

Alternative Dispute Resolution



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Editor's Note

Welcome to the *Alternative Dispute Resolution Journal* Vol. 7 No. 1, 2019, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The Journal has grown from strength to strength and it is now a useful reference point for Alternative Dispute Resolution (ADR) scholars worldwide.

The Journal is published in hard copy and also online at www.ciarkenya.org.

The Journal is peer reviewed and refereed so as to ensure quality.

ADR has continued to be relevant; negotiation, mediation, conciliation, arbitration, alternative/traditional justice systems are all necessary in the Access to Justice discourse.

The current Issue covers a wide range of current and emerging themes and issues within the ADR and access to justice including: the use of technology to cut costs in International Commercial Arbitral Proceedings; viability of Restorative Justice as a tool for access to for access to justice in Gender Based Violence; the relevant tools and skills for building an effective arbitral practice in Africa; the current place of Alternative Dispute Resolution in the Kenyan Criminal Justice System; a discussion on the place and jurisdiction of customary justice systems in Kenya; the current jurisprudence on the role of Kenyan courts in arbitration proceedings; the effectiveness of arbitration in performance bonds disputes in construction; the basic requisite skills in effective practice of mediation; viability of arbitration of Community Claims as "Human Rights" claims in Sub-Saharan Africa; applying Blockchain technology to ADR; the basics of international commercial arbitration and the entrenchment of the same in Kenya; the effectiveness of the East African Court of Justice as an International Arbitral tribunal; use of ADR In intergovernmental disputes in Kenya's Devolved System of Governance; the current status of online dispute resolution in Kenya; the salient considerations in constitution of disputes boards; and a case review on the Kenya Airports Authority v World Duty Free Co. Ltd T/A Kenya Duty Free Complex case.

ADR is no longer “Alternative”. It should indeed be called ‘Appropriate Dispute Resolution’ at least in the Kenyan context.

Recent baseline studies have revealed that ADR’s use transcends many sectors. Debate on how best to institutionalise the wide spectrum of ADR without losing its essence is now on among ADR scholars, practitioners and policy makers.

The Constitution of Kenya recognises ADR mechanisms as a tool for the enhancement of access to justice. This has mainstreamed ADR and made the Journal even more relevant.

The Editorial team aims at continuous improvement of the Journal. Feedback is therefore received and reflected on so as to take the Journal to greater heights.

CIArb-K takes this opportunity to thank the Publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to keep going, publish in time and to reach our worldwide audience.

Dr. Kariuki Muigua, Ph.D., FCIArb (Chartered Arbitrator)

Editor

Nairobi, March, 2019.

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Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings: Kariuki Muigua & Jeffah Ombati

Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings

By: Kariuki Muigua* & Jeffah Ombati**

Abstract

Expeditious access to justice in commercial and business transactions is a fundamental human right whose inviolability cannot be compromised. Alternative Dispute Resolution (ADR) and especially arbitration, is considered as one of the most viable means of access to justice due to some intrinsic advantages over litigation. Notably, it bridges the gaps and challenges that arise from transacting across borders as well as managing the disputes that come with such transactions. The developments in technology have changed the way in which people communicate and interact with one another. This has inevitably impacted the ways in which disputes are also managed and resolved. Various technological platforms such as email, video/audio conferencing, online platforms, electronic signatures and e-filing have already manoeuvred their way into the realm of arbitration. Technology has both positive and negative consequences that have the potential to impact and disrupt arbitral proceedings in a myriad of ways. This necessitates a discussion on achieving expeditious justice through harnessing technology for cost effective arbitral proceedings.

1.0 Introduction

Globally, international commercial arbitration has been regarded as the legal bridge that transcends the differences in legal systems to enable the business

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and commercial people to manage their disputes without having to deal with the potential challenges faced by these legal systems.¹

Scholars have observed that ‘the high degree of uncertainty and risks associated with litigating international business disputes in national courts have been contributing factors in the prominence of arbitration as the preferred method of resolving international business and commercial disputes’.² The challenges necessitating the use of international commercial arbitration in international business and commercial transactions disputes are summarised as follows:

International business and commercial transactions are affected by significant levels of risk and uncertainty. The more complex and lengthy the contractual relationship, the higher the likelihood of disputes arising between contracting parties.³ International business transactions also have increased uncertainty and risk due to financial and monetary factors (e.g. the cost and availability of capital and currency exchange fluctuations), political and legal factors (e.g. the possibility of war, revolution, violent civil unrest, nationalisation, inconvertibility of local currency and precipitous government acts or omissions), language differences (e.g. linguistic barriers created by parties having to communicate in a foreign language and use of interpreters), communication and logistical factors (e.g. difficulties created by geographical distances and limitations of technology), and cross-cultural barriers and difficulties posed by the interaction of parties with different cultural backgrounds.litigating disputes arising in international business and

¹ See McConaughay, P.J., ‘The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles’ *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, pp. 11-12; See also Muigua, K., ‘Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration,’ *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution*, Vol. 3, No 1, (2015), pp.45-87.

² Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International, 2003, p.7. Available at https://books.google.co.ke/books?hl=en&lr=&id=PZKHwaTNz1oC&oi=fnd&pg=PA1&ots=zm686eQWLI&sig=Cb8bgLUuo_clkGZmo9F-34bUpX0&redir_esc=y#v=onepage&q&f=true [Accessed on 3/12/2018].

³ *Ibid*, p.4.

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commercial transactions in national courts pose various problems and creates legal complexities given the potential involvement of several different legal systems. It may be difficult for the parties to find the most appropriate forum to litigate the dispute.⁴

International commercial arbitration is associated with a number of advantages and the same is also considered as an important method of dealing with disputes in private cross-border or transnational economic transactions.⁵ These advantages can be summarised as follows:

*The major advantages are a relatively well-defined legal structure for international enforcement of arbitration agreements and arbitral awards, considerable insulation from the application of national public policies extrinsic to the intentions of the parties, procedural flexibility, free choice of decision-makers, and confidentiality. Disadvantages include additional costs and less effective tools of discovery.*⁶

Generally, arbitration is considered potentially cost effective.⁷ However, it must be clarified that this depends on a number of factors including the willingness of the parties involved to move the process forward. Even where parties are willing to save time and costs, some resultant costs may be inevitable. For instance, in most cases, especially those involving parties from different jurisdictions, the parties will have chosen a jurisdiction different from their own, that is the juridical seat and the venue, as a measure to avoid bias, and this usually means inflated costs. With time, commercial arbitration has also become very expensive in terms of filing fees and the legal fees. This usually results in very high final costs of the arbitral proceedings. It is therefore important that

⁴ Ibid, p.4.

⁵ Ibid, p.1.

⁶ Nelson, S.C., "Planning for Resolution of Disputes in International Technology Transactions," *Boston College International and Comparative Law Review* 7, no. 2 (1984): 269 at p.279.

⁷ Shah, A., "Using ADR to Resolve Online Disputes." *Richmond Journal of Law & Technology* 10, no. 3 (2004): 25.

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measures aimed at avoiding unnecessary costs and cutting down those that can, should be explored by the parties at every stage of the proceedings.

It is against this background that this paper seeks to explore the opportunities that information technology presents to parties in international commercial arbitration, as a means of keeping the costs of these processes at a minimum or eliminating them all together, where possible.

Arbitration is one of the ADR Mechanisms in common use in the modern world.⁸ It has widely been used in settling disputes both at the international and the national levels.⁹ For instance, arbitration has been applied in the settlement of several disputes in numerous areas of law including commercial, family and environmental.¹⁰ Disputants often resort to settle their disputes through arbitration due to its several advantages which include: party autonomy to determine the law and seat of arbitration, flexibility; cost effectiveness and confidentiality.¹¹

2.0 International Arbitration and Expeditious Access to Justice

The positive attributes of arbitration enable disputants to get expeditious settlement of disputes. The top benefits of arbitration are specialized expertise, time savings and privacy.¹² Arbitration of international disputes provides

⁸ Muigua K., *Settling Disputes Through Arbitration in Kenya*, 3rd Edn, Glenwood Publishers

Ltd, Feb., 2017, pp. 34.

⁹ *Ibid.*

¹⁰ Muigua K., *Settling Disputes Through Arbitration in Kenya*, op. cit.

¹¹ Muigua, K., *Resolving Conflicts Through Mediation in Kenya*, 2nd Edn Glenwood Publishing Nairobi, 2017, p. 12.

¹² Gary Benton, Chris Compton & Les Schiefelbein, "Cost is the Top Tech Litigation Problem, Survey Shows Arbitration Strongly Preferred for Specialized Expertise." Available at

<https://svamc.org/wp-content/uploads/SVAMC-2017-Survey-Report.pdf> [Accessed November 28, 2018].

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awards that are enforceable through worldwide treaty conventions.¹³ Besides, arbitration offers a private decision-making process that is favoured particularly where confidential business information or trade secrets are at issue.¹⁴ Although cost, time and expertise are concerns in both litigation and arbitration, the opportunity for decision-making by specialized practitioners and time savings are viewed as significant advantages of arbitration compared to litigation. Privacy, streamlined processes and flexibility are also ranked high as benefits provided by arbitration.¹⁵ It is advisable that parties choose arbitrators with the right technology expertise to manage the arbitral proceedings to limit costs and take advantage of the benefits and flexibility offered by arbitration.¹⁶ This in turn enhances provision of expeditious justice through efficient arbitral proceedings. The challenges facing litigation as a means of access to justice in international business and commercial transactions can be summarised as follows:

Two reasons traditionally given for the emergence of international commercial arbitration as a private dispute resolution system are: (a) the privacy of the arbitration process; and (b) that it allows each party to avoid being forced to submit to the foreign courts of the other. ..there is concern over potential disadvantage due to the perceived national bias by the courts and lawyers, lack of familiarity with the jurisdictions language and procedures, and layers of appellate review causing further delay and uncertainty in the ultimate resolution of the dispute....the perceived neutrality of the arbitration forum as

¹³ Ibid; See also Martinez, R., "Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions," *The International Lawyer* (1990): 487-518.

¹⁴ Ibid; Blackman, S.H. and McNeill, R.M., "Alternative Dispute Resolution in Commercial Intellectual Property Disputes," *American University Law Review* 47, no. 6 (1998): 5; Gu, W., "Confidentiality Revisited: Blessing Or Curse In International," *UCLAL REV* 949 (2000): 1085.

¹⁵ Ibid, "Cost is the Top Tech Litigation Problem, Survey Shows Arbitration Strongly Preferred for Specialized Expertise," op cit; Gu, W., "Confidentiality Revisited: Blessing Or Curse In International," *UCLAL REV* 949 (2000): 1085.

¹⁶ Ibid; Sussman, E. and Wilkinson, J., "Benefits of arbitration for commercial disputes." Retrieved June 20 (2012): 2014.

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distinct from the influences of a state's national courts is one of the primary motivations for recourse to arbitration.¹⁷*

Notably, one of the challenges associated with the use of litigation in both domestic and transnational disputes is the escalation of costs due to the long periods of time usually taken to deal with these disputes. Such costs range from court fees, legal fees and other miscellaneous costs that may ultimately hinder access to justice for the parties involved.¹⁸ However, the issue of escalating costs may not be unique to litigation as the costs involved in international arbitration have also continually increased to sometimes prohibitive amounts.¹⁹ This threatens one of the bestselling points of using international arbitration-cost effectiveness. This may be attributed to the different jurisdictional issues and the need for a neutral venue and juridical seat as well as the growing complexity of international arbitration proceedings. This is well captured by the International Chamber of Commerce (ICC) in the following words:

.....if the overall cost of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing the costs connected with the parties' presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence. Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner that leads to needless duplication. The increasing and, on occasion, unnecessary complication of the proceedings seems to be the main explanation for the long duration and high

¹⁷ Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*, op. cit., pp.11-12; See also Leahy, E.R. and Bianchi, C.J., "The Changing Face of International Arbitration," *Journal of International Arbitration*, vol.17, no. 4 (2000): 19-61.

¹⁸ See generally, Gotanda, J.Y., "Awarding Costs and Attorneys' Fees in International Commercial Arbitrations," *Michigan Journal of International Law* 21, no. 1 (1999): 1-50.

¹⁹ Halket, T.D., "The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties," *John's L. Rev.* 81 (2007): 269, at p.269.

*Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings: Kariuki Muigua & Jeffah Ombati
cost of many international arbitrations. The longer the proceedings, the more expensive they will be.*²⁰

The next section explores the various ways in which information technology can be harnessed to enable the parties save on the total costs of the arbitral proceedings.

3.0 Harnessing Technology for Cost Effective Arbitral Proceedings

One of the factors that have contributed to an increasingly globalised economy has been the innovations in information technology and computer networks.²¹ Closely associated with this is the realisation that, 'in the context of the Internet, where parties located in different corners of the world can contract with each other at the click of a mouse, litigation of online disputes is often inconvenient, impractical, time-consuming and prohibitive.'²²

The developments in technology have changed the way in which people communicate and interact with one another.²³ This has inevitably impacted the ways in which disputes are managed and resolved.²⁴ Various technological platforms such as email, video/audio conferencing, online platforms, electronic signatures and e-filing have already maneuvered their way into the realm of arbitration.²⁵ The greatest concern is whether these technological platforms have

²⁰ International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007, p.1. Available at <http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf>

²¹ Lynch, K. and Lynch, K.L., *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International, 2003, op. cit., p. 1.

²² Shah, A., "Using ADR to Resolve Online Disputes," *Richmond Journal of Law & Technology* 10, no. 3 (2004): 25 at p.25.

²³ Blake S., Heather JB, & Stuart S., *A Practical Approach to Alternative Dispute Resolution*. 2nd Edn Oxford University Press, 2016, pp. 67.

²⁴ Ibid.

²⁵ Soares, Francisco Uribarri, "New Technologies and Arbitration," *Indian J. Arb. L. 7* (2018): 102-103; See also International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007; Negi, C., "Concept of Video Conferencing in ADR: An Overview-Access to Justice." (2015). Available at

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attained fully mainstream application in arbitration, and their impact in the conduct of arbitral proceedings.²⁶

Technology has both positive and negative consequences that have the potential to impact and disrupt arbitral proceedings in a myriad of ways.²⁷ This necessitates a discussion on the present technologies being used in arbitration and the potential future technologies whose usage may have an impact in arbitration.²⁸ Thus, this paper entails comprehensive discussion on achieving expeditious justice through harnessing technology for cost effective arbitral proceedings. It mainly ventures into the advantages and risks associated with the use of technology in arbitral proceedings. Consequently, it uses this analysis to make a case for the enhanced regulatory framework and information security for effective usage of technology in arbitral proceedings.

Digital technologies play a fundamental and an increasingly central role in arbitration.²⁹ Technology is particularly used in e-briefs to purposefully eliminate the need for hard-copy submissions, presentation technology and

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662344 [Accessed on 10/12/2018]; Ekwenze, S.A., "Video Conferencing in Arbitration: An Overview." (2012). Available at <https://coou.edu.ng/resources/video-conferencing-in-arbitration.pdf> [Accessed on 10/12/2018]; "Use of Telephonic and Video Conferencing Technology in Remote Court Appearances," *A Supplemental Report to a State Justice Institute (SJI) Funded Project*, June 20, 2016. Available at <https://www.ncsc.org/~media/Microsites/Files/Civil%20Justice/UseTelephonicVideoTechnology.ashx> [Accessed on 10/12/2018].

²⁶ Ibid.

²⁷ Ibid; See also Kaufmann-Kohler, G. and Schultz, T., "The use of Information Technology in arbitration," *Jusletter* 5. Dezember (2005).

²⁸ Panjwani, P., *The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When?* April 27, 2018, Available at <http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/> [Accessed November 28, 2018].

²⁹ International Chamber of Commerce, *Three Takeaways on how Digital Technologies are Transforming Arbitration*, (Paris August 30, 2017) Available at, <https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/>

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technology consultants for managing documents during the hearing, and in persuasive presentations.³⁰ The following are some examples of the usage of technology in arbitration:

3.1 E-briefs

An e-brief is an interactive version of the submissions.³¹ A party or counsel in arbitration does not have to wait until the arbitral proceedings' hearing phase to persuasively apply technology.³² A first step in conducting a paper-free hearing is to begin using available technology solutions from the initial pleading.³³ Rather than searching through hundreds of PDF files or boxes of paper, an e-brief enables the tribunal to click on hyperlinks from the cites in the brief to all the referenced exhibits, legal authorities, witness statements and expert reports in an easily accessible digital format.³⁴ The e-brief has become more popular especially with the following challenges affecting the paper based system (in courts): Paper files are cumbersome to organize, difficult to retrieve quickly, and are subject to the access limitations of normal business hours; Paper files are usually only available to one person at a time, limiting the ability of a panel of judges or their clerks to access or work on files at home; and Paper files require multiple copies to file, distribute, maintain and store, all of which must be done manually with a risk that files will be lost or misfiled.³⁵

E-briefs provide the perfect affordable solution for tribunal members to easily review all submissions from the statement of claim through post-hearing briefs

³⁰ Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, Available at <https://globalarbitrationreview.com/chapter/1147795/the-effective-use-of-technology-in-the-arbitral-hearing-room> [Accessed November 28, 2018].

³¹ Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, op.cit.

³² Ibid.

³³ Ibid.

³⁴ Ibid; See also Jagusch, S., *Guide to Advocacy*, (Law Business Research Ltd., Nov 3, 2017).

³⁵ Crist, M.P., "The E-Brief: Legal Writing for an Online World," *New Mexico Law Review* 33, no. 1 (2003): 49, at p.52.

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in a joined-up manner.³⁶ In a nutshell, these submissions provide the arbitrator an opportunity to examine the submissions and evidence in a more holistic fashion thus enabling him to come up with a prudent award.³⁷

3.2 Electronic Submissions

Notably, whether it is an electronic arbitration or not, it is possible for arbitrators to settle the dispute without any hearings unless the parties have decided otherwise. Once the parties have determined the seat of arbitration, all proceedings and hearings could be held electronically and the arbitrators need only state the seat of arbitration in the award itself, as the parties determined, and sign the award.³⁸

Electronic submissions such as submissions via the email, yahoo and WhatsApp are cheaper and take a shorter time as compared to sending hard copies.³⁹ It facilitates delivery of documents to members at different jurisdictions within a shorter time, quickly and cheaply.⁴⁰ For instance, in arbitration cases with several exhibits and large bundles of briefs can be easily and quickly sent to the whole tribunal, whose members may be located indifferent jurisdictions, and also to the other counsel.⁴¹ This saves time and the costs of printing. A good example of active use of electronic submissions is the WIPO Electronic Case Facility (ECAF), which enables parties, the arbitral tribunal and the Center to file, store, and retrieve case-related submissions electronically.⁴² It is secure and allows for access from anywhere in the world using the Center's website. It takes the form of a case management system, a central database accessible via

³⁶ Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, op. cit; See also Crist, M.P., "The E-Brief: Legal Writing for an Online World," op. cit.

