without exceptions. In the case of *Emmott v Michael Wilson and Partners*,⁴⁵ the Court of Appeal in England upheld the High Court's decision and in effect, stated that at least four exceptions to the general rule on confidentiality exist. First, where disclosure is compelled by law, for example, where disclosure is ordered or permitted by the Court. Second, where disclosure is in the public interest or interest of justice. Third, where disclosure is reasonably necessary for the establishment or protection of an arbitrating party's legal right to found a cause of action against a third party, or to defend a claim or counterclaim brought by the third party. Fourth, where there is the express or implied consent of all the parties. The second and third exceptions were recently upheld by the Court of Appeal of England in its decision in the case of *Westwood Shipping Lines Inc and another vs Universal Schiffartsgesellschaft MBH and another*.⁴⁶

The foregoing exceptions are a mirror reflection of those under Kenyan law. Public policy, rights of a party to approach court for relief, consent of all parties and so as to defend or mount claims against third parties (as discussed hereinbefore), are statutory and Constitutional waivers and exceptions to confidentiality in Arbitration both, in England and Kenya.

⁴⁴ See generally Claude R. Thomson & Annie M.K Finn, "*Confidentiality in Arbitration; A valid Assumption? A proposed solution!*" (2007) *Dispute Resolution Journal* Vol. 62.No 2 at pg 1.

⁴⁵ [2008] EWCA Cir 184.

⁴⁶ [2012] EWCH 3837(Comm).

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4.2 The United States of America

Unlike England, the American approach is radically different from that found in Kenya and other UNCITRAL model law states. The U.S.A seems to emphasize that confidentiality in Arbitration is the function of the Arbitration agreement (in which a confidentiality clause is provided) or in a separate confidentiality agreement entered into before or during the subsistence of the Arbitral Proceedings⁴⁷. Confidentiality in American law will also abound, following statutory provisions that vary from state to state in the federal Union. No uniform federal position seems to exist as various semi-autonomous federal states seem to uphold, and others, to reject the confidentiality principle.⁴⁸

Courts in the USA have, therefore, strictly interpreted confidentiality agreements and observed that confidentiality agreements must be enforced, unless the facts militate towards disclosure.⁴⁹ The Courts have, thus, defined and delimited what constitutes the presumption of public access to judicial documents and proceedings as a constitutional right, and as a presumption under the first amendment to its Constitution.

The US Courts have also squarely placed on an applicant the burden of showing that the documents sought to be produced bear a higher value in their being confidential than public, discharge of which overcomes the presumption of public access. A Federal Appeal Court has held that parties to an Arbitration cannot enter into a confidentiality agreement to bind a third party to not access information which such third party, has a legal right to access.⁵⁰ Courts have, therefore, consistently ignored or

⁴⁷ See generally Laura A Kaster, *Supra* note 1.

⁴⁸ *Ibid* at 23.

⁴⁹ *Gotham Holdings LP v Arce*, 533 F.3d 342 (5th Cir 2008).

⁵⁰ *Supra* note 46 at 25.

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disregarded such agreements where disclosure is deemed to be supported by public policy considerations. Such prohibited high value disclosure documents may include medical information or attorney-client privileged information. These may also extend to trade secrets and financial records. The Court was also of the view that even arbitration institutions' rules were not capable of waiving the first amendment presumption of public access to judicial documents and proceedings, where the documents are of insufficient sensitivity.⁵¹ The standard to impeach the presumption in support of public access is indeed quite high.

State laws also provide for the exceptions on the ground of public policy. For instance, in the case of *City of Newark v Law Department of the City of N.Y.*,⁵² the Appellate Court held that the Arbitration tribunal did not have the power to deny the public access under the Freedom of Information law. In *Omaha Indem Co v Royal Am. Managers Inc.*⁵³, the Court found that if parties to the Arbitration testified, federal prosecutors could use Arbitration testimony transcripts for impeachment in a criminal trial, even though the material was the subject of both a stipulation of confidentiality and a protection order.

US Public agencies and bodies involved in Arbitration have routinely published arbitration awards. Corporate agencies also bear regulatory reporting or disclosure requirements that may not permit such bodies to enter into complete confidentiality agreement.⁵⁴

⁵¹ *Ibid* at 23.

⁵² 760 N.Y.S 2d 431, 436-37 (NY App. 2003).

⁵³ 140 F.R.D 398, 400 (W.D.Mo 1991).

⁵⁴ *Supra* rule 47 at 23.

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In a nutshell, therefore, at least four states in the US offer varied statutory protection of Arbitration communication.⁵⁵ The most common protection is usually that of business and trade secrets, medical records and Attorney- client communication.

Enforcement of Arbitration confidentiality agreements in the USA is said to be problematic.⁵⁶ Enforcement takes two primary forms; preventive and remedial. The most resorted to preventive relief is an injunction to enforce the confidentiality agreement.⁵⁷ However, American Courts seem reluctant to accept that confidentiality agreements can be invoked if the Court finds them inimical, limiting or preventing the enforcement of Arbitration Awards. The obvious rationale seems to be that the enforcement of confidentiality agreements cannot be used to defeat the very essence thereof, which is the resolution of disputes through Arbitration and its end product, the Award's enforcement.

Other remedies available under US Arbitration law include making the applications before the Arbitral tribunal, such as for protection of trade secrets.⁵⁸ American Courts have, however, underlined that damages for breach of a confidentiality agreement is the most preferred and effective remedy as opposed to specific performance.⁵⁹

⁵⁵ Arkansas, California, Missouri and Texas.

⁵⁶ *Supra* note 47 at 2.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

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4.3 Sweden

In the Swedish case, *A.I. Trade Finance inc. v Bulgarian Foreign Trade Bank Ltd (Bulbank)*,⁶⁰ the Court of Appeal held that a duty of confidentiality is not implied in law. Rather, the Court referred to a duty of loyalty and good faith, which would restrict disclosure of certain information pertaining to the arbitration, depending on the circumstances of the case.

4.4 Institutional Arbitration Rules

The position on confidentiality is as varied as there are institutions offering or supporting Arbitration. For instance, the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules do not expressly provide for confidentiality of Arbitration proceedings. However, the tribunals thereunder have used Rules 19, 34(1) and 44 of the said Rules to find that confidentiality is implicit in general powers of the Arbitrator to conduct Arbitration as a master of his procedure, and to decide any matter which may not be expressly covered by the rules including, but not limited to confidentiality, admissibility of any evidence adduced and probative value thereof. Using the same yardstick, the UNCITRAL model Arbitration law, which does not also expressly speak to confidentiality of Arbitral proceedings thereunder, but has similar provisions to the ICSID Arbitration Rules, can be interpreted to implicitly implead confidentiality.

The absence of express provisions on confidentiality has, on the one hand, been hailed as contributing to the flexibility and discretion open to tribunals and Courts. The only difficulty is that the vacuum leaves parties at the mercy of local Courts, which fill the void, thereby extensively

⁶⁰ 14 Marley Int’l Arbitration Rep. 4 A 1(1999).

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eroding the confidentiality of Arbitral proceedings. The proponents of the silence of institutional rules on confidentiality advance that the silence of the laws allow the tribunal to forge appropriate obligations of confidentiality which conform to, and address peculiar dictates of justice particular to each case situation.

The two leading Arbitration institutions in the USA, the American Association of Arbitrators (AAA) and American Bar Association (ABA), provide canons which impose a duty upon Arbitrators to maintain confidentiality in proceedings. These high moral ground values are embedded in both AAA and ABA Statement of Ethical principles⁶¹ and Ethics for Arbitrators in Commercial Disputes,⁶² respectively. As discussed above, USA Federal and State law in which the said institutional rules operate, severely limit the scope of the confidentiality, in practice and application.

Closer home, the Kigali International Arbitration Centre (KIAC) is worth sampling. Article 26 and 48 of the KIAC Arbitration Rules seem to specifically enjoin parties and the tribunal to observe utmost confidentiality, unless with the acceptance of all parties. In fact, the KIAC Arbitration Rules dedicate an entire Article (48) to confidentiality. This seems most impressive and progressive in highlighting and engraining confidentiality in the fabric of Arbitration under the said institution. The rules are very exhaustive, providing for confidentiality of all proceedings, evidence and the Award. However, a closer reading will quickly dash the hopes of any observer who interrogates the effect of the claw-back exceptions that follow the general obligation under Article 48

⁶¹ See the ICSID decision in *Biwater Buaff (Tanzania) Ltd v Tanzania ICSID case no. ARB/05/22* procedural order No. 3 of 29 September 2006 (Biwater) and *Giovanna a Beccara and others v Argentina (ICSID case No. ARB/of/05)*.

⁶² See Canon VI of AAA code of Ethics which requires Arbitrators to maintain the confidentiality of all matters relating to the Arbitration.

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of the said KIAC Arbitration Rules. The six exceptions include the exclusion of confidentiality where the same is for the purpose of making an application to any competent Court of any state to enforce or challenge an Award, pursuant to an order of subpoena issued by a Court with competent jurisdiction in the pursuance of a legal right or claim, or in compliance with the provisions of the law.

5.0 Conclusion

In the ultimate, I reflect on the truism contained in the words of Dr. Claude R. Thomson & Annie M.K.,⁶³ which words ring true for the Arbitration practitioner in Kenya as in Canada, where the context of their words obtain. They argue:

Like most countries, Canada and its provinces do not have legislation that defines and regulates the scope of confidentiality in domestic and international arbitration. Most Arbitration Institutions have provisions dealing with privacy of hearings but not the confidentiality of awards, evidence and submissions that are circulated between the parties. In the absence of statutory direction, practitioners have struggled to determine whether the applicable law imposes an implied duty of confidentiality when parties agree to submit their disputes to arbitration without mentioning confidentiality and, if so, precisely what is confidential and what exceptions to any rule must be recognized.

Dr. Thomson and Ms. Finn offer a most compelling justification for the presumption of confidentiality in Arbitration to be that Arbitration as a dispute resolution mechanism is inherently private in nature, and that confidentiality and privacy should thus be preserved, since they form the

⁶³ ABA Code of Ethics at http://www.abanet.org/dsipute/commercial_disputes.pdf, which enjoins ABA members to maintain confidentiality in Arbitrations. (Accessed on 3rd October, 2014).

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very basis for parties electing Arbitration rather than litigation in public Courts.⁶⁴

The concept of confidentiality in both domestic and international Arbitration exists in Kenya, but like other countries, it is severely threatened, eroded and may soon be extinct or remain cosmetic or reduced to an illusion. The concept of confidentiality in light of the Constitution 2010, is anemic and faces imminent demise. In an effort to preserve whatever little that is left of confidentiality as a critical attribute of Arbitration as a private dispute resolution mechanism in Kenya, I proffer the following suggestions, which are incidentally perfectly embedded in the Arbitration Act, 1995:

- (a) Consider drafting confidentiality agreements between the parties and the Arbitrator, setting out the matters covered therein and the extent of the said confidentiality. This is perfectly in line with the concept of party autonomy, which concept is a golden thread that runs through the entire provisions of the Arbitration Act, 1995.
- (b) Electing a juridical seat and governing substantive law that effects sanctions for breach of confidentiality agreements. This is in line with Section 21(1) of the Arbitration Act, 1995.
- (c) Agreeing to have an award that is not reasoned. This is one of the options open to parties' election under Section 32(3) (a) of the Arbitration Act, 1995. It also eliminates chances of publicizing embarrassing documents and trade secrets.
- (d) Provide, by agreement or a protective order that without consent of parties, only such information as is required by law shall be disclosed in connection with enforcement or challenge. Mark the trade secrets,

⁶⁴ *Supra* note 44 at 3.

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identify them and include them in terms of reference or a protective order and if necessary, provide for an arbitral expert to recover the documents in the event of a dispute as to either disclosure or need for confidentiality.⁶⁵

- (e) Whereas institutional Arbitration rules such as the Chartered Institute of Arbitrators (CI Arb) Arbitration Rules 2012 allow for publishing awards in law reports upon the consent of parties, parties desiring to maintain confidentiality may opt not to enter such consent.

It should still be noted that, however much efforts are made to maintain confidentiality in Arbitration, the same remains difficult to achieve, particularly when third parties have a legitimate constitutional claim to information with regard to the Arbitration, particularly in public Courts.

⁶⁵ Ibid at 1& 6.

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Abstract

This paper analyses a number of pertinent issues in International Commercial Arbitration. It begins with a highlight of the advantages and disadvantages of International Commercial Arbitration. A distinction is drawn between International Commercial Arbitration and alternative dispute resolution (ADR). Jurisdiction issues in International Commercial Arbitration are discussed. The authors analyse issues related to the powers of the arbitral tribunal, the seat of arbitration, choice of arbitrator, choice of law, place of arbitration, and subject matter of arbitration. Procedural issues are broken down, including the procedure governing conduct of International Commercial Arbitration and the rules governing International Commercial Arbitration.

1.0 Introduction

International Commercial Arbitration refers to a dispute resolution process which relates to parties or subject matter in different states, for business transactions.¹ This paper discusses pertinent issues in international commercial arbitration. It presents the advantages and disadvantages of international commercial arbitration, distinguishes international commercial

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¹ Arbitration Act 1995 s 3(3).

arbitration from alternative dispute resolution (ADR), and argues the jurisdiction issues in international commercial arbitration. The paper elaborates on the powers of the arbitral tribunal, the seat of arbitration and choice of arbitrator. Issues of choice of law and place of arbitration are presented, and the subject matter of arbitration is brought to light. Lastly, the procedure governing conduct of international commercial arbitration is highlighted, as well as the rules governing international commercial arbitration.

2.0 Advantages and disadvantages of International Commercial Arbitration

2.1 Advantages

The advantages of international commercial arbitration include provision for enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), choice of neutral forum and choice of arbitrator, speed and finality, flexibility, and confidentiality.² The advantages must be tempered, and not taken without questioning their validity.

First, while enforcement is provided for under the New York Convention, there is a reliance on the national law and therefore, national courts in enforcing the arbitral award. The entire intention of avoiding the scrutiny of the courts is null, as the matter may land before a judge in the country of enforcement.

Secondly, while the parties have the choice of a neutral forum and the arbitrator, certain disputes may be mandated to be handled by a particular entity by the national law. For example, investment disputes with investors from countries with which Kenya has a Bilateral Investment Treaty (BIT)

² Peter Binder, 'General Introduction into International Commercial Arbitration' <http://www.eipa.eu/modules/EuroMedJustice/Conferences/28_Athens_12_15Nov07/speeches/3%20Speech%20Peter%20BINDER.pdf> Accessed 3 March 2016.

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must have the matter determined at ICSID, and there is little allowance for selection of either the forum or the arbitrator. A case in point is when, Vanoil, a Canadian company investing in the Oil and Gas industry in Kenya, threatened to bring proceedings against the Government of Kenya for revocation of its petroleum exploration contract, in the sum of Sh13.4 billion (USD 150 million).³ Vanoil is considering bringing the proceedings through its shareholders in the UK and Switzerland, because Kenya does not have an existing BIT with Canada.⁴

The last advantage discussed in this paper is confidentiality. It is set out below.

2.2 Confidentiality

International commercial arbitration is a favourite resort for businesses that intend to keep their working practices and operations confidential. While this is an advantage, the growing tendency for awards in international commercial arbitration to be published challenges confidentiality. Leonard Obura Aloo and Edmond Kadima Wesonga in their paper, ‘What is there to Hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010’⁵ discuss the opposite principles of transparency and confidentiality and argue for public access to government or state-related arbitration, which would include an international commercial arbitration in which the state is a party. This tension was illustrated in the case of *World Duty Free Company Limited v Republic of Kenya (ICSID Case No.*

³ Immaculate Karambu, ‘Oil Company Sets Stage for Fight with the State’ *Daily Nation* (Nairobi, Kenya, 22 November 2014) <<http://www.nation.co.ke/business/Oil-company-sets-stage-for-fight-with-the-State/-/996/2531708/-/gw9nju/-/index.html>> Accessed 5 March 2016.

⁴ Ibid.

⁵ Leonard Obura Aloo & Edmond Kadima Wesonga, ‘What Is There to Hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010’ (2015) 3 *Alternative Dispute Resolution* 1.

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ARB/00/7), where the claimant, a business company based in Dubai seeking to establish duty free complexes at the Nairobi and Mombasa Airports, admitted that it had bribed the then President of the Republic of Kenya, Daniel Toroitich Arap Moi, to procure a tender to contract with the state. A summary of the Chatham House International Law discussion group meeting, held on 28 March 2007, applauds the tribunal that was faced with the complex issue of corruption on the part of the state, and highlights the importance of public access to proceedings of international commercial arbitration.⁶

The arguments for preserving confidentiality as an integral part of international commercial arbitration are presented by proponents for the position that displaying all the proceedings to the public eye may have serious economic effects to the parties.

2.3 Disadvantages

International commercial arbitration may, however, be disadvantageous because of the limited powers of the arbitral tribunal, conflicting awards, and the cost.⁷ The issue of cost of international commercial arbitration is discussed below, to dispel the myth that international commercial arbitration is a preferred avenue for parties because of its ‘low cost’.

2.4 Cost

International Commercial Arbitration may be costly. For example, an arbitrator under the International Centre for Settlement of Investment Disputes (ICSID) handling an investment dispute receives USD 3,000 per

⁶ Chatham House, ‘World Duty Free v The Republic of Kenya: A Unique Precedent?’ (Chatham House) <http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Moi_World_Duty_Free_Chatham_House_Mar_28_2007.pdf> Accessed 3 March 2016.

⁷ Peter Binder (n 2).

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meeting day or 8-hour day of other work.⁸ That is the equivalent of Kshs 300,000 per day at an exchange rate of 1:100. This is excluding per diem subsistence allowances, when the arbitrators are away from their normal place of residence, to cover personal expenses such as food, accommodation and personal communications for the arbitrators.⁹

Standard allowance is USD 115 per day. Nairobi is listed as a city in the USD 135 per diem category, while an arbitrator conducting the proceedings in Beijing, Rio de Janeiro, Kingston and Johannesburg are in the USD 170 per diem category, and cities in the USD 185 per diem category include Mombasa, Kampala, Paris and Stockholm.¹⁰ An arbitrator sitting in Nairobi would therefore receive a per diem of approximately Kshs 13,500 while one in Mombasa would receive Kshs 18,500.

Apart from the arbitrator's fees and living allowance, the arbitrator must also be reimbursed for travel expenses related to the meetings for the arbitration, at one class above economy being business class for flights.¹¹ The arbitrator submits the claim for expenses to the ICSID Secretariat together with supporting documents, the Secretariat approves the claim and the World Bank makes the payment by electronic bank transfer directly into the arbitrator's account.¹² The parties therefore do not have control over the expenses claimed by the arbitrator, and only receive a final bill once it has been tabulated. This, therefore, puts international commercial arbitration at a significant cost to the parties.

⁸ ICSID, 'Memorandum on the Fees and Expenses' (July 2005)
<<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/--Memorandum-on-the-Fees-and-Expenses-English.aspx>> Accessed 3 March 2016.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

3.0 Distinction between International Commercial Arbitration and Alternative Dispute Resolution (ADR)

International commercial arbitration is singled out from ADR, and its similarity to other avenues of ADR is disputed. ADR in this paper includes negotiation, mediation and conciliation. While both international commercial arbitration and ADR are dispute resolution processes with party autonomy, flexibility, and the like, international commercial arbitration has developed as a distinct dispute resolution mechanism. This section, therefore, discusses the distinction between international commercial arbitration and ADR.

International Commercial Arbitration must be international, while ADR may be either domestic or international. International Commercial Arbitration has a commercial aspect involved, while ADR may be for either commercial or non-commercial matters, such as family disputes or employment claims. International Commercial Arbitration is less flexible than ADR, because the interplay of the laws of the different jurisdictions calls for uniformity, and therefore, the flexibility is diminished with the introduction of International Conventions, statute and rules. In ADR, the parties retain significantly more room to determine how the process will be conducted. While International Commercial Arbitration, as an arbitration process, has a result that is final and binding, ADR resolutions or conclusions are neither final nor binding, unless the agreed terms are reduced into writing by the parties into a contract. If negotiations succeed, for example, the parties may enter into a negotiated agreement setting out the obligations of both parties.

Over the years, International Commercial Arbitration has been seen to take the rigidity of a court-like system, especially with issues such as reliance on institutions and publishing awards. Reliance on institutions such as the International Commercial Court (ICC), and the International Centre for Settlement of Investment Disputes (ICSID) has led to formalisation of International Commercial Arbitration. The UNCITRAL Secretariat publishes information on court decisions and arbitral awards relating to the Conventions

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and Model Laws that have emanated from the work of the Commission under the project called Case Law on UNCITRAL Texts (CLOUT).¹³ Publishing awards has the following advantages:

- a. ensuring transparency;
- b. ensuring the tribunal acts in the interest of the public;
- c. development of the law and jurisprudence;
- d. certainty and predictability by ‘learning from the mistakes of others’;
- e. consistency;
- f. legitimacy of the system and ensuring that justice is done;
- g. education and training of arbitrators by learning from the work of others;
- h. ensuring quality of arbitral awards with recognition by the tribunal that the public will see the final result;
- i. promoting neutrality because previous inclinations of the arbitrator would be known and the possibility of the tribunal to favour an appointing party it has previously interacted with on other matters would be laid clear;
- j. upholding the reputation of arbitrators where public scrutiny keeps the tribunal in check;
- k. equality of arms allowing the parties to make well-informed decisions of who is the best placed to handle the dispute, and
- l. permitting parties to select the institution that has the best placed experience in handling the category of dispute in question.¹⁴

However, publishing arbitral awards is not favourable to international commercial arbitration because it:

¹³ UNCITRAL, ‘Case Law on UNCITRAL Texts (CLOUT)’ (2016)
<http://www.uncitral.org/uncitral/en/case_law.html> Accessed 3 March 2016.