³⁷ Ibid.

³⁸ YÜKSEL, A.E.B., "Online International Arbitration," *Ankara Law Review* 4, no. 1 (2007): 83-93, at p.89.

³⁹ Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, op. cit

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Kaufmann-Kohler, G. and Schultz, T., "The use of Information Technology in arbitration," *Jusletter* 5. Dezember (2005), p.53.

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the Internet that allows participants in a case to submit documents online and to access a case overview, contact information, time tracking, docket listing, a finance overview, and a message board.⁴³

3.3 Artificial Intelligence

Artificial intelligence (AI) is defined as a field of computer science that includes machine learning, natural language processing, speech processing, expert systems, robotics, and machine vision.⁴⁴ Notably, there exist a number of artificial intelligent models, a detailed discussion of which goes beyond the scope of this paper.⁴⁵ The paper however highlights some of the ways in which such models can be explored in achieving cost effective arbitration proceedings. Artificial Intelligence (AI) aids in the automation of institutional arbitrations and case management by software.⁴⁶ AI can also aid in the prediction of costs, duration, and, perhaps more ambitiously, the merits of an arbitration.⁴⁷ For instance, in an effort to enhance quick resolution of disputes, arbitral institutions could, at the request of the parties or their agents, propose settlement ranges

⁴³ Ibid, p.53.

⁴⁴ Stothard, P., Plaistowe, M. and Dowling, C., "Jargon buster: legal technology" Navigating the hype, in *Norton Rose Fulbright Publication*, October 2017, p.27. Available at <http://www.nortonrosefulbright.com/files/20170925-international-arbitration-report-issue-9-157156.pdf> [Accessed on 13/12/2018].

⁴⁵ See Andrade, F., Novais, P., Carneiro, D. and Neves, J., "Conflict resolution in virtual locations," In *Information Communication Technology Law, Protection and Access Rights: Global Approaches and Issues*, pp. 33-50, IGI Global, 2010.

⁴⁶ Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango?* KLUWER ARB. BLOG (February 23, 2018), Available at <http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificialintelligencetimetango/><https://globalarbitrationreview.com/chapter/1147795/the-effective-use-of-technology-in-the-arbitral-hearing-room> [Accessed November 28, 2018].

⁴⁷ Ibid.

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based on arbitrations of similar size and complexity.⁴⁸ This could push the parties toward settlement.⁴⁹

AI can also aid in the augment human cognitive abilities and automate time-consuming labour.⁵⁰ A number of AI-powered products and services already exist to help lawyers parse through submissions, identify better legal authorities, review documents and agreements (e.g. predictive coding), estimate costs, and predict outcomes.⁵¹ A number of start-ups are focusing on disrupting the legal industry, with some already offering case management and forecasting services to the international arbitration community.⁵²

AI could also help with the appointment of arbitrators, the preparation of the award, and the simulation of judicial review.⁵³ Case management could be automated, or significantly streamlined with the aid of software, giving arbitrators more time to arbitrate.⁵⁴ Some practitioners have advocated for the

⁴⁸ Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango? op. cit;* Bellucci, E., Lodder, A.R. and Zeleznikow, J., "Integrating artificial intelligence, argumentation and game theory to develop an online dispute resolution environment," In *null*, pp. 749-754. IEEE, 2004.

⁴⁹ Ibid; Lodder, A. and Thiessen, E., "The role of artificial intelligence in online dispute resolution," In *Workshop on Online Dispute Resolution at the International Conference on Artificial Intelligence and Law, Edinburgh, UK.* 2003.

⁵⁰ Ibid; See also Carneiro, D.R., Novais, P., Andrade, F.C.P. and Neves, J., "Retrieving Information in online dispute resolution platforms: a hybrid method," In *Proceedings of the Thirteenth International Conference on Artificial Intelligence and Law*, pp. 224-228, ACM, 2011.

⁵¹ Ibid; Katz, D.M., "Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry," *Emory Law Journal* 62, no. 4 (2013): 909.

⁵² Ibid; International Bar Association, "Times are a-changing': disruptive innovation and the legal profession." (2016): 7-11.

⁵³ Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango? op. cit;* Nappert, S, "The Impact of Technology on Arbitral Decision Making - The Practitioner's Perspective," 2016. Available at https://www.researchgate.net/publication/303749723_The_Impact_of_Technology_on_Arbitral_Decision_Making_-_The_Practitioner's_Perspective

⁵⁴ Ibid; Chernick, R. and Neal, B.R., "Expediting Arbitration," available at

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use of AI in arbitration to help in the management of massive amounts of documentation.⁵⁵ Besides, albeit with reservations, it can be used to analyse arbitration or court decisions in order to statistically derive probabilities about how your own case is going to be decided, in what has also been termed as ‘predictive justice’.⁵⁶ Although there are various legal and ethical issues that may arise with the use of AI and technology in general⁵⁷, they are not within the scope of this paper.

3.4 Video Conferencing

Arbitral proceedings’ hearings can also take place through a video platform.⁵⁸ For instance, instead of having a venue of arbitration located in Nairobi that forces the arbitrators to travel to Nairobi, everybody stays in his or her office and uses the online platform to conduct the hearing.⁵⁹ For example, in the case of an international arbitration, parties can strive to ensure that tele-conferencing is used in the case of witnesses of fact and expert witnesses from abroad. This will save the parties the costs as well as time.⁶⁰

https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Chernick_Reeves_March_7.authcheckdam.pdf

⁵⁵ Hogan Lovells, “The future of arbitration: New technologies are making a big impact – and AI robots may take on “human” roles,” *Hogan Lovells Publications*, 21 February 2018. Available at

<https://www.hoganlovells.com/en/publications/the-future-of-arbitration-ai-robots-may-take-on-human-roles> [Accessed on 13/12/2018].

⁵⁶ Ibid.

⁵⁷ See Kemp, R., “Legal Aspects of Artificial Intelligence (v2.0),” 26 September 2018, available at <http://www.kempitlaw.com/wp-content/uploads/2018/09/Legal-Aspects-of-AI-Kemp-IT-Law-v2.0-Sep-2018.pdf> [Accessed on 13/12/2018].

⁵⁸ Soares, Francisco Uribarri, "New Technologies and Arbitration," *Indian J. Arb. L.* 7 (2018): 97.

⁵⁹ Ibid.

⁶⁰ International Chamber of Commerce, “Benefits of IT in arbitration outweigh risks, says new ICC report,” Paris, 12/04/2017. Available at <https://iccwbo.org/media-wall/news-speeches/benefits-arbitration-outweigh-risks-says-new-icc-report/> [Accessed on 13/12/2018].

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In summary, the use of videoconferencing in international commercial arbitration has been recommended because the use of the infrastructure will be:

more cost effective; the inconveniences of travelling will be eliminated; effect of any political factor in any country will not interfere with arbitration process; restriction of entry of any of the parties, arbitrators and witnesses will be eliminated; there will not be any diplomatic break – down or interference; there will not be need for transfer of funds to the venue of the arbitration proceeding for the administrative duties and convenience of arbitrators and witnesses; there will not be need for suitable rooms for hearing; shortage of hotel rooms for parties and arbitrators/witnesses will not arise; there will not be need for transportation facilities and hold – ups; need for support facilities, for instance shorthand writers and interpreters and so on, may not be there; the net cost will be very much less than the aggregate cost of rooms, air fare for all parties, arbitrators and witnesses; there will not be any need for justifiable, but paralyzing fear of flight due to terrorist attack and SARS; there may not be need for fear of natural disaster(s) where it normally occurs like earthquake, TSUNAMI, volcano etc.; phobia for unfamiliar forum will be eliminated; there will be effective use of time by every person involved as only negligible time of each person may be used for arbitration by video conferencing; the recording and storage of proceedings will be faster and easier; and dissemination of information will be faster.⁶¹

3.5 Presentation Technology and Technology Consultants

Technology consultants create an electronic bundle of all exhibits for use in real time on the screen in the hearing room using software such as TrialDirector or OnCue.⁶² The application of these programs yields quick access to supporting

⁶¹ Ekwenze, S.A., "Video Conferencing in Arbitration: An Overview." (2012), p.6. Available at <https://coou.edu.ng/resources/video-conferencing-in-arbitration.pdf>

⁶² Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, op. cit.

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information and allows for the repetition of key points, which increases retention.⁶³ Besides making the presentation interactive, it gives tremendous flexibility to the manner in which the case is presented.⁶⁴ This ensures that all involved are indeed following the same, relevant document.⁶⁵ This saves an incredible amount of time and maximises efficiency.⁶⁶

A common misconception is that these types of services are too costly and reserved for use only in very large cases.⁶⁷ This argument is not true as the use of technology brings efficiency and cost reduction in the conduct of arbitral proceedings.⁶⁸

3.6 Email Communication

The consent in arbitration can be given by and through the email correspondences.⁶⁹ Email communications are beneficial in several ways which includes delivery/service of documents is possible after offices close at 5.00 p.m., beating traffic jams, Email communication saves the cost of printing, copying, envelopes and postage/courier, one can send or receive emails from anywhere in the world, such that it does not matter when one travels; easy to forward communication to arbitrator, client, parties, etc. ; searchable database; ease of digital filing and retrieval and quoting documents verbatim is easy – just copy and paste!⁷⁰

⁶³ Ibid.

⁶⁴ Whitley Tiller et al, *The Effective Use of Technology in the Arbitral Hearing Room*, op. cit.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid; International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007.

⁶⁹ Panjwani, P., *The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When?* April 27, 2018, Available at <http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/> [Accessed November 28, 2018].

⁷⁰ Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 *Alternative Dispute Resolution*, pp 133-134.

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3.7 Advantages of the use of Technology in International Commercial Arbitration

Use of technology in arbitration increases efficiency, reduce costs and permit the expansion of arbitration into new market segments.⁷¹ Advances in communication technology enable arbitrators and parties to transmit all sorts of documents instantly, from simple letters to audio and visual files.⁷² Digital technologies have as much potential to transform arbitration as they have transformed other areas of life.⁷³ It is now up to practitioners and other stakeholders to define best practices and create a workable environment that enables this potential to be fully leveraged for the benefit of all.⁷⁴ However, while all there are many benefits that can potentially accrue from the use of technology, the main focus of this paper as the end result is the cost and time saving ability of effective utilisation of technology in international commercial arbitration proceedings.

3.8 Risks Associated with the use of Technology in Arbitral Proceedings

The International Chamber of Commerce rightly cautions that practitioners should not always believe that any use of IT will always save time and costs or ensure the arbitration is conducted efficiently. If managed poorly, the use of IT can increase time and costs, or even result in the unfair treatment of a party.⁷⁵

⁷¹ Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," *Nw. J. Int'l L. & Bus.* 22 (2001): 319, P. 345.

⁷² Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," *op. cit.*

⁷³ Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," *op. cit.*

⁷⁴ International Chamber of Commerce, *Three Takeaways on how Digital Technologies are Transforming Arbitration*, (Paris August 30, 2017) Available at, <https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/> [Accessed November 28, 2018].

⁷⁵ International Chamber of Commerce, "Benefits of IT in arbitration outweigh risks, says new ICC report," Paris, 12/04/2017; See also the counter argument on the use of technology in international commercial arbitration in Serbest, F., "The Use of Information Technology in International Commercial Arbitration," June 2012. Available at

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Despite numerous advantages conferred by the use of technology in the arbitral proceedings, there are several drawbacks associated with it.⁷⁶ First, there is a concern that machines lack emotional sensitivity or perception which are considered to be a prerequisite for the efficient conduct of one's duties as an arbitrator, and are also inextricably linked to information, motivation, processing, memory and judgment.⁷⁷ Besides, some jurisdictions may not enforce codified decisions rendered by a machine arbitrator due to the lack of reasoning attached to such decisions.⁷⁸

Second, the use of technology in arbitral proceedings has impacted greatly on the element of confidentiality. The confidential nature of arbitration is one of its major advantages.⁷⁹ The issue of confidentiality has evolved from interpersonal

https://www.researchgate.net/publication/259823045_The_Use_of_Information_Technology_in_International_Commercial_Arbitration [Accessed on 14/12/2018].

⁷⁶ Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.; See also Halket, T.D., "The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties," *St. John's Law Review* 81, no. 1 (2012): 13.

⁷⁷ Ibid; Soares, Francisco Uribarri, "Machine arbitrators: science-fiction or imminent reality?" December 2018, Special Report: International Dispute Resolution, *Financier Worldwide Magazine*. Available at <https://www.financierworldwide.com/machine-arbitrators-science-fiction-or-imminent-reality/> [Accessed on 14/12/2018]; Ryan, E., "The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation," *10 Harvard Negotiation Law Review*, 231-285 (2005) (2005).

⁷⁸ Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.; International Centre for Settlement of International Disputes, *ICSID Convention, Regulations and Rules* (as Amended and Effective April 10, 2006), Article 48(3). Available at

<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap04.htm>;

Knoll III, W.H. and Rubins, N.D., "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?" *Am. Rev. Int'l Arb.* 11 (2000): 531; Carbonneau, T.E.,

"At the Crossroads of Legitimacy and Arbitral Autonomy," *bepress Legal Series* (2006): 1139; Gleason, E.E., "International Arbitral Appeals: What Are We So Afraid Of?" *Pepperdine Dispute Resolution Law Journal*, 7, no. 2 (2007): 5; Carbonneau, T.E., "Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions," *Columbia Journal of Transnational Law*, 23 (1985): 579; Lalive, P., "On the reasoning of international arbitral awards," *Journal of International Dispute Settlement*, 1, no. 1 (2010): 55-65.

⁷⁹ Noussia, K., *Confidentiality in International Commercial Arbitration: A Comparative*

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confidentiality to technological confidentiality.⁸⁰ For instance, enabling access to precedents and the external assistance required to operate technologies during the conduct of arbitration, including reporters and translators, create confidentiality concerns.⁸¹ Since commercial arbitration awards and procedural orders are generally private thus confidential the subsection of the issues of the dispute to the third parties threatens this principle even though these parties can be subjected to confidentiality agreements.⁸²

Third, there are several issues surrounding email communication some which affect confidentiality of the arbitral proceedings, such as the potential risks of hacking.⁸³ Most email providers also have size limits for possible attachments, another hurdle to email communication in arbitration.⁸⁴ This particularly interferes with the proper communication among the members of the tribunal or from the tribunal to the parties and vice versa.

Fourth, despite the proliferation of technology in developing countries, a significant number of the smaller law firms in particular risk facing more costs, as they might lack the necessary financial and technical resources to utilize new

Analysis of the Position under English, US, German and French Law, (Springer-Verlag Berlin Heidelberg 2010); Brown, A.C., "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration," *American University International Law Review*, 16, no. 4 (2001): 969-1025.

⁸⁰ Britz, J. J., "Technology as a threat to privacy: ethical challenges to the information profession." (2010). Available at <http://web.simmons.edu/~chen/nit/NIT%2796/96-025-Britz.html> [Accessed on 14/12/2018]; Trakman, L.E., "Confidentiality in International Commercial Arbitration," *Arbitration International* 18, no. 1 (2002): 1-18.

⁸¹ Norton Rose Fulbright, *International Arbitration Report*, Issue 9, October, 2017. Available at <http://www.nortonrosefulbright.com/files/20170925-international-arbitration-report-issue-9-157156.pdf> [Accessed on 14/12/2018].

⁸² Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

⁸³ Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," op. cit.

⁸⁴ Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," op. cit.; See also Outlook, "Maximum email size limit for Gmail, Outlook.com, etc," July 19, 2013. Available at <https://www.outlook-apps.com/maximum-email-size/> [Accessed on 14/12/2018].

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technologies.⁸⁵ While this may greatly affect their ability to take up the challenge of using technology while participating in international commercial arbitration, either as a firm or as individual advocates, it has been suggested that they can overcome the challenge by coming up with alliances between smaller law firms and outsourcing to specialized companies.⁸⁶ This way, they may be the much needed option for their equally disadvantaged clients. In addition, international commercial arbitration practitioners should be aware of potential security hacks, of which law firms are often targets.⁸⁷

4.0 Legal Framework on Harnessing Technology for Cost Effective Arbitral Proceedings

The international commercial arbitration legal framework as it exists may not have been designed to expressly forbid nor allow the appointment of computers as arbitrators.⁸⁸ Although advancements in technology are occurring at an ever more rapid pace, the incorporation of technology in international commercial arbitration proceedings remains extremely slow or even non-existent in most countries.⁸⁹ In order for information technology to be successfully integrated into the system of international commercial arbitration in the future, its parameters should be clearly defined and its use should be regulated. While there may be development of customised information technology legal

⁸⁵ Arbitration Institute of the Stockholm Chamber of Commerce, "Innovation in Arbitration, p.5. Available at https://sccinstitute.com/media/37112/innovation-in-arbitration_the-report.pdf [Accessed on 14/12/2018]

⁸⁶ Ibid, p.5.

⁸⁷ Panjwani, P., "The Present and Near Future of New Technologies in Arbitration: If not US, Who? If not Now, When?" April 27, 2018, Available at <http://arbitrationblog.kluwerarbitration.com/2018/04/27/the-present-and-near-future-of-new-technologies-in-arbitration-if-not-us-who-if-not-now-when/>

⁸⁸ José Maria de la Jara et al., *Machine Arbitrator: Are We Ready?*, KLUWER ARB. BLOG (May. 4, 2017), Available at <http://arbitrationblog.kluwerarbitration.com/2017/05/04/machine-arbitrator-are-we-ready/>.

⁸⁹ International Chamber of Commerce, Three Takeaways on how Digital Technologies are Transforming Arbitration, (Paris August 30, 2017) Available at, <https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/>

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framework for the use of the same in international commercial arbitration, amendment of the existing arbitration rules, domestic legislation, and international agreements may also be another route towards making this work. Such changes in domestic arbitration laws would be strongly recommended to provide certainty to the international arbitration community (arbitral institutions, counsel, and parties) that the use of such technology as AI and others, for settlement of disputes by arbitration is legal.⁹⁰ This therefore necessitates the examination of the legal framework on the use of technology in arbitration.

4.1 Current Legal Framework on Use of Technology in Arbitral Proceedings

In this advent of technology, the major concern is whether the underlying arbitral frameworks permit the use of technologies by all players and parties to arbitral proceedings.⁹¹ The current legal and policy framework on arbitration does not categorically rule out the use of new technology in arbitral proceedings. This is because both the decision to arbitrate and the manner in which the arbitration is conducted are contractually based, which confers on the parties and the arbitrator significant operational freedom.⁹² Indeed, some jurisdictions have embraced and encouraged the use of technology in arbitration proceedings to not only increase efficiency but also save on time and costs.⁹³

⁹⁰ Snider, T., Dilevka, S. and Aknouche, C., "Artificial Intelligence and International Arbitration: Going Beyond E-mail," April 2018. Available at <https://www.tamimi.com/law-update-articles/artificial-intelligence-and-international-arbitration-going-beyond-e-mail/>

⁹¹ Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

⁹² Ibid.

⁹³ Essam Al Tamimi and Sara Koleilat-Aranjo, "United Arab Emirates: Commentary on the UAE's New Arbitration Law," 8 August 2018. Available at <http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law> [Accessed on 14/12/2018]; See also International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007, op. cit.

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Article 7 of the 1985 version of the *UNCITRAL Model Law on International Commercial Arbitration*⁹⁴ on the form of the arbitration agreement was modelled on the language used in article II (2) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.⁹⁵ This provision was amended in the 2006 Model and among the fundamental amendment is the new article 7 (4) which provides that, "the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."⁹⁶ This revision was intended to address evolving practice in international trade and technological developments aspects such as the use of technology in arbitration.⁹⁷ Article 19(1) of the *UNCITRAL Model Law on International Commercial Arbitration* allows the parties, subject to the provisions of the Model Law, to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings.⁹⁸

Apart from the abovementioned Model Law, various institutional rules such as the *Singapore International Arbitration Centre Rules*⁹⁹, the *London Court of International Arbitration Rules*, the *Hong Kong International Arbitration Centre Rules* and the *International Chamber of Commerce Rules*, afford the parties and the tribunal the opportunity to determine different procedural aspects of the

⁹⁴ UNCITRAL Model Law on International Commercial Arbitration UN Doc A/RES/40/17 annex1 (As adopted by the United Nations Commission on International Trade Law on 21st June 1985).

⁹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, (Adopted 10th June 1958, came into force 7th June 1959) 330 UNTS 38.

⁹⁶ Art 7 (4), UNCITRAL Model Law on International Commercial Arbitration, op. cit.

⁹⁷ Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

⁹⁸ UNCITRAL Model Law on International Commercial Arbitration, op. cit.

⁹⁹ SIAC Rules (6th Edition, 1 August 2016), available at <http://www.siac.org.sg/index.php>

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hearing in international commercial arbitration. Therefore, it can be gathered that there is a significant degree of freedom awarded to arbitrators in establishing the facts of the case – and there is no specific mention or restriction on the means by which they may do so.¹⁰⁰

4.2 Need for Enhanced Regulatory Framework and Information Security

As technology evolves, the time to amend domestic laws might come sooner than expected.¹⁰¹ It is obvious that early regulatory frameworks on arbitration such as the *New York Convention* did not foresee unprecedented development of high technology as a means of communication.¹⁰² However, this position is changing and in some instances it has already changed, as evidenced by ICC's efforts to encourage the active uptake of technological advancements to help in saving time and costs.¹⁰³ It is also noteworthy that in line with the 2006 amendments on the UNCITRAL Model Law, countries have continually amended their domestic laws on arbitration to reflect these developments on the modern means of communication.

In addition to these developments, however, there is need to establish the regulatory framework on the information security in different countries around the world, including Kenya, considering that some of the procedural aspects of international commercial arbitration may be subjected to domestic laws especially during the recognition and enforcement stage of the resultant award.

¹⁰⁰ Soares, Francisco Uribarri, "New Technologies and Arbitration," op cit.

¹⁰¹ José Maria de la Jara et al., *Machine Arbitrator: Are We Ready?*, KLUWER ARB. BLOG (May. 4, 2017), Available at <http://arbitrationblog.kluwerarbitration.com/2017/05/04/machinbrihtnesse-arbitrator-are-we-ready/>.

¹⁰² Ljiljana, B., "International commercial arbitration in cyberspace: recent developments," op. cit.

¹⁰³ International Chamber of Commerce, *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration*, ICC Publication 843, 2007.

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5.0 Conclusion

Traditional arbitration is increasingly incorporating modern technology into its proceedings.¹⁰⁴ What cannot be denied is that with improved technology and automation, less complex disputes work will be claimed by online dispute resolution services.¹⁰⁵ It is therefore imperative that legal practitioners continue to improve themselves and keep abreast of the latest legal and technological developments to avoid falling by the way side in the wake of technology's relentless march.¹⁰⁶ There are several unprecedented opportunities associated with the use of technology such as use of email, video/audio conferencing, online platforms, electronic signatures and e-filing that helps to save time and costs in international commercial arbitration.

Achieving expeditious justice in arbitration is necessary. Harnessing technology for cost effective international commercial arbitration proceedings is a potent idea whose time has come.

¹⁰⁴ Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, KLUWER ARB. BLOG (Mar. 29, 2018), Available at <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-futurealternative-dispute-resolution/> [Accessed November 28, 2018].

¹⁰⁵ Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, *op. cit.*

¹⁰⁶ *Ibid.*

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By: David Ngira* & Maureen Okoth**

1.0 Introduction

Gender based violence is generally considered to be a form of violence that one suffers due to his/her gender.¹ The forms of violence include sexual violence, domestic violence, trafficking, forced/early marriages and harmful traditional practices like female genital mutilation (FGM) and honour killings.²

Available research cites unequal power relations between men and women, weak or non-existent policies, violent socialization, religion patriarchy and retrogressive traditional practices as some of the main factors causing GBV.³ All these factors intersect to give unequal power to men over women resulting into imbalanced power distribution at the family level, a factor which indirectly and sometimes directly promotes GBV against women and children.⁴ It has been noted that women's low economic status, bargaining power in families and culture of silence makes them more susceptible to GBV. In the recent past the fluidity of power and power relations has seen an increasing number of men

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¹ UNHCR 'Action against Sexual and Gender-Based Violence: An updated Strategy' June 2011, <http://www.refworld.org/docid/4e01ffeb2.html>

² Jennifer Ulrich, 'Confronting Gender-Based Violence with International Instruments: Is a solution to the Pandemic within Reach?' 2000 (7) 2 'Indiana Journal of Global Legal Studies 629,630.

³ IWRAW, 'Gender-Based Violence Against Women and International Human Rights Law: Options for Strengthening the International Framework' accessed <https://www.ohchr.org/Documents/Issues/Women/SR/Framework/2.IWRAWAsiaPacificDiscussionPaperOptionInternationalMechnisms.pdf>

⁴ IWRAW, 'Gender-Based Violence Against Women and International Human Rights Law: Options for Strengthening the International Framework' accessed from <https://www.ohchr.org/Documents/Issues/Women/SR/Framework/2.IWRAWAsiaPacificDiscussionPaperOptionInternationalMechnisms.pdf>

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suffer Gender based violence at the hands of their spouse, a reality that has activated calls for policy and programme reconfiguration to address violence against men. Notwithstanding this reality, evidence indicates that women suffer disproportionate amount of violence compared to men.⁵

Even though the protection of GBV in Kenya is governed by statutory law, Alternative Dispute Resolution (ADR) is still the most preferred resolution mechanism. Robert Mnookin refers ADR as a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.⁶ ADR is therefore a collective term for mediation, negotiation, arbitration, conciliation, reconciliation and traditional dispute resolution mechanisms.⁷

The traditional justice system is normally based on reconciliation and restoration and often goes beyond dispute resolution to promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.⁸ It must be observed that all the forms of ADR are underpinned by the principle of restorative justice as discussed below.

2.0 Restorative Justice

It must be admitted from the outset that there is no universally agreed definition of restorative justice. Accordingly, the definitions of restorative justice are as varied as the categories of scholars who deal with the subject matter. Question abound over the number, forms and foundation of restorative justice with some

⁵ UN Economic and Social Council, 'Progress towards the Sustainable Development Goal, Report of the Secretary-General' accessed from http://www.un.org/en/ga/search/view_doc.asp?symbol=E/2017/66

⁶ M, Robert Alternative Dispute Resolution (March 1998). Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 232. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.319.4741&rep=rep1&type=pdf>

⁷ (Re) Configuring 'Alternative Dispute Resolution' As 'Appropriate Dispute Resolution': Some Wayside Reflections: David Ngira.

⁸ Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

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scholars arguing that there is nothing just about restorative justice since it is anchored on apology and forgiveness of the offender.⁹ The contestation about the concept of restorative justice is as much of a concept about justice as it is about restoration. For conceptual clarity this paper considers justice to be a virtue that encompasses fairness, impartiality and equity in the dispute resolution process.

It must be noted that due to the definitional bottlenecks, most scholars have opted to explore the features of restorative justice rather than engage in the controversial exercise of definition. Menkel Madow, for instance, argues that restorative justice involves 4 R's namely repair, restoration, reconciliation, and reintegration of the offenders and victims to each other and to their shared community.¹⁰ She avers that due to its roots in forgiveness and truth, restorative justice is the most suitable option on the resolution of conflicts in relationship based institutions such as family, communities and clan. This is because adversarial justice systems are generally disruptive and make it less likely for the victim and the offender to reconcile after the punishment and or imprisonment of the offender.¹¹

Other scholars like Maria Lurdes have opined that restorative justice is important in family dispute resolution because it focuses on the victim rather than the offender. She suggests:

"Victims need to be given information, they need to be heard ("tell their truth"), sometimes they need to listen to the offender, they need to feel empowered and they need reparation. For their part and directly related to the needs of the victim, perpetrators need positive reinforcement to assume their liability towards the victim.....they need to feel supported as they undergo a personal

⁹ David Ngira, (Re) Configuring 'Alternative Dispute Resolution' As 'Appropriate Dispute Resolution': Some Wayside Reflections: David Ngira, 2018 6 3 Journal of Alternative Dispute Resolution, 193.

¹⁰ Menkel Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual Review of Law Social Sciences 10.1, 2.

¹¹ Ibid.

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transformation, re-join society, and in some cases, suffer restrictions or limitations. The social environment closest to the victims and offenders also needs support as secondary victims affected by the impact of crime, they need opportunities to build a sense of community and mutual responsibility, they require a positive reinforcement to take care of their obligations to all its members, including victims and offenders, and to promote conditions conducive to community welfare. ”¹²

3.0 Suitability of Restorative Justice System for GBV

The traditional retributive justice approach which seeks to punish offenders is considered by some scholars as a mechanical response to gender based violence (GBV) as it deprives or undermines the victims’ participation in the process. Accordingly, scholars argue that the over reliance on criminal law to control GBV has not deterred the vice.¹³ Thus, in Kenya, even though both the Penal Code and the Protection Against Domestic Violence Act, 2015 prescribe the legal framework governing gender based violence, evidence illustrate that most of the GBV cases never end up in court. Studies by Federation of Women Lawyers (FIDA) Kenya and Collaborative Centre for Gender and Development illustrate that women are generally unwilling to report their husbands to the police and even when they do, their interest is in having the violence stop rather than in having the husbands taken to court and if found guilty imprisoned for the violence.¹⁴

Several factors account for this reality. First, most husbands are the breadwinners in their families and women often feel that having them

¹² Fernández-Manzano, M.L, 2014. Restorative Justice, Forgiveness and Reparation for the Victims. *Oñati Socio-legal Series* [online], 4 (3), 390-403. Available from: <http://ssrn.com/abstract=2467998>

¹³ http://www.ijhssnet.com/journals/Vol_3_No_18_October_2013/8.pdf

¹⁴ FIDA Kenya, *‘Informal Justice Systems in Kenya: A Study of Communities in Coast Province* (2013) 10, accessed from

<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> on 12/1/2019, See also Collaborative Centre for Gender and Development, *‘Reducing Vulnerability to Sexual and Gender Based Violence in Kenya’* (2015) 39 accessed from <http://ccgdcentre.org/index.php/publications/reports> accessed on 25/1/2019.

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imprisoned will rob them of the only breadwinner therefore throwing the family into poverty. Accordingly, they see a violent breadwinner better than no breadwinner at all. This view is however problematic due to the actual reality that gender based violence can result into death. It is also noteworthy that all GBV legislations do not address this economic angle of GBV, a factor that generally leads to the low reporting level. This challenge is not necessarily unique to the Protection against Domestic Violence Act, 2015. Rather it is an inherent challenge with the very nature of law. In other words, penal laws in most common law jurisdictions generally focus on punishing the offender without addressing the status of the victim or the underlying causes of the offence. Within this context, the entire dispute becomes an instrumental arena in which the state uses the law for deterrence or retribution purposes without examining the substantial factors behind the offence. Secondly, the very nature of law is very offender oriented to the extent that the victim is considered as a means of achieving conviction rather than as a person who has been damaged and who in essence needs restoration. It is on this basis that some scholars have argued that the adversarial system is about justice for the state and not justice for the victim.¹⁵

Secondly, pressure from family members often compels women to drop any reported cases. Thus, once a woman reports a GBV case to the police, family members intervene to persuade her to drop the case in favour of a home based solution, for instance, mediation or traditional dispute resolution mechanism. Marriage in African families is considered as a community and or clan affair and therefore, a decision to report to the police cannot be made without the clan's approval and or intervention.

Thirdly, clan membership is seen as a responsibility part of which involves intervening in cases of spouses' differences within the clan. Accordingly, having a case from the clan reported to the police would imply that the clan has failed in its dispute resolution mechanisms at the family level. Although the use

¹⁵ Meadow-Menkel, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 (1) *William. & Mary Law Review*, 5.

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of mediation and traditional dispute resolution mechanism in cases of GBV is a reality, research on the effectiveness of this strategy for the prevention and response to gender based violence is largely anecdotal with evidence illustrating that it can temporarily pause but cannot conclusively deal with gender based violence. Thus, many women opt to accept the intervention of family members due to fear of rejection by both their and the man's family.

Lastly, failure to report cases of GBV is often attributed to the fear of divorce which is perceived as a logical reprisal to the imprisonment of the man. Accordingly, many women believe that if they were to report the husband to the police and such an action results into his imprisonment, the man would definitely opt for divorce upon his release. This fear of divorce explains the fact that although gender based violence has been cited as a ground for divorce,¹⁶ not many victims of GBV opt for divorce due to the stigma associated with the same. Such stigma is usually worse when the divorce is filed by the woman and not the man.

It is on the above basis that scholars have come forth to advocate for the use of restorative justice in the resolution of family disputes.¹⁷ However, as discussed below, restorative justice itself has certain features which are incompatible with the question of gender based violence, a reality that essentially converts restorative justice into an instrument of injustice for the victims.

4.0 Inadequacy of Restorative Justice to address GBV

Notwithstanding the above approval by scholars, restorative justice poses a challenge for the resolution of family disputes. First, as noted in the first part of this paper, spouses are generally socially, economically and academically unequal. The assumption of restorative justice (and indeed of all other forms of justice,) that the two or more parties in a dispute are equal is problematic.

¹⁶ See, for instance, T J M v A K M [2015] eKLR.

¹⁷ For such a discussion see Hanan E, 'Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation' (2016) 46 (1) New Mexico Law Review,123, see also Latimer J, Dowden C, Muise D, 'The Effectiveness of Restorative Justice Practices: A Meta-analysis (2005) 85 (2) The Prison Journal,127.

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This inequality traverses the entire scope of personhood so that even the personality characteristic of spouses may be so starkly unequal that one may not be able to favourably compare with the other in a dispute resolution setting. Accordingly, traits such as humility, dominance, aggressiveness, timidity, kindness and cruelty are all represented in families. Notwithstanding these differences, the doctrine of restorative justice presumes abstract equality between the parties in a dispute. Such an assumption is equally reflected in constitutional law and family law in general where equality is equally presumed.¹⁸ This abstract equality, that ignores the social, economic, cultural and psychological realities of marriages, often works against the weaker party in the dispute. In other words, a house wife who is married to a millionaire, although presumed to be equal to the millionaire by the doctrine of restorative justice, under the Constitution and the Marriage Act, she is not necessarily equal to him. Thus, when a dispute between the two emerge, the millionaire will most likely use his economic power within (and sometimes without) the family to manipulate the woman and her family. Since mediation, a form of restorative justice, is usually conducted by a person who previously knew the couple, such as a neighbour friend or relative, the resource capacity of the man may be an intimidating factor which will compromise the neutrality of the mediator. Accordingly, the pressure will be on the woman to forgive her husband rather than on the husband to apologize and transform. This reality is further worsened by the economic stratification of morality, where actions attributed to generally more economically endowed individuals have a lower threshold of morality than those attributed to the poor and powerless.

Because couples in the post conflict arrangement will most likely have to continue living together, there is undue pressure on both to compromise for the sake of family stability, children or to avoid embarrassing the family. Restorative justice, to the extent that it considered extraneous factor such as the children and community becomes a victim of double victimization of the offended. In other words, on one hand, a person has been offended by his or her spouse but on the other hand his or her agency has been taken away to the extent

¹⁸ See, for instance, article 45 of the Kenyan constitution, and the Marriage Act, 2014.

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that he/she cannot make an independent decision to either leave or stay in the marriage for such a decision is evaluated not on the basis of its merit to the victim but on the basis of its implication on the family, community and children who were not the direct victims of the offence. Such an assault on personhood essentially converts restorative justice to be another form of injustice against the victim. Although scholars like Plato have opined that justice implies correcting an injustice, the procedure and nature of restorative justice often goes against this doctrine by making restorative justice to be an instrument of further injustice.

Secondly, women are generally socialised to be agreeable, compromising, forgiving and nurturing. Since mediation is often tailored towards protection of the family and restoration of relationships, the mediator is often naturally biased towards actions or inactions that would facilitate this reality. Accordingly, the women are often encouraged to compromise and give in, in line with their feminine identity. Women who stick to their positions are considered as argumentative, stubborn and therefore unwomanly. At the same time, the negative implication of divorce on the children often means that the person who is socialised into caring roles with regard to the children is most likely to compromise for the sake of the children. Since caring denotes compassion, empathy and forgiveness, women often feel that they are socially and sometimes even religiously obligated to forgive. Accordingly, a mediation session often becomes an opportunity for the offender (in this case husband) to tender his apology to the wife and for the wife to accept this apology. Since an apology doesn't guarantee that the offence will not be repeated, women often find themselves cornered by the moral expectations of restorative justice. Secondly, since the genuineness of an apology cannot be determined by the restorative justice process, apology basically becomes an instrument of social and psychological manipulations in the dispute resolution process often to the disadvantage of the woman and the children who in most cases would easily suffer the next bout of abuse. In other words, a woman who rejects her husband's apology is seen as a stubborn woman who does not have moral and or social values. The social construction of a good woman, a good wife, a good

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man and a good husband are therefore inconsistent with the doctrines of apology for they denote traits which are generally incompatible, so that in most cases restorative justice enforces the male traits over the dispute resolution process.

Lastly, restorative justice is anchored upon the doctrine of reparations. Thus, other than admitting fault, the offender in a restorative justice process is meant to compensate the victim for the offence. Such compensation may be in the form of an item, livestock or money. The challenge with this compensation is that it makes the marriage transactional. As noted by scholars like Manzano, Meadow and Hanan, marriage as an institution is held together by harmony, unity, love affection, compassion and care, and not by legal rights.¹⁹ The legalization of marriage and entrenchment of the language of rights within the same has thus been cited as one of the dysfunctional elements of modern day marriages.²⁰ Accordingly, compensation as an aspect of restorative justice instrumentalizes the relationship between the spouses and makes it less likely that true reconciliation will take place. In other words, whereas it is possible to quantify compensation, a focus on compensation at the expense of true reconciliation would often mean that the offender will most likely focus on compensation at the expense of true reconciliation. Secondly, in instances where the offender is of a weaker economic status than the offended and possibly depends on the offended for support, asking the offender to compensate the offended would essentially put more strain on the offended as the resources for compensation will most likely come from his or her anyway.