¹⁴ Elina Zlatanska, ‘To Publish, or Not To Publish Arbitral Awards: That Is the Question...’ (2015) 81 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 25.

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- a. erodes the privacy and confidentiality that make International Commercial Arbitration the choice dispute resolution mechanism for business. Parties may not be willing to give pertinent information for fear of being discovered;
- b. would lead to dissemination of sensitive technical and business data that may be detrimental to the function of the parties;
- c. leads to accrual of greater costs and delay for expunging sensitive information from the award to be published;
- d. relates to a different set of facts which may not be applicable in another case at all;
- e. may jeopardise the parties' reputation leading to economic loss;
- f. would result in a proliferation of literature which may be unnecessary; and,
- g. would increase the cost of operation for the arbitral institutions leading to loss of market share due to higher costs offset to the parties.¹⁵

These issues of publication of awards may be avoided if the parties engage in ADR, where there is little risk of losing confidentiality and privacy of the parties.

4.0 Jurisdiction issues in International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration contains provisions on jurisdiction of the arbitral tribunal at Chapter IV. The Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration discusses jurisdiction of the arbitral tribunal as a 'salient feature' of the Model Law. The provisions on the Model Law are adopted, almost word for word, into the Kenya's Arbitration Act of 1995. Article 16 of the Model Law has been adopted into section 17 of the Arbitration Act. This section discusses the jurisdiction issues in International Commercial Arbitration that arise based on the provisions of the Arbitration Act.

¹⁵ Ibid.

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Section 17 of the Arbitration Act gives the tribunal the power to decide on its own jurisdiction. This presents the issue of *kompetenz-kompetenz*. It also presents the issue of separability. While the entire contract may fail, the arbitration clause still stands as a separate and valid law, giving the tribunal the jurisdiction to decide. These two issues are captured in the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration which states that Article 16 of the Model Law and, therefore, Section 17 of the Arbitration Act, adopt ‘the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the arbitration clause’.

4.1 The Principle of ‘Kompetenz-kompetenz’

The principle of *kompetenz-kompetenz* refers to the ability of the tribunal to determine whether there was an arbitration clause providing for arbitration or not. In essence then, the tribunal decides on whether it should be deciding on the subject matter. The tribunal has jurisdiction to determine its own jurisdiction. It has the competence to determine its own competence. This principle was discussed in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR¹⁶ where the Court of Appeal of Kenya stated:

“...Section 17 of the Arbitration Act of Kenya... gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as “Competence/Competence” which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is “Competence to decide upon its

¹⁶ *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] Court of Appeal of Kenya Civil Application Nai 327 of 2009 (UR 225/2009), eKLR.

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competence” and as expressed elsewhere in this ruling in German it is “Kompetenz/Kompetenz” and in French it is “Competence de la Competence”. To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as “acting wrongly but within jurisdiction.””

The Court of Appeal termed the action of the High Court as an ‘extraordinary wrong’ which called for ‘extraordinary measures’. It determined that the High Court incorrectly considered the jurisdiction of the tribunal at the first instance, where according to the Arbitration Act, the tribunal itself should be the first place for resort by the party challenging the jurisdiction. Therefore, in the words of the Court of Appeal, ‘The Commercial Court has no business acting against an Act of Parliament and ruling on a matter it was not competent to rule on in law. Such a ruling is a nullity period.’ In finding that the High Court usurped the jurisdiction of the tribunal, and ‘in order to give recognition to arbitration as an alternative to litigation and also to give effect to the overriding objective and in exercise of this Court’s inherent jurisdiction’, the Court of Appeal struck out the ruling of the High Court and granted an interim measure of protection restraining the respondents from evicting the applicant from the premises and demolishing the telecommunication equipment in question.

In *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR,¹⁷ the High Court of Kenya adopted the words of the Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR¹⁸, in finding that it is the tribunal that has original jurisdiction to determine its jurisdiction, and the High Court does not have such power. The High Court also quoted Dr. Kariuki Muigua in his book,

¹⁷ *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] High Court of Kenya at Nairobi, Milimani Commercial Courts Civil Case No. 571 of 2011, eKLR.

¹⁸ *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (n 16).

*Settling Dispute through Arbitration in Kenya*¹⁹, where the High Court states that he ‘illuminatingly’ writes:

“The fundamental principle, embodied in the Arbitration Act, 1995 (the Act), is that where there is a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator should be decided by the tribunal, and the court should not intervene. This proposition was well captured in the case of Shamji v. Treasury Registrar Ministry of Finance the court stated that it was a well settled proposition that where a dispute between the parties has been referred to the decision of a tribunal of their choice, the Court should direct that the parties go before the specified tribunal other than interfere with the party’s choice of that forum”.

In the *Bellevue* case, the Arbitrator held that he had jurisdiction, under Section 17 of the Arbitration Act to rule on his jurisdiction, and directed that any party that wished to oppose his jurisdiction, should do so by filing and serving a formal application. The plaintiff did not file the formal application. The High Court thus found that the plaintiff was estopped by conduct from bringing the issue of jurisdiction before the High Court as the matter was dealt with conclusively by the arbitrator and was therefore *res judicata*.

4.2 The Principle of Separability or Autonomy of the Arbitration Clause

The arbitration clause is a standalone contract in itself. If all other clauses in the contract fail, the arbitration clause remains standing. No party may, therefore, argue that the invalidity of a contract makes for a failed arbitration clause. According to Section 17(a) of the Arbitration Act, ‘an arbitration clause which forms part of a contract should be treated as an agreement independent of the other terms of the contract’. Section 17(b) states that ‘a decision by the arbitral tribunal that the contract is null and void should not itself invalidate the arbitration clause.’ In *Kenya Tea Development Agency Ltd*

¹⁹ (2012) 2nd Ed. Glenwood at p. 91.

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& 7 others v Savings Tea Brokers Limited [2015] eKLR²⁰, the High Court considered two applications; one seeking to set aside an arbitral award, and the other seeking to enforce the award. While this was an issue of a domestic commercial arbitration, the findings of the court are instructive in international commercial arbitration also. One of the grounds the applicants sought to rely on for setting aside the arbitral award was that the tribunal did not have jurisdiction to determine the dispute because of a conflict between Section 4 and Section 17 of the Arbitration Act.

Section 4 (1) states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In this particular arbitration, the arbitration clause was contained in brokerage agreements which were challenged. The applicants alleged that the agreements were not valid, and therefore the arbitration clause was also invalid. The court rejected this position, relying on the principle of separability. The court was persuaded by the decision of Kimaru J in the case of *Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa*,²¹ on the application of the principle of severability of an arbitration clause, when he stated that:

...it is this court's view that where there exist (sic) an agreement with an arbitration clause, under the principle of seperability (sic) of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement.

The court further stated that the applicants' interpretation of the application of Section 4 was untenable. According to the applicants' argument, if the

²⁰ *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* [2015] High Court of Kenya at Nairobi, Milimani Commercial Courts Miscellaneous Civil Application No. 129 of 2014, eKLR.

²¹ *Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa, Civil Case 434 of 2009.*

contract creating the relationship was not signed, or did not exist at all, then the tribunal could not possibly have jurisdiction. However, the court applied the principle of separability to determine that even though the existence and validity of the contracts was disputed, the arbitrator had the jurisdiction to determine the rights and obligations of the parties, and also to establish whether the contracts were valid or not.

4.3 Timing of the objection to jurisdiction

Jurisdiction is a key consideration in International Commercial Arbitration. Where a tribunal has the jurisdiction to hear a matter, it can exercise its authority to proceed within its scope. However, where it is found that the tribunal did not have the authority to conduct the proceedings, all activities carried out become void. The timing of the application for determination of jurisdiction must, therefore, be proper.

The application should be raised at the earliest opportunity. According to section 17(2) of the Arbitration Act, the latest time that the application should be raised should be at the submission of the statement of defence. This is based on the assumption that it would be the respondent raising the objection to the jurisdiction of the tribunal. This would be the case where the claimant seeks to rely on the arbitration clause, but the respondent notes in the statement of claim that according to the subject matter, the tribunal does not have the authority to determine the matter.

However, even the claimant may object to the jurisdiction of the tribunal. This may be the case where after appointment of the tribunal, the claimant realises that the tribunal does not have the power to sit, under the circumstances. Section 17(2) states that ‘a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.’ The appointment of the arbitrator usually takes place at the instance of the claimant, who raises a dispute about an issue in the commercial relationship, and seeks to have it addressed by the tribunal.

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Even if the application for determination of the jurisdiction of the tribunal is not made by the time of submission of the statement of defence, Section 17(4) of the Arbitration Act gives the tribunal the discretion to allow the plea later in the proceedings, if the tribunal considers that there is good reason for the delay.

4.4 Exceeding Jurisdiction

In some matters, the tribunal may have the jurisdiction to determine the dispute. However, since jurisdiction concerns authority, the tribunal may overstep the limits of the powers given to it. In such a situation, the tribunal would have exceeded its jurisdiction. Where this happens, Section 17(3) of the Arbitration Act states that the issue should be raised with the arbitrator ‘as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings’. Similarly, as with a plea for determination of jurisdiction, Section 17(4) of the Arbitration Act provides that a plea about exceeded jurisdiction may be brought at a later stage, if the tribunal finds that there is good reason for the delay.

4.5 Point of determination

The tribunal may consider the plea concerning its jurisdiction either as a preliminary question, or in an arbitral award on the merits. Where the matter is determined as a preliminary question, the aggrieved party may apply to the High Court. Where the issue of jurisdiction is determined in an arbitral award on the merits, the parties cannot apply to the High Court.

An application to the High Court only lies where the issue of jurisdiction is determined as a preliminary question. According to Section 17(6) of the Arbitration Act, the party aggrieved by the tribunal’s ruling on its jurisdiction may apply ‘to the High Court, within 30 days after having received notice of that ruling, to decide the matter’. What if a party raises an issue of jurisdiction to delay the process and scuttle efforts to have it determined? The first safeguard to ‘reduce the risk and effect of dilatory tactics’ is found in Clause

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4 of the Explanatory Note on the Model Law, which states that there is little wiggle-room for a party to use the provision to abuse or frustrate the tribunal's time with the limitation of the period for filing with the High Court, to 30 days. The party cannot wait for the issue to carry on longer than 30 days and towards the end of the proceedings bring an application challenging the tribunal's ruling. This allows for the quick determination of issue of jurisdiction, which the Explanatory Note on the Model Law refers to as 'the very foundation' of the tribunal's 'mandate and power'.

Section 17(7) provides that the 'decision of the High Court shall be final and shall not be subject to appeal'. This is a second safeguard as detailed at Clause 4 of the Explanatory Note on the Model Law, to save time and money, as the High Court is the final determinant of the jurisdiction of the tribunal. Once the High Court has set its mind to the matter, it is not appealable.

A third safeguard to protect the upset of the matter at the hands of a belligerent party is found in Clause 4 of the Explanatory Note on the Model Law and Section 17(8) which provides that the arbitration proceedings may continue even with the Section 17(6) application pending before the High Court. The issues that arise in continuing with the proceedings are that:

- a. If the matter continues to its conclusion, the award will not take effect until the High Court determines the section 17(6) application;
- b. If the matter proceeds and the High Court determines that the tribunal has jurisdiction, then the award would be valid;
- c. If the matter proceeds but the High Court determines that the tribunal does not have jurisdiction, then the award and all the proceedings to the date of the decision of the High Court would be considered void *ab initio*;
- d. Who pays fees under an invalid arbitration? In *Invesco Assurance Company Limited v Charles Muturi Mwangi* [2012] eKLR,²² while considering arbitration proceedings for an employment dispute, the court

²² *Invesco Assurance Company Limited v Charles Muturi Mwangi* [2012] High Court of Kenya at Nairobi Civil Case No. 358 of 2012, eKLR.

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addressed the issue of costs which would be applicable in a similar situation in an International Commercial Arbitration which has proceeded to the end, only for the High Court to determine that there was no jurisdiction and therefore the matter was void. The Court stated:

However, my concern is, what will be the effect of those proceedings and the position of the parties if the Originating Summons ultimately succeeds and it is found that the arbitrator did not have jurisdiction to entertain those proceedings as presented? Won't they be set aside? Where will the parties be left? What of the costs and expenses that would have been incurred in the meantime? The Applicant through its Counsel complained that it will be paying the arbitrator every time it will appear before him, it will also incur legal costs. Our take of it is that if those proceedings proceed as scheduled and then they are finally overturned, the parties would have incurred unnecessary costs which can be avoided. The prejudice to be suffered will be irreversible as the costs incurred would not be recoverable, and even if they are recovered, they would have been incurred in an exercise in futility.

From the passage above, the fees to the tribunal are already taken care of and paid, as parties pay the arbitrator and incur legal costs for every step of the process. These would then be lost by the parties, who it appears would still need to pay the tribunal and their legal counsel.

The parties cannot file a Section 17(6) application to the High Court where the tribunal decides on its jurisdiction in the arbitral award on merits. Instead, if jurisdiction is determined at this point, the only remedy available to the aggrieved party would be a Section 35 application to set aside the arbitral award. In *Sebhan Enterprises Limited v Westmont Power (Kenya) Limited [2006] eKLR*,²³ the High Court of Kenya notes that 'our Section 17(2) (6) (7) and (8) of the Arbitration Act 1995 was lifted from INCITRAL (sic) Model Law on International Commercial Arbitration'. Further, it highlights that 'it

²³ *Sebhan Enterprises Limited v Westmont Power (Kenya) Limited [2006] High Court of Kenya at Nairobi, Milimani Commercial Courts Civil Case No. 239 of 2005, eKLR.*

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appears that the decision to refer the matter to the High Court only where the arbitral tribunal rules as a preliminary question that it has jurisdiction is deliberate.’ Parliament did not intend to provide for reference to the High Court where the issue of jurisdiction is referred as a final matter.

The statement by the High Court in the *Sebhan* case concerning Sections 17(6), (7) and (8) being ‘lifted’ from the UNCITRAL Model Law is, however, not entirely accurate. Article 16(3) of the Model Law states simply:

while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

However, the esteemed drafters of the Arbitration Act expanded section 17(8) to read as follows:

While an application under subsection (6) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.

Inserting the words ‘commence’ and ‘conclude’ appears to be an effort to avoid any doubt as to what the parties can do. However, the utility of the word ‘commence’ appears to be absurd. The clause implies that parties may initiate proceedings, while at the point of the application in reality the proceedings are already ongoing. It is thus unclear what the parties would be commencing. While the use of the word ‘conclude’ is permitted in the Model Law reference to making an award, the utility of the word ‘commence’ is uncertain.

5.0 Powers of the Arbitral Tribunal

An arbitral tribunal comprises of persons appointed by parties who have chosen or consented to resolve their disputes by arbitration. The powers of the

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arbitral tribunal stem from the arbitration agreement.²⁴ An arbitration agreement establishes the obligation to arbitrate, as well as confers powers to the arbitral tribunal, which are to be exercised within the limits of public policy.²⁵

An arbitral tribunal derives its powers from two main sources. First, powers derive from the consent of the parties as expressed in the arbitration agreement.²⁶ The parties have the ability to confer express powers to the arbitral tribunal directly or indirectly.²⁷ Directly, the parties agree expressly on the powers to be exercised by the arbitral tribunal and set them out in the terms of appointment or some other special agreement to cover their matters.²⁸ Such powers may include the power to determine the sufficiency of evidence, to hold hearings, and to appoint experts among others.²⁹ The parties also have the ability to confer indirect powers on the tribunal through the provision of set arbitral rules in the case of ad hoc arbitration, and the automatic rules which come about under institutional proceedings.³⁰

²⁴ Arjun Gupta, et al, 'Blessed Unions in Arbitration - An Introduction to Joinder and Consolidation in Institutional Arbitration' 4 *Indian Journal of Arbitration Law* 134.

²⁵ Nigel Blackaby, et al, 'An Overview of International Arbitration', *Redfern and Hunter on International Arbitration* (Oxford University Press).

²⁶ Babatunde Osadare, 'Jurisdiction and Powers of Arbitral Tribunals: Who Decides?' <http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_9_999086504.pdf> .> Accessed 27 April 2016.

²⁷ *Ibid* 3, 4.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ John W. Hinchey, 'Fast-Track International Construction Arbitrations' [2013] *Contemporary Issues in International Arbitration and Mediation Contemporary Issues in International Arbitration and Mediation*.

Secondly, powers may also devolve on the arbitral tribunal by operation of law.³¹ For example, the Arbitration Act of 1995 confers the arbitral tribunal with powers to decide on matters of evidence, to administer oaths or take the affirmations of the parties and witnesses.³²

6.0 Drafting the Arbitration Clause

The arbitration clause contains a provision for reference of disputes to arbitration. Other than this, parties may include more specific details to determine how they intend arbitration to be conducted. Such details may include the choice of law, seat of arbitration, place of arbitration, rules to be applied, and choice of arbitrators. It is important to draft the arbitration clause to accurately reflect the intention of the parties. For example, an arbitration clause that provides that the seat shall be in ‘Britain’ and governed by ‘the laws of the United Kingdom’ would create unnecessary complication in determining the intended seat, place and governing law of the arbitration.³³ The correct reference should be either ‘England’, ‘Scotland’, ‘Wales’, or ‘Northern Ireland’ for the seat, and either ‘English law’, ‘Scots law’, or ‘the laws of Northern Ireland’ for the governing law.³⁴ Clarity at the outset would limit disagreement on the relevant issue at the point of commencing proceedings.

³¹ Babatunde Osadare, ‘Jurisdiction and Powers of Arbitral Tribunals: Who Decides?’ op cit.

³² Arbitration Act, 1995 (2009).

³³ Tom Bolam, ‘Common Mistakes in Choice of Law and Jurisdiction Clauses’ (*Lexology*, 22 September 2015) <<http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675-21463a3355e9>> Accessed 19 May 2016.

³⁴ Sarah Carter, ‘A Guide to the UK Legal System’ (*Globalex - Hauser Global Law School Program, New York University School of Law*) <http://www.nyulawglobal.org/globalex/United_Kingdom1.html> Accessed 19 May 2016; Tom Bolam (n 32).

This section addresses some important considerations when drafting an arbitration clause.

7.0 Governing Law, Seat of Arbitration and Venue/Place of Arbitration

The choice of the system of laws to govern the subject matter of the contract (*lex causae*), and the law to govern the arbitration (*lex arbitri*), may be identified in the arbitration clause.³⁵ In a situation where the proceedings do not take place at the juridical seat of arbitration, a third angle may arise, being the laws of the venue/place of arbitration (*lex fori*) or the laws of the nation where the tribunal is held.³⁶ Where an arbitration clause is embedded in a contract, parties usually rely on the choice of governing law clause in the main contract. However, what happens where the parties elect that the contract will be governed by the laws of State A, but the arbitration clause states that the seat of arbitration will be State B, and the arbitral proceedings will be conducted in State C? The impact of nominating these three states in the arbitration clause is an important issue the drafter should keep in mind. The parties may decide to have the laws of the same state to apply as the *lex causae*, *lex arbitri* and *lex fori* by stating, for example that:

- a. The contract shall be construed in accordance with the laws of the Republic of Kenya
- b. The arbitration shall be governed by the Arbitration Act of 2009, Laws of Kenya; and
- c. The seat of the arbitration shall be at Nairobi within the Republic of Kenya

Parties may expressly identify the law to govern the arbitration process. Where there is no express mention of the governing law in the arbitration clause, the court will apply the law of the seat of the arbitration. In *Sulamérica*

³⁵ *Kundan Singh Construction Limited v Tanzania National Roads Agency* [2012] High Court of Kenya at Nairobi Miscellaneous Civil Cause 248 of 2012, eKLR.

³⁶ *Ibid.*

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*Cia Nacional de Seguros SA v Enesa Engenharia SA*³⁷, the two insurance policies provided that they would be governed by the laws of the Republic of Brazil, but the arbitration clause provided that the seat of arbitration would be London. The arbitration clause did not expressly provide for which law would govern the arbitration. The insured filed suit in Brazil, claiming that the law of the contract applied to the arbitration clause. The insurer filed suit in London, seeking a determination that the applicable law would be English law because the seat was designated as London. The Court of Appeal of England and Wales found in favour of the insurer, fortifying the position that the law of the seat of the arbitration takes a prime position in determination of the governing law.