¹⁹ See Meadow *Supra*, see also Latimer J, Dowden C, Muise D, 'The Effectiveness of Restorative Justice Practices: A Meta-analysis (2005) 85 (2) *The Prison Journal*, 127.

²⁰ See for instance Meadow, *supra*. See also Jane Murphy, 'Revitalizing the Adversary System in Family Law. Revitalizing the Adversary System in Family Law (2010)78 *University of Cincinnati Law Review* 891, 893,896,898 .See also Jane Murphy and Jana Singer, 'Moving Family Dispute Resolution from the Court System to the Community' (2016) 75 *Maryland Law Review* Endnotes 9, 9-14.

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It has also been noted that since GBV systematically lowers a person's self-esteem, the victim is unlikely to express any form of assertiveness that is necessary for the meaningful dispute resolution. Accordingly, the process of restorative justice, which requires the victim to sit together with the offender and not to judge him or her, ignores the psychological implication of GBV. Secondly, the process of recounting the violence in the absence of any psychological support is essentially a form of violence which only does more to harm the victim of the offence especially if the same is denied by the offender. Accordingly, restorative justice with its focus on truth may end of being more harmful to the offender unless measures are put in place to guard the psychological health of the victim.

5.0 Conclusion

This paper does not in any way approve of retributive justice in the resolution of family disputes. This is because the structural, gender, economic and personality inequalities that characterise restorative justice are even more pronounced in the adversarial justice system where the focus is on instrumental application of statutes and case law rather than on truth and sustainable conflict resolution. As opined by realists, the economic status of the parties in the conflict (in this cases spouses) as well as their personality traits interact with the procedures of the adversarial system to further victimize the offended party. Since economic factors influence the choice of defence advocates which essentially play a crucial role on the final determination of any suit, the implication of economic inequalities on legal outcomes cannot be underestimated.

Secondly, because the social factors that militate against restorative justice in GBV such as fear of divorce and pressure from family members are equally active (or even more pronounced) in court processes and therefore directly influences the highly researched tendency of victims withdrawing cases of Gender based violence before court, adversarial justice is not holistically promising for victims of gender based violence.

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The solution thus neither lies in holistic retributive justice nor in restorative justice but in the contextual analysis of each dispute to determine the most suitable dispute resolution setting. Allowing victims, the opportunity to engage in forum shopping across the formal and informal justice system may be the first step towards this direction. Notwithstanding the preferred choice of the victim, dispute resolvers must be alert to the structural, economic and personality inequality between the parties in conflict and adopt methods and mechanisms that would minimize the implication of these realities on the dispute resolution process not only to avoid double victimization of the victim but also to restrain the offenders from taking advantage of the economic, social and psychological superiority to achieve outcomes that are desirable to them. Such a cautious approach may also be crucial in the adversarial system where rigidity has so far militated against the effectiveness of the legislations put in place to address gender based violence. In both cases, the voice of the offended over the punishment of the offender must be given more prominence.

Building an Effective Arbitral Practice in Africa: What Tools Does One Need?: Njeri Kariuki

Building an Effective Arbitral Practice in Africa: What Tools Does One Need?

*By: Njeri Kariuki**

This paper is written from the personal perspective of a Chartered Arbitrator of the female kind, duly peppered with anecdotes.¹ I was informed by a President of the Chartered Institute of Arbitrators World Wide several years ago that I am, apparently, a rare breed of arbitrator, there being so few of us the world over. You cannot know how overwhelmed I felt on hearing this, quite honoured to be treading where few females had been before. Nevertheless, what I have to share about my journey could well echo the journey of any of you present here today, male or female.

Most arbitration clauses contain a default position, something to the effect that in the event of disagreement between the parties - i.e. the occurrence of some unhappy event in the future - then an institute, like the International Chamber of Commerce (ICC) or the Chartered Institute, will make the election on behalf of the parties. Well, my entry into the hallowed halls of arbitration was something like that - I fell into it quite by default when a former employer was unable to attend the Chartered Institute's Entry Course and I haven't looked back since. (Maybe I found my soul mate in arbitration & ADR - resolving disputes in a peaceable manner.) This was all the way back in 1992 and in those days, becoming a Fellow meant waiting until one was 35 years of age; I achieved Fellowship at age 41. The first tool: be patient! Becoming an arbitrator of substance, wherever you are from, takes time. To be successful, it will require focus, stamina & determination as it is, to be quite frank, a long-distance race. Many I know have fallen by the wayside and I am sad to say that the bulk are my fellow women. A very disheartening fact. The jury is still out on the reasons why this happens.

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¹ This paper was originally presented in a Conference.

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My first arbitral reference as a tribunal of one was a baptism by fire: any application in the book was thrown at me by the recalcitrant Respondent who must have realised quite early into the Reference that its case was hopeless. Here, I pay tribute to the men in my journey towards becoming a Fellow: they were there for me in every sense of that phrase. They took me under their collective wing and mentored me and it is during this first reference that their support of & for me became evident: they must have seen something in me that I could not. You must appreciate that there were no female role models (not like *Ernestine Sheppard*) that I could look up to, there being no female arbitrators in Kenya at the time and so I became *one of the boys*. I have to admit to never feeling discriminated against because of my gender within the world of arbitration, either on a local or international level, which is a very big plus and possibly one of the reasons why many of us feel so comfortable! Arbitration is all about what one has to offer in terms of skills and personal integrity.

So the second tool: accept mentoring by those with more experience and skill than you do. The benefits are huge. We mean well and are just giving back what we received from those who came before us. This means badgering more senior arbitrators to allow you to sit in and learn as they conduct arbitrations, of course, with party consent. In regard to mentoring, I have noted a worrying trend that leaves a bad taste in the mouth: where students who have undergone an assessment of their arbitral skills refuse to accept the outcome where they fail to pass. They unfortunately believe their skills are much better than the reality. Since the criteria applied is usually objective, the question is why one should draw such a conclusion. There is also a tendency for folks in this country to undergo a basic course and decide there is no further need to follow through to Fellowship, the logic being with that basic information, one can present themselves to the world as a fully-fledged arbitrator and conduct arbitrations. Well, WRONG! That fact really should be clear to a right-thinking reasonable person but when one's focus is on material gain rather than rendering sterling service that, unsurprisingly, will be the outcome. In this regard, the Kenya Branch of the Chartered Institute has evolved a policy not to appoint Associate Members of the Institute to conduct references. The reputation of the Institute is at stake.

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The third tool: invest in yourself by attending seminars & courses and undergoing training at the hands of masters of the trade. I learned at the feet of great men who shared their experiences with me, answered my many questions, trained and pointed me in the right direction. Arbitration is such a deep area and so there is much to learn. I have also purchased several books for my personal library, all of which have proved invaluable.

This brings me to the fourth tool: Once you have acquired a level of skill that will lead you to believe you have something to offer to others, get involved in training courses as a resource person or tutor thereby demonstrating your skills and experience. Doing so lends itself to indelibly writing on your brain cells all you know about arbitration until it is coming out of your pores, so, in essence, growing your skills. Just to illustrate this point, I once pupiled under an arbitrator of advanced years; he died at 88 and had not stopped conducting arbitrations even then!

Immersing yourself in training will, in addition, help you focus on the areas where you wish to hone your skills. One may decide to act as counsel rather than be an arbitrator. The prospects are great, for in Kenya, this is a growth area. Since promulgation of the Y2010 Constitution which *vide* Article 159, elevated Arbitration & ADR to a whole new level, a world of opportunity has opened up for practitioners & trainers alike. For example, Sections 159 & 189 must now be applied prior to constituent bodies of the National & County Governments engaging in conventional methods of resolving disputes. Again, with Africa enjoying unparalleled growth over the last 4-5 years, interest in the region from other economies has grown too and with the number of multinational corporations (MNCs) setting-up shop in East Africa, besides all the infrastructure projects, it is of import to position oneself to offer the very best.

Leading on from that is the fourth tool: which is investing time and money in attending conferences, both domestically & internationally, where one gets to meet other players in the field so gaining the visibility that will result in appointments. Further visibility can be gained through the sixth tool: which is

Building an Effective Arbitral Practice in Africa: What Tools Does One Need?: Njeri Kariuki writing articles on arbitration and making contributions to journals thus showcasing your knowledge.

How about the manner in which one conducts one's self? Does this have any bearing on your budding practice? As the Late Great Mark Cato remarked in a conversation with me and others, it's all you've got when it really matters. Tool Number 7 is therefore the most important tool of all: you must build your arbitral practice on a personal reputation for ethical behaviour and integrity. It may be a strange thing to say but even thieves want to put their money in the hands of an honest person of high integrity for it will be right there when they want it back. The IBA Guidelines on Conflict of Interest are infused with references for the need to disclose any matter that may affect an arbitrator's independence and impartiality, whether such incident has already occurred or may occur during the pendency of a reference. I leave it to you to decide whether or not I went too far during a reference when one of the parties sneakily sought an introduction through a friend of many years. As I recognised the overture for what it was, I didn't fall for it. (Oh, how this had been hammered into my head over my several years of training!) However, during the next hearing of the Reference, I denounced the advance to the Party Representatives in the presence of the witnesses by saying 'your Client is trying to see me' and that was the end of that!

My point is that once word goes around that you are willing to bend to the will of any party for material gain or you are unprincipled and will hike your fees during the course of an arbitration or you enhance your hours through time-wasting or you don't deliver awards as promised or at all, then your time to conduct arbitrations will be a short one. And surely, after being patient, going the distance and investing in yourself, why bring your journey to a screeching halt because you couldn't wait a little while longer for fame & fortune borne of your sweat and tears? It is not the easy route, particularly in this era of instant gratification, but it is most rewarding.

In closing, it is my sincere hope that my words have traced the journey of many of you and for those who may be just starting off or considering doing so, that

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you will consider adopting the 7 tools as your road map to building an effective
arbitral practice, wherever you are located. Thank-you for your time.

An Appraisal on the Jurisprudential and Precedential Leaps Institutionalizing the Ideals of Alternative Dispute Resolution in the Kenyan Criminal Justice System:

Paul Mwaniki Gachoka & Sunday Mema

An Appraisal on the Jurisprudential and Precedential Leaps Institutionalizing the Ideals of Alternative Dispute Resolution in the Kenyan Criminal Justice System

By: Paul Mwaniki Gachoka* & Sunday Mema**

Abstract

This paper proffers a contemplative narrative on the emerging role of Alternative Dispute Resolution in the criminal justice system in Kenya. In a broad sense, it engages in a surgical examination of the judicial developments that have shaped the realm of ADR in Kenya. Due to the limited jurisprudential leaps on the place of ADR in Kenya, this treatise discusses untapped prospects of ADR in criminal cases.

Moreover, this paper advances the ideological concept of restorative justice as a worthwhile ideal upon which to ground the criminal justice system in Kenya. It demonstrates that the fruits of ADR can be fruitfully harvested in an environment conditioned with the theory of restorative justice. Despite the immense advantages of this approach, this piece discusses the drawbacks of Alternative Dispute Resolution in adjudication of certain cases in the domain of criminal practice.

1.0 Introduction

Perhaps Elspeth Huxley¹ hilarious and thought provoking novel, *Red Strangers*², presents a good starting point in addressing the subject at hand. In the novel, Karue's son is instructed by his father to collect overdue dowry owed to him by

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¹ Elspeth Huxley was a writer who frequently visited Kenya, and turned out to be progressively perceived as a writer of African lifestyles over time. At first a staunch supporter of colonialism, she would later come to help push toward African freedom.

² *Red Strangers* is a 1939 novel by Elspeth Huxley. The story is an account of the arrival and effects of British colonialists, told through the eyes of four generations of Kikuyu tribesmen in Kenya.

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Matu. Unfortunately, his son is killed after a heated argument. Before the family settles the matter, the colonial masters arrive and arrest Matu to face the colonial justice system. The deceased family and Matu agree that Matu confesses to committing the crime although it was Muthengi's (the deceased's brother) knife that killed the son. To their surprise the white man sentences Matu to six seasons in prison. The following excerpt from the book ensues:

Matu said nothing, for the words did not seem to make sense. He supposed that the interpreter had made a mistake. Muthengi however asked:

"But why is Matu to stay here in Tetu? The affair of the young man's death is between Karue and my father Waseru. What has the stranger to do with it?"

"That is the stranger's law. Matu killed the evil man. Therefore, he stays with stranger."

"Does the stranger give him to Karue?" Muthengi persisted.

"No, he stays here."

"Who gives him food?" "The stranger gives him food."

"Then what does Karue receive in compensation for his son, who is dead?"

"He does not receive anything."

"That I cannot understand!" Muthengi exclaimed. "If a man loses his son, or a child his father, must not his family be given compensation for their loss? How else can justice be done?"

"Stranger's justice is different," the interpreter said. "Matu must stay here."

"Then the stranger gets something for Karue's loss, and Karue's clan gets nothing at all," Muthengi said. "This seems to me to be a very peculiar law, and one with no justice in it at all. Now I understand how these strangers have become so exceedingly rich; when they sit in judgement they award nothing to the injured person, but everything to themselves."

"That is the law nonetheless." The interpreter said.

2.0 The Conceptualization of ADR in Kenya

Alternative Dispute Resolution (ADR) refers to all those adjudicative mechanisms other than litigation including but not limited to negotiation,

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enquiry, mediation, conciliation, expert determination and arbitration.³ Therefore, ADR is nothing but an alternative method of managing disputes other than by litigation.

The utilization of ADR forms in criminal cases is a moderately new phenomenon in Kenya and the expanded enthusiasm for the use of ADR procedures in the criminal justice system emanates from a general dissatisfaction with the traditional adversarial methods of dispute resolution.⁴

The discussion about whether such procedures can or ought to be utilized in a criminal justice system brings up normative issues with regards to the role of the justice system, sociological questions as to the nature of criminal offending and the relationship between the individual, the community and the state, and descriptive questions as to the adequacy of particular justice practices.⁵ The criminal justice system in Kenya has always preferred a deterrent and a retributive approach in dealing with crime. Regrettably, this mode of theorizing punishment does not suit the use of ADR. ADR prefers a more restorative mode in punishing criminal conduct.⁶ Therefore, conceptualizing a restorative theory is a good step in understanding how ADR can fit in the criminal justice system.

³ Muigua, K., "Alternative Dispute Resolution and Article 159 of the Constitution" available at

<http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>

⁴ Kariuki, F., "Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: A case Study of Republic v Mohamed Abdow Mohamed," (2013) eKLR (2014) 1 Alternative Dispute resolution at 203.

⁵ Australian Law Reform Commission, Review of the Adversarial System of Litigation: ADR -Its Role in Federal Dispute Resolution, IP 25.

⁶ Gulfam, M., (2014), Introducing 'Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective', *Bangla vision* Vol. 13, No. 1, pp.206; Alamin, Md., 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview', *Journal of Research in Humanities and Social Science*, Vol.3, Issue 11, (2015) 68.

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3.0 A Restorative Approach in Criminal Justice

Restorative Justice is an approach in penology that aims on the needs of victims, offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. The theory of restorative justice is not to punish the offender, but rather to guide the offender to repent for their crime, strive to mend the injury done, and reintegrate into society.⁷

Restorative justice is a victim-centred response to crime that provides opportunities for those most directly affected by crime - the victim, the offender, their families, and representatives of the community - to be directly involved in responding to the harm caused by the crime.⁸ Restorative justice is based upon values which emphasize the importance of providing opportunities for more active involvement in the processes of: holding offenders directly accountable to the people and communities they have violated; restoring the emotional and material losses of the victims; providing a range of opportunities for dialogue and problem solving among interested crime victims; offering offenders the opportunities for competency development and reintegration into productive community lives and strengthening public safety through community building.⁹ The concept of restorative justice is different from the contemporary understanding of criminal justice in a number of ways. First, criminal conduct is observed on a wider lens incorporating not only the offender but also the victim and the community.¹⁰ Such an approach is abhorred by a system whose emphasis is inflicting punishment upon the offender or reforming the offender.

⁷ Cameron, A., (2005). "Restorative Justice: A Literature Review." The British Columbia Institute on Family Violence. Available at <https://docplayer.net/13706536-Restorative-justice-a-literature-review-angela-cameron-april-2005.html>

⁸ Mark S. Umbreit, Restorative Justice through Victim Offender Mediation: A Multi-Site Assessment, *Western Criminology Review*. 1998; 1(1). at <http://wcr.sonoma.edu/v1n1/umbreit.html>

⁹ Justice N.R.O Ombija, "Restorative Justice And Victims Of Crime In Kenya," available at <http://kenyalaw.org/kl/index.php?id=1895>

¹⁰ Griffiths, C. T. (1996). "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities", *International Journal of Comparative and Applied Criminal Justice*, 20(2), 195-208.

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Another difference is notable in the overall result of this approach. It measures how criminal conduct is prevented and not the punishment or change an offender undergoes.¹¹

4.0 The Legal Corpus Governing ADR in Criminal Cases in Kenya

The Constitution¹² explicitly recognizes that settlement of disputes, even in the criminal realm, is not only limited to convictions and acquittals but it extends to ways such as mediation, reconciliation, arbitration and traditional dispute resolution.¹³ The applicability of traditional dispute settlement mechanisms is however limited when it does contravene the Bill of Rights, when it is repugnant to justice and morality or leads to an outcome that is repugnant to justice or morality and is inconsistent with any other written law.¹⁴

It is however worth noting that the ADR mechanisms recognized in the Constitution are not mandatory but are only to be promoted.¹⁵ However, in civil cases, the court can make it mandatory for parties to pursue alternative ADR mechanisms before resorting to the court process. Unfortunately, there are no similar rules that mandate criminal cases to be referred to ADR at first instance.¹⁶

Another caveat to the application of Traditional Dispute Resolution mechanisms is the Judicature Act which excludes the application of Traditional Dispute Settlement mechanisms in criminal matters.¹⁷ The applicability of ADR

¹¹ Daly, K. (2003). "Mind the gap: Restorative justice in theory and practice". In A. von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (Eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford: Hart Publishing.

¹² The Constitution of Kenya 2010 (Government Printer, Nairobi).

¹³ Article 159(2) of the Constitution of Kenya 2010 (Government Printer, Nairobi).

¹⁴ Article 159(3) of the Constitution of Kenya 2010 (Government Printer, Nairobi).

¹⁵ Muigua, K., 'Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/legitimising_alternative_dispute_resolution_mechanisms_in_kenya.pdf

¹⁶ Section 58B of the Civil Procedure Rules Chapter 21 Laws of Kenya.

¹⁷ The Judicature Act, Cap 8, in section 3(2) stipulates that the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil

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in criminal matters is further fostered by the Criminal Procedure Code,¹⁸ which promotes the application of reconciliation in cases of common assault. From the analysis of the body of laws governing the applicability of ADR, it is evident that the criminal justice system fails to adequately integrate use of alternative systems of dispute settlement.

5.0 An Overview of Judicial Decisions addressing the use of ADR in Criminal Cases

The use of judicial precedents to clarify legal standpoints has always been a hallmark of the common law system. In instances such as this where the statutory provisions are limited, judicial decisions shed more light on the grey areas. The first case in point is *Republic v Juliana Mwikali Kiteme and 3 others*¹⁹, decided by Judge Lulu. In this case, the accused person was charged with murder. After two years without progress on the matter, the prosecution counsel urged the court to settle the matter in line with Kamba customs and traditions. In his ruling, the learned Judge considered article 159 (2) of the Constitution and section 25 of the Office of the Director of Public Prosecution Act²⁰ and discontinued the case. It is worth noting that the prosecution and the accused person were both involved in seeking the termination of the matter.

A major jurisprudential leap on the role of ADR in criminal cases was made by the learned judge Lagat in *Republic v Mohamed Abdow*²¹. The accused had been charged with murder. Just before the hearing began, the prosecution advised the court that the parties had decided to settle the matter in accordance

cases in which one or more parties is subject to it, so far as it is applicable and is not repugnant to justice or morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without due delay.

¹⁸ Section 176 of the Criminal Procedure Code, Cap 75.

¹⁹ *Republic v Juliana Mwikali Kiteme & 3 others* [2017] eKLR.

²⁰ Section 25 of the Office of the Director of Public Prosecutions Act No. 2 of 2013 provides that the Director may, with the consent of the court, discontinue any criminal case before judgment.

²¹ *Republic v Mohamed Abdow Mohamed* (2013) eKLR.

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with Islamic Law and Customs. In discontinuing the case, the judge relied on Article 157 of the Constitution on Nolle Prosequi.²² Nolle Prosequi is the power of the prosecution to terminate a criminal trial at any stage before judgment.²³ These two cases are significant because the court appreciated the import of ADR in criminal cases.

However, in some instances, the courts have been reluctant to let ADR be utilized in the disposal of some criminal cases. In *Republic v Abdullahi Noor Mohammed*²⁴, the learned Justice Lessit disagreed on the use of ADR to solve a charge of murder. In this case, the accused person sought to have an out of court settlement in line with the Somali culture, law and religion. However, the prosecution opposed the application. In rejecting the application by the accused, she emphasized the common law principle of a crime constituting a public wrong. And thus, the prosecution ought to have consented to the application because it is the custodian of the people. The learned judge further emphasized that prosecutorial powers are sacrosanct powers of the Director of Public Prosecution²⁵ and thus the discontinuance of a criminal dispute must consented by the body.

The use of ADR in criminal cases was further canvassed in the case of *Kelly Kases Bunjika v Director of Public Prosecution and another*²⁶. The facts of this case are straightforward. The applicant was charged with the offence of robbery with violence contrary to section 269 (2) of the Penal Code in a lower court.²⁷ The complainant then asked the court to withdraw the matter which application was rejected by the prosecution. After listening to both parties, the magistrate

²³ Sunday Mema, 'Nolle Prosequi a two-legged stool the under current dispensation', *The Nairobi Law Monthly*, September 1, 2016.

Available at <http://nairobilawmonthly.com/index.php/2016/09/01/nolle-prosequi-a-two-legged-stool-the-under-current-dispensation/>

²⁴ *Republic v Abdullahi Noor Mohammed* (alias Arab) eKLR.

²⁵ *Gregory & Another v Republic thro' Nottingham & 2 others* (2004) 1KLR 547.

²⁶ *Kelly Kesses Bunjika v Director of Public Prosecution (DPP) & Another* (2018) eKLR.

²⁷ *The Penal Code*, Chapter 63 Laws of Kenya.

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declined to grant the request for withdrawal. On this basis, the applicant approached the High Court seeking to review the order of the trial magistrate denying the request for withdrawal of the matter by the complainant. In the judgment of the High Court, the central role of the Director of Public Prosecution was highlighted as extremely central in disposal of cases. Thus, without this consent, the application of ADR mechanisms would hit a snag.

6.0 The Role of the DPP in Adjudication of Criminal Cases through ADR

The office of the DPP is an office established by the Constitution to prosecute cases.²⁸ Power to institute²⁹ and terminate³⁰ criminal proceedings is also vested upon the office. Although a private person can institute private criminal proceedings, the DPP has the power to take over the private prosecution at any stage. The Office of the Director of Public Prosecutions Act integrates the power of the DPP to terminate criminal proceedings before judgment.³¹

Courts have insisted that the consent of the DPP is indispensable before criminal cases are disposed by way of ADR.³² However, the question that stares starkly is whether the DPP has thrown the spanner in the works on the adoption of ADR in criminal cases. It is crucial to answer this question because current judicial decisions have held the consent of the DPP as an overarching factor.

Of great significance is Article 157(10) which stipulates the independence of the office of the DPP.³³ In *Kelly Kases Bunjika v Director of Public Prosecution and Another*, the learned judge emphasizes the independence of this office in his words below:

²⁸ Article 157 of the Constitution of Kenya, 2010, Government Printer, Nairobi.

²⁹ Article 157(6) (a) of the Constitution of Kenya 2010, Government Printer, Nairobi.

³⁰ Article 157(6) (c) of the Constitution of Kenya 2010, Government Printer, Nairobi.

³¹ Section 25 of the Office of the Director of Public Prosecutions Act 2013.

³² Republic v Faith Wangoi, Kajiado HC Criminal Misc. Application No. 1 of 2015.

³³ The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

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“It is evidence of the sacrosanct nature of the DPP’s mandate, Article 157 (10) of the Constitution provides that he exercises his functions without any direction by any authority, of course, save for constitutional and judicial review of such exercise for juridical validity....To succeed in challenging the constitutional validity of the action or, where he refuses to institute or continue or discontinue a prosecution, inaction of the DPP, an applicant must show that the DPP has failed to give effect, in the particular case, to “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”. Or, what amounts to the same thing, that the public interest and the interest of administration of justice and the proper use of the legal process demands that the action or inaction proposed by the applicant’”.

In the above case, the role of the DPP in prosecuting crimes is termed sacrosanct, one which cannot be directed by any person or body on how to conduct its affairs. The independence of the office is highly regarded that it would amount to a constitutional violation to promote the constitutional spirit of settling disputes by ADR without consulting the DPP. Moreover, Justice Lessit in *Republic v Abdullahi Noor Mohammed* reiterates the critical importance of involving the DPP before resorting to settle criminal cases through ADR. She states as follows in her ruling:

“A crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any offer by the accused to negotiate a plea agreement proposal. By asking this court to enforce an arrangement between the accused and the family of the accused, to the exclusion of the prosecution amounts to a disregard of the law on the exercise of prosecutorial powers. That cannot be the object envisioned under Article 159 when recognizing alternative justice systems as one of the principles to be promoted by courts when exercising judicial authority.

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Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land''.

The learned judge appreciates the fact that crime is a wrong against the state and not necessarily a single individual. Further, she states clearly that the minimum threshold before seeking redress through ADR is through consultation with the DPP.

A common thread that runs through the decisions of the court is necessity of consulting the DPP before abandoning the courts for other arenas of dispute settlement. In construing Article 159, the courts have insisted that it's not a stand-alone proviso but that its application is based on its conformity with other provisions of the Constitution. Another important legal component that springs from *Republic v Abdullahi Noor Mohammed* is the concept of plea bargaining. Not only has the court addressed how ADR ought to be inculcated in the legal system, the office of the DPP has in a number of instances failed to prosecute cases after the criminal disputes were disposed before being addressed by the courts.

One such case is *Aberdares Engineering Contractors Limited v University of Nairobi*³⁴. The gravamen of the dispute concerned the illegal allocation of land L. R. No. 1/514 situated along Galana Road. The land belonged to the University of Nairobi and was valued at over KES. 2 billion. Aberdares Engineering Contractors Limited agreed to surrender the land and all the title documents to the University of Nairobi. However, as a condition, it obtained concurrence of the DPP that upon surrender, it would not be prosecuted in a criminal matter. The office of the DPP gave that undertaking and the Ethics and Anti-Corruption Commission (EACC) and Aberdares Engineering Company consented for the surrender of the land at the civil registry. Before the matter was adjudicated by

³⁴ ELC No. 330 of 2011; See also Ethics and Anti-Corruption Commission v Aberdares Engineering Contractors Limited, ELC No. 955 of 2016. The two suits were later consolidated and disposed of together after the negotiations and settlement.

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the courts, the DPP and the EACC decided to resolve the matter out of court. Consequently, the parties registered consent in court with the DPP agreeing not to prosecute the case further and the land was subsequently given back to the University of Nairobi.

Thus, the DPP, clothed with the powers to prosecute cases, wields so much influence in the quest of adopting ADR in the criminal circles. In addition to the power to prosecute, the DPP has powers to conduct plea bargaining.

6.1 Plea Bargaining vis-à-vis ADR

The Black's Law Dictionary has defined plea bargain as a negotiated agreement between a prosecutor and a criminal defendant who pleads guilty to lesser offence or to one or more multiple charges in exchange for some concession by the prosecutor, usually a more eminent sentence or a dismissal of the other charges.³⁵

In the Kenyan context, plea bargaining is governed by the Criminal Procedure Code³⁶ and The Criminal Procedure (Plea Bargaining) Rules, 2018. The practice involves the prosecutor and the accused person agreeing on whether to withdraw the case reducing the charge to a lesser offence. Furthermore, the DPP is under a legal obligation to consult the investigating officer handling the case.³⁷ The act further gives the court powers to reject a plea bargaining agreement entered into by the DPP and the accused person.

However, the concept of plea bargaining is not tantamount to alternative dispute resolution because the same is under the supervision of the court. However, the court can still vary the plea bargaining agreement and decide the

³⁵ Bryan A. Garner (ed. In .C) Black's Law Dictionary (8th ed) (Minnesota: Thompson Web Publishers, 2004), p.1189.

³⁶ Section 137O of the Criminal Procedure Code.

³⁷ Rule 7 of The Criminal Procedure (Plea Bargaining) Rules, 2018.

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case on its own merits further, the court can intervene if the accused person breaches the plea bargaining agreement.³⁸

A case in point is *Republic v Joy Gwendu*³⁹, where the former nominated Senator, helped to organize a fund raiser for a self-group from her County. The senator irregularly banked all the collections in her personal account and the group was unable to recover the money and reported the matter to EACC. She was charged with various accounts under the plea bargaining agreement, she pleaded guilty to abuse of office and was to repay the amount alleged to have been illegally acquired by her in installments. In return, the offence of forgery was dropped. The condition imposed was that in the event of breach in the repayment terms, the matter would be mentioned before the magistrate for a conviction to be recorded and judgement issued. She only paid a part of the money and when she breached the terms of payment, the magistrate recalled the file, convicted her and sentenced her to two years' imprisonment.

7.0 The Merits and Demerits of Adopting ADR in the Criminal Justice System

Albeit the advantages that ADR provides in dispute resolution, it also has drawbacks. This discussion considers the advantages and disadvantages of adopting ADR in dispute resolution. One of the major advantages of adopting ADR in the settlement of criminal disputes is the flexibility of ADR.

Courts have many procedural rigors that make the dispute resolution process take a long time. It is well documented that the existing justice system is not able to cope up with the ever increasing burden of criminal litigation.⁴⁰ The main problem is case backlog but extends to other fronts. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. ADR on the other hands lets parties in a criminal dispute find a resolution without facing a myriad of procedural technicalities.

³⁸ Rule 12(2) of the The Criminal Procedure (Plea Bargaining) Rules, 2018.

³⁹ Milimani Anti-Corruption Court Case No 1 of 2018.

⁴⁰ Coldham S., *Criminal Justice Policies in Commonwealth Africa, Trends and Prospects*, *Journal of African Law*, 44 at 220.

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Our criminal justice has over time been blamed for lagging cases. The settlement of criminal cases through the judicial system mostly takes a long time for a resolution to be found⁴¹. This is unlike ADR where parties in a dispute can solve their grievances in a short period of time. Moreover, at most instances, parties that employ the use of ADR have the ability to determine how long their dispute will take to be resolved.⁴²

Another hallmark of the use of ADR in dispute resolution is that parties have the ability to mend their broken relationship. This is unlike the criminal justice system that emphasizes on punishment rather than reconciliation. Despite the analogy that crimes are committed against the state, it is equally true that crimes hurt the immediate victim. Adopting ADR in such instances helps in promoting reconciliation and unity between the perpetrator of the offence and the victim.

Despite the glaring advantages of ADR, it still bears drawbacks. For instance, ADR does not promote other theoretical approaches to crime punishment such as deterrence and retribution. These theoretical approaches are also important in the criminal justice system as they do serve different purposes.

Furthermore, ADR may be costly to parties. In most alternative dispute resolution methods, the parties have the onus of paying the fees of the umpire. On the other hand, an accused person in a criminal trial before court does not bear the expenses of the judge or magistrate. The expenses purely lie on the state.

8.0 A Different Glimpse: ADR in India's Criminal Justice System

ADR gained statutory recognition in India through the adoption of Civil Procedure Amendment Act, 1999, the Arbitration and Conciliation Act 1996 the Legal Services Authorities Act 1997 and Legal Services Authorities

⁴¹ https://www.the-star.co.ke/news/2018/08/21/cases-backlog-to-be-cleared-says-Cj_c1805859 Accessed on 11th February 2019.

⁴² Green Paper on alternative dispute resolution in civil and commercial matters, COM/2002/0196 Final. Can be found at <http://eurlex.europa.eu/>.

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(Amendment) Act 2002. Despite this number of legislation, the adoption of ADR cases in criminal matters is limited to the concept of plea bargaining and victim offender mediation. Victim-offender mediation is a process wherein, the victim and the offender of the crime are brought together to meet face-to-face under the structured guidance of a mediator.⁴³ The mediation may take place at any time during the course of the justice process, but almost all of them take place after court involvement.

Victim Offender mediation in India has grown out of an attempt to take seriously some of the ways the traditional criminal justice process fails to address important needs of both victims and offender.⁴⁴The purpose of victim-offender mediation and dialogue is to provide a restorative conflict resolution process that actively involves victims and offenders in repairing (to the degree possible) the emotional and material harm caused by the crime; an opportunity for both victims and offenders to discuss offenses and express their feelings and for victims to get answers to their questions; and an opportunity for victims and offenders to develop mutually acceptable restitution plans that address the harm caused by the crime.⁴⁵

Another facet of the Indian Criminal Justice system that incorporates ADR is plea bargaining. Plea bargaining in India is a new concept for Indian legal system contained in Section 265A to 265L, Chapter XXIA of the Criminal Procedure Code.⁴⁶ Plea bargaining is the pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. It is an agreement in which

⁴³ Mark S. Umbreit, Robert Coates, Betty Vos. *VictimOffender Mediation: Three Decades of Practice and Research*, *Conflict Resol. Q.* 2004; 270-81:280.

⁴⁴ Friedman B, *Causes of Popular Dissatisfaction with Administration of Justice: A Retrospect (and a Look Ahead)*, *Indiana Law Review*, 82, (2007).

⁴⁵ Umbreit, M. S., & Greenwood, J., *Guidelines for victim-sensitive victim-offender mediation: Restorative justice through dialogue*. US Department of Justice, Office of Justice Programs, Office for Victims of Crime, 2000.

⁴⁶ The Criminal Law (Amendment) Act, 2005.

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the defendant pleads guilty to a lesser charge and the prosecutors in return drops more serious charges.⁴⁷

In India, plea bargaining is not applicable for the offences for which punishment is life imprisonment or death sentence. It is only applicable for the offences for which punishment is less than 7 years. Further offences affecting socio-economic condition of the country or committed against women or child below 14 years have been excluded from the ambit of Plea Bargaining. Pursuant to this, Central Government had immediately notified list of 19 Acts of Parliament declaring offences therein as affecting the socio-economic condition of the country.

The Indian context provides a glimpse on how victim-offender mediation and plea bargaining are key if adopted in the criminal justice system. Although, plea bargaining has been adopted in Kenya, the concept of victim offender mediation is still blurry.

9.0 Recommendations

The Constitution and other statutory laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice.⁴⁸ Thus, in promoting and realizing the constitutional spirit of adopting ADR in dispute resolution a number of changes need to be effected.

First, redefining the extent of use of ADR in criminal justice is important. The constitutional parameters embodied under Article 159 only gives the judicial arm the authority to adopt ADR but fails to provide the procedural mechanism through which ADR is to be implemented. Albeit implemented in the civil front, there have been no guidelines on how the same is to be utilized in the criminal sense. Inasmuch as the courts have delineated the boundaries of the

⁴⁷ Alschuler, Albert W., "The Prosecutor's Role in Plea Bargaining," *University of Chicago Law Review* 36, no. 1 (1968): 3.

⁴⁸ Republic v Abdullahi Noor Mohamed (alias Arab) [2016] eKLR.

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application of ADR, the precedential pronouncement to substantially add flesh to the Constitution skeleton.

Moreover, the legal corpus governing punishment ought to change and reflect a more restorative nature. Our judicial system is grounded on the theoretical grounds of deterrence, retribution and rehabilitation. This abstract approach fails to consider an important facet of penology which is restorative justice. Philosophical foundations on criminal punishment ought to be reconfigured so as to appreciate other ideals of the criminal justice system.

Another considerable recommendation would be the adoption of Victim-Offender Mediation. As stated earlier, Victim-Offender Mediation (VOM) refers to a facilitated discussion between the victim and offender about the offence, its consequences, and possible means of repairing the harm caused. This can be deduced from the *Aberdares Engineering Contractors Limited v University of Nairobi* case where parties mutually agreed to settle their dispute. In a safe and structured setting, victims are able to question their offender and discuss how they were affected by the crime, with the goal of holding the offender accountable for his actions.

10.0 Conclusion

Time is indeed ripe for the criminal justice system to redefine the underlying structures upon which it is founded. Rethinking criminal punishment concepts such as deterrence, retribution and rehabilitation is key in instilling and installing the precepts of ADR in the criminal justice system. The system should be flexible and inculcate restorative justice as a cornerstone of the criminal justice system.