The seat determines the national law that will direct the arbitral process, and the extent to which the national courts will intervene. For example, where a contract is governed by French Law and the parties have agreed to arbitration under the rules of the ICC with its seat of the tribunal in London, the interpretation of the substantive issues arising from the contract will be governed by French law, the ICC will be adopted in conducting the arbitration, and English procedural law will apply in matters such as issuing witness summons, stay of proceedings commenced in courts of law, granting of interim relief, enforcement of awards, and challenge of awards.³⁸

In order to avoid ambiguity, the arbitration clause must identify a seat of arbitration.³⁹ The drafter should note that the seat of arbitration has a bearing

³⁷ *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] Court of Appeal of England and Wales EWCA Civ 638.

³⁸ *SA Coppee Lavalin NV v Ken-Ren Chemicals and Fertilisers Ltd (in liquidation in Kenya) and Voest-Alpine Aktiengesellschaft v Ken-Ren Chemicals and Fertilizers Ltd (in liquidation in Kenya)* (1994) 2 Lloyds Reports (House of Lords); Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (LawAfrica Publishing Ltd 2011) 65; Republic of Kenya, *Kenya National Assembly Official Record (Hansard)* (Republic of Kenya 1995) 1643.

³⁹ Rajani Associates, 'Seat of Arbitration: What Proposed Amendments Post-Balco Will Do' (*Legally India*, 24 September 2015) <<http://www.legallyindia.com/Blogs/seat-of-arbitration>> Accessed 27 April 2016.

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on the governing law of procedure and also the law governing enforcement of the arbitral award.⁴⁰ To avoid excessive cost in conducting the arbitration proceedings, the parties may agree that the *lex arbitri* and *lex fori* be in the same jurisdiction as the country most closely related to performance of the contract. For example, in *Areva T & D India Limited v Priority Electrical Engineers & Another*⁴¹, a sub-contract between a company incorporated in India with its principal place of business being in India required a company incorporated in Kenya to carry out civil and electrical works under the main contract between the Indian company and the Kenya Power and Lighting Company (KPLC). The sub-contract stated that first, the *lex arbitri* would be the Indian Arbitration Act, 1996. Secondly, the venue would be at New Delhi, India. Thirdly, the Courts of Delhi would have exclusive jurisdiction. The Court of Appeal of Kenya found that in the absence of any legal or logical justification to the contrary, since the parties were free to select the governing law, the seat of arbitration and venue of the arbitration, then the ‘exclusive jurisdiction’ clause giving jurisdiction to the Courts of Delhi, held sway.

The finding in *Areva v Priority*,⁴² though sound in law, would imply high costs for conducting the proceedings because the contract was performed entirely in Kenya, all of the evidence was located in Kenya, and most of the witnesses were domiciled in Kenya. Further, the Government of the Republic of Kenya owned a majority stake in the company paying out the funds under the main contract, being KPLC. The inconvenience to the sub-contractor, a company incorporated and operating in Kenya, is therefore evident. This highlights the importance of the discussion on the appropriate laws to govern the contract and the arbitration.

⁴⁰ Ibid.

⁴¹ *Areva T & D India Limited v Priority Electrical Engineers & Another* [2012] Court of Appeal of Kenya at Nairobi Civil Appeal 103 of 2011, eKLR.

⁴² Ibid.

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The seat of arbitration is not necessarily the place where the actual arbitration process will be carried out.⁴³ It is incorrect to use the ‘seat’ of the arbitration to also refer to the ‘venue’ of arbitration. The two terms should not be used interchangeably. To do so would be to imply that the selection of the venue of the arbitration also has a bearing on the governing law of the arbitration, when strictly speaking, it should not.⁴⁴ Although the seat and venue could be the same, the dispute could be heard in several places but the seat remains unaffected.⁴⁵ For example, in *Kundan Singh Construction Limited v Tanzania National Roads Agency*,⁴⁶ the contract stated that the seat of arbitration was in Stockholm, Sweden, but the hearings were conducted in Paris, France.

Where the contract identifies the venue, the parties would be bound to carry out the arbitration at the venue, unless there is a subsequent agreement to the contrary. In the absence of a provision on the venue, then it would be concluded that the parties intended the seat of the arbitration to also be the venue of the arbitration. However, the parties may at any stage enter into a further agreement to have the venue of the proceedings at a place convenient to them. A possible scenario would be where the parties are contracting in State A, with the seat of the arbitration as State A, but both disputing parties have their normal places of business in State B. It may, therefore, be convenient for the venue of the hearings to be in State B.

⁴³ Kariuki Muigua & Ngararu Maina, ‘Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration’ 6 <https://profiles.uonbi.ac.ke/kariuki_muigua/files/effective_management_of_commercial_disputes_opportunities_for_the_nairobi_centre_for_international_arbitrat> Accessed 20 May 2016.

⁴⁴ *Midland Finance & Securities Globetel Inc v Attorney General & another* [2008] High Court of Kenya at Nairobi Miscellaneous Civil Application 359 of 2007, eKLR.

⁴⁵ *Kundan Singh Construction Limited v Tanzania National Roads Agency* [2012]; Clyde & Co, ‘The Seat of Arbitration - Why Is It so Important?’ (Clyde & Co, 2016) <<http://www.clydeco.com/insight/updates/view/the-seat-of-arbitration-why-is-it-so-important>> Accessed 27 April 2016.

⁴⁶ *Kundan Singh Construction Limited v Tanzania National Roads Agency* [2012].

8.0 Rules of Procedure Governing Conduct of International Commercial Arbitration

The rules governing international commercial arbitration may be found in various texts including the UNCITRAL Arbitration Rules and the rules of various arbitral institutions such as the Chartered Institute of Arbitration (Kenya Branch), the Nairobi Centre for International Arbitration (NCIA), London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the Permanent Court of Arbitration (PCA). Parties may adopt these rules of procedure by reference in the arbitration clause.

The procedure governing the conduct of arbitration must satisfy the principle of fair resolution of disputes by an impartial body, without unnecessary delay or expense with restricted interference of the court.⁴⁷ Depending on the terms of agreement, subject matter of the dispute and laws governing the arbitration, the conduct depends on whether it is *ad hoc* arbitration or institutional arbitration. In *ad hoc* arbitration, parties make their own arrangements for selection of arbitrators, designation of rules, applicable law and administrative support. On the other hand, institutional arbitration is conducted with the administrative support of the relevant institution, which usually adopts its own set of rules to the proceedings it administers. For example, London Court of International Arbitration (LCIA) has its own arbitration rules.

The UNCITRAL Arbitration Rules were initially developed for application in *ad hoc* arbitrations, taking into account the different legal, social and economic systems on the international trade level.⁴⁸ However, with time, the

⁴⁷ Namrata Shah & Niyati Gandhi, 'Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries' (2011) 6 Journal of International Commercial Law and Technology 232.

⁴⁸ United Nations Commission on International Trade Law (UNCITRAL), 'Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission' (UNCITRAL) <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation/arb-recommendation-e.pdf>> Accessed 20 May 2016.

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UNCITRAL Arbitration Rules have been widely accepted and numerous arbitral institutions have drawn on them in preparing their own rules.⁴⁹ These rules outline the steps followed in the actual conduct of the arbitration. They govern issues such as the remuneration of the arbitrators, format and timelines for filing and service of pleadings and documents, and the extent of court assistance in functions such as taking evidence.

The objectives of most international arbitral institutions are to support and facilitate international arbitration. They maintain lists of potential arbitrators for parties to select, or may themselves appoint an arbitrator, if parties agree to have the institution do so. Institutions may also carry out awareness programs for members of the public on arbitration issues, assist with conference and hearing rooms. Some may offer transcription services and other information technology services. The Arbitration Act of 1995 does not endorse any arbitral institution to operate in the country, therefore the parties are at liberty to elect whether to carry out *ad hoc* arbitration or institutional arbitration under a particular institution of their choice.⁵⁰

9.0 Choice of Arbitrator

The parties are free to choose the arbitrator they consider would best handle the dispute between them.⁵¹ The parties may indicate in the arbitration agreement that if they fail to agree on the appointment of an arbitrator, then a certain institution would appoint the arbitrator. If all else fails, then the High Court of Kenya may appoint an arbitrator either by consent of the parties, or

⁴⁹ Ibid.

⁵⁰ Kariuki Muigua, 'Effectiveness of Arbitration Institutions in East Africa' 5 <<http://www.kmco.co.ke/attachments/article/170/Effectiveness%20of%20Arbitration%20Institutions%20in%20East%20Africa%2022%20February%202016.pdf>> Accessed 20 May 2016.

⁵¹ Arbitration Act, 1995.

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upon the application of the non-defaulting party.⁵² The High Court does not unilaterally appoint the arbitrator, so the input of the parties is important in identifying the necessary qualifications for the arbitrator to be appointed by the court.⁵³

Parties may draft the arbitration clause to include a requirement for the arbitrator to possess certain qualifications or qualities, even for the arbitrator to be of a certain nationality. International commercial arbitration involves a wide scope of possible disputes, including not only legal, but also financial and accounting differences. Parties may, therefore, agree to appoint an arbitrator with certain additional qualifications.⁵⁴ Also, the parties may authorize the tribunal to appoint experts conversant with a specific technical issue, to give an opinion on a particular point.⁵⁵

9.1 *Subject matter of Arbitration: Arbitrability*

Subject matter is the dispute which an arbitral tribunal is called upon to determine. The subject matter affects the jurisdiction of arbitral tribunal, the enforcement and recognition of award. In international arbitration, as with domestic arbitration, not every dispute is arbitrable. Arbitrability refers to the question whether or not the subject matter of the dispute arising between the parties, may be resolved by arbitration.⁵⁶ It refers to whether the parties have

⁵² Ibid 7.

⁵³ *Henry Muriithi Myungu & Another v Bruno Rosiello* [2006] High Court of Kenya at Nairobi Miscellaneous Civil Application 264 of 2006, eKLR.

⁵⁴ *Edward Muriu Kamau & 4 others all trading as Muriu, Mungai & Co Advocates v John Syekei Nyandieka* [2014] High Court of Kenya at Nairobi Miscellaneous Civil Application 480 of 2013, eKLR.

⁵⁵ Arbitration Act, 1995; *Edward Muriu Kamau & 4 others all trading as Muriu, Mungai & Co. Advocates v John Syekei Nyandieka* (2014).

⁵⁶ *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & Another* [2006] High Court of Kenya at Nairobi Petition 390 of 2006, eKLR.

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made the particular dispute available to resolution by way of the arbitration process.⁵⁷ It also includes the question as to whether the matter may be referred to arbitration at all, due to illegality or other public policy considerations.⁵⁸

There are two types of arbitrability: subjective arbitrability and objective arbitrability.⁵⁹ Subjective arbitrability relates to the question whether the party intending to have the matter referred to arbitration has obtained the necessary special authorisation to do so, either through its individual rights, or legal capacity to enter into contracts, such as the arbitration agreement.⁶⁰ Subjective arbitrability may be seen in matters where a state or public institution is a party to an arbitration agreement.⁶¹ Objective arbitrability refers to the question whether the particular dispute is capable of resolution by arbitration in the light of public policy considerations.⁶²

⁵⁷ Ibid; Jules J Justin, 'Arbitrability and the Arbitrator's Jurisdiction' in Jean T McKelvey (ed), *Management Rights and the Arbitration Process* (BNA Incorporated 1956) 3 <<http://naarb.org/proceedings/pdfs/1956-1.PDF>> Accessed 20 May 2016.

⁵⁸ *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & Another* (n 55); Matthias Lehmann, 'A Plea for a Transnational Approach to Arbitrability in Arbitral Practice' (2004) 42 *Columbia Journal of Transnational Law* 753, 755.

⁵⁹ L Yves Fortier, 'Arbitrability of Disputes' in Gerald Aksen and others (eds), *International Law, Commerce and Dispute Resolution* (International Chamber of Commerce 2005) 269; Natalja Freimane, 'Arbitrability: Problematic Issues of the Legal Term' (Master's Thesis, Riga Graduate School of Law 2012) 21 <<http://www.sccinstitute.com/media/56097/arbitrability-problematic-issues.pdf>> Accessed 20 May 2016.

⁶⁰ L Yves Fortier, 'Arbitrability of Disputes' op cit, 270; Natalja Freimane, 'Arbitrability: Problematic Issues of the Legal Term,' 21.

⁶¹ Natalja Freimane, 'Arbitrability: Problematic Issues of the Legal Term' op cit 21.

⁶² L Yves Fortier, 'Arbitrability of Disputes' op cit, 270; Natalja Freimane, 'Arbitrability: Problematic Issues of the Legal Term' 21.

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Some matters cannot be resolved through an arbitration process. However, the courts, in supporting arbitration, should promote all arbitrable disputes to arbitration.⁶³ Courts should not, on the other hand, allow matters that are against public policy to be handled in arbitration, which therefore reserves certain disputes to the domain of the national courts.⁶⁴ Since ‘public policy’ varies from one state to another, the issue of arbitrability must be discussed with the particular national laws in mind.⁶⁵

A party may raise issue on the arbitrability of a dispute either before the arbitral tribunal at its commencement, or at the national courts during enforcement or setting aside proceedings. The New York Convention promotes recognition and enforcement of arbitral awards concerning parties with a ‘defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration.’⁶⁶ In a situation where the provisions of the UNCITRAL Model Law have been adopted into national law, then a party may raise the issue of arbitrability before a court of competent jurisdiction in an application to set aside the arbitral award.⁶⁷ Even where the UNCITRAL Model Law is not adopted into the national law, courts usually apply public policy considerations in either allowing recognition and enforcement, or setting aside the arbitration award.

⁶³ *Midland Finance & Securities Globetel Inc v Attorney General & another* (n 43).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art 2(1).

⁶⁷ United Nations Commission on International Trade Law (UNCITRAL), ‘Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006’ (UNCITRAL) paras 46, 47.

10.0 Conclusion

This paper has discussed pertinent issues in international commercial arbitration. It presented the advantages and disadvantages of international commercial arbitration, distinguished international commercial arbitration from alternative dispute resolution (ADR), and argued the jurisdiction issues in international commercial arbitration. It elaborated on the powers of the arbitral tribunal, the seat of arbitration and choice of arbitrator. Issues of choice of law and place of arbitration are presented, and the subject matter of arbitration is brought to light. Lastly, the procedure governing conduct of international commercial arbitration is highlighted, as well as the rules governing international commercial arbitration.

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Alvin Gachie,* Ebby Kashindi,** Mading Gum† and William Nyamwange***

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List of Abbreviations and Acronyms

ADR	Alternative dispute resolution
BIT	Bilateral Investment Treaty
ICSID	International Centre for Settlement of Investment Disputes
Kshs	Kenyan Shillings
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollars

Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya

Florence Karimi Shako*

Abstract

For a long time, the courts in Kenya have been marred by delays and a backlog of cases. This has slowed down the wheels of justice, leading to public outcry over the need to find possible solutions for a more effective justice system. Court-annexed mediation is a form of Alternative Dispute Resolution whereby cases which are brought to court for litigation are referred to mediation for possible settlement. The Kenyan Judiciary is in the process of launching a Court Mediation Pilot Program to aid in this objective of speedy resolution of disputes. By screening and referring suitable cases to court-annexed mediation, the expectation is that a majority of these cases will result in settlement. The article analyses the foundational basis for court-annexed mediation and its impact on the nature of the mediation process. The author proposes factors to be taken into account when implementing this program into the justice system in Kenya to make it compatible with the needs of the Kenyan people.

1.0 Introduction

Alternative Dispute Resolution (ADR) is an umbrella term that is generally applied to a range of techniques for resolving disputes, other than by means of traditional court adjudication. The range of dispute resolution procedures covered by the term ADR includes *inter alia* mediation, conciliation, early neutral evaluation, arbitration, med-arb, arb-med and ombudsmen.¹

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The function of the Judiciary in Kenya includes providing easy access to justice and the speedy resolution of cases, which also aims at reducing the backlog in the courts. To achieve this objective, in exercising judicial authority, courts and tribunals ought to be guided by ADR.² Mediation is one of these principal ADR methods.

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution. It is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.³ Court-annexed mediation envisions a situation where disputes brought forth by parties for litigation at the courts, are screened for suitability to be resolved through the mediation process, and thereafter, referred by judges to mediation. This is in the hope that the parties are able to achieve settlement through facilitated negotiation.

In Kenya, the immediate former Chief Justice Dr. Willy Mutunga launched a campaign aimed at clearing the backlog of cases in the courts which has led to delayed justice. Judiciary has since launched the Court Mediation Pilot Program at the Commercial and Family Divisions of the High Court at Milimani. Dr. Mutunga in October 2015 gazetted the Mediation (Pilot Project) Rules 2015.

According to the new rules, every civil action instituted in court will be subjected to mandatory screening by the mediation deputy registrar, and those found suitable will be referred to mediation. For cases referred to mediation,

¹ Dame Hazel Genn, et al, "Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure" (2007) 1/07 *Ministry of Justice Research Series* 18.

² The Constitution of Kenya 2010 art. 159 (2) c).

³ Kariuki Muigua, *Resolving Conflicts Through Mediation* Nairobi, (Glenwood Publishers Limited, 2012), p.3.

the registrar shall notify the parties within seven days of completion of screening to enable them to file a case summary. Three qualified mediators will then be nominated by the deputy registrar and the parties notified within a seven-day window to state their preferences of the nominees in order of priority. The parties will not pay the mediators under the pilot project and all mediation proceedings shall not exceed 60 days from the date of commencement. The deputy registrar's office will only allow a maximum 10-day extension of the proceedings in exceptional cases where parties encountered complex issues.⁴

This article analyses the introduction of court-annexed mediation into the justice system in Kenya. Part I of this article delves into an analysis of the theoretical framework of dispute resolution within which we can understand court-annexed mediation. The analysis takes into account the conflict theories surrounding mediation and the procedural justice theory, and other theories that form the foundation of court-annexed mediation. Part II examines the nature of court-annexed mediation with a focus on the impact of institutionalizing mediation on the nature of the process. Part III argues for key factors to be taken into account before introducing court-annexed mediation, in order to make it more effective and suited to the needs of our unique justice system.

PART I

1.1 Theoretical Foundations of Court-Annexed Mediation

In analysing court-annexed mediation, it is important to look at the theoretical underpinnings of mediation as a form of dispute resolution. Conflict theories inform the framework that is adopted to resolve disputes when parties submit their disputes to mediation. It is also important to examine the theoretical framework that is the foundation of the practice of court-annexed mediation.

⁴ Allan Odhiambo "Judiciary in Race to Clear Thousands of Pending Cases" (Business Daily, 11 November 2015) <http://www.businessdailyafrica.com/Judiciary-to-adopt-mediation-in-civil--commercial-cases-/-/539546/2952922/-/1rxaf2z/-/index.html> Accessed 20 January 2016 at 12p.m.

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Conflict is a process that begins when one party perceives that another party has negatively affected, or is about to negatively affect, something the first party cares about. While the start of a conflict is framed as a product of perception, evidence of conflict does not surface until one or the other party's actions are influenced by these perceptions. A considerable amount of conflict remains latent and may be suppressed by the inability of the first party to articulate their perceptions to the second party. Conflict resolution processes, therefore, are likely to be more successful if they address both the actions and perceptions of both parties to a dispute.⁵

1.2 Conflict theories of Mediation

In the book 'The Promise of Mediation', Bush and Folger clearly articulate theoretical models of both conflict in general, and mediation in particular. The most prevalent models were the problem-solving model and the transformative model. Bush and Folger argue that the problem-solving model of mediation was based upon an essentially psychological and economic view of human conflict.⁶

According to the problem-solving model, conflict represents a problem in solving the parties' incompatible needs and interests. The mediator's goal is to generate an agreement that solves tangible problems on fair and realistic terms. Good mediator practice is a matter of issue identification, option creation, and effective persuasion to "close the deal." The problem-solving framework is based on, and reflects an individualist ideology, in which human beings are assumed to be autonomous, self-contained, atomistic individuals,

⁵ Rory Ridley-Duff & Anthony Bennett "Towards Mediation: Developing a Theoretical Framework to Understand Alternative Dispute Resolution" (2011) Vol. 42:2 *Industrial Relations Journal* 107-108.

⁶ Dorothy J. et al, "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy" (2002-2003) Col. 3: 39 *Pepperdine Dispute Resolution Law Journal* 47-50.

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each motivated by the pursuit of satisfaction of his own separate self-interests.⁷

Bush and Folger also articulate the transformative model of mediation. This model takes an essentially social and communicative view of human conflict. According to this model, a conflict represents first and foremost a crisis in some human interaction. Specifically, the occurrence of conflict tends to destabilize the parties' experience of both self and other. This model assumes that the transformation of the interaction itself is what matters most to parties in conflict, even more than settlement on favourable terms. Therefore, the model defines the mediator's goal as helping the parties to identify opportunities for empowerment, and recognition shifts as they arise in the parties' conversation, to choose whether and how to act upon these opportunities, and thus to change their interaction from destructive to constructive.⁸

1.3 Procedural Justice Theory

Procedural justice is concerned with the fairness of procedures or processes that are used to arrive at outcomes. Disputants who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair. In effect, a disputant's perception of procedural justice anchors general fairness impressions or serves as a fairness heuristic. Further, research has indicated that disputants who have participated in a procedure that they evaluated as fair do not change their evaluation even if the procedure produces a poor or unfair outcome. The perception of procedural justice also serves as a shortcut means of determining whether to accept or reject a legal decision or procedure. Disputants who believe that they

⁷ Ibid.