Although considerable effort has been shown by the courts and the office of the DPP, the potential for expanding use of ADR in certain fronts is still manifest. If steps are taken to such effect, then, the Augean stables in the judicial front would be steadily be cleaned.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki
Customary Justice Systems in Kenya: An Exploration of their Jurisdiction

By: **Francis Kariuki***

Abstract

In light of the recognition of customary justice systems (hereinafter 'CJS') which are informal and culturally-appropriate customary or traditional courts in the Constitution of Kenya 2010, this article discusses some of the teething jurisdictional issues they are likely to encounter and generate. Currently, there exists no policy or legal framework delineating the jurisdiction of CJS be it personal, territorial, pecuniary, territorial or substantive. In addition, the existence of a unitary court system in Kenya where courts already have jurisdiction over customary law questions, means that the delineation of CJS jurisdiction will be a daunting task as it might create conflicts between state courts and CJS. Whereas CJS normally have jurisdiction over persons subject to the same customary law, where they involve parties from different ethnic groups, they are likely to face enormous jurisdictional dilemmas. Similarly, where a CJS comprises members from different ethnic communities, it is not apparent which customary law would be applied. It is in this context that the article seeks to explore the jurisdictional issues that CJS are likely to encounter in Kenya. Part 1 offers a general introduction. Part 2 looks at the legal framework for CJS in Kenya. Part 3 discusses jurisdictional issues over customary law while highlighting potential forms of jurisdiction that CJS in Kenya might have. Part 4 highlights challenges facing CJS from a jurisdictional perspective. Part 5 offers a conclusion and way forward.

1.0 Introduction and background on CJS and customary law in Kenya

Before the introduction and establishment of formal judicial institutions by the British colonial administration in Kenya, conflicts and disputes were settled through the machinery of traditional/customary institutions.¹ Traditional institutions were governed by customary laws of the various ethnic groups. Customary law governed all affairs of the people and its application was

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¹ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki principally based on membership into an ethnic group. CJS have remained resilient in most parts of Kenya, and continue to play a key role in the justice sector especially due to challenges faced by people in accessing justice within the formal justice system.² Janine Ubink, in a Namibian study,³ Julie Davies and Dominic Dagbanja in a Ghanaian study, and Tanja Chopra and Deborah Isser⁴ in a Somali study, have all come to the conclusion that CJS are still very prevalent in most parts of Africa. They usually operate outside the domain of state justice system and handle disputes that would conventionally be addressed by formal courts. To this end, most African countries, including Kenya have enacted laws recognising CJS, in large part due to their contribution in enhancing access to justice amongst the poor in rural areas and within informal settlements.⁵

Compared to state courts, traditional justice systems resolve disputes on a case by case basis. Although there are general customary principles that underpin each dispute, CJS generally blend various options that would result in the most restorative outcome.⁶ Some of the advantages of CJS are that: the proceedings are understood and consequently accepted by a majority of the people; they bring justice closer to the people; they apply customary law where panelists have special understanding; encourage participation of people in

² Onyango P, *African Customary Law: An Introduction*, Law Africa, 2013, Nairobi, 149.

³ Janine Ubink 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' available at <https://onlinelibrary.wiley.com/doi/full/10.1111/dech.12415> accessed on 9 April 2018.

⁴ Chopra T, and Isser D, 'Women's access to justice, legal pluralism and fragile states', in Albrecht P, Kyed H, Isser D and Harper E, (Eds), *Perspectives on involving non-State customary actors in justice and security reform*, International Development Law Organisation in conjunction with the Danish Institute for International Studies, available at http://pure.diiis.dk/ws/files/61420/DIIS_Book.pdf , on 9 April 2018, cited in

⁵ Ubink J and van Rooij, *Towards customary legal empowerment: an Introduction*, in Ubink J and McInerney, (Eds), *Customary justice: Perspectives on legal empowerment*, International Development Law Organisation, at <https://tinyurl.com/y74kvff7>, on 10 April 2018.

⁶ Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' <http://ssrn.com/abstract=3165522>, accessed on 16 June 2018 at 8.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki administration of justice; they are not expensive; and do not impose a heavy burden on the national budget.⁷ In addition, they promote restorative justice and are informal compared to the formal justice system where strict rules of evidence and procedure are strictly adhered to. With the establishment of British colonial administration, CJS evolved into native courts/tribunals. The Native Courts Regulations 1897,⁸ enacted by Her Majesty's Commissioner and Consul-General for the East Africa Protectorate, established "native courts". With the promulgation of the 1907 Native Courts Ordinance, the Chief Native Commissioner was authorized to set up, control and administer the courts. The ordinance also did this at the divisional level of each district. Appeals could be made to the District Officer, District Commissioner, the Provincial Commissioner, and the final appeal lay with the Supreme Court. According to the Native Tribunals Ordinance of 1930, native tribunals were to apply native law and custom prevailing in the area of the jurisdiction of the tribunal so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony.⁹

The Native Courts/Tribunals ran parallel to Her Majesty's courts and gave rise to the Dual Court System in colonial Kenya which was largely dependent on the race of the inhabitants. It is noteworthy, that Kenya was among the few British colonies in Africa with a parallel legal system where one system served the Africans and the other whites.¹⁰ The duality of courts was manifest in that, on one hand, there were native tribunals (later African courts) staffed by local men but supervised by administrative officers, some with legal qualifications but most without.¹¹ Appeals went through the administration, district and

⁷ Nwogugu E, 'Abolition of customary courts - The Nigerian experiment', 12.

⁸ Hertslet, *Treaties*, Vol. 20, 74, cited in Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 130.

⁹ Section 13a *Native Tribunal Ordinance*, (1930).

¹⁰ Brett Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524 at 512.

¹¹ Cotran E, 'The Development and Reform of the Law in Kenya' (1983) 27(1) *Journal of African Law* at 42.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki provincial commissioners, with no possibility of appeal to the judiciary.¹² However, the chief justice or the attorney general had the power to review, revise, and/or quash any and all cases, whether heard in the tribunals or in magistrates' courts.¹³ On the other hand, there was the judicial, professional, English-orientated system of courts (Supreme court and subordinate courts) that applied English law and heard all cases involving foreigners and serious criminal cases involving Africans (such offences were heard by a magistrate and not an administrator).¹⁴ Allot explains that the practice in East Africa differed from that in other parts of British Africa with the creation of a parallel or dual system of courts.

The Supreme Court and the subordinate courts in all cases, civil and criminal to which natives were parties were to be guided by native law only in so far as it was applicable and not repugnant to justice or morality or inconsistent with any Order in Council or Ordinance in force.¹⁵ This was also the case in other African countries.

In Kenya, the African Courts Ordinance of 1951 introduced a few changes. Native tribunals were renamed African Courts from which appeals lay to an African Appeal Court and thence to the District Commissioner as before. But instead of appeals to the Provincial Commissioner, appeals now lay to a new Court of Review consisting of a Chairman of high judicial standing to be appointed by the Chief Justice, the Chief Native Commissioner, the African Courts Officer and an African to be appointed by the Governor.¹⁶

The dual system of courts has been criticised by scholars. According to Nwogugu, the 'idea of Customary Courts derives essentially from the plural

¹² Brett Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524 at 512.

¹³ Brett Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524 at 512.

¹⁴ Allott A.N, Customary Law in East Africa, 4(3) *Africa Spectrum*, 1969, 12-22 at 13-14.

¹⁵ Article 12, Kenya Colony Order in Council 1929; Art. 4(2) *Kenya Colony Order in Council* (1921). See also Cotran E, 'The Development and Reform of the Law in Kenya', at 42-44.

¹⁶ Cotran E, 'The Development and Reform of the Law in Kenya', 43.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki nature of the colonial society which was predicated on a distinction between the so-called native population and the colonial authority'.¹⁷ Therefore, the perpetuation of this distinction by a duality of laws, customary law and statute law, with implications of superior and inferior laws, is clearly untenable in a sovereign and autonomous society.¹⁸ After independence, the dual system was harmonized and in 1967, the native courts were dismantled and a unitary court system established¹⁹ but most countries sustained the limitations imposed on the application of customary law. Specifically, in 1962, the African courts were transferred from the administrative level to the Judiciary. In 1963, a formal and independent judiciary was set up. The independence Constitution provided that the Supreme Court had the original, unlimited jurisdiction over criminal and civil matters over all persons regardless of their races or ethnic considerations. Judges were to be appointed by an independent Judicial Commission and Kadhis' Courts were established by the Constitution.²⁰ In 1964, the Supreme Court was replaced by the High Court.

Writing in the context of Nigeria, Nwogugu explains that the policy of the regional government, of the East Central State (now Anambra and Imo States), was to abrogate the Customary Courts Law by making provision for many more Magistrates to enable Magistrates' Courts handle effectively the functions of the former Customary Courts.²¹ It is therefore intended to extend the jurisdiction of the Magistrates' Courts and the High Courts to embrace all those aspects hitherto reserved to customary law and practice and thereby achieve a necessary and essential unity of laws."²² Relatedly, Allott notes that:

¹⁷ Nwogugu E, 'Abolition of customary courts – The Nigerian experiment', (1976) 20(1) *Journal of African Law*, 1-19 at 2.

¹⁸ Nwogugu E, 'Abolition of customary courts – The Nigerian experiment', (1976) 20(1) *Journal of African Law*, 1-19 at 2.

¹⁹ Cotran E, 'The Development and Reform of the Law in Kenya', 42-44.

²⁰ Onyango P, *African Customary Law: An Introduction*, 149.

²¹ Nwogugu E, 'Abolition of customary courts – The Nigerian experiment', (1976) 20(1) *Journal of African Law*, 1-19 at 2.

²² Nwogugu E, 'Abolition of customary courts – The Nigerian experiment', (1976) 20(1) *Journal of African Law*, 1-19 at 2.

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“The effect of British rule on customary laws was, to begin with, minimal. They did not abolish these laws; they preserved them. They recognized the native tribunals, which, later on, were redesignated as native courts; they recognized Islamic courts in various areas. The British only gradually altered the characteristics of these indigenous courts, both as regards their staff, their procedure, and the law they applied. For a long time, they recognized these institutions which administered the customary law.”²³

The Judicature Act of Kenya, which was enacted upon independence delimits the application of African customary laws by stating that:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality...”²⁴

The general rule still in practice from the colonial era is that written and received law ranks higher than customary laws as colonialists regarded it inferior to written laws and therefore had to place limitations on its application²⁵ most evidently through a repugnancy clause).²⁶

The provision that the courts are to be “guided” by customary law is ambiguous as there are several possible interpretations of “guided”. First, it could mean that courts have an unfettered discretion whether to apply customary law or not, and, if they decide to apply customary law, which rules to apply and with whatever qualifications they think fit. Second, it could mean that courts have no discretion whether to apply customary law or not (subject to any discretion imported by the word “applicable”); but in applying customary law they need not apply it in all its rigour and detail. The use of the word “shall” before “guided” rather than “may” is treated as significant. Third, it may also mean

²³ Allott A.N, ‘Customary Law in East Africa’ (1969) 4(3) *Africa Spectrum*, 12-22 at 13-14.

²⁴ Section 3(2), *Judicature Act*, No. 16 of 1967.

²⁵ HWO Okoth-Ogendo, ‘The Tragic African Commons: A Century of Expropriation, Suppression and Subversion’, (2003) 1 *University of Nairobi Law Journal*, 107-117.

²⁶ Onyango P, *African Customary Law: An Introduction*, 149.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki that there is no discretion; and courts must apply customary law in cases between Africans, and they must apply it in its full detail, save for that excluded by the repugnancy and inconsistency.²⁷ Moreover, and despite the purported application to all cases and all courts, the words “to which natives are parties” are ambiguous. Do they intend to deal only with cases in which all the parties are Africans, or do they cover also disputes in which at least one of the parties is an African?²⁸

2.0 Legal Framework for CJS in Kenya

Nationally, the role of TJS in promoting access to justice and better governance is recognised in the Constitution of Kenya 2010.²⁹ Besides, the 2010 Constitution has recognised customary law, as a source of law in Kenya,³⁰ and explicitly recognised CJS. The Constitution provides that in exercising judicial authority, courts and tribunals shall promote the use of traditional dispute resolution mechanisms (CJS).³¹ But the Constitution does not limit the application of TJS to any area of the law. The 2010 Constitution allows for the use of TJS in the resolution of land and environmental disputes.³² And due to the sensitivity of the land question in Kenya, TJS seem to be very appropriate as they would foster relationships and coexistence even after the dispute settlement. Courts have also recognised TJS. For example, in the case of *Lubaru M'imanyara v Daniel Murungi*,³³ parties filed a consent seeking to have the dispute referred to the *Njuri Ncheke* Council of Laare Division, Meru County and the court citing Articles 60(1) (g) and 159(2) (c) of the Constitution referred the dispute to the *Njuri Ncheke* noting that it was consistent with the Constitution. The consent

²⁷ Hertslet, *Treaties*, Vol. 20, 74, cited in Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 132.

²⁸ Hertslet, *Treaties*, Vol. 20, 74, cited in Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 132.

²⁹ Articles 48 and 159(2) (c), *Constitution of Kenya*, 2010.

³⁰ Article 2(4), *Constitution of Kenya*, 2010.

³¹ Article 159(2) (c), *Constitution of Kenya*, 2010.

³² Article 159(2) (c), 60(f), 67(2) (f), *Constitution of Kenya* 2010. See also ss 18 and 20(1) of the Environment and Land Court Act No. 19 of 2011 allowing the Environment and Land Court to adopt and implement Article 159 of the Constitution.

³³ Miscellaneous Application No. 77 of 2012. [2013] eKLR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki reached by the parties was adopted as an order of the court.³⁴ CJS have also been applied in criminal cases since the promulgation of the Constitution 2010, a development that has been received by courts with mixed reactions.³⁵

However, CJS are to be promoted if they do not contravene the Bill of Rights, are not repugnant to justice or morality or any other written laws.³⁶ Subjecting CJS to the repugnancy clause shows that even in this post-democratization Constitution, where the status of customary law is constitutionally protected, it is nonetheless inferior to the other conceptions of justice. The repugnancy clause has not only relegated customary law to an inferior status but has also provided a firm basis for its disqualification.³⁷ Courts have relied heavily on the repugnancy clause to declare African customary law as repugnant to justice and morality, with one glaring deficiency in this application being that Kenyan law is yet to define exactly what is meant by 'repugnant'. In exercising their discretion to discern its meaning, judges have even relied on foreign laws to determine what actions are repugnant to justice and morality, which are invariably out of context.³⁸ In *Katet Nchoe and Nalangu Sekut v. R*,³⁹ the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The court disregarded the customs and practices of the Maasai and adopted the definition of repugnancy to justice and morality under the Ghanaian Constitution that defines a repugnant custom as that which is harmful to both the social and physical well-being of a citizen. The Court held

³⁴ Similarly in *Seth Michael Kaseme v Selina K. Ade*, Civil Appeal 25 of 2012; [2013]eKLR, the High Court recognised the role of the Gasa Council of Elders of Northern Kenya in dealing with land disputes.

³⁵ See generally *Republic v. Mohamed Abdow Mohamed* [2013] eKLR; *Republic v. Lenaas Lenchura*, Criminal Case 19 of 2011; *Republic v. Joseph Kiprotich Maiyo*[2012]eKLR; *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR; and *Republic v Juliana Mwikali Kiteme & 3 others* [2017]eKLR.

³⁶ Article 159 (3), *Constitution of Kenya* (2010).

³⁷ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 13.

³⁸ Most notably the stance adopted in *Katet Nchoe and Nalagu Sekut v R* (Criminal Appeal No. 115 of 2010).

³⁹ Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition.

Under the Marriage Act, it is provided that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage. Beyond this, the only additional consideration noted as an additional guide is that the said process of mediation “shall conform to the principles of the Constitution.”⁴⁰ Again, it is noteworthy that divorce proceedings under the Act are entertained under the formal courts.⁴¹ It is noteworthy that a customary marriage under the Act is one that is ‘celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.’⁴² This means that if the parties to a customary marriage are from different ethnic communities, they can choose the customary law that will apply to their marriage. Consequently, if they are to go through a customary dispute resolution process before petitioning for divorce, it appears that that process would be governed by the chosen custom, and the CJS could have jurisdiction over a spouse who is not from the ethnic group whose customary law is being applied.

The Judicature Act states that,

*“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”*⁴³

In *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR the court opined that:

⁴⁰ Section 68, *Marriage Act*.

⁴¹ See Section 69, *Marriage Act*.

⁴² Section 43(1), *Marriage Act*.

⁴³ Section 3(2), *Judicature Act, Cap. 8, Laws of Kenya*.

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“The **Judicature Act** in fact only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law.”

More specifically, the Magistrates’ Courts Act contains a specific provision on jurisdiction exercisable by the courts in relation to African customary law. Under Section 7(3), magistrate’s courts have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law:⁴⁴ land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of, or adultery with a married person; matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as they are not governed by any written law. Magistrate’s court may call for and hear evidence of the customary law applicable to any case before it.⁴⁵ The Act does not contain specific provisions on the exercise of the attendant customary law jurisdiction, let alone on jurisdictional conflicts in customary law matters. Moreover, the Act confers jurisdiction that ordinarily vests on CJS under customary law on magistrates’ courts, a clear effort towards the suffocation of CJS in Kenya. Therefore, formal courts have original jurisdiction on all matters that were previously heard and determined by CJS.⁴⁶

From the aforementioned, it is notable that the fate of CJS in Kenya has not been impressive, from the colonial time to independence. Even the Constitution of 2010 has not made CJS any better as they are to be promoted by the Judiciary. The current structure of the judiciary establishes a unified hierarchy of courts, and the courts may promote and be guided by the principles of traditional dispute resolution mechanisms.⁴⁷ However, there is notably no provision for customary courts as the Magistrates’ Court retains jurisdiction in proceedings

⁴⁴ Section 7(3), *Magistrates’ Courts Act*, No. 26 of 2015.

⁴⁵ Section 16, *Magistrates’ Courts Act*.

⁴⁶ Ngira D, ‘Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism’ <http://ssrn.com/abstract=3165522>, accessed on 16 June 2018.

⁴⁷ Article 159 (2) (c), *Constitution of Kenya* (2010).

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki of a civil nature concerning matters under African customary law as elaborated earlier.⁴⁸ The colonial policy of suffocating customary law and CJS therefore continues to date.

Customary law is the best reflection of the confluence of law and social order exhibited in the African experience, and its strongest pillar is the fact that it provides a medium for society to protect certain values.⁴⁹ This notwithstanding, the general rule still in practice from the colonial era is that written and received law ranks higher than customary law since the latter has historically been regarded as inferior to written laws, and therefore limitations had to be placed on its application⁵⁰ through a repugnancy clause. Consequently, customary law, which is most relevant to the people of Kenya, is at the bottom of the hierarchy of norms and further limited by the mentioned repugnancy caveat. As a result, promoting and strengthening CJS is favourable and is most archetypal of the customs practiced in the country and accepted by the citizens, as opposed to received laws that are not specific to the Kenyan context. Ignorance of this fact has led to absurd results in some cases.⁵¹

From the foregoing, it is apparent that African customary law is a relatively significant source of law in Kenya, with formal judicial structures being infused with, in various ways, customary law considerations. It is thus a contradiction that the law is yet to define the jurisdictional contours of CJS in Kenya.

3.0 Jurisdictional Conflicts over Customary Law and Suggestions for CJS

Jurisdictional conflicts could be viewed as part of the legal problems arising in multi-ethnic societies, in cases where communities live under different laws.

⁴⁸ Section 7(3), *Magistrates' Courts Act* (Act No. 26 of 2015).

⁴⁹ Buluma B, *The Case for the Supremacy of Customary Law in Kenya*, 2005, available at < http://www.academia.edu/9132576/The_Case_for_the_Supremacy_of_Customary_Law_in_Kenya >

⁵⁰ HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion', 1. *University of Nairobi Law Journal*, 2003, 107-117. See also Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 6.

⁵¹ See *R v Amkeyo* [1917] EALR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki These conflicts arise most often when such matters are canvassed in courts. These problems may arise not only when members of different communities enter into legal relationships, but also when the parties, whether members of the same community or not, choose to regulate their legal relations in accordance with another personal law.⁵² In relation to choice of law questions in scenarios where parties to a dispute are subjected to different personal laws different conflicts arise. In the particular case of Africa, Allot has noted that these include conflicts between the general (or English) law and special laws (customary or religious); conflicts between local customary laws and, finally, conflicts between customary law and Islamic law.⁵³

CJS are likely to encounter jurisdictional conflicts when they are faced with inter-tribal conflicts of law. Inter-tribal conflicts of law are conflicts that arise between two tribal laws, sometimes, differences can exist between different sections of the same tribe. In the latter case, where the tribe is a political unit, it may be polytechnic and one may be forced to choose between one kind of customary law and another prevailing within the same tribal area.⁵⁴ Common law and statutory law are largely inadequate in resolving cases touching on the application of customary law since in most cases judges are not experts in customary law.

During the colonial period, the problem was as much to determine which court was to try a case as to determine what law should govern it. Indeed, the choice of court was often conclusive of the choice of law, since if it was decided that a case was amenable to the jurisdiction of a native court, the result usually was that customary law would be applied to its determination; whilst if a British court exercised jurisdiction, it would automatically apply its own law to the resolution of the case.⁵⁵ The position was that each type of court had a primary

⁵² Tier A, 'Techniques of choice of law in conflict of personal laws', 30(1) *Journal of African Law*, 1986, 1-19.

⁵³ Allott A, 'Internal conflict of laws: Principles and statutory provision', in his *New essays in African law*, Butterworths, 1970, 107.

⁵⁴ Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 108.

⁵⁵ Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 110.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki law, by which is meant that in default of any special reason or circumstance, a court of a given type would apply a system of law of a given kind with exceptions. The primary law in native courts in British colonial territories was the African customary law existing in their respective jurisdictions.⁵⁶ However, the laws governing other courts, usually provided that the non-African courts could have power to apply customary law in cases involving Africans, whilst many of the native or African courts had a limited jurisdiction, at least in the later colonial period, to apply non-customary law.⁵⁷ Currently, this is the position obtaining in Kenya, as formal courts can still apply customary law, while CJS can only apply relevant customary law.

The ensuing section discusses approaches that can be used in dealing with jurisdictional conflicts in the implementation of CJS in Kenya.

(a) Lex fori

In dealing with choice of law problems, Akolda Tier draws a distinction between 'systems of personal law' (where personal laws are administered in their respective courts of nationality, religion or ethnic community) and 'mixed or inter-community courts' administering two or more personal laws.⁵⁸ He argues that the existence of the *lex fori* in the former and its absence in the latter, affects the approach to the problem of choice of law rules by which a personal law is to be selected. Under 'systems of personal law' it is the duty of the court to determine each issue in accordance with its *lex fori* and to confine itself to that law in all cases in which it is competent.⁵⁹ Accordingly, in systems of personal laws, there is no question of choice between the *lex fori* and any other personal law, the former is always the rule of decision.⁶⁰

As would be clear, the extent to which CJS applies its *lex fori* would then turn on the rules governing its competence. Since CJS normally have jurisdiction over

⁵⁶ Articles 2(b), 3 & 4 of the Native Courts Regulations of 1897.

⁵⁷ Antony Allott, *New Essays in African Law*, Butterworths, London, 1970, 110.

⁵⁸ Tier A, 'Techniques of choice of law in conflict of personal laws' 2.

⁵⁹ Tier A, 'Techniques of choice of law in conflict of personal laws' 2.

⁶⁰ Tier A, 'Techniques of choice of law in conflict of personal laws', 4, 7.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki community members applying the same customary law, cases involving members from the same ethnic group might not give rise to choice of law problems as would cases in which members of different communities entered into legal relationships. For instance, if a choice arises between Kamba customary law and another personal law, a CJS applying Kamba law will select the former. In courts that administer one or more personal laws, there is no set *lex fori*. In such instances, Tier explores various grounds upon which claims to competence by the court can be established.⁶¹ The first is that parties can consent to the exercise of jurisdiction by choosing a particular law to govern their legal relationship. The requisite consent must be that of one or both parties who are not subject to the jurisdiction.⁶² As noted earlier, it is noteworthy that even in cases where there is consent, in systems of personal laws, it is significant that the law impliedly chosen by the parties is the *lex fori* itself. CJS could utilise this technique in resolving choice of law conflicts in matters such as inter-ethnic marriages. The second approach could be with respect to the custom established as applying to the parties to a legal relationship. It is difficult to envision a case where there would be more than one custom applicable to the parties at the same time.⁶³ Under inter-ethnic marriages, two systems of law are *prima facie* applicable, and there would thus be no one court with competence. Firstly, the customary law of each party, and, secondly, the *lex celebrationis*. The Marriage Act in Kenya provides that parties in an intended customary marriage can choose the customary law that will apply to their marriage meaning that if they are from different ethnic communities, and have accepted the law of one community as the applicable law, that law would be the *lex fori* of the CJS. However, such a suggestion can work well in mixed/inter-ethnic CJS as some of the members of the tribunal will have competence to adjudicate arising disputes.

It is also possible to resolve the problems of choice of law through compromise which would result either in the unification of differing laws or devising a different law as the applicable law. The new law then becomes the *lex fori* of the

⁶¹ Tier A, 'Techniques of choice of law in conflict of personal laws', 5.

⁶² The Local Courts Act 1977, Section 12(1) (a) and (b).

⁶³ Tier A, 'Techniques of choice of law in conflict of personal laws', 15.

*Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki CJS.*⁶⁴ Kenyan courts have used this avenue in determining the applicable law in burial disputes as will be illustrated later.

These observations have buttressed the conclusion that in systems of personal laws parties' choice of law always operates one way, namely, in favour of the *lex fori* itself. The application of the *lex fori* is justified on the grounds that (i) parties' choice of jurisdiction is, by implication, choice of law administered by the court and (ii) behind the legislative authorization to administer the *lex fori* may lie choice of law rules within the *lex fori* itself. These rules served to identify the local court which was competent in cases between members of different communities.

(i) Personal jurisdiction of CJS in inter-ethnic jurisdictional conflicts

The jurisdiction of CJS could be determined by the personal law applicable to a party. For instance, it is reported that in the case of Ghana, the personal jurisdiction of the native courts was based on ethnicity.⁶⁵ If the parties are from one ethnic community, the personal law applicable is the relevant customary law, and the CJS could easily be seized of jurisdiction. Jurisdictional conflicts, may however arise, in cases where a party has chosen or wishes to be excluded from the application of customary law.

The case of *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*,⁶⁶ popularly known as the SM Otieno case, gave an authoritative pronouncement on the application of customary law to a party where jurisdictional conflicts existed. In the case, the deceased had been born and bred a Luo, and as such under Luo customary law, his wife on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children were also Luo as well as members of their deceased father's clan. On the death of a married Luo man, the customs are that the clan takes charge of his burial as far

⁶⁴ Tier A, 'Techniques of choice of law in conflict of personal laws', 7.

⁶⁵ Paul Kuruk 'African customary law and the protection of folklore' (2002) 36(2) *Copyright Bulletin*, 4-32 at 12.

⁶⁶ [1987] eKLR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki as taking into account the wishes of the deceased and his family are concerned. However, the wife contested the application of Luo burial customs.

Three positions emerged in the case regarding the law applicable to the deceased. First, the wife posited that the husband had evidently distanced himself from the Luo customary laws by embracing a 'Western' life. Second, there was the position that an individual cannot choose the law applicable to their personal matters, and that it is only judicial reason that can establish the appropriate law where different laws overlap and contradict each other. In this sense, it is not the lifestyle of a person that determines the governing personal law, but the nature of his laws and their interpretation. And third, that as a Luo, the deceased husband was throughout his entire life subject to the authority of "customary law" and that no issues other than the manner of his birth and the facts concerning the ritual establishment of his "name" have any relevance whatsoever.

As with other African communities, the Court observed that an "*African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal*" and that a "*different formal education and urban life style cannot affect one's adherence to his personal law.*"⁶⁷ Therefore, the court concluded that the wife upon marriage was bound by Luo custom, had no right to bury her husband, and she did not become the head of the family upon the death of her husband. *The court held that the applicable law was that of the husband's tribe. A similar finding was reached by Justice Philomena Mwilu in Salina Soote Rotich v Caroline Cheptoo & 2 Others*⁶⁸ where she opined that:

"For the above reasons I come to the conclusion that the deceased Benard Kiprotich was a Keiyo who subjected himself to the customs of his father and forefathers and who became incapable of divesting himself from the customs of his people. He was for all practical purposes bound by those customs."

⁶⁷ See *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*, Civil Appeal Number 31 of 1987 [1987] eKLR.

⁶⁸ [2010] eKLR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki Murungi, writing on African jurisprudence, has provided a spirited defence of the court's position in the SM Otieno case observing that the wife ignored or failed to see that being "christianised", "educated" or "urbanized" in the context of contemporary African history amounts, for the most part, to just being "Europeanised".⁶⁹ Essentially, this shows that Africans by virtue of their ontological origins still remain, radically, the juridical subjects of African customary law. As such, if a Kenyan subject to customary law, makes a unilateral and individual decision to detach himself/herself from customary law, this does not say anything about whether a judicial body might exercise African customary law with respect to their affairs or not. CJS could affirm this consideration further, and that they may, in principle, exercise personal jurisdiction even when there is a jurisdictional conflict between customary law and statutory law. If CJS courts are to retain the integrity of the African socio-legal setup, then it is submitted here that such an approach, should guide the exercise of their jurisdiction.

However, it is also possible to consider, scenarios where the defining law to personal matters could be governed by a person's wishes or choices. The Marriage Act allows parties to an intended customary marriage to choose the customary law applicable to their union.⁷⁰ In such cases, it would be appropriate to consider whether the person has submitted to the jurisdiction of the relevant customary law. The issue arose in the Ghanaian case of *Brown v Miller*,⁷¹ where the issue was the competence of a local Ga court to decide on, and apply the Ga law of property to a claim relating to land owned by a Jamaican woman, the defendant in the Ga court. According to the court, for a stranger to be amenable to that jurisdiction, "it must be clearly shown that he has by definite and unmistakable signs and acts committed himself to the adoption of membership of the native community which claims him as one of its body." Similarly, in *King v Elliot*, the court opined as follows:⁷²

⁶⁹ Murungi J, 'The question of an African jurisprudence: some hermeneutic reflections', in Wiredu K (ed), *A companion to African philosophy*, Blackwell, Oxford, 2004, 524.

⁷⁰ *Magistrates' Courts Act* (Act No. 26 of 2015).

⁷¹ (1921) Full Court 48.

⁷² 1 Ghana L. Rep. 54 (1972), 57.

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“An alien who acquires a domicile of choice here does not necessarily become a person subject to customary law – no matter where he settles in Ghana. This is clearly the case with a Lebanese, or an Indian, or an Englishman. He will be held to have become subject to customary law only if he could be shown by positive evidence regarding manner of life etc. to have embraced a particular system of customary law.”

As already pointed out, in the SM Otieno case, there was the position by the wife that SM’s entire life was ordered in a way that indicated incontrovertibly that he had chosen to live outside the reach of “customary law” and, therefore the narrative of his life was all that was needed to demonstrate the applicable law.⁷³ But the Court of Appeal was of the view that where there was a conflict between a deceased person’s wishes and customs, the latter take’s precedence. Likewise, in *James Apeli and Enoka Olasi v Prisca Buluka* [1979] it was argued that the will of the deceased cannot be respected if it contravenes customary law. But in *Charles Onyango Oduke & Anor v Onindo Wambi* [2010] the High Court held that “courts ought to give effect to the wishes of the deceased as far as possible.”

In the case of CJS, it is possible to opine that the customary law that a person is subject to, or the personal law that parties have chosen to govern their legal relationship, will to a large extent dictate which CJS will have jurisdiction over their disputes. That law will also be the *lex fori* since it can determine the competence of the CJS to hear the dispute. It then follows that if, as a result of compromise in systems of personal law, there is unification of differing laws or devising of a different law to govern the relationship, it could be difficult to get a local court with jurisdiction. Such a dispute could then be adjudicated within the formal courts.

(ii) Territorial/spatial jurisdiction of CJS

The question of territorial jurisdiction (previously enjoyed by the Magistrates’ Courts but repealed as of 2015 in the Magistrates’ Court Act) may aid in determining the jurisdiction of CJS. During the colonial period, a native was

⁷³ See generally, *Virginia Wambui Otieno v Joash Ochieng Ougo & Another, Civil Appeal Number 31 of 1987* [1987] eKLR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki prohibited from filing an action in respect of immovable property situate within the native lands in any court other than a Native Tribunal.⁷⁴ This approach is already being used in inheritance matters as the application of customary law in intestate succession is defined by territorial delimitations. The Law of Succession Act provides that the law applicable on intestacy to agricultural land and crops or livestock in certain Districts (now counties)⁷⁵ in Kenya is the law or custom applicable to the deceased's community or tribe as the case may be.⁷⁶ It is noteworthy that the listed districts are the territories of pastoral communities in Kenya most of whom are also regarded as indigenous groups, and whose culture and customs are essential to their way of life. Since as indigenous peoples they have suffered some form of marginalization from the state including from the formal justice systems, majority of them access justice through CJS.

The Customary Courts Act of Botswana provides that a customary court shall have and may exercise civil jurisdiction over causes and matters in which the defendant is ordinarily resident within the area of jurisdiction of that court, or the cause of action arose wholly therein.⁷⁷ Moreover, the criminal jurisdiction of the Botswana customary courts is territorially limited in that it is exercisable where the criminal charge relates to the 'commission of an offence committed either wholly or partly within the area of jurisdiction of the court.'⁷⁸

In Nigeria, a customary court has jurisdiction over and notably the area of the court is unlimited in most instances so long as the matters the court can adjudicate over are governed by customary law.⁷⁹ The jurisdiction of the

⁷⁴ A. N. Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34 at 32.

⁷⁵ They include: West Pokot, Wajir, Samburu, Lamu, Turkana, Marsabit, Mandera, Garissa, Tana River, Narok, Isiolo and Kajiado.

⁷⁶ Section 32 and 33, Law of Succession Act (Cap. 160).

⁷⁷ Section 11 of the Customary Courts Act of Botswana.

⁷⁸ Section 11(2) of the Customary Courts Act of Botswana.

⁷⁹ Olubor J, 'Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court Of Appeal', 5. Section 20(1) of the Nigerian Customary Courts Edict of 1984.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki customary courts in Nigeria and their respective edicts are applicable to specific states. For instance, the Bendel State Customary Court Edict of 1984 is applicable to Edo State and gives unlimited jurisdiction to the area and district customary court⁸⁰ which shows that the jurisdiction of the customary courts and the area courts is quite wide.

CJS in Kenya may thus need to impose wide territorial jurisdiction to ensure that where certain customs are peculiarly applicable over one area then causes may be brought forward from there. A wide territorial jurisdiction for CJS is necessary owing to intermarriages and the fact that most communities have migrated from their native territories to urban or town areas where they co-exist with other ethnic communities. In *R v Mohammed Abdow Mohammed*,⁸¹ the High Court in Nairobi discharged a person charged together with others not before the court for the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh, within the Starehe District of Nairobi, after the application of CJS in accordance with Somali customs. This is an interesting case on CJS since whereas the parties were from the Somali community who ordinarily reside in the north eastern part of the country, the murder took place in Nairobi but still the requisite Somali traditional justice system was applied in the matter. There is, however, need for caution, since if the jurisdiction of CJS is based on the fact that a Defendant is ordinarily resident within the area of jurisdiction of the CJS or where the cause of action arose, CJS could extend their reach to parties who are not subject to the jurisdiction of the CJS or customary law applied by the CJS. This could create room for challenge of the decisions of the CJS in courts.

(iii) Pecuniary jurisdiction of CJS?

Currently, there is no law stipulating the pecuniary jurisdiction of CJS in Kenya. The Customary Courts Act of Botswana gives pecuniary jurisdiction to customary courts where 'the claim or value of the matter in dispute does not exceed the maximum amount thereof set out in its warrant.'⁸² They can also

⁸⁰ See *Samson Erhabor v. Godwin Onaghise* Customary Court of Appeal (1996) (unreported).

⁸¹ [2013] eKLR.

⁸² Section 11(1) of the Customary Courts Act of Botswana.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki 'hear and determine suits for the recovery of liquid civil debts due to the State or any town or district council.'⁸³

(iv) Subject-matter jurisdiction of CJS

Currently, the substantive jurisdiction of CJS in Kenya is not clear. There is no explicit law stipulating the substantive jurisdiction of CJS thus creating uncertainty as to whether they can be used in all civil and criminal matters. In the colonial period, and in so far as the criminal jurisdiction of mixed native tribunals was concerned, the proper law to apply was suggested to be statutory law rather than customary law.⁸⁴ The Constitution in providing for the use of CJS does not state whether they can only be used in civil matters. Indeed, Kenyan courts have recognised the role of CJS in the resolution of criminal matters a number of times⁸⁵ suggesting that CJS have a criminal jurisdiction in Kenya. However, and as already pointed out, the Magistrates' Courts Act still recognises the jurisdiction of Magistrates' courts, in civil matters touching on customary law including land, marriage and divorce yet a number of laws enacted since 2010 have recognised the civil law jurisdiction of CJS for instance in marriage and land matters. It therefore begs the question as to why the Constitution recognised CJS without delineating their jurisdiction. If the intention is to encourage and promote the use of CJS in dispute resolution in Kenya within a truly legal pluralistic system, the Magistrates' Court Act and related laws which allocate jurisdiction over customary law matters ought to be reviewed.

In Botswana, customary courts have civil jurisdiction over causes and matters in which 'the matter is justiciable under any law administered by the court under section 15'. Under, section 15 a customary court is empowered to administer customary law and the provisions of any written law which the court

⁸³ Section 11(2) of the Customary Courts Act of Botswana.

⁸⁴ A.N. Doorly 'Native Tribunals' (1946) (28)3/4 *Journal of Comparative Legislation and International Law* at 29.