⁸ Ibid.

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were treated fairly in a dispute resolution procedure are more likely to comply with the outcome of that procedure.⁹

Process elements, such as voice, consideration, even-handed and dignified treatment, do reliably signal procedural justice for disputants. Procedural justice is much more than a means to a substantively just end. The research strongly suggests that procedural justice considerations should underlie all of the third party processes that are institutionalized within the courts, regardless of whether those processes are consensual or non-consensual. Thus, the institutionalization of procedural justice in mediation will respond more accurately to the preferences of disputants and do more to insure the legitimacy and social stature of the courts while also facilitating settlements.¹⁰

Therefore, when introducing court-annexed mediation in Kenya, it is important to take into account the need for procedural justice. It is important that disputants view the mediation process as fair for the process to be responsive to their needs, and for them to be able to embrace this new method of dispute resolution.

1.4 Social Exchange theory

According to the social exchange theory, disputants value the opportunity to voice their grievances because this provides them with the opportunity to influence the decision maker and indirectly influence the final outcome. Procedure is important because it serves the disputants' goals of achieving favourable outcomes.¹¹

⁹ Nancy A. Welsh "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?" (2001) Vol.79:787 *Washington University Law Quarterly* 817-819; See also Katherine R. Kruse, et al, 'Client Problem Solving: Where ADR and Lawyering Skills Meet,' *Elon Law Review*, Vol. 7, pp. 225-260.

¹⁰ Nancy A. Welsh "Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice" (2002) Vol. 1 *Journal of Dispute Resolution* 191.

¹¹ Nancy A. Welsh "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?" (2001) Vol.79:787 *Washington University Law Quarterly* 826-835.

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The social exchange theory is relevant to mediation because there will only be an outcome if all of the disputants agree to one. Simply, in order to reach a mutually acceptable agreement, the disputants must persuade each other to move from mutually exclusive positions. Such persuasion requires that the disputants hear and understand each other's voice. Often, this also requires the mediator to hear and understand the disputants' voices, so that the mediator can then use the information he has learned to encourage each of the disputants to make responsive, and perhaps even creative new offers and demands.¹²

1.5 The Group Value Theory

The group value theory supplements the social exchange theory and helps to explain the inherent value of voice. The group value theory emphasizes the symbolic and psychological implications of procedures for feelings of inclusion in society and for the belief that the institution using the procedure holds the person in high regard.¹³ By focusing on the symbolism and psychological implications of procedures, the group value theory explains the overwhelming importance of voice in affecting perceptions of procedural justice, even when such voice will not affect the outcome of a decision-making forum. The theory provides a means for understanding the importance of dignified treatment and consideration of the views expressed by the disputants. It suggests that disputants will care very much about the mediator's behaviour and will interpret it as a sign of the judiciary's attitude toward them and their disputes.¹⁴

¹² Nancy A. Welsh "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?" (2001) Vol.79:787 *Washington University Law Quarterly* 826-835.

¹³ Ibid.

¹⁴ Ibid.

PART II

2.0 Nature of Court-Annexed Mediation

Mediation as an ADR mechanism is deemed advantageous because the timing of the process is within the control of the parties, it is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome.¹⁵ As the Kenyan Judiciary is in the process of introducing a court-annexed mediation program, it is important to undertake an analysis of the manner in which the institutionalization of mediation in the courts would affect the nature of the mediation process, if at all.

2.1 Voluntariness

Mediation is a process that emphasizes voluntary decision-making by the parties and focuses on self-determination of disputes as a controlling principle. In court-annexed mediation, the court's involvement in the process could be said to threaten the voluntary nature of the mediation process. Coercion into the mediation process, therefore, seems inconsistent with, and even antithetical to the fundamental tenets of the consensual mediation process. Any attempts to impose a formal and involuntary process on a party may seem to potentially undermine the *raison d'être* of mediation.¹⁶

Many mediation proponents have claimed, and some researchers have concluded, that voluntary action in mediation is part of the 'magic of mediation' that leads to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement, and

¹⁵ Kariuki Muigua, *Resolving Conflicts Through Mediation* Nairobi, (Glenwood Publishers Limited, 2012), p8.

¹⁶ Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program," (2010) Vol. 11 *Cardozo Journal of Conflict Resolution*, 479-481.

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greater adherence to settlement terms.¹⁷ A common argument in favour of voluntary participation comes from the early days of the mediation movement: agreements reached in mediation are said to be more durable and fitting than court decisions because the parties design them. Put another way, “volition is the key to successful outcomes-volition validates those mediated outcomes; compulsion does not.”¹⁸

In the context of court-annexed mediation, it is important that the voluntariness of the process be preserved. Some writers and analysts have suggested that a certain amount of coercion to accept the mediation process is inherent, particularly when matters are referred by courts, and that such coercion is acceptable as distinguished from coercion in mediation, that is coercion to accept a particular settlement. Coercion to enter mediation is often labelled ‘encouragement.’¹⁹

Some writers adamantly contend that coercion into the mediation process invariably leads to coercion to settle within the mediation process, which leads to unfair outcomes.²⁰ This should be taken into account in implementing the court-annexed mediation program in Kenya, to ensure that even though there is mandatory mediation, parties are not coerced into settlement.

Other observers such as Professor Frank Sander, however, share the opinion that mandatory mediation is not an oxymoron because there can be a clear distinction between coercion *within* the mediation process and coercion *into* mediation. An individual may be told to attempt the process of mediation, but

¹⁷ Timothy Hedeon, “Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others” (2005) Vol.26:3 *Justice System Journal* 275.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Dorcas Quek, “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,” *op cit*, 479-486.

that is not tantamount to forcing him to settle in the mediation. Furthermore, the individual is not being denied access to court because mandatory mediation is not being ordered in lieu of going to court. Instead, the parties' access to court is only delayed; the parties have the liberty to pursue litigation once again if mediation fails.²¹ Therefore, it is a question of taking the horse to the water but not forcing it to drink.

2.2 Confidentiality

Mediation is also deemed to be a confidential process as compared to litigation since parties can conduct proceedings in private. Confidentiality is essential for mediation to be effective. In the court-annexed mediation program in Kenya, confidentiality requirements are taken into account in the Mediation (Pilot Project) Rules, 2015. It is provided that all communication during mediation, including the mediator's notes, shall be deemed to be confidential and shall not be deemed to be admissible in evidence in any current or subsequent litigation or proceedings.²² Further, neither the mediator nor any person present or appearing at a mediation session may be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.²³

When a dispute in mediation is also the subject of a lawsuit, confidentiality provisions perform the important role of keeping the judging function separate from the mediation function. This separation is especially important for court-annexed mediation programs, because these functions are more closely linked than when a privately mediated dispute is later litigated. Without assurances of confidentiality between court mediators and judges, parties may fear that their conversations with the mediator could be conveyed informally to the decision-maker. This fear of backdoor disclosures could be quite chilling for

²¹ Ibid.

²² Mediation (Pilot Project) Rules 2015 s. 12 (1).

²³ Mediation (Pilot Project) Rules 2015, s. 12 (3).

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mediation, notwithstanding limitations on introducing mediation information as evidence in a lawsuit.²⁴

The problem is especially great if the parties face the prospect of a bench trial in the event that they fail to settle the case. Moreover, confidentiality between mediators and judges helps protect the integrity of both processes. As with other ex parte communications, communications between a mediator and the assigned judge casts doubt on the judge's decision-making neutrality. Such communications can also raise questions about the independence of the mediator from judicial influences. When courts provide mediation, and especially when they mandate mediation, they need to carefully prevent improper cross communication, if they are to avoid the appearance of bias on the part of the judge or mediator.²⁵

2.3 Party Autonomy

There is a palpable tension between the courts' desire to exert control over the parties' conduct in mediation and the need for parties to exercise the fullest level of autonomy within mediation. It has been astutely highlighted that 'the higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its choosing.'²⁶ In other words, excessive control by the courts should be avoided, since it will compromise the parties' right of self-determination. While it may be argued that lenient standards would not penalize parties who are blatantly uncooperative during the mediation, it is equally, if not more, important, that the parties should be free to conduct themselves as they see fit during the mediation. This

²⁴ Ellen E. Deason, "The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?" (2001) Research Paper no. 00-05 *Illinois Public Law and Legal Theory Research Papers Series 5*.

²⁵ *Ibid.*

²⁶ Edward F. Sherman, "Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?" 46 *S.M.U.L. Rev.* 2079 (Summer 1993).

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overarching priority in mediation cannot be jeopardized by well-intentioned desires to compel co-operation in a process that is ultimately grounded in voluntariness and party autonomy. Furthermore, any party's lack of co-operation may be easily dealt with by the mediator who should be astute enough to end the mediation, if it proves unfruitful.²⁷

Hence, in implementing the pilot program in Kenya, it is important that the courts maintain the required level of participation of the parties to ensure that they do not undermine the process. Minimal standards of compliance are acceptable, such as the stipulation that the parties are required to attend all mediation sessions accompanied by an advocate or a representative. If the party is a corporation, partnership, government agency or entity other than an individual, an officer duly authorized to represent and bind the party should attend.²⁸

2.4 Sanctions

Disproportionate sanctions for failure to participate in mediation may also result in coercion and undermine the nature of mediation as a voluntary process. It is indeed ironic if punitive sanctions have to be imposed in order to compel a party to participate in a voluntary process. A strict regime of sanctions may cause the parties to enter the mediation process with an acute consciousness and fear of court sanctions, resulting in less than candid and autonomous participation in the mediation process.²⁹

²⁷ Dorcas Quek "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) Vol. 11 *Cardozo Journal of Conflict Resolution* 479-495.

²⁸ Mediation (Pilot Project) Rules, 2015 s. 9 (1).

²⁹ Dorcas Quek "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" op cit, 491.

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In the Kenyan Court Mediation Pilot Program, if a party fails to comply with any of the mediator's directions or consistently fails to attend mediation sessions, the mediator should file a certificate of non-compliance in the prescribed form with the Mediation Deputy Registrar, who should then refer the matter back to court.³⁰ The court may order that the parties attend further mediation sessions on such terms as it deems appropriate or strike out the pleadings of the non-complying party, or order the non-complying party to pay costs as assessed and determined by the court, or make any other order as it deems fit.³¹

2.5 Legal Representation

It is widely accepted that there is no general obligation on lawyers to be present during mediation, although they will often play a role in both preparation for the session and the drafting of any agreement reached. Where they do participate, the role of legal representatives is influenced by many variables including the identity of the lawyers, the preferences of the parties, the nature of the dispute and the extent to which the issues involved are factually or legally complex. The various rules of court also contemplate different levels of participation from lawyers assisting parties engaged in mediation, with some jurisdictions giving the mediator unfettered control over the process, including the right to exclude the parties' legal representatives at their discretion.³²

In the Kenyan pilot program, the parties may be accompanied by an advocate or representative. It is important that the mediators involved in the process ensure that the legal representation, which is the constitutional right of each

³⁰ Mediation (Pilot Project) Rules 2015 s. 11 (1).

³¹ Mediation (Pilot Project) Rules 2015 s. 11 (2).

³² Tina Cockburn & Melinda Shirley "Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability" (2003) Vol. 31 *Western Australian Law Review* 72.

party, will not be allowed to interfere with the mediation process and turn it into a form of litigation.

PART III

3.0 Perspectives for the Kenyan Justice System

As the Judiciary plans to introduce the Court Mediation Pilot Program, there is need to take into account the following perspectives to strengthen the process and procedure of court-annexed mediation:

3.1 The preservation of the integrity of the process

It is important to preserve the integrity of the mediation process and retain its attributes when introducing a court-annexed process. Some scholars have suggested an understanding based on an assimilation theory, where the dominant model swallows the marginal one. Under this view, mediation is no longer a separate “alternative” to the judicial system, but a part of it. Others attribute mediation’s directional shift toward arbitration practice to the expansion of court-connected and lawyer dominated programs, and courts’ failures to distinguish between different types of ADR in designing programs. There are also strong cultural currents at work here; adversarial currents flowing more towards ideas about justice than about peace that make mediation less interest-based, less problem-solving-oriented, more rights-based and more adversarial.³³

Therefore, when introducing court-annexed mediation, it is important to design the programs in a manner that ensures that mediation, as an alternative dispute resolution method, is not undermined and does not become formalized

³³ Jacqueline Nolan-Haley, “Mediation: The New Arbitration” (2012) Vol. 17:61 *Harvard Negotiation Law Review* 90-91.

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to the point that it becomes a form of arbitration or litigation. It needs to remain a distinct process that is interest-based and not adversarial.

3.2 The Cultural Factor

A Western model of court-annexed mediation was introduced into Indonesian courts in 2003, but was relatively unsuccessful because cultural issues were not taken into account. The diverse backgrounds of disputants need to be considered in the choice of mediator(s) and the process to be used. It is important to ground conflict resolution services in the traditional processes of the disputants' culture. The culturally competent mediator begins by reflecting on his or her own culture and the culturally-based values, assumptions, and biases that are brought to one's mediation practice. At the same time, it is important to develop an understanding of the worldview of culturally diverse clients, and to draw upon the resources of diverse cultures in conflict resolution.³⁴

The primary emphasis of culturally-specific mediation approaches is the provision of conflict resolution services that are grounded in the traditional dispute resolution processes of the disputants' culture.³⁵ In Kenya, this means that in introducing court-annexed mediation, the program has to draw from the culture of the Kenyan people and not just a replication of the Western model of mediation. This will ensure the interests of individuals and communities are met and that the program will be a better fit for the citizens.

3.3 The Cost Factor

While the Judiciary pilot scheme does not have a cost implication for disputants involved in the process, once the court-annexed mediation program

³⁴ Fatahillah Abdul Syukur & Dale Margaret Bagshaw "Court-Annexed Mediation in Indonesia: Does Culture Matter?" (2013) Vol. 30 No.3 *Conflict Resolution Quarterly* 385.

³⁵ *Ibid.*

is in force, parties will have to incur the cost of mediation. The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives. Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. The lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation, as it implies extra costs to the parties and there might be no provision for taxation of costs even where a mediated agreement is reached. The best starting point would have been to allow parties to reclaim court fees or part of it.³⁶ Further, the costs of mediation should not be too high, as this will only serve to impede access to justice, which is inconsistent with the ultimate goals of the Judiciary.

4.0 Conclusion

Effective access to justice is one of the fundamental conditions for the establishment of the rule of law, as well as a just and egalitarian society. Any judicial system that is unable to provide it has failed completely in its responsibility as a bastion of hope. In the past, the right of access to judicial protection meant essentially, and almost exclusively, the aggrieved individual's formal right to litigate or defend a claim, defined in strictly legal terms. A broader view of what is going on behind such claims which characterize ADR, opens new pathways to resolving disputes, relieving the overcrowding that makes court cases unnecessarily slow.³⁷ Court-annexed mediation is, therefore, an important way to improve access to justice in Kenya which is a right guaranteed under the Constitution.³⁸

³⁶ Kariuki Muigua, "Court Sanctioned Mediation in Kenya – An Appraisal" (2015) 19-20 <http://www.ciarkkenya.org/assets/court-sanctioned-mediation-in-kenya.pdf> Accessed 21 January 2016 at 3pm.

³⁷ L.H. Gummi "Sink or Swim: Evolving a Broader Definition of Courts through the Multi-Door Approach to Dispute Resolution and the Implications it has for Traditional Court Systems" (2010) *International Journal for Court Administration* 9.

³⁸ The Constitution of Kenya 2010 Art. 48.

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As the Judiciary initiates the Court Mediation Pilot Program aimed at reducing the backlog of the cases in the courts, it is important to reflect on the process itself and contextualize the process for the needs of our unique justice system. The most important consideration is to preserve the integrity of the mediation process, and not to undermine the nature of mediation as an interest-based and non-coercive form of dispute resolution.

Building Kenya's Future as A Global Hub for International Commercial Arbitration

Dorothy S. Aswani*

1.0 Introduction

Arbitration is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party, who has the authority to hand down a binding decision based on objective standards. There is no universal definition of an 'international' arbitration. Accordingly, recourse must be had to the relevant national laws when seeking to enforce an award.¹ Arbitration, as one of the Alternative Dispute Resolution Mechanisms (ADR), is not a new concept to the Kenyan people and Kenyan legal regime in general. Kenya has a well-established legal infrastructure, based on common law principles, with established provision for dispute resolution in support of a local economy built on agriculture and the service sector. Outside the High Court, the use of arbitration is on the verge of a major leap with the introduction of the Constitution of Kenya, 2010, which inserted a requirement for arbitration prior to the pre-trial process.² Arbitration of international commercial disputes has become a popular practice amongst business persons and corporations. This has tremendously grown with the development of the commercial industry internationally and the concept of globalization.³

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¹ Attiya Waris, "International Commercial Arbitration in Kenya" in Muigai, G. (ed), *Arbitration Law and Practice in Kenya*, (Law Africa, 2011)."

² The Constitution of Kenya, Article 159 (Government Printer, Nairobi, 2010).

³ P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators*, United Kingdom, February 2014, pp.10-13.

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Arbitration of business disputes in Africa continues to grow progressively. This upward trajectory in disputes is largely as a consequence of vigorous economic growth in many African jurisdictions. A recent World Bank Report⁴ projected Sub-Saharan Africa's growth at an average of 3.7 percent in 2015, partly thanks to "continuing infrastructure investment". The International Monetary Fund (IMF) continues to forecast sub-Saharan Africa's growth at an average of 4 per cent in 2016.⁵ This is despite the global economic situation and marked reductions in commodities prices, particularly in the natural resources sector, which to date has contributed significantly to much of Africa's growth. It has indeed been rightly observed, that the increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business, and the preferred methods of resolving international disputes, a trend that is likely to continue into the 22nd Century.⁶ Investment in Africa, in general and Kenya specifically, continues to attract investors not only in new sectors, but also from different jurisdictions, with China being a good example. The country has developed a strong foothold in Kenya, and Africa in general, providing the impetus for the creation of an arbitration partnership between China and South Africa for instance.

The establishment of Kenya as a regional hub is very much an ambition of the government. This paper seeks to address the challenges that are now a hindrance to the realization of this 'dream'.

⁴ General Overview of the World Bank from 22 October 2015 available at <http://www.worldbank.org/en/region/afr/overview>.

⁵ World Economic Outlook Report published on 19 January 2016 available at <https://www.imf.org/external/pubs>.

⁶ Kariuki Muigwa, *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya*, 2013.

2.0 The Place of International Law

Kenya has had laws on Arbitration from as early as 1914.⁷ Being a key player in international trade and choice in international investments, Kenya put in place a legal framework for the recognition and promotion of international commercial arbitration. The adoption of UNCITRAL Model Arbitration law led to legal reforms repealing the 1968 Arbitration Act and replacing it with the Arbitration Act (1995) and the Arbitration Rules therein.⁸ The model of the United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. Later, Kenya's Arbitration Act, 1995 was amended vide the Arbitration (Amendment) Act, 2009.

However, it is worth mentioning that although the words 'international commercial arbitration' are not expressly provided for under the domestic laws on arbitration in Kenya, its inclusion can be inferred from the Arbitration Act, 1995.⁹ Section 3(2) of the 1995 Kenyan Arbitration Act states that-

An arbitration is domestic, if the arbitration agreement provides expressly or by implication for arbitration in Kenya and at the time when proceedings are commenced, or the arbitration is entered into-

- a. where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;
- b. where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;
- c. where the arbitration is between an individual and a body corporate –

⁷ Arbitration Ordinance, 1914.

⁸ Kariuki Muigua, *Nurturing International Commercial Arbitration in Kenya*, July 2014.

⁹ Act No. 4 of 1995(Amended in 2009)Revised Ed. 2012

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- (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and
- (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or
- (iii) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.

An international arbitration is defined in section 3(3) as one where any of the following applies:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
- (b) one of the following places is situated outside the state in which the parties have their places of business –
 - (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement and if a party does not have a place of business, reference is to be made to his habitual residence¹⁰.

¹⁰ Section 3(4), Arbitration Act.

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The 1995 Arbitration Act adopted Article 1(3) of the UNCITRAL Model Law, which defines arbitration as international, if:

- a) the agreement is concluded when the parties have their places of business in different countries;
- b) one of the following places is situated outside the country in which the parties conduct business:
 - (i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement; or,
 - (ii) any place where a substantial part of the commercial relationship's obligations are to be conducted or the place with which the subject matter of the dispute is most closely connected; or
- c) the parties have expressly agreed that the subject matter of the agreement relates to more than one country.

The UNCITRAL Model Law recommends that the term 'commercial' be interpreted broadly so as to cover all commercial relationships, whether contractual or not. Without providing an exhaustive list, it suggests that the following relationships are regarded as being of a commercial nature, viz any trade transaction for the supply or exchange of goods or services; a distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation and carriage of goods or passengers by air, sea, rail or road.¹¹ The Model Law encapsulates the policy of autonomy of parties and restricts the involvement of courts of law in the arbitral process, except in the circumstances provided by the law.

¹¹ Ibid, Note 1.

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The inclusion of the phrase 'commercial relationship' in the definition of international arbitration can therefore be construed to mean that the Arbitration Act contemplates international commercial arbitration.

In addition to this, Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC)¹² and to *International Convention on the Settlement of Investment Disputes* (ICSID) both of which deal with international commercial arbitration.

The 1958 New York Convention is irrefutably one of the most important multilateral Conventions in the recognition and enforcement of foreign arbitral awards. This is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The Convention, however, confers sweeping powers on domestic competent authorities to refuse to recognize and enforce foreign awards.¹³ Article V, which enumerates the various grounds on which recognition and enforcement of an arbitral award may be refused, gives the authorities power to question the substantive law of other jurisdictions and this is likely to stifle international commercial arbitration.¹⁴

Section 36(2) of the Kenyan Arbitration Act provides that an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the *New York Convention*¹⁵ or any other convention to which Kenya is signatory and relating to arbitral awards.

¹² The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

¹³ Gakeri, K. Jacob, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (2011) *International Journal of Humanities and Social Science*, vol. 1 No. 6 p. 225.

¹⁴ Ibid.

¹⁵ Ibid, Note 8.

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The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award.

Arbitration has gained popularity over time as the choice approach to conflict management, especially by the business community, due to its obvious advantages over litigation. The most outstanding of its advantages is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence of realizing justice in the best way achievable.¹⁶ Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.

However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner, is not left behind in entrenching the practice of arbitration in settling international commercial disputes.¹⁷ It follows, therefore, that the constituent states, Kenya included, should take the necessary steps towards becoming a focal point for international commercial arbitration, in the recognition of international arbitration as one of the most viable approaches to international disputes management.

3.0 Opportunities and Challenges

Arbitration is now firmly entrenched as a viable alternative to the courts in many jurisdictions across Africa, and as seen above is gaining prominence in Kenya. Although the developments seen in recent years have helped establish

¹⁶ Kariuki Muigua, *Promoting International Commercial Arbitration in Africa*, paper presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

¹⁷ Kariuki Muigua, *Reawakening Arbitral Institutions for Development of Arbitration in Africa; May, 2005*, available at <https://profiles.uonbi.ac.ke/> (Accessed on 10th March, 2016).

more reliable and consistent arbitration practices and procedures, there is still more work to be done. There are still relatively few international arbitration cases heard on African soil (in 2014 only eight ICC arbitration cases were heard in African countries),¹⁸ and the number of African arbitrators appointed on international cases remains woefully small. To set out or give recommendations on the ways to make Kenya a hub for international commercial arbitration, it is critical to first identify the challenges facing the practice in Kenya.

3.1 Attitude on Enforcement and National Courts Interference

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. Although the Arbitration Act¹⁹ provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one, where on the one hand, courts seem to recognise and acknowledge that arbitration should bear minimum court interference, and on the other hand, they appear to violate this important objective of the Act of minimal court interference. Section 10 of the Kenyan Arbitration Act provides that: “*except as provided in the Act, no court shall intervene in matters governed by this Act.*”

The provision permits two possibilities where the court can intervene in arbitration, and that is, where the Act expressly permits it or where it is in the public interest for the court to intervene. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are contemplated under the Model Law.

¹⁸ 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

¹⁹ Cap 49, Laws of Kenya, Arbitration Act 1995.

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Court interference intimidates investors since they are never sure what reasoning the court might adopt, should it be called upon to deliberate on such disputes.

The court has no legal right 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. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga -VS- Victoria Njoki Gathara*.²⁰ The Court of Appeal observed that most of the applications going to court to have the award set aside will be on grounds of public policy. It, however, stated that one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality, would be injurious to the public good or would be wholly offensive to the ordinary, reasonable and fully informed members of the public, on whose behalf the State's powers are exercised.²¹

The Court also stated that *“it follows, therefore, all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.”*

²⁰ Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR.

²¹ Ibid.

Ringera J (as he then was), in *Christ For All Nations vs. Apollo Insurance Co. Ltd*²² defined public policy in the following words:

“Although public policy is a most broad concept incapable of precise definition...an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

- 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 and morality.”*

The challenge here is the lack of a clear meaning of public policy which gives courts more opportunities to interfere with arbitration proceedings. This has the potential to intimidate local and foreign investors, who carry on business in Kenya, from settling their commercial disputes in Kenya, to instead opt for foreign jurisdictions.

Although there are instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings, these powers, sometimes are exercised far beyond what the Act provides.²³ This often happens where the courts decide that there existed illegality, fraud, incapacity or that the award is against public policy. Though public policy has been defined in the Kenyan context,²⁴ the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only Kenya's problem but of the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot*,²⁵ the Supreme Court decided that a

²² [2002] 2 EA 366.

²³ Ibid.

²⁴ Christ for all Nations v Apollo Insurance Company Ltd.

²⁵ Civil Appeal 3343/2005 - 12 October 2011.

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foreign award can be set aside under section 48(2) of the Act, if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test, which further complicates the understanding of what is to be regarded as being against public policy. As mentioned above, court interference intimidates investors.

The New York District Court in the case of *Parsons & Whittemore Overseas Co. Inc. vs Societe Generale de l'Industrie du Papier (RAKTA)* was confronted by an argument that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the defendant's state) and the United States had been severed. The court rejected this argument and referred to the 'general pro-enforcement bias' of the New York Convention. It held that the Convention's "public policy" defence should be construed narrowly, and that enforcement of foreign arbitral awards should only be denied on this basis "where enforcement would violate the forum state's most *basic notions* (emphasis added) of morality and justice."

As a way forward, therefore, for any jurisdiction to be considered to be a hub of international commercial arbitration, court interference in Arbitration has to be minimized. As Justice Visram in the case of *Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors*²⁶ observed:

Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest...The courts should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so.

²⁶ *Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors* (2007) eKLR

The Arbitration Act, however, seems to have vested vast powers in the High Court. In an effort to encourage arbitration as a dispute resolution method, where parties so agreed, Section 6 of the Act confers powers to the High Court to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to do so. However, under Section 11, the High Court may determine the number of arbitrators if parties fail to agree. It can also appoint arbitrators where parties fail to agree on the procedure of appointing the Arbitrator(s)²⁷ or even decide on the termination of the mandate of an arbitrator who fails to act where parties are unable to do so.²⁸ The High Court has powers to set aside an arbitral award as per the provisions of Section 35, and it may also decide on an application by a party in arbitration proceedings challenging an arbitrator. There seems, therefore, to be unlimited opportunities for the courts to interfere with or be involved in arbitration, and parties may also abuse their autonomy through involving the courts.

3.2 Arbitral Tribunal

The secrecy of the Tribunal's deliberations is fundamental to the arbitral process and this requirement is explicitly set out in some national laws and in the International Bar Association's (IBA) Ethics for International Arbitrators.²⁹ The Arbitration Act, however, imposes no general duty on the arbitral tribunal to act fairly or avoid conflict of interest or unnecessary delay or expense.³⁰ The only provision that comes close to this is Section 19 which provides for equality in treatment of parties, with each being given full opportunity to present his case. Otherwise, the Act imposes no positive duty to use reasonable dispatch in conducting the proceedings or making the award and the tribunal is duty bound to adhere to the time limits imposed on them

²⁷ Section 12, Arbitration Act.

²⁸ Ibid, Section 15(2)

²⁹ Section 6

³⁰ Ibid, Note 9

by parties. In the absence of an agreement, there is also no specific time frame imposed by the Act within which the award may be made. The Act does not also impose a duty on the tribunal to act judicially, make an award or ensure the award is unambiguous or uncertain. If these were imposed as minimum duties on arbitral tribunals, arbitration would have been more entrenched in the dispute resolution matrix in the country.³¹

3.3 Arbitration as a Profession

The Arbitration Act does not recognize arbitration as a profession, although it is increasingly becoming common for some individuals to practice exclusively as arbitrators, non-lawyers included. Arbitration, without a doubt, involves attributes generally peculiar to professionals such as professional training, discipline, integrity, expertise and commitment to certain appropriate values. Therefore, recognizing arbitration as a profession would not only enhance the profile of arbitration as a dispute resolution mechanism, but would lead to greater accountability and utilization of the process, as well as popularize arbitration.

3.4 Perception of Corruption/ Government Interference

Corruption in international business is rife, and growing. A report on the state of corruption indicated that:

The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse. The consequences are dramatic. In developing and transition countries alone, corrupt politicians and government officials receive bribes believed to total between USD 20 and 40 billion annually... When corruption allows reckless companies

³¹ Ibid

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to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.³²

At times, governments are perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where its interests are at stake, and put forward the argument of grounds of public policy. Kenya has had cases where instances of corruption had been inferred at the international arena.

The ICSID case of *World Duty Free v Republic of Kenya*³³ is a relevant example. This was a case of a claim of enforcement of a contract by World Duty Free, who claimed to have bribed the former President of the Republic of Kenya, Daniel Arap Moi. The claimant investor argued that the alleged US\$2m bribe to the former Kenyan president was made under the “Harambee” system of “mobilizing resources through private donations for public purposes” and was therefore legally justified. ICSID was of the opinion that in light of domestic laws and international conventions relating to corruption, the tribunal was convinced that corruption is contrary to public policy in most jurisdictions. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by the arbitral tribunal. Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process.

Kenya’s competitiveness, according to a Transparency International Survey, is held back by corruption that penetrates every level of society. Frequent demands for bribes by public officials lead to increased business costs for

³² Transparency International, The 2009 Global Corruption Barometer. Available at http://www.transparency.org/research/gcb/gcb_2009

³³ ICSID Case No ARB/00/7 (4 October 2006).

foreign investors.³⁴ This being the case, it is of utmost importance that international commercial arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration such as the construction, oil and mining industries suffer from endemic corruption.³⁵ However, the responsibility for just and effective adjudication of issues of corruption, within the context of the global fight against the scourge of corruption, cannot rest entirely with the tribunal. Parties have as important a role to play in ensuring that the tribunal is properly briefed on these issues, and must make the correct tactical decisions in the prosecution of their case, with sensitivity for the way courts handle public policy challenges.³⁶

3.5 Legal and Institutional Reforms

The growth of arbitration in Africa is by no means restricted to an off-shore jurisdiction. Relatively mature arbitral centres already exist in a number of African cities including Kigali, Nairobi and Accra. In 2014, Morocco launched an annual arbitration conference-Casablanca Arbitration Days, which initiative seeks to establish Casablanca as a hub for international arbitration.³⁷ Governments are getting wise to the fact that arbitration can be a source of economic activity, with conference centres, hotels and professionals engaged in the processes set to benefit. The inadequate legal regimes and infrastructure for the efficient and effective organization and

³⁴ GAN Integrity Solutions, “Business Corruption in Kenya”, Business Anti-Corruption Portal (2016).

³⁵ According to Transparency International’s 2011, Bribe Payers Index.

³⁶ Hwang M.S.C et al, “Corruption in Arbitration-Law and Reality” available at <http://www.arbitration-icca.org>.

³⁷Ostrove, M. et al, “Developments in African Arbitration” *The Middle Eastern and African Arbitration Review* (2016).

conduct of international commercial arbitration in Kenya³⁸ has, however, denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Tremendous progress has nevertheless been gradually made to change this situation and hopefully, the results will soon follow.

3.6 Endless Court Proceedings

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings, whether yet to start or pending.³⁹ Sometimes matters will be appealed all the way to the highest court of the land in search of setting aside of awards. This delays finalization of the matter, as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference. The Arbitral Court established under the *Nairobi International Centre for Arbitration Act*⁴⁰ will hopefully cut down such cases. It is to provide for the establishment of a regional Centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. This legislation may have been borne out of the recognition that Nairobi is yet to become an attractive destination for foreign investors, seeking the services of international institutional arbitrators. Lack of an elaborate legal and institutional framework on arbitration and excessive court interference in arbitration matters may be cited as some of the contributory factors to this phenomenon.⁴¹ The functions of the

³⁸ Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke>.

³⁹ Kariuki Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration in Kenya*, Kenya Law Review (2010).

⁴⁰ Laws of Kenya, Nairobi International Centre for Arbitration Act, No. 26 of 2013.

⁴¹ Ibid.

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Centre include to *inter alia*, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations, as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute's resolution process of choice.⁴² There is already in place a board of directors and an acting registrar, and the physical premises are located in Cooperative House, along Haile Selassie Avenue, Nairobi.

The Act also establishes a Court to be known as the Arbitral Court⁴³ which is to determine all disputes referred to it in accordance with this Act or any other written law, and its decisions are to be final.⁴⁴ These provisions are useful in guaranteeing confidentiality and non-interference by ordinary national courts. Section 22(1) of the Act provides that the Court should have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. Section 22(2) further provides that a decision of the Court in respect of a matter referred to it should be final.⁴⁵ Under Section 23, subject to any other rules of procedure by the Court, the Arbitration Rules of the UNCITRAL, with necessary modifications, should apply. The Act also establishes an independent tribunal whose decisions on matters of arbitration under the Act should be final and binding. This will go a long way in ensuring its independence. For any country, a recognized arbitral Centre is also a great show of “soft power”, helping to underline broader messages about political and legal stability, and give comfort to foreign investors.

The foregoing provisions, in recognizing international legal instruments on arbitration, therefore, place Kenya in a competitive position to engage with

⁴² Ibid, Section 5.

⁴³ Ibid, Section 21.

⁴⁴ Ibid, Section 22.

⁴⁵ Attiya Waris, "International Commercial Arbitration in Kenya" op cit.

the other regional players in its promotion as a hub for International Commercial Arbitration.⁴⁶ In order to offer true competition to the established arbitral centres around the world, this Centre will need to demonstrate that it can offer a reliable and efficient alternative for the users of arbitration-including by giving comfort that the local judiciary will actively support, or at least not interfere with, the arbitral process.

3.7 Inadequate Marketing and Bias in Appointment of Arbitrators

Kenya, and the African continent in general, have been portrayed as 'less developed' in terms of handling international commercial arbitration, and nothing much has been achieved in marketing of Kenya as a Centre for international commercial arbitration.⁴⁷ Many people outside Africa still carry with them the perception that Africa does not have adequate/ any qualified international commercial arbitrators. They have, therefore, not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption. With racism still existing in society, Africa has borne the brunt of it, with this bias rendering Africa's image as a corrupt and uncivilized continent. It has been observed that parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.⁴⁸ Despite there being individuals with the relevant knowledge, skill and experience in international dispute resolution, and competent institutions which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turf to

⁴⁶ Ibid.

⁴⁷Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' (2014), p. 15.

⁴⁸ Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, University Press, Cambridge, 2001, p. 5-6.

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appoint arbitrators.⁴⁹ Most disputants prefer to appoint non-nationals as arbitrators in international disputes, thus, resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can, in part, be explained by the fact that African states predominantly appoint international lawyers to represent their interests.⁵⁰ This portrays Africa to the outside world as a place where there are no qualified arbitrators to be appointed as international commercial arbitrators.⁵¹

According to statistics from two of the leading global arbitral institutions, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), the number of arbitration cases involving African parties, and in particular parties from sub-Saharan Africa, is on the rise. In its 2014 Statistical Report, the ICC noted that a record 113 parties from sub-Saharan Africa were involved in ICC arbitration in 2014.⁵² In its 2013 Statistics, the LCIA registered almost twice as many arbitrations involving African parties as it did in 2012.⁵³ Despite this strong growth in caseload, however, it is notable that few of the arbitrators nominated to hear these disputes were African themselves. The need for arbitral tribunals to be more diverse and to reflect the community of users is nowhere more stark geographically than in Africa.⁵⁴

⁴⁹ Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', *African Development Bank, Law for Development Review*. Available at <https://www.mcgill.ca/files/isid/LDR.2.pdf> [Accessed on 10/03/2016].

⁵⁰ Karel Daele, Mishcon de Reya, 'Africa's track record in ICSID proceedings' *Kluwer Arbitration Blog*, 30 May 2012.

⁵¹ Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya', pages 9-12.

⁵² 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

⁵³ Registrar's Report, Casework 2013, available at <http://www.lcia.org/LCIA/reports.aspx>.

⁵⁴ Ostrove, M., et al, 'Developments in African Arbitration,' *The Middle Eastern and African Arbitration Review 2016*. Available at <http://globalarbitrationreview.com/reviews/79/sections/306/chapters/3183/>

3.8 Uncertainty of Costs and Institutional Capacity

There have not been very clear guidelines on the remuneration of arbitrators, and foreigners are not always very sure on what they would have to pay, if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.⁵⁵ It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.⁵⁶

3.9 Key Evolutions

In order to cement the progress made to date, other key evolutions are also needed. Kenya has gone a long way in modernizing its domestic arbitration laws through the amendments discussed earlier and through entrenchment of the provision in the Constitution which inserted a requirement for arbitration prior to the pre-trial process. There is, however, need for the local judges and lawyers and other professionals, who in one way or another engage in arbitration to acquire deeper knowledge of arbitration. An awareness of the upside -as well as downside- of arbitration as an effective means of dispute resolution is also crucial towards fostering the growth of arbitration in Kenya and eventual growth of the country as a regional and global hub.

⁵⁵ CIArb Kenya Website Available at www.ciarbkenya.org.

⁵⁶ Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at <http://www.kmco.co.ke/attachments>.

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Capacity building is now being implemented through non-profit organizations such as African Legal Support Facility (ALSF) as well as through international cooperation agreements, such as the one concluded between the Permanent Court of Arbitration (PCA) and the African Union.⁵⁷ These agreements aim to assist with the development of arbitral infrastructure and the engagement of the regional arbitration community in participating in educational outreach and training programmes throughout the continent.⁵⁸ Kenya should take advantage of such programs.

3.10 Modernization of Arbitral Institutions

Communication remains a challenge to arbitrations being heard in the continent, and a quick fix would be to ensure that institutions created, and already in existence, maintain user-friendly websites where the latest arbitral rules and details of arbitrator panels can be found. According to a recent survey, the most commonly cited challenge by parties when conducting arbitration in Africa is the availability and experience of arbitrators.⁵⁹ According to Judge Abdulqawi Ahmed Yusuf, the Somali vice-president of the ICJ Court, African states have failed to appoint an African arbitrator or conciliator in 69 out of 85 existing ICSID disputes involving the continent.⁶⁰ He further states that the “legitimacy of investor-state arbitration in Africa depends on African arbitrators serving on tribunals and African states having more of a role in the formulation of bilateral investment treaties”.⁶¹

⁵⁷ Ostrove, M., et al, ‘Developments in African Arbitration,’ *The Middle Eastern and African Arbitration Review 2016*, op cit.

⁵⁸ Transparency International, *The 2009 Global Corruption Barometer*, op cit..

⁵⁹ <http://www.simmons-simmons.com/~media/Files/Corporate/External%20publications>.

⁶⁰ Lacey Yong et al, ‘Africa must have more representation on tribunals, says Somali judge’, *GAR*, vol. 10, iss 6, 15 October 2015.

⁶¹ *Ibid.*

4.0 Conclusion

It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a commercial dispute, parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.⁶² Further, international arbitration has been regarded as being very effective in the international business arena, since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations, and the awards can only be challenged on very limited grounds.⁶³ Africa's seventh largest economy, Kenya, is home to a well-developed legal disputes sector, with a healthy future, and since the introduction of the country's new constitution, arbitration has been gaining ground. Although the full effect has not been felt, growth in the market is imminent.⁶⁴

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence, knowing their disputes will be settled expeditiously and this can enhance economic development for Kenya and the region. Arbitration is already established in certain sectors because it allows cases to be heard by specialists in a relatively short period of time. There is arbitration where parties feel that judges do not have enough expertise to handle the matter, or where they want the dispute at hand to be resolved within a particular period of time because the courts tend to be somehow unpredictable.⁶⁵ The surge in construction, in the Nairobi area as well as the East Africa region in general, is potential fuel

⁶² Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, *International Arbitration Insights*, 18 June 2008.

⁶³ See Attiya Waris, "International Commercial Arbitration in Kenya".

⁶⁴ Andrew Mizner, 'Arbitration rising,' (African Law & Business, February, 2016). Available at <https://www.africanlawbusiness.com/news/6143-arbitration-rising>

⁶⁵ Ibid.

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for arbitration work. Government related disputes in Kenya's and the region's mining sector, energy, insurance and commercial corporations that 'want to resolve their problems and get on with business' also figure strongly in the use of arbitration.⁶⁶

The current Arbitration Act is compatible with the prospect of Kenya being an attractive venue for international commercial arbitration, both for *ad hoc* and institutional arbitrations.⁶⁷ If the foregoing challenges are fully addressed, then Nairobi (Kenya) can secure for itself a place on the global arbitration map.

⁶⁶ Ibid.

⁶⁷ In institutional arbitration, the specialist institution generally administers the arbitration under its own rules, unless it agrees to do so under another set selected by the parties. The institution appoints the tribunal and, in most cases, acts as the intermediary between the parties and the tribunal until the hearing commences, undertaking all necessary administrative arrangements. In *ad hoc* arbitration, the parties agree to execute the process themselves by appointing the arbitrator and attending to the necessary administrative requirements before and during the hearing. (see Attiya Dr. Waris. "International Commercial Arbitration in Kenya - Book Chapter in Arbitration Law and Practice in Kenya Ed Prof G Muigai (LawAfrica: 2011)."