⁸⁵ See generally *Republic v. Mohamed Abdow Mohamed* [2013] eKLR; *Republic v. Lenaas Lenchura*, Criminal Case 19 of 2011; *Republic v. Joseph Kiprotich Maiyo*[2012]eKLR; *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR; and *Republic v Juliana Mwikali Kiteme & 3 others* [2017]eKLR.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki may be authorised to administer by any written law.⁸⁶ This is unlike the situation in Kenya, where magistrates' courts have been empowered to exercise jurisdiction on customary law matters.⁸⁷ Additionally, the customary courts in Botswana may exercise criminal jurisdiction 'to the extent set out in its warrant in connection with criminal charges and matters in which the charge relates to the commission of an offence committed either wholly or partly within the area of jurisdiction of the court.'⁸⁸

(v) Mixed/inter-community CJS

Some of the jurisdictional conflicts that are likely to arise could be addressed by having mixed CJS consisting of members belonging to different ethnic communities with jurisdiction over parties who may also be from different ethnic groups. Mixed CJS could be helpful in dealing with disputes that may arise in urban areas where different ethnic groups currently co-exist. Nonetheless, mixed CJS are likely to raise concerns over the nature of the law that can be applied unless the parties have expressly chosen the law applicable to their legal relationship.⁸⁹ Where parties have expressly chosen the law applicable to their legal relationship, that law will be the *lex fori* of the CJS. Moreover, applying the law of one or other of the parties in mixed CJS is manifestly inequitable, since the CJS has no *lex fori*, unless it is applying common sense or natural justice in adjudicating the rights of the parties.⁹⁰ In such cases, innovation would be necessary, so that the law applied is common to the parties.

In the colonial period, settlers could sit alongside elderly natives and 'employ some version of customary law, keep farm disputes within the farm, and allow the lord/settler his voice in manorial/community affairs.'⁹¹ Shadle gives

⁸⁶ Section 15, Customary Courts Act, Botswana.

⁸⁷ *Magistrates' Courts Act* (Act No. 26 of 2015).

⁸⁸ Section 12(1), Customary Courts Act, Botswana.

⁸⁹ A.N. Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34.

⁹⁰ A. N. Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34 at 30.

⁹¹ Brett Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524 at 518.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki accounts of how settlers such as Karen Blixen could preside over intra-African disputes on their farms even though they 'knew nothing about African customary law.'⁹² Moreover, Doorly writes that in the municipalities and non-tribal areas mixed tribunals,

*"found themselves faced with situations requiring decisions which either are not referable to native law or custom or to which the native law or custom is no longer properly applicable in the opinion of the Tribunals. In these circumstances the Tribunals have not hesitated to give decisions which are tantamount to the recognition of new custom."*⁹³

Such difficulties have befallen the Kenyan courts in burial disputes. The lack of a legal framework on burial matters has created a legal conundrum especially in determining who should bury the deceased person. Ngira opines that judges have resorted to assessing the relationship between the deceased and the litigants in burial disputes.⁹⁴ For instance, in *Edward Otieno Ombaja v Odera Okumu* [1996], the Court of Appeal pointed out that:

"We wish to observe here that customary law, like all other law, is dynamic. Because it is not codified, its application is left to the good sense of the judge or judges who are called upon to apply it. That is why, as stated earlier S. 3(2), above, is worded the way it is to allow for the consideration of the individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here."

Ngira argues that the fact that a person with whom the deceased had a sour relationship cannot be allowed to bury him/her regardless of the position of customary law, is an attempt by courts to develop customary law rather than

⁹² Brett Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524 at 518.

⁹³ A. N. Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34 at 29.

⁹⁴ Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' <http://ssrn.com/abstract=3165522>, accessed on 16 June 2018.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki interpret it.⁹⁵ Similarly, Justice Jackton Ojwang (then of the High Court) in *Ruth Wanjiru Njoroge v Njeri Njoroge & Anor* [2004] where the second wife sought to stop the first wife and the mother-in-law from burying her husband in their ancestral land and have him buried in their matrimonial home. Although Justice Ojwang allowed the deceased man to be buried in his ancestral land, he introduced a new doctrine in burial disputes; that of *legal proximity*. The doctrine is based on the assumption that the decision as to the determination of the place of burial is based upon proof by the parties in the dispute of their proximity to the deceased.

4.0 Some challenges for CJS from a jurisdictional perspective

Whereas countries like South Africa, Nigeria and Ghana have promoted the use of customary law by establishing traditional courts, Kenya retains a hybrid system in which both customary law and state law are subject to interpretation by state courts. The Constitution seems to cement this position as it stipulates that CJS are to be promoted and encouraged by courts. This creates doubts as to the future development of customary law and CJS in Kenya owing to the divergent and conflicting approaches taken by judges over the years in interpreting customary law. The development of customary law is neither anchored on any legal reform nor on classical western jurisprudence but simply on evolving cultures and patterns of human behaviour. To this end, the methodological approaches of the formal justice systems are generally unsuitable in interpreting customary law whose success and enforcement in dispute resolution is not based on state coercion but on moral, psychological and social-cultural validity.⁹⁶ It therefore presents jurisprudential and practical challenges, and puts into question the ability of state courts to adjudicate in customary law matters, and promote the use of CJS. It also presents a practical challenge to parties in inter-community legal relationships, in identifying the appropriate forum for resolution of their disputes.

⁹⁵ Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' <http://ssrn.com/abstract=3165522>, accessed on 16 June 2018.

⁹⁶ Onyango P, *African Customary Law: An Introduction*, LawAfrica, 2013, Nairobi.

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Moreover, the conflict in law regarding the precise jurisdiction of CJS requires resolution. On the one hand, the Constitution and laws enacted since 2010 recognise CJS and implicitly vests them with wide substantive jurisdiction in diverse matters. On the other hand, the Magistrates Courts Act vests magistrates' courts with jurisdiction on matters that are ordinarily within the competence of CJS in most communities. In this circumstances, the lack of a clear delimitation of the jurisdictions of CJS is likely to occasion conflicts between formal courts and CJS occasioning confusion to parties in choosing the appropriate forum, and impeding access to justice.

Cases dealt with by CJS may not fit easily within the neat categories of civil and criminal law, nor do these concepts translate easily into non-Western legal systems. The conventional approach fails to recognize that CJS often employ their own normative frameworks that may resemble or overlap with state criminal and civil law but are rarely one and the same. Basing the jurisdiction of CJS on external legal categories therefore poses conceptual and practical challenges.⁹⁷ As illustrated above, courts are contending with a multiplicity of decisions emanating from CJS, where they have ended up giving conflicting decisions regarding the jurisdiction of CJS.

5.0 Conclusions and way forward

The paper sought to examine the jurisdiction of CJS in Kenya. By looking at how CJS have been employed in Kenya previously, and current laws and judicial pronouncements, the paper has examined diverse jurisdictional dilemmas that CJS present in Kenya. In view of that discussion, the paper makes the following recommendations. Wherever possible, both actors from the formal and non-state sectors should be involved in jointly identifying jurisdictional limits, procedural standards and lines of appeal.⁹⁸ Unfortunately, current efforts towards institutionalizing CJS in Kenya are being led by the judiciary with

⁹⁷ Ross Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in Janine Ubink & Thomas McInerney (eds.) *Customary Justice: Perspectives on Legal Empowerment*, IDLO (2011) at 53.

⁹⁸ Ross Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in Janine Ubink & Thomas McInerney (eds.) *Customary Justice: Perspectives on Legal Empowerment*, IDLO (2011) at 64.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki minimal participation of customary law and CJS scholars, and non-state actors who can infuse enormous contribution in the Alternative Justice Systems Taskforce.

Crucial to effective integration of CJS into formal legal systems are clearly and simply defined Jurisdictions. This is a key requirement for effective oversight and prevention of abuses of power. Where uncertainty exists, inefficiency has been instituted, claimants may be unclear where to seek justice services, record-keeping issues are exacerbated, and monitoring becomes more complicated.⁹⁹

As the article has shown, there are diverse approaches to determining the jurisdiction of CJS that can be adopted in Kenya. However, there is need to clearly define the diverse jurisdictions of CJS, and when CJS can be seized of jurisdiction in different scenarios. This way there will be certainty and claimants will know where to seek justice, ensure oversight and monitoring and thus avoid abuse of power.¹⁰⁰

Most importantly, there is need to recognise the plurality of CJS, and their evolution including the possibility of mixed CJS. Therefore, there is need for caution in legislating on CJS to avoid overregulation which might hamper the growth and development of customary law and CJS, and occasion legal and judicial rigidity.

More caution in Kenya in integrating CJS within the court system. Currently, the country retains a hybrid system in which both customary law and state law are subject to interpretation by state courts, and enormous amount of ambiguity as to the jurisdictional remit of CJS. There is need to revisit section 7 of the Magistrates Courts Act which vests extensive substantive jurisdiction on

⁹⁹ Ross Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in Janine Ubink & Thomas McInerney (eds.) *Customary Justice: Perspectives on Legal Empowerment*, IDLO (2011) at 53.

¹⁰⁰ Ross Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in Janine Ubink & Thomas McInerney (eds.) *Customary Justice: Perspectives on Legal Empowerment*, IDLO (2011) at 53.

Customary Justice Systems in Kenya: An Exploration of their Jurisdiction: Francis Kariuki customary law matters on Magistrates Courts, and review it so that it can recognise the place and jurisdiction of CJS in customary law matters.

Fortunately, progress regarding this has been made with a gazetted Taskforce on Informal Justice Systems mandated in 2016 by the then Honourable Chief Justice Dr. Willy Mutunga to develop a policy to mainstream into the formal justice system traditional, informal justice systems and other informal justice mechanisms to access justice in Kenya. Traditional dispute resolution mechanisms will enhance access to justice due to the fact that in some parts of the country there are no formal courts, and this would be the only way to access justice.¹⁰¹

¹⁰¹ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 11.

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*By: Thige Muchiri**

1.0 Introduction

There is a great work of illuminating literature on the role of Kenyan courts in arbitration proceedings.¹ This paper shall draw from such literature but with a bias towards reflecting on the recent decisions of the superior courts in Kenya on the topic. The Arbitration Act, 1995 (“Arbitration Act”) is the main Act that provides for arbitration law in Kenya. Other Acts also do regulate arbitration law and practice in Kenya. These are the Civil Procedure Act and Rules², the Nairobi Centre for International Arbitration Act and Rules³, Kenya Airports

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¹ See for example Muigua, *Settling Disputes Through Arbitration in Kenya*, 3rd Edition, Glenwood Publishers Limited, (2017); Kariuki Muigua, “Role of the Court under Arbitration Act, 1995: Court Intervention Before, Pending And After Arbitration in Kenya” Kenya Law Review Vol. II [2008-2010] available at <https://bit.ly/2NdGLQb> as accessed on 1st October 2018; Claire Mwangi, “The Role of Kenyan Courts in Arbitration, Enabling or Constraining” (LL.M Thesis, The University of Nairobi 2014) available at <https://bit.ly/2zIIo4W> as accessed on 1st October 2018; J Abwuor, “Role of Courts in Arbitration: A critical analysis of the Kenyan Arbitration Act No. 4 of 1995” (LL.M Thesis, The University of Nairobi 2012) available at <https://bit.ly/2DN8APQ> as accessed on 1st October 2018; and, Kamau Karori & Ken Melly “Attitude of Kenyan Courts Towards Arbitration” in E.Onyema (ed), *Rethinking the Role of African National Courts in Arbitration*, (Kluwer Law International B.V., 2018) available at <https://bit.ly/2NXk3AY> as accessed on 1st October 2018;

² Chapter 21 of the Laws of Kenya, *Government Printer*, Nairobi.

³ Nairobi Centre for International Arbitration Act, 2013, *Government Printer*, Nairobi.

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Authority Act⁴, the Kenya Ports Authority Act⁵, and the Kenya Railways Act⁶ among others.

Section 10 of the Arbitration Act provides for the guiding law of the role of Kenyan courts in arbitration. The section states that “except as provided in this Act, no court shall intervene in matters governed by this Act.”⁷ The section allows for two situations where the Court can intervene: i) where the Arbitration Act expressly provides, and ii) in “exceptional cases” where the inherent jurisdiction of the Court is invoked to correct “obvious errors” such as breach of the rules of natural justice.⁸ This section has been the subject of several interpretations by various superior courts as shall be discussed in this paper.

We now turn to the instances where the Arbitration Act expressly provides for intervention by the courts.

⁴ Kenya Airports Authority Act, Chapter 395 of the Laws of Kenya, Government Printer, Nairobi.

⁵ Kenya Ports Authority Act, Chapter 391 of the Laws of Kenya, Government Printer, Nairobi.

⁶ Kenya Railways Authority Act, Chapter 397 of the Laws of Kenya, Government Printer, Nairobi.

⁷ This is a replica of Article 5 of the UNCITRAL Model Law on International Commercial Arbitration upon which the Arbitration Act is based.

⁸ Per the Court of Appeal in *Sadrudin Kurji & another v Shalimar Limited & 2 others* [2006] eKLR. In the case, the High Court had allowed an application to enforce an arbitral award which had been made ex parte and contrary to the Arbitration Rules, 1997. The Court of Appeal allowed the appellant leave to appeal against that ruling on the basis that a cardinal rule of natural justice (right to be heard) had been breached.

See also Kariuki Muigua, “Role of the Court under Arbitration Act, 1995: Court Intervention Before, Pending and After Arbitration in Kenya” Kenya Law Review Vol. II [2008-2010] available at <https://bit.ly/2NdGLQb> as accessed on 1st October 2018 at page 4.

Cf. the decision of the Court of Appeal (differently-constituted) in *Broadway Trust Ltd v China Young Tai Engineering Co. Ltd* [2018] eKLR where the Court held that if a party has been served with a notice to enforce an award under rule 5 of the Arbitration Rules 1997, and the party elects to do nothing then the applicant is entitled under Rule 6 to apply ex parte to enforce an award as a decree of the High Court.

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2.0 Stay of Legal Proceedings

In cases where there exists a valid arbitration agreement, Courts are enjoined to stay proceedings before them and refer the disputes on such agreements to arbitration. In doing so, the Courts give effect to the intention of the parties as contained in the agreement i.e. have their matters resolved by arbitration. Also, in granting the stay and reference the courts hold the parties to their respective bargains, and avoid re-writing such contracts.⁹

Section 6 (1) of the Arbitration Act empowers a Court to stay legal proceedings before it and refer the matter to arbitration. In full, the section provides as follows,

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

- a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
- b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

The section formed the kernel of determination by the Court of Appeal in the recent case of *Adrec Limited v Nation Media Group Limited* [2017] eKLR. The Court held that,

Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of

⁹ See the Court of Appeal decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR in which the Court held that it is not for a court of law to rewrite a contract, as parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved.

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appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position.¹⁰

An application for stay is to be dealt with as a matter of priority because it is a challenge to the jurisdiction of the court to handle the matter.¹¹ The court is only seized of jurisdiction if the Defendant files a defence in the case.¹² If a party enters appearance but fails to file a defence or apply for a stay and reference to arbitration, it appears that the court can rely on Article 159 (2) (c) of the Constitution to still refer the matter to arbitration by extending the time within which to do so.¹³ An arbitration clause that handicaps a party to it would not be enforced by the courts, and stay of proceedings would not be granted. This was the case in *Laiser Communications Limited & 5 others v Safaricom Limited* [2016] eKLR where there was a contract which had a clause limiting the liability of the respondent whether arising from a tort, contract or otherwise to KES 100, 000.

The appellants in the case filed a suit against the respondents claiming a sum of more than KES 100, 000. The respondent successfully managed to stay the suit at the High Court and refer the same to arbitration. In allowing the appeal, the Court of Appeal among other reasons held that the limitation of liability clause was a serious impediment to the appellants' right to access justice. This was because the appellants were claiming more money than was allowed in the contract, and as such the respondent would have had an "undue influence and

¹⁰ *Adrec Limited v Nation Media Group Limited* [2017] eKLR at paragraph 14.

¹¹ *Ibid* at paragraph 16.

¹² *Ibid* at paragraph 14. See also the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR.

¹³ *Neelcon Construction Co. Ltd v Kakamega County Assembly* [2018] eKLR.

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an unfair bargaining power". Thus, the Court refused to refer the matter to arbitration as it would have led to an injustice.

This decision appears to trample on the principle of party autonomy and also on the jurisdiction of an arbitrator. On party autonomy, it is not shown that any of parties to the agreement had been coerced to sign it, or otherwise induced by fraud, misrepresentation or other vitiating factors. The parties had freely executed the agreement that had both the limitation of liability clause and the arbitration clause; it would have only been right to hold both parties to their respective bargains as captured in the agreement.

On the issue that the limitation of liability to KES. 100, 000 was an impediment to access to justice, that would have been well-within the jurisdiction of an arbitrator to determine.¹⁴ Moreover, it is questionable whether one clause (limitation of liability) can be used to invalidate an arbitration clause in the same contract. Further, the Arbitration Act provides that an arbitration clause shall be treated as an agreement independent of other terms of a contract when determining the jurisdiction of an arbitrator.¹⁵ In any event, arbitrators are now

¹⁴ Section 17 of the Arbitration Act.

Cf. the decision of the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR in which a party had refused to heed to directions by the Court of Appeal on arbitration and instead chose to file a petition before the Supreme Court. The Supreme Court relied on Article 50 (1) which provides that every person has the right to have his or her dispute resolved in a fair and public hearing before a court. Then, the Supreme Court at paragraph 25 went ahead to state that "It follows that even though the petitioners could have adhered to directions for arbitration while they were before the Court of Appeal, their *rights to judicial resolution of conflict* were unaffected; and consequently, they had quite properly moved the Supreme Court."

¹⁵ Section 17 (1) (a) of the Arbitration Act. See especially the Court of Appeal decision in *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited* [2017] eKLR where the court upheld the principle of separability in the following words "...under the principle of separability, the arbitration clause in a contract is considered to be separate from the main contract, and as such it survives the termination of the contract. If there was need therefore to challenge the arbitration clause in the contract in question, that could have been done separately without impugning the entire contract."

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also bound to consider the Constitution –which expressly provides for the right of access to justice- while making their decisions.¹⁶

It appears that courts will not shy away from upholding an arbitration clause even where no formal contract has been properly executed. As long as an agreement in writing can be proved, courts will uphold an arbitration clause referred to therein. In *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* [2017] eKLR, the Court of Appeal held the parties as bound to an arbitration clause contained in the 1999 Agreement and Conditions of contract for building works published by the Architectural Association of Kenya and the Joint Building Council even though the parties had not signed the agreement. The Court found that the parties had exchanged letters stating that their contract would be in the form of the 1999 Agreement, and that the construction works commenced and several payments were made before the contract could be signed. The court held that the parties' intention was clear; that they were bound by an agreement that incorporated the 1999 Agreement; and, that since the 1999 Agreement had an arbitration clause then the dispute between the parties ought to have been settled through arbitration.¹⁷

The court is enjoined by section 6 (1) (b) to deny an application under the section if there is no dispute that was contemplated in the arbitration agreement. For example, in disputes where there are third parties who were not parties to the arbitration agreement, a court would not stay the matter. This