Book Review-Natural Resources and Environmental Justice in Kenya

Njuguna James Ndungu*

Book Title: Natural Resources and Environmental Justice in Kenya

Authors : Kariuki Muigua, Ph.D., Didi Wamukoya & Francis Kariuki

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This is a book that is recommended for all Alternative Dispute Resolution (ADR) practitioners. It contains an in-depth discussion on Natural Resources and Conflict Management (Chapter 16). Mechanisms such as negotiation, mediation, problem solving and facilitation are analysed in relation to their role in natural resources conflict management.

There is also a vivid discussion on the merits and demerits of using Alternative Dispute Resolution in natural resources conflict management. The chapter covers water-based conflicts, biodiversity conflicts, land-based conflicts and minerals, oil and gas conflicts, amongst others.

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An accomplished Mediator and Counsellor who offers volunteer services to the public through various organizations including "Worldwide Gospel Church of Kenya", a church organization.

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The need for such management is explained therein. The various mechanisms available for natural resources management such as judicial mechanisms, ADR and traditional justice systems are also critically analysed.

The authors have ably illustrated how ADR can empower the Kenyan people so that they can meaningfully participate in natural resources management.

The authors argue that environmental justice for all is achievable through inclusivity, the use of effective, participatory environmental governance mechanisms and the application of ADR in tandem with other mechanisms.

For those interested in natural resources management, the book contains other materials covering Principles of Natural Resources Management in Kenya, Environmental Justice, Devolution, and Management of various resources such as land, forests, water, wildlife and biodiversity resources, Coastal and Marine Resources and Transboundary Resources.

One running theme in the book is that, for there to be effective management of natural resources, there must be inclusivity. The people affected by decision-making or those who depend on the resources should have access to information and should have a say in how resources are governed. ADR gives them a voice. Specifically, negotiation empowers them to engage with Governments, corporations, Non-Governmental Organisations (NGOs) and Developers and participate in meaningful decision-making.

The book was recently cited by the Supreme Court of Kenya in *The Matter of the National Land Commission [2015] eKLR*,¹ where the Court was deliberating on the importance of the role and place of public participation in the administration and management of land in Kenya. ADR is not just academic. The book offers an insight into how ADR can be used to manage

¹ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

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natural resource-based conflicts and thus ensure the attainment of sustainable development.

Judicial Enforcement of Arbitral Awards: A Theoretical Perspective

Gad Gathu Kiragu*

Abstract

This paper looks at the theoretical framework behind judicial decisions in applications for recognition and enforcement of arbitral awards. It argues that the law is indeterminate, thus giving leeway to judges to interpret it, and thus end up making law.

1.0 Introduction

Arbitration has several advantages over the court process, which may include efficiency, confidentiality and flexibility.¹ Though the arbitration Act² envisages a situation where the court's involvement in the arbitration process is severely limited, there are situations where the involvement of the courts is inevitable. One such situation is where a party to arbitration proceedings, against whom an award is given, is unable or unwilling to settle the award. The successful party then has to resort to the courts for recognition and enforcement of the award.

In Kenya, a party seeking to have an arbitral award recognised and enforced has to apply to the High Court.³ While there is a provision that international

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¹ Muigua, K. ADR: The Road to Justice in Kenya, p.34. Available at <http://www.kmco.co.ke/attachments/article/151/PAPER%20ON%20ADR,%20THE%20ROAD%20TO%20JUSTICE%20%20IN%20KENYA-15%20MARCH%202015.pdf> Accessed on 15th May 2016.

² Arbitration Act No. 4 of 1995. Section 10.

³ Arbitration Act No. 4 of 1995. Section 36.

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awards are recognized as binding automatically, subject to the provisions of the United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of International Commercial Arbitration Awards (The New York Convention), the process of enforcement is basically similar, whether the award is international or domestic.⁴

This paper attempts to show a nexus between the theoretical concept of indeterminacy of law and judicial decisions on enforcement of arbitral awards. It argues that the law on enforcement of arbitral awards contains bare minimum guidelines, which leave the court with a lot of leeway to make law through judicial decisions.

The High Court may, on its own volition, refuse recognition and enforcement of an arbitral award, if the subject matter of the arbitration was not capable of settlement through arbitration under the law of Kenya, or, if recognition and enforcement of the award would be contrary to the public policy of Kenya.⁵ These two areas will be the focus of this paper. The paper begins by analyzing the concept of indeterminacy of law, then analyzes the procedural provisions towards seeking recognition and enforcement of an arbitral award and finally examines the issues of arbitrability and public policy as defined in various judicial decisions.

2.0 Indeterminacy of Law.

The judicial process lays bare the fact that law is not determinate for if it was, all courts would make the same findings on law as they would be applying the same law to same facts. This is especially so considering that, generally no new evidence is admissible on appeal, at least in most common law jurisdictions. It is, therefore, possible that judges are influenced by factors, other than legal rules, when deciding matters before them.

⁴ A comparison of Sections 36 and 37 of the Arbitration Act No. 4 of 1995 and Articles IV and V of the New York Convention shows this.

⁵ Arbitration Act No. 4 of 1995, Section 37 (b) (i) and (ii).

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The question of how judges interpret the law to arrive at certain decisions is related to the fundamental question in jurisprudence on “what is law?” This is a question that has occupied legal theorists for ages.⁶ The theoretical approach to finding answers to this question can be very roughly, and for the purposes of this study, be said to be divided into two.

On one hand, there is the classical positivist school of thought that holds that the law is the law. This classical positivist school of thought can be seen in the work of John Austin who saw the law as a command from a sovereign backed by threats of sanctions.⁷ To classical positivists, the existence of a law was one thing, and its merits or demerits was another thing altogether. The classical positivist school of thought was subjected to criticism by latter day positivists such as H.L.A Hart. Hart especially criticized the command theory in that, firstly, the law applied to those who enacted it and not merely to others. Secondly, there were laws created to confer powers or to vary legal relationships, which could not be described as orders backed by threats. Thirdly, there were some legal rules which differed from orders backed by threats, because they were not brought into being by anything analogous to explicit prescription. Lastly, the concept of a sovereign, who was habitually obeyed, failed to account for the continuity of the legislature common in modern legal systems.⁸

Hart further introduced the rule of recognition.⁹ The rule of recognition can be said to be an authoritative criteria for identifying primary rules of recognition. It can take the form of a constitution, enactments by a legislature or judicial precedent. The rule had superficial similarities to Hans Kelsen’s Grundnorm, in that, it is a basis upon which to identify the law. However,

⁶Bix, B. *Jurisprudence: Theory and Context*, 6th ed. p. 9.

⁷Freeman, M.D.A. ‘Lloyd’s Introduction to Jurisprudence’ (Sweet and Maxwell.8th Ed.) pp. 295-299.

⁸Hart, H.L.A. ‘The Concept of Law’ 3rd ed. pp.s50-59.

⁹ See generally Ibid Chapter VI.

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Hart pointed to several points of departure with Kelsen's Grundnorm, mainly that the Grundnorm was a juristic hypothesis, while the rule of recognition was an empirical question of fact.¹⁰

On the other hand, there are naturalists who believe that there is a higher law than the law of man.¹¹ This higher law is superior to that of man, and if the law of man is inconsistent with the higher law, then the higher law gains precedence. Thus, if a judge is faced with a question of law in which he feels that the higher law contradicts the law of man, he will entirely disregard the written law and be guided by the higher law when making his decision. However, there have been criticisms leveled against this school of thought at three levels. The first is the problem of defining justice, the second is the issue of who decides that a certain law contradicts natural law in such a way as to call for its disregard, and the third issue, is the question of the consequences of disregarding law.¹²

Ronald Dworkin is associated with the natural law school of thought.¹³ According to Dworkin, judges are constrained by the law and should never go beyond the law in determining cases. Dworkin rejected the idea that judges do make law when deciding cases. He argued that if judges did indeed make law, then they were undermining democratic principles. This is because they were not elected officials who ideally are the ones who should govern a community as they are answerable to the electorate. It would also mean that there was the risk that judges could make new law and apply it retroactively.¹⁴ Dworkin argued that to every case there was "a right answer" to legal

¹⁰Hart, H.L.A. *The Concept of Law*, op cit pp. 292-294.

¹¹Freeman, M.D.A.) *Lloyd's Introduction to Jurisprudence*, op cit. pp. 90-91.

¹² Ibid, p. 92.

¹³Ibid, p. 718. However, it has also been argued that he does not squarely fit into the natural law school of thought and is more associated with interpretivism.

¹⁴Ibid.

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questions placed before judges since they had to arrive at an answer for every question placed before them.

Legal formalism held the notion that judicial decisions could be deduced from general concepts with no attention to real world problems.¹⁵ Thus, a case could be decided without regard to the real world consequences of such a decision. The legal realism school of thought criticized the formalistic approach, especially its notion that the law was a self-contained moral logical system.¹⁶ Legal realism sought to address the problem of judicial law making and how judges interpret the law through its principles that the law is indeterminate and that in deciding cases, judges primarily respond to the stimuli of the facts of the case rather than to legal rules. This has been described as the core claim of legal realism.¹⁷ According to legal realists, in every single case there are multiple points of indeterminacy of law.¹⁸ There was also the question of judges having a choice of which rules to apply to a particular set of facts. Further, even the doctrine of precedence does not bind judges to decide in a particular way as they could always distinguish a prior case.¹⁹

A deeper analysis of the two aforesaid basic approaches to legal theory, could easily lead us to the complex debate about law and morality, which would be beyond the scope of this discussion. Nevertheless, it suffices to state that this paper is concerned with the concept of indeterminacy of law as shown in judicial reasoning.

¹⁵Bix, B. *Jurisprudence: Theory and Context*, op cit, pp. 196.

¹⁶ Ibid p. 199.

¹⁷Leiter, B. "American Legal Realism" in Golding, MP & Edmundson A.W ed. *The Blackwell's Guide to the Philosophy of Law and Legal Theory*.p. 50.

¹⁸Altman, A. *Legal Realism, Critical Legal Studies and Dworkin*. pp. 186-187.

¹⁹ Ibid.

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The concept of indeterminacy of law is also associated with the positivist school of thought, through the writings of H.L.A Hart. For example, he states that in any legal system there will always be certain legally unregulated cases, in which at some point no decision is dictated either way by the law and the law is therefore indeterminate.²⁰ In such instances, it falls upon a judge to determine the law, thus exercising law making powers. However, the judge should not do this arbitrarily but “he must act as conscientious legislator would by deciding according to his own beliefs and values.”²¹

When it comes to enforcement of arbitration awards we can identify the rule of recognition in the constitutional safeguards of a fair hearing. A judge would use the constitution as a basis for determining the law as to enforcement of international commercial arbitration awards. Thus, in *Samura Engineering Limited v Don-Woods Company Limited*²², the court held that the opportunity to be heard under Section 37 of the Arbitration Act was not rendered useless just because the person against whom execution of the award was sought had not filed an application under Section 35 of the Arbitration Act. The court, in this instance, referred to the fair hearing provision enshrined in the Constitution of Kenya, 2010²³ to identify the law, and the constitution could therefore be said to have been the rule of recognition.

Moreover, the application of the public policy exception to recognition and enforcement of international commercial arbitration awards shows just how much judges can be influenced by outside factors. This is because public policy is not defined under the New York Convention, UNCTRAL model law or the Kenyan Arbitration Act, 1995.

²⁰ Hart, H.L.A. *The Concept of Law*, op cit pp. 272.

²¹ Ibid p. 273.

²²[2014] eKLR

²³Article 50 of the Constitution of Kenya, 2010

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It is, therefore, clear that judges can and do make laws when they decide on cases before them. With such enormous powers, it is only fair for a litigant to expect that the judge is sufficiently trained in the area of law that is before the judge, to ensure that other factors such as overwork, do not influence judges to decide in a certain way. It is also expected that a judge is alive to the socio-politico and economic practicalities prevailing at the moment under the concept of public policy, which allows the judge to refuse recognition and enforcement of an award on the basis of public policy. These expectations are a bare minimum towards ensuring that there is access to justice for anyone seeking to enforce an international commercial arbitration award.

3.0 Recognition and Enforcement of Arbitral Awards.

The Arbitration Act 1995 and the Arbitration Rules, 1997²⁴ lay out the procedure for enforcement of the award. The party seeking to enforce the award must lodge a formal application which must be accompanied by:-

- a) the duly authenticated original award or certified copy;
- b) the original arbitration agreement or certified copy; and
- c) a certified translation of the arbitration agreement if it is not in the English language.²⁵

The Arbitration Rules provide that any party may file an arbitral award in the High Court.²⁶ The filing must be notified to all other parties,²⁷ and if no application set aside the award is made, the applicant may apply *ex parte* by

²⁴Arbitration Rules, 1997. Legal Notice No. 58 of 1997

²⁵ Arbitration act Section 36 (1) & (2)

²⁶ Rule 4(1) of the Arbitration Rules, 1997. Legal Notice No. 58 of 1997

²⁷ Ibid Rule 5

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summons, for leave for confirmation of the award as a decree.²⁸ The application is made by way of chamber summons.²⁹

The provision for applying for confirmation of the award as a decree *ex parte* pursuant to Rule 6 of the Arbitration Rules, 1997 is controversial, in that it can be said to negate access to justice vide denying the other party an opportunity to be heard. The Court in *Justus Nyang'aya v Ivory Consult Limited*³⁰ extensively considered the question of whether a party who has not filed an application to set aside an award ought to be served with an application for enforcement of an award. The Court held thus:-

The opportunity to be heard, under section 37 of the Arbitration Act is not, therefore, rendered otiose just because the person against whom execution of the award is sought has not filed an application under section 35 of the Arbitration Act. Accordingly, by making specific reference in section 36(1) of the Arbitration Act that, recognition and enforcement of the award will be subject to section 36 itself and section 37, Parliament was not under any delusion, and the opportunity to be heard in section 37 of the Arbitration Act is not an unnecessary or superfluous addition or appendage; it is a substantive provision of the law aimed at providing substantive justice to all the parties in the arbitral proceedings. The process provided for in the Arbitration Act should also be seen within the nature of arbitration as a consensual and voluntary process. There is absolutely no prejudice that the party applying will suffer in adhering to the law and serving all processes on the other party. The practice of adhering to procedure in the Arbitration Act will only reinforce the probity of and sanctify the court's willingness to issue adoption orders, and undoubtedly, execution will be freed from unnecessary applications by unscrupulous parties who do not wish the arbitral process to end.

²⁸ Ibid Rule 6

²⁹ Ibid Rule 9

³⁰ [2015] eKLR. See also *Samura Engineering Limited V Don-Wood Co Ltd* [2014] eKLR

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Thus, the court seems to be saying that regardless of what the Arbitration Act provides, an application for enforcement of an arbitration award must be served on the other side. It says that there is no prejudice that will be suffered by the party seeking to enforce, if it serves the application for enforcement on the other party. Conversely, if the application for enforcement is not served on the other side, then there is room for the party that was not served to approach the court for relief on that basis, which will end up delaying the process.

4.0 Arbitrability

The High Court may, on its own motion, refuse the recognition or enforcement of an award if it finds that:-³¹

- a) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
- b) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

Refusal on the High Court's own motion on grounds of non-arbitrability is pretty straightforward. There are matters that are simply not arbitrable. Such matters could include, criminal matters and divorce matters. For example, in *T.S.J v S.H.S.R*,³² the High Court, sitting in Nairobi, refused to recognize and enforce an award made by His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi that purported to grant a divorce and provide for the maintenance and custody of children pursuant to arbitration. However, in other instances, the Courts have acceded to some form of arbitration as a means of settling a criminal matter, though not in terms of recognizing and enforcing an award. In *Republic v Mohamed Abdow Mohamed*³³ the accused person was charged with the offence of murder. His

³¹Section 37(1) (b) of the Arbitration Act, 1995.

³²[2014] eKLR.

³³(2013)eKLR

family and that of the deceased subsequently arrived at a settlement, where compensation was paid to the family of the deceased and some rituals were performed. The Director of Public Prosecutions, therefore, made an application to withdraw the charge against the accused person citing Article 159 (1) of the Constitution “which allows the Courts and Tribunals to be guided by alternative dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.” The Court allowed the application and discharged the accused person.

5.0 Public Policy

In Kenya, public policy has been defined by Ringera J (as he then was), in *Christ for All Nationals v Apollo Insurance Co. Ltd*³⁴ in the following words:

Although public policy is a most broad concept incapable of precise definition...an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

- 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 and morality.*

The problem with the above definition, especially when it comes to “being inimical to the national interests of Kenya” or “contrary to justice and morality,” is that these are abstract concepts of which an individual judge will have to decide whether a case on the particular facts has achieved this abstract threshold. In the case of *D. Manji Construction Limited v C & R Holdings Limited*,³⁵ the court conceded that, going by the definition in *Christ for All*

³⁴ (2002) EA 366

³⁵ [2014] eKLR

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Nationals v Apollo Insurance Co. Ltd, public policy was indeed a very elastic ground that would require cogent proof.

Indeed in *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited*³⁶ the court stated that the principles of “being inimical to the national interests of Kenya” or “contrary to justice and morality” are not straight forward, stating further that:-

..... neither the Court nor the Legislature can provide an exhaustive list of the elements or items that constitute; inimical to the national interest or Kenya; or contrary to Justice and Morality. It will all depend on the circumstances of the particular case, the facts being pleaded, and the evidence offered in support of those facts.

In other words what may be contrary to justice and morality in the eyes of one judge may not be so in the eyes of another judge. Thus, in the aforecited case of *Republic V Mohamed Abdow Mohamed*³⁷ some other judge may have found such a settlement of a murder case to be contrary to justice and morality.

Basically, the courts seem to be saying that the law does not provide clearly what the public policy exemption entails, and each judge has absolute leeway to decide each case as he deems fit.

6.0 Conclusion.

We have seen that the law on recognition and enforcement of arbitral awards is indeterminate. While this may have been intended so as not to fetter judicial discretion, we have seen that it has created an unruly horse which is difficult to saddle. This unruly horse could end up wreaking havoc, for example, in a case of rogue judicial officers who will interpret the provisions to suit certain ends. There is, therefore, a need for further inquiry into the issue with a view to coming up with laws that offer more defined guidelines. This will not only

³⁶ [2014] eKLR

³⁷(2013)eKLR

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aid judicial officers in the execution of their duties, but it will also aid parties to arbitration proceedings in presenting and defending claims before arbitral tribunals, and will also guide arbitrators in making awards.

Mediation: A Milestone for the Judiciary

Comm. Irene Wanyoike*

1.0 Introduction

Parties in family disputes now have the chance to negotiate resolutions and agreements within court-mandated mediation. From May 2016, the Judiciary implemented a mediation pilot program at the Milimani Law Courts, at the Family and Commercial Divisions of the High Court at Nairobi.¹

Cases filed in the two divisions will be screened by the newly appointed Mediation Registrar to determine whether or not they should go for mediation. The incorporation of Alternative Dispute Resolution (ADR) in Kenya is anchored in the Constitution vide Article 159 (2) (c), which provides for the courts to be guided by the principle of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.²

But what is Family Mediation? This is a voluntary dispute resolution process in which an independent professional mediator facilitates a couple, whose marriage is experiencing problems, to work out a negotiated and agreed settlement, which when reduced into writing and signed by all the parties, becomes binding. In mediation, there is no winner; it is a win-win situation because there is no forced settlement. Some of the prevalent cases include child custody and maintenance matters.

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¹ Frequently Asked Questions: Court Annexed Mediation, Judiciary Brochure.

² Constitution of Kenya, 2010, Article 159(2)(c)

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Mediation is a sure way of opening up the channels of communication by creating a safe space for the parties to air their grievances. Family members who were previously not able to see eye to eye are able to open up and talk. Through the conversations, the mediator is able to pick up on the real issues, thereby breaking the shell of the strife. The parties to the mediation often agree with each other, upon the revelation of the actual reasons why they are disagreeing.

The fact that parties who could not previously listen and talk to each other are now communicating, gives the parties confidence and most importantly, confidence and trust in the mediator. Ideally, the mediator must be earnestly patient and neutral to steer the process in a skilful and professional manner, for the parties to listen and talk to each other.

The mediator encourages the parties to talk and vent out piles of unresolved issues, thus ensuring that the real underlying issues are identified and finally resolved by both parties. This ensures decisions are made jointly and that they are agreeable to both parties. No decision is, therefore, imposed on the parties. They come up with their own resolutions by giving in from their initial hard-line positions to an agreeable settlement.

As an experienced family mediator, I am convinced that mediation is the best remedy to the litigation crisis in Kenya.

The high costs, long delays and broken family relationships associated with tedious court processes often make litigation an infeasible method of resolving family disputes.

One of the salient features of mediation is that it stresses interests rather than (legal) rights. This is compounded by the fact that it eases hostilities and provides for continuity in family relations.

Mediation resolves disputes quickly- it can be done in one day or one session and a settlement is drafted. It is confidential, cost - effective, flexible and easily accessible to parties in the conflicts.

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Sustainability of settlements reached under mediation is high and almost guaranteed because settlements are owned by the parties. Furthermore, mediation settlements will be registered by the court and enforced as an order. Without a doubt, this is the way to go for sustainable settlement in family disputes.

Arbitrability: It's Ambit in the Kenyan Legal System

Grace Chelagat- Tanah*

Abstract

This paper examines the concept of arbitrability, and its effect on the practice and law of arbitration, in the Kenyan context. The author discusses the issue of arbitrability in light of international and domestic arbitration. The discourse also traces the relationship, if any, between arbitrability and public policy. Using caselaw, the author identifies the general principles that inform both public policy and arbitrability, in international arbitration as well as domestic arbitration.

1.0 Introduction

Arbitrability as a concept in arbitration has often not received much attention in Kenyan and international texts and court decisions are analogous. ‘There is no internationally accepted opinion on what matters are arbitrable.’¹ It is relegated to the obvious and not much query has been made on its ambit in determining the enforceability of arbitration clauses and agreements alike. Arbitrability is best thought to be a creature akin to public policy and not much focused and independent literature has been dedicated to its purview and reach in international commercial arbitration.’ The subject of arbitrability has not received much attention in English courts either. ²

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¹ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, (Oxford University Press, 2005), p. 107.

² Sutton David, et al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), p.15.

2.0 Arbitrability Defined

The definition of arbitrability is one with no general consensus in international commercial arbitration discourse (ICA). ‘Arbitrability relates to the issues in dispute and whether they are capable of settlement by arbitration.’³ ‘The issue of arbitrability was raised and considered when the UNCITRAL Model Law was being drafted. The drafters could not reach any general consensus as to the definition of arbitrability. In the end, it was decided to ignore the whole issue within the UNCITRAL Model Law’⁴. ‘An attempt to define arbitrability has been cast as an exercise in futility because ‘different states have their own traditions and precepts differing radically from state to state... to attempt to draw up a list containing common factors which determine arbitrability was bound to fail and has failed.’⁵

Arbitrability seeks to bring about the balance between ‘policy of reserving matters of public interest to the courts and the public interest of encouraging arbitration in commercial matters.’⁶ Marshall Enid asserts that ‘a wide range of commercial and financial disputes may be referred to arbitration. However, on grounds of public policy certain matters are not ‘arbitrable’.⁷ There exists a strong nexus between public policy, for it is thought to be the precursor of the arbitrability of a subject matter of not. To further compound this issue, most international commercial arbitrations are trans-boundary and trans-national in nature, whilst public policy is country specific. There is no prescribed definition of international public policy. ‘The enforceability of a contract is dependent on its arbitrability. In order to be valid and enforceable, the subject matter of the arbitration must be arbitrable. As a general rule,

³ Ibid, p.107.

⁴ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p. 108.

⁵ Ibid.

⁶ Ibid.

⁷ Marshall Enid, *Gill: The Law of Arbitration*, (4th Ed, Sweet & Maxwell, 2001), p.4.

matters are arbitrable when they refer to economic and disposable private rights.’⁸

Various legal scholars have addressed their mind on the definition of arbitrability. Allan Redfern⁹ defines arbitrability as the determination of disputes that may be resolved by arbitration and that which remains exclusively in the domain of the courts. This paper adopts a working definition of arbitrability to mean the determination of the intrinsic character of a subject matter of arbitration to fall within or without the permitted bounds of arbitration as per national law, morality, public welfare international law, domestic public policy and international public policy.

The rationale for the reservation of jurisdiction to the court, on some specified subject matters upon domestic courts simply lies in the fact ‘that arbitration is a private proceeding with public consequences that some types of disputes are reserved for the national court, whose proceeding are generally in the public domain.’¹⁰ The Judiciary in most countries is thought be the independent guardian of the Constitution and the repository of public morality. The Constitution of Kenya under Article 165(3) vest upon the High Court unlimited original jurisdiction in criminal and civil matters. This evidences the court’s role in international commercial arbitration and of the importance of its continued reservation of jurisdiction thereupon. This position is entrenched in the United Kingdom’s 1996 Arbitration Act ¹¹ which provides

⁸ Moses Magret, *The Principles and Practice of international Commercial Arbitration*, (Cambridge University Press, 2008), p.31.

⁹ Redfern Alan, et al, *Law and Practice of international Commercial Arbitration*, (Thomson Sweet & Maxwell, 2004), p. 138; see also Article 2059 of the French Civil Code provides that ‘all persons may enter into arbitration agreements relating to the rights that they may freely dispose of. Art 2060 provides hat parties may not agree to arbitrate in family law and public interest. ‘(*plus generalement dans toutes les mantieres qui interessent l’ordre public.*)

¹⁰ Ibid.

¹¹ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p. 18.

that ‘the court does, however retain limited powers in respect of matters that affect public policy or the public interest.’

3.0 International Arbitrability and Domestic Arbitrability

A State’s economic, political and social policy, often form the backdrop of determining the arbitrability of subject matters in ICA. That said, ‘ in the international sphere , the interests of promoting international trade as well as a country’s comity have proved important factors in persuading the courts to treat types of disputes as arbitrable.’¹²

This position was first elucidated in *Mitsubishi Motors Corp. v Soler Chrysler-Phymouth Inc*,¹³ where the United States Supreme Court held that ‘the concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity resolution of all disputes require that we enforce the parties’ agreements.’ The court, in expounding their position, relied on the case of *Fritz Scherk v Alberto- Culver Co*,¹⁴ where the court declared that ‘it will be necessary to the international policy favouring commercial arbitration.’ Domestic courts often have a tussle between upholding the myriad of domestic policies and morality vis a vis safeguarding international trade and investment in ICA.

The arbitrability or lack of it of the subject matter of ICA may be dependent on the laws and policies of various states concerned over the same transaction. They are likely to include: the law governing the party involved, where the agreement is with the state; the law governing the arbitration agreement; the law of the seat of arbitration; and the place of enforcement of the award.¹⁵ That said, the general principles remain that issues of arbitrability, if raised

¹² Ibid, p.138.

¹³ 473 US 614. 105 CT Reports (1985) 3346 (1986) Ybk Comm 555-65.

¹⁴ 417 US 506, 515-20(1974).

¹⁵ Sutton David, et al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), p.139.

during the arbitration proceedings, are usually determined by the reference to the law of the seat of the arbitration or the law of the arbitration agreement if it is different.’¹⁶

To reach a common definition of arbitrability has proved to be an insurmountable challenge, hence the push for each state to determine matters arbitrable within its jurisdiction and to inform other states of its stand. ‘The UNCITRAL Working group has suggested that it should call on every country to list what subject matters it considers not arbitrable,’ so that parties to an international contract will know whether their disputes are capable of settlement by arbitration at the seat of arbitration and their awards likely to be enforced.’ This will in turn foster predictability hence inculcating investor confidence.

There are, however, some globally condemned activities where most universal courts have a general consensus on their ban on public policy grounds. In *Wesacre Investment Inc v Jugoimport-SDPR Holding Co. Ltd*,¹⁷ the English Court of Appeal held that there were certain universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia corruption or fraud in international commerce which would ‘invite the attention of the English public policy in relation to contracts which are not performed within the jurisdiction of English courts, even if the award is made outside England.’ Justice Waller, in laying down the aforementioned decision, asserted that ‘there are rules of public policy if infringed will lead to non-enforcement by the English courts whatever the proper law and wherever their place of performance.’¹⁸

¹⁶ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p. 108.

¹⁷ [2000] QB 288 [1999] 3 WLR 811, [1999]3 ALL ER [1999]1 All ER (Comm.) 865.

¹⁸ See also Michael Hwang S.C. & Kevin Lim, ‘Corruption in Arbitration— Law and Reality,’ available at http://www.arbitrationicca.org/media/4/97929640279647/media013261720320840corrupti on_in_arbitration_paper_draft_248.pdf.

4.0 The Nexus between Public Policy and Arbitrability

‘Whether or not a particular type of subject matter is arbitrable under a given law is in essence a matter of public policy to determine. Public policy varies from one country to the next, and indeed changes from time to time.’¹⁹ Public policy has often been conceived as an unruly horse, one which one can seldom tell where it is headed or coming from. This is partly because of its evolutionary nature, fluidity and motile adaptability to the changing social, political and economic realities within a state and indeed internationally. Under the United Kingdom Arbitration Act 1996 enforcement of an award may be opposed on the ground that it is contrary to public policy and an application may be made to set aside an award ...which is procured contrary to public policy.²⁰ In *Eco Swiss China Time LTD v Benetton International NV*, the European Court of Justice, in pronouncing itself on public policy, stated that a national court to which application is made for the annulment of an arbitration must grant that application if it considers the award in question ...where the domestic rules fails to observe national rules of public policy.’²¹

The definition of public policy often bedevils ICA practitioners. Justice Ringera (as he then was) pronounced himself on the matter encapsulating the Kenyan positional definition in the case of *Christ for all Nations v Appollo Insurance Co.Ltd.*²² He held that although public policy is a most broad concept incapable of definition...an award could be set aside under section 355 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya, if it was shown that either it was- a) Inconsistent with the Constitution or other laws of Kenya whether written or unwritten; b) Inimical to the national interest of Kenya; or c) Contrary to justice and morality.’

¹⁹ [2000] QB 288 [1999] 3 WLR 811, [1999]3 ALL ER [1999]1 All ER (Comm.) 865, p. 139.

²⁰ Sutton David, et al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), op cit, p. 19

²¹European Court of Justice, July 1, 1999, *Eco Swiss China Time Ltd v. Benetton International. NV* (1999), Case C-126/97, available on the EU's website.

²² [2002] EA 366

5.0 Stages in the Arbitration Process Where One Contests the Arbitrability

When an issue of arbitrability is raised in the proceedings then arbitration tribunal may either address it immediately or proceed with the arbitration. An arbitration tribunal which proceeds with the arbitration may justify its stance on the basis that this reflects the intention of the parties to resolve the dispute by arbitration.²³ A party can dispute the arbitrability of a matter subjected to arbitration in three stages. 'First, on an application to stay the arbitration, when opposing party claims that the opposing party lacks jurisdiction to determine a dispute because it is not arbitrable.'²⁴ This often done by a preliminary objection that the subject matter is not arbitrable, hence the tribunal lacked the prerequisite jurisdiction.' Second, in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction, and third, on the application to challenge the award or to oppose its enforcement'²⁵

5.1 Presumption that Disputes are Arbitrable

This presumption stems out from the presumption favouring the validity of an agreement to arbitrate as was held in the case of *Oldroyd v Elmira Saving Bank FSB*.²⁶ The presumption favouring arbitration was more precisely bought out in the landmark case of *Moses H Cone Memorial Hospital v Mercury Construction Corp*.²⁷ The court held that 'any doubt concerning the scope of arbitrable issues should be resolved in favour of arbitration. This

²³ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p.109.

²⁴ Ibid.

²⁵ Sutton David, el al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), op cit, p. 15.

²⁶ 134 F 3d 72, 76 (2d cir 1998).

²⁷ 460 US 1,24-25 (1983).

presumption gains more traction in ICA as opposed to the domestic realm. This principle was established in the case of *Deloitte Noraudit A/S v Deloitte Haskins & Sells*,²⁸ where the court held that ‘where there is an international relationship between the parties the presumption may be stronger.’

The Second Circuit court of the United States went further to pronounce itself on the factors that a court should take into account in adjudging a matter arbitrable or not in a two-prong inquiry. ‘Where any party raises the issue of whether or not a dispute has arisen or whether the dispute ought to proceed to arbitration, first, the court must establish expressly that the parties agreed to arbitrate and ‘if so whether the scope of the agreement encompassed the asserted claims. This is also referred to as jurisdictional and subject matter arbitrability. ‘²⁹

6.0 Categories of Disputes Generally not Considered Arbitrable

There are several issues upon which there exists general consensus on their lack of arbitrability, namely, crime patents, trademarks Anti –Trust, human rights, securities and bribery and corruption, among others. Further, ‘matters that affect third party are generally not capable of being solved by arbitration’.³⁰

6.1 Crime

A crime is a penal wrong meted upon a citizen but prosecuted in the name of the state. An obvious area where disputes are not arbitrable is criminal responsibility, where only judges and magistrates can punish criminals. There are very few occasions where a tribunal will determine whether a crime has

²⁸ US,9F 3D,655,666(2d Cir 1997).

²⁹ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p.108.

³⁰ Sutton David, el al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), op cit, p.16.

been committed but defence may be raised to a commercial claim which, if proved, could mean that one or both parties committed the crime.³¹ The culpability of the parties in ICA may be determined by the tribunal, but the prosecution and punishment remains within the purview of the state. Matters not capable of settlement by arbitration involve the state imposing a sanction on the parties such as criminal proceedings.

6.2 Patents, Trademarks and Copyrights

Patents, trademarks and copyrights are accorded to an individual to protect their innovation within the jurisdiction of the state. Whether or not a patent of trademark should be granted is plainly a matter for the public authorities of the state concerned, these being monopoly rights that only the state can grant. Any dispute relating to their grant or validity is outside the domain of arbitration. However, the owner of a patent or trademark often issues licences to one or more corporations or individuals, in order to exploit the patent or trademark. Any such dispute between the licensor and the licensee may be referred to arbitration.³²

6.3 Anti-Trust and Competition Law

In his book, the *Wealth of Nations*,³³ Adam Smith noted that ‘people in the same trade seldom met together even for merriment and diversion, but the conversion in a conspiracy against the public, or in some contrivance to raise prices.’ Issues of anti-trust often are aimed at swindling the public at large for the interest of capital-minded business men. ‘Issue of competition and anti-trust arising from the alleged breaches of securities legislation are arbitrable

³¹ Ibid.

³² Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p.139.

³³ Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edwin Cannan, ed. London: Methuen & Co., Ltd. 1904. Library of Economics and Liberty [Online] available from <http://www.econlib.org/library/Smith/smWN.html>, Book 10, para 2.

.... in so far as the agreement will be severable as a result of s.7 of the Arbitration Act 1996 and may survive such invalidity.’³⁴ The Tribunal determines whether or not the anti-trust legislation has been abridged but the State reserves the right to punish such offenders.’ The arbitration tribunal decides that there has been a breach of anti-trust legislation but does not award the punitive damages prescribed by the legislation because the tribunal regards the same as penal.’³⁵

This exception to arbitrability is informed by the distrust of cartels who could easily manipulate the market to the economic sabotage of a country. In the case of *American Safety Equipment Corp. v J.P Maquire & Co*,³⁶ it was held that ‘claims under the antitrust laws are not matters arbitrable....Anti-trust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. However, the jurisdiction of arbitral tribunals with regard to anti-trust matters is on the rise. Increasingly, disputes involving anti-trust laws which were formerly considered inappropriate for arbitration are being arbitrated.’³⁷ Later the Supreme Court by a majority vacated this position in *Mitsubishi Motors Corp. v Soler Chrysler-Phymouth Inc*³⁸ by deciding that antitrust issues arising out of international contracts are arbitrable despite the public importance of antitrust laws.

6.4 Bribery and Corruption

Bribery and corruption raise issues of important public policy concern. Corruption and bribery in procurement, allocation of tenders and procurement are issues keen in the public eye. ‘On an international level, there is a general

³⁴ Sutton David, et al, *Russel on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007), op cit, p.17.

³⁵ Ibid p.18.

³⁶ 391 F.2d 821 (2d Cir 1968).

³⁷ Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice*, op cit, p.31.

³⁸ 473 US 614. 105 CT Reports (1985) 3346 (1986) Ybk Comm 555-65.

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agreement that corruption should be stamped out. However, the practice of states do not always match up to their preaching ...virtuous proclamations which raise the fight of corruption to the level of international public policy, live side by side with fiscal rules, which from the point of view of taxation, confer a benefit on the practice.’³⁹

In the ICC arbitration No.110,⁴⁰ 10 percent commission was paid to Mr X of the value of the industrial development for a public energy project. Witnesses testified that the money was for “Peron and his boys “as the only way to “get business from Argentina in any scale.’ The contract was condemned by public decency and morality. The UNCITRAL Arbitration Rules addressed the dire reality of corruption and bribery in the public sector. In the case of *Himpurna California Energy v PT (Perse) Perusahann Listruik Negara*,⁴¹ the tribunal asserted:

The members of the tribunal do not live in an ivory tower. Nor do they view the arbitral process as one that operates in a vacuum divorced from reality. The arbitrators are well aware of the allegations that commitments by public-sector entities have made in relation to major projects....without adequate heed to their economic heed to public welfare, simply because they benefitted a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways.

Kenya has in past been ranked highly in the in the Transparency International corruption index.⁴² Arbitration is not the best avenue of dispute. As such, the

³⁹ Redfern Alan, et al, *Law and Practice of international Commercial Arbitration*, op cit, p.142.

⁴⁰ ICC Case no 1110 Arbitration Tribunal 277(1994).

⁴¹ Final Award dated 4th May 1999.

⁴² Transparency International, *Corruption Perceptions Index 2015*, available at <https://www.transparency.org/cpi2015/#downloads>

courts are vested with jurisdiction to determine such cases because they are custodians entrusted by the public to look out for their best interests in issues of economic crimes.

6.5 Fraud

This closely relates to the aforementioned, especially in procurement and the performance of contracts. Fraud raises a myriad of issues of related to public welfare, morality and public policy which are best handled by the court.

7.0 The Kenyan Experience

The Constitution of Kenya, under Art. 159,⁴³ accords constitutional credence to the importance of arbitration for the first time in Kenya's history. The Arbitration Act⁴⁴ (Kenyan Act) is notably silent on the issue of arbitrability. It should be borne in mind that the Kenyan Act is a reflection of the Model law which failed to reach a consensus during its drafting on issues on arbitrability. 'The 1995 Act does not directly lay down the requirement of arbitrability.'⁴⁵

Under order 46, the Civil Procedure Act⁴⁶ the Act provides that whether any party raises issue on whether or not a dispute has arisen, or whether the dispute ought to proceed to arbitration, the issue then becomes an issue of interpretation of contract and in this respect, the court has inherent jurisdiction to determine the matter.⁴⁷ When parties have agreed to commence arbitration

⁴³ The Constitution 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, subject to clause (3).

⁴⁴ The Arbitration Act, No. 4 of 1995, Chapter 49, revised 2010.

⁴⁵ Muigua Kariuki, *Settling Disputes Through Arbitration in Kenya*, (Glenwood Publishers, 2012), p. 34.

⁴⁶ The Civil Procedure Act, Cap 21, Laws of Kenya.

⁴⁷ Muigai Githu, *Arbitration Law and Practice in Kenya*, (Law Africa, 2011), p.69.

as a condition precedent to litigation this does not still usurp the court's inherent jurisdiction to determine the matter as per article 165 of the Constitution.⁴⁸

Criminal matters are generally thought not to be arbitrable. However, this position has arguably been challenged in Kenya in the case of *R v Mohammed Abdow Mohammed*,⁴⁹ where the accused was charged with murder the director of public prosecution requested that the charges be withdrawn on account of the settlement reached between the families of the accused and the deceased, and emphasised that under Article 159(1), the Constitution allows the courts to be guided by alternative dispute resolution(ADR). Justice Lagat, in discharging the accused, held that, under the unique circumstances of the present application, he was satisfied that the ends of justice would be met by allowing rather than disallowing the application. Though the case did not specially turn on arbitration, the acceptance of ADR by the courts is an indicator of the widening of scope of ADR and could indicate the progressive acceptance of the arbitrability of criminal matters.

8.0 Conclusion

There is no general consensus on the definition and ambit of arbitrability in ICA laws, domestic Kenyan statutes and practices. Issues of arbitrability are of paramount importance for they affect the enforceability of arbitration clauses and agreements alike. This paper has delved into the nexus between public policy and arbitrability, the various stages in the arbitration process when arbitrability may be contested, the presumption favouring the arbitrability of international commercial arbitration, matters generally considered not arbitrable, among other headings. The last limb of the

⁴⁸ Art. 165. (1) There is established the High Court, which— (3)(a) (a) unlimited original jurisdiction in criminal and civil matters.

⁴⁹ High Court at Nairobi Criminal case 86 of 2011.

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discussion demystified the evolving nature of subject matters considered arbitrable under Kenyan laws and recent judicial decisions.

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Reflections on Public Policy in International Commercial Arbitration – A Kenyan Perspective

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Abstract

This article contains reflections on the concept of public policy in international commercial arbitration from a Kenyan perspective. The first section explores definitions of public policy, to set the stage for a discussion of its application in international commercial arbitration. The second section presents its roots in international law and further in statute and case law in Kenya. This paper addresses the use of the concept of public policy as a shield to counter the recognition and enforcement of arbitral awards, as well as its use as a sword in attacking the arbitral award by setting it aside. It serves as a guide to parties in international commercial arbitration seeking to rely on a public policy argument in either an application under section 35 or section 37 under Kenyan law.

1.0 Introduction

The description of public policy, in the words of Burrough J in *Richardson v Mellish (1824)*,¹ while written hundreds of years ago, still holds true:

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

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¹ *Richardson v Mellish* [1824] All England Law Reports 229 (Court of Common Pleas, and Other Courts).

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Imagine mounting a horse that does not obey the rider's orders. You do not know in which direction it will dart, but all you know is that with its sheer power and strength, you will go somewhere, and hopefully you will not fall off! You will get one unforgettable ride. Nobody takes the unruly horse, unless there is no other horse in the stable. Similarly, public policy is, more often than not, the last option that a party resorts to where there is little hope of success in the other arguments in the party's stable.

Public policy is a darling to an aggrieved party in opposing recognition and enforcement of an arbitral award, and similarly in seeking setting aside of an arbitral award.² A party would normally pursue all the avenues possible within the confines of the law, and only when these fail, is public policy called out.³ This does not only apply to arbitration. In litigation, the issue of public policy is also under debate, with its scope coming into question.⁴

This article addresses the use of the concept of public policy, as a shield to counter the recognition and enforcement of arbitral awards, as well as its use as a sword in attacking the arbitral award by setting it aside. It serves as a guide to parties in international commercial arbitration seeking to rely on a public policy argument in either an application under section 35 or section 37 under the Kenyan law on arbitration.

² Sameer Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?' (2011) 5 Transnational Dispute Management <<http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf>> Accessed 10 June 2016; Justinas Jarusevicius, 'Lithuania Has Restrained the Unruly Horse of Public Policy' [2015] Kluwer Arbitration Blog Kluwer Arbitration Blog <<http://www.kluwerarbitrationblog.com/2015/11/12/lithuania-has-restrained-the-unruly-horse-of-public-policy/>> Accessed 16 March 2016.

³ *Richardson v Mellish (1824)*; Justinas Jarusevicius, 'Lithuania Has Restrained the Unruly Horse of Public Policy' op cit.

⁴ Christopher S Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 4 Penn State Law Review 1227, 1228.

2.0 Unpacking the Concept of Public Policy

The concept of public policy in Kenya is well founded in the various pronouncements of Justice Ringera (as he then was) in the case of *Christ for All Nations v Apollo Insurance Company Limited*.⁵ While public policy may be an effective tool to successfully argue an application, the tenets must be well understood for an effective application. Justice Ringera stated:

*“... I take the view that although public policy is a most broad (sic) concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that 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 and morality. The first category is clear enough. ...”*⁶

The public policy argument, therefore, gains its definition in Kenya from the elements that must be proved for an application based on this tenet to pass. First, an arbitral award may be argued to be against the public policy of Kenya where it is against the laws of Kenya. The laws delineate what is allowed by the public in the country. This limb is ‘straightforward’,⁷ because it may be directly shown that the arbitrator acted in violation of a particular positive law. Secondly, an arbitral award may be found to be against public policy where there is matter that is inconsistent with the national interest of the country. This would include a situation where the award is against ‘the interests of national defence and security, good diplomatic relations with friendly nations,

⁵ *Christ for All Nations v Apollo Insurance Company Limited* [2002] High Court of Kenya Civil Case 499 of 1999, 2 EA 366.

⁶ *Patrick Muturi v Kenindia Assurance Company Limited* [2016] High Court of Kenya at Meru Civil Suit 114 of 1990, eKLR; *Christ for All Nations v Apollo Insurance Company Limited* (n 7); *APA Insurance Co Ltd v Chrysanthus Barnabas Okemo* [2005] High Court at Nairobi Miscellaneous Application 241 of 2005, eKLR.

⁷ *Christ for All Nations v Apollo Insurance Company Limited* (n 7).

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and the economic prosperity of Kenya’.⁸ This suggests that the interest of the country must be prioritised by the courts.

The third consideration in a public policy argument is a matter that is against justice and morality of the people. This is a problematic aspect because from a moral relativism perspective, the definitions of justice and morality may vary from one country to another.⁹ This makes the public policy argument differ from state to state, especially where it concerns international commercial arbitration with individuals from different jurisdictions. However, some of the aspects of this limb that are accepted universally is that the public policy argument may be relied on where ‘the award was induced by corruption or fraud’.¹⁰

The nebulous concept of public policy is not only problematic in Kenya, but the world over.¹¹ The longstanding interpretation of the meaning of the public policy argument in Kenya, made by Justice Ringera, arose from a decision of the Supreme Court of India. In *Renusagar Power Co. v General Electric Co.*,¹² the Supreme Court of India presented the position of the public policy argument from the Convention on the Recognition and Enforcement of

⁸ Ibid.

⁹ Thomas Nagel, ‘The Problem of Global Justice’ [2005] *Philosophy and Public Affairs* <<http://philosophyfaculty.ucsd.edu/faculty/rarneson/NAGELglobaljustice.pdf>> Accessed 19 June 2016; Katinka J.P. Quintelier, Delphine De Smet and Daniel M.T. Fessler, ‘The Moral Universalism-Relativism Debate’ (2013) 27 *Klesis – Revue philosophique* <<http://www.revue-klesis.org/pdf/Klesis-philosophie-experimentale-8-Katinka-J.P.-Quintelier-Delphine-De-Smet-Daniel-M.T.-Fessler-The-moral-universalism-relativism-debate.pdf>> Accessed 19 June 2016.

¹⁰ *Christ for All Nations v Apollo Insurance Company Limited* (n 7).

¹¹ Kojo Yelpaala, ‘Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California’ (1989) 2 *Transnational Law* 379, 387.

¹² *Renusagar Power Company Limited v General Electric Company* [1993] Supreme Court of India 1994 AIR 860, 1994 SCC Supl. (1) 644.

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Foreign Arbitral Awards (New York, 1958) (the ‘New York Convention’)¹³, and from decisions of the courts in India, England, the United States of America, France and Australia. The court sifted through the decisions of different courts at different levels of jurisdiction, each of which rendered their minds to the concept of public policy. The conclusion of the court formed the basis for the public policy definition under Kenyan law. The Court stated that a matter would be contrary to the public policy of the country where it is ‘contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.’¹⁴ While this is not an exhaustive definition, it serves as the platter on which the courts in Kenya have built the concept of public policy.

Public policy may be described at 3 different levels: domestic public policy, international public policy, and transnational public policy.¹⁵ A finding that an arbitral award is against the public policy of one state, such as Kenya, indicates a situation where the award is in conflict with the country’s domestic public policy.¹⁶ However, in international commercial arbitration in general, the concept of ‘international public policy’ arises.¹⁷ International public policy is ‘domestic public policy applied to foreign awards and its content and application remains subjective to each State’.¹⁸ Prevention of vices such as

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

¹⁴ *Renusagar Power Company Limited v General Electric Company* op cit.

¹⁵ Maria Pavlidou, ‘Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Commercial Arbitration’ (LLM Dissertation, International Hellenic University 2013) 13 – 15
<https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/284/Maria%20Pavlidou_4399_assignsubmission_file_Maria.Pavlidou.pdf.pdf?sequence=1> Accessed 20 June 2016.

¹⁶ Ibid.

¹⁷ *World Duty Free Company Limited v The Republic of Kenya* [2006] International Centre for Settlement of Investment Disputes (ICSID), Washington DC ICSID CASE NO. ARB/00/7.

¹⁸ Ibid 138.

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corruption and bribery is the subject of numerous legal texts under international law and also under the laws of many states in the world, therefore, presenting the issue as an example of international public policy considerations.¹⁹

In *World Duty Free Company Limited v The Republic of Kenya*,²⁰ a tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC, observed that ‘States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation’.²¹ The tribunal concluded that it could not support the enforcement of a contract which was concluded on the strength of a bribe by a company to a Kenyan government official because bribery and corruption are against international public policy.²² Transnational public policy, however, does not rely on the public policy considerations of individual states, but rather leans on the general conscience of the international sphere, being the ‘international consensus on accepted norms of conduct.’²³

While there is no central definition of public policy, it has some attributes that are similar regardless of the jurisdiction in which it is applied, being the relativity, extra-territoriality, and fundamentality of the concept.²⁴ First, public policy is geographically relative, meaning it has a different application depending on which jurisdiction it is being applied in.²⁵ On this same limb,

¹⁹ *World Duty Free Company Limited v The Republic of Kenya* op cit.

²⁰ Ibid.

²¹ Ibid 146.

²² Ibid 157.

²³ Maria Pavlidou (n 17) 13 – 15.

²⁴ Obinna Ozumba, ‘Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency’ (2009) 1 20.

²⁵ Ibid.

public policy is chronologically relative, meaning it changes from time to time.²⁶ Therefore, the public policy at the time that a party intends to rely on an arbitral award may be different from the public policy considerations present in the jurisdiction 10 years before. Secondly, the extra-territoriality of public policy is exhibited where a state intends to protect its own people from the introduction of foreign elements from other jurisdictions that may appear to bring harm to the nationals in the enforcement state.²⁷ Thirdly, the fundamentality of public policy points to the centrality of the values that the state seeks to protect: being justice and morality of its people.²⁸ Though the particular activities or trends considered to be against public policy may vary, the above attributes of public policy cut across the elusive definitions.

3.0 Public Policy argument in the Law

This section provides an appreciation of the place of the public policy argument in the law. An understanding of this illusory concept allows an informed discussion of its application in international commercial arbitration. A clear understanding of what the concept entails enables a losing party to properly articulate how this aspect affects an arbitral award. The need for a conceptualization of public policy is clear in light of the fact that a losing party, in proceedings challenging an arbitral award, would in default take a public policy argument but unfortunately do so without a full appreciation of its nature, and fail to bring out its application correctly.²⁹

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23 Arizona Journal of International & Comparative Law <http://www.tblaw.com/downloads/publications/mlus-journal-note-23-ariz-j-intl-comp-l-747-466748_4.PDF> Accessed 20 June 2016.

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The international community recognised that the public policy argument would be a useful inclusion in proceedings to challenge the recognition and enforcement of an arbitral award, and embodied this in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at the United Nations Conference on International Arbitration, held at New York in 1958 (the ‘New York Convention’).³⁰ At Article V, the New York Convention sets out the international standard for the public policy argument:

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

...
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

The provision of the New York Convention for the public policy argument underscores the fact that public policy is state-specific. The public policy of the people in one state may not be the same as the public policy of the citizens of a different state, even where the states in question share common borders. The public policy argument in the New York Convention was adopted from the Convention on the Execution of Foreign Arbitral Awards concluded in Geneva in 1927 (the ‘Geneva Convention’).³¹ However, the Geneva Convention distinguished between an award being ‘contrary to the public policy’ of the country in which the award is sought to be relied upon, and the ‘principles of the law’ of that country. The omission of the distinction between these two items appears to acknowledge the proposition that an award that is against the principles of the law of a country would contemporaneously be against the public policy of that country.³²

³⁰ New York Convention (n 15).

³¹ Convention on the Execution of Foreign Arbitral Awards 1927.

³² *Christ for all Nations V Appollo Insurance Co.Ltd* [2002]; *Renusagar Power Company Limited v General Electric Company* op cit.

The public policy argument may arise either in proceedings to set aside an arbitral award, or to refuse the recognition and enforcement of a foreign arbitral award.³³ The difference between the effect of these two provisions exemplified in sections 35 and 37 respectively, of the Arbitration Act of 1995, is illustrated in the following diagram:

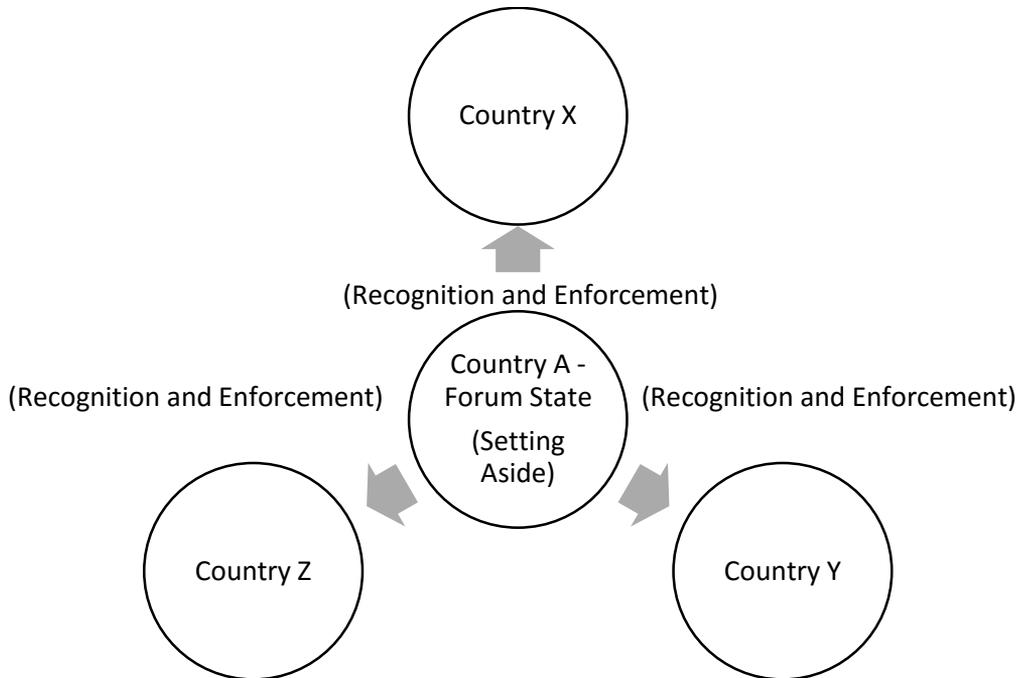


Fig: Public Policy in Setting Aside contrasted against Recognition and Enforcement, Source: Authors

The illustration above shows Country A, the jurisdiction in which the arbitral tribunal carries out the arbitration. Countries X, Y and Z represent the jurisdictions in which the ‘winner’ of the arbitration seeks to have the arbitral award recognised and enforced. By way of example, the ‘loser’ of the arbitration would ideally have assets in Countries X, Y, and Z, which the

³³ United Nations Commission on International Trade Law (UNCITRAL), ‘Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006’ (UNCITRAL) para 44.

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winner seeks to attach. Each of these countries has a different public policy, based on the societal differences. Where the public policy argument succeeds in Country A during proceedings seeking to set aside the arbitral award, then the entire award crumbles and cannot be moved to the next stage of recognition or enforcement in Countries X, Y or Z.³⁴ However, where the arbitral award is in line with the public policy of Country A, but is against the public policy of Country X, the winner may still move the courts in Countries Y and Z for the recognition and enforcement in their respective jurisdictions.³⁵

The public policy argument may be used in proceedings to set aside an arbitral award. The Explanatory Note by the United Nations Commission on International Trade Law (UNCITRAL) secretariat on the 1985 Model Law on International Commercial Arbitration, as amended in 2006,³⁶ 'is to be understood as a serious departure from fundamental notions of procedural justice'.³⁷ The principles of natural justice must be upheld in the arbitral process for international commercial arbitration carried out in a particular state to gain any legitimacy on the international front.³⁸ This highlights the importance of clarifying the public policy argument in international commercial arbitration. In order to make Kenya a conducive environment for the conduct of international commercial arbitration, the courts must uphold international standards of procedural justice. Hence, the need to discuss the bounds of the public policy argument in the country.

³⁴ Ibid; New York Convention (n 15), art V (1) (e).

³⁵ United Nations Commission on International Trade Law (UNCITRAL) op cit 44.

³⁶ Ibid.

³⁷ Ibid 35.

³⁸ James Leslie Bain Allsop, 'International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region' (2nd Annual Global Arbitration Review, Sydney, Australia, 11 November 2014) <<http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20141111>> Accessed 19 June 2016.

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In Kenya, an application to the High Court to set aside an arbitral award must fall within the narrow confines of section 35 of the Arbitration Act. Most applications are brought under section 35(2)(b) of the Arbitration Act of 1995, under which the High Court may, *suo motu*, set aside the arbitral award if it finds that the public policy argument is well predicated.³⁹ In *Anne Mumbi Hinga v Victoria Njoki Gathara*,⁴⁰ the Court of Appeal of Kenya discusses the public policy argument in an appeal following an objection to a section 36 application for leave to enforce an arbitral award. The Court stated that while public policy ‘can never be defined exhaustively and should be approached with extreme caution’, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the State’s powers are exercised’.⁴¹ Through this statement, it appears that the definition of public policy is so wide that it may not possibly be properly defined, and thus the courts may have a wide avenue through which to interfere with an arbitral award.⁴² In this case, the court dismissed the application to set aside the award because the applicant failed to prove that there were any grounds relating to conflict with the public policy of Kenya.

There are various cases in which applicants unsuccessfully seek to rely on the public policy argument in an application under section 35. In *APA Insurance Co. Ltd v Chrysanthus Barnabas Okemo*,⁴³ the applicant sought to set aside the arbitral award, raising the public policy argument as the first ground on

³⁹ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited, 2012), 199.

⁴⁰ *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] Court of Appeal of Kenya at Nairobi Civil Appeal 8 of 2009, eKLR.

⁴¹ *Ibid.*

⁴² Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, op cit, 171.

⁴³ *APA Insurance Co. Ltd v Chrysanthus Barnabas Okemo* op cit.

the face of the application. The applicant relied on the contemplations of Justice Aaron Ringera in *Christ for All Nations v Apollo Insurance Company Limited*.⁴⁴ Also, in *Patrick Muturi v Kenindia Assurance Company Limited*⁴⁵ the applicant, while relying on Justice Ringera's rendition of the definition of public policy, did not raise sufficient reason for the High Court to set aside the arbitral award based on the public policy argument. Both of these cases were applications under section 35, to set aside an arbitral award. Section 35 of the Arbitration Act of 1995 states as follows:

- “35. Application for setting aside arbitral award*
(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
(2) An arbitral award may be set aside by the High Court only if—
...
(b) the High Court finds that—
...
*(iii) the award is in conflict with the public policy of Kenya.”*⁴⁶

Similarly, the public policy argument may be raised where there is an application for refusal of recognition of a foreign arbitral award brought under section 37 of the Arbitration Act of 1995. In *Glencore Grain Limited v TSS Grain Millers Limited*,⁴⁷ the High Court of Kenya at Mombasa considered an application for enforcement of a foreign arbitral award under section 36 of the Arbitration Act. The respondents relied on section 37 of the Arbitration Act of 1995, arguing, *inter alia*, that if the court agreed with the applicant and allowed the recognition and enforcement of the arbitral award in the country,

⁴⁴ *Christ for all Nations V Appollo Insurance Co.Ltd* [2002].

⁴⁵ *Patrick Muturi v Kenindia Assurance Company Limited* op cit.

⁴⁶ Arbitration Act 1995 s 35.

⁴⁷ *Glencore Grain Limited v TSS Grain Millers Limited* [2002] High Court of Kenya at Mombasa Civil Suit No 388 of 2000, Kenya Law Reports.

then the court would be upholding a contract that was against the public policy of the country.⁴⁸ Section 37 of the Arbitration Act states as follows:

*“37. Grounds for refusal of recognition or enforcement
(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—*

...

(b) if the High Court finds that—

...

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.”⁴⁹

An argument under section 37 on public policy would be employed in a situation where a party intends to have a foreign arbitral award, made in another jurisdiction, recognised in Kenya as a valid conclusion of the arbitral process.⁵⁰ It may also be used to argue against the enforcement of an arbitral award, even though the award was not made in Kenya.⁵¹ In *Glencore Grain Limited v TSS Grain Millers Limited*,⁵² the High Court of Kenya held that a contract for the supply of white maize which was certified as unfit for human consumption, was against the public policy of Kenya because it would cause a risk to the health of the people of Kenya if the maize were to be ultimately consumed.⁵³ The Court held the view that to support compensation of the party providing this maize would be akin to furthering injustice because the Court would be supporting an entity that was violating Kenyan health laws.⁵⁴

⁴⁸ Ibid.

⁴⁹ Arbitration Act 1995.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *Glencore Grain Limited v TSS Grain Millers Limited* op cit.

⁵³ Ibid.

⁵⁴ Ibid.

Similarly, the courts would not support a party whose cause would lead to a violation of the laws of another country. The court should not condone recognition or enforcement of an arbitral award that would further an illegality under the laws of another state. In *Tanzania National Roads Agency v Kundan Singh Construction Limited*,⁵⁵ the High Court of Kenya at Mombasa found that the arbitral tribunal acted in violation of the laws of the Republic of Tanzania, in failing to apply the laws of the country, in disregard for the arbitral clause which stated that ‘any dispute shall be referred to arbitration and shall be governed by the law of Tanzania’.⁵⁶ The High Court of Kenya noted that it would be against the public policy of Kenya, to allow a party to benefit from an award made contrary to the laws of Tanzania, and dismissed the application to recognise and enforce the arbitral award in Kenya.⁵⁷

4.0 Conclusion

Public policy is a darling to an aggrieved party in opposing recognition and enforcement of an arbitral award, and similarly in seeking setting aside of an arbitral award.⁵⁸ A party would normally pursue all the avenues possible within the confines of the law, and only when these fail, is public policy called out.⁵⁹ This paper has addressed the use of the concept of public policy as a shield to counter the recognition and enforcement of arbitral awards, as well as its use as a sword in attacking the arbitral award by setting it aside. It serves as a guide to parties in international commercial arbitration seeking to rely on

⁵⁵ *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] High Court of Kenya at Mombasa Miscellaneous Civil Application 171 of 2012, eKLR.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Sameer Sattar, ‘Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?’ op cit; Justinas Jarusevicius, ‘Lithuania Has Restrained the Unruly Horse of Public Policy’ op cit.

⁵⁹ *Richardson v Mellish (1824)*; Justinas Jarusevicius, ‘Lithuania Has Restrained the Unruly Horse of Public Policy’ op cit.

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a public policy argument in either an application under section 35 or section 37 under Kenyan law on arbitration.

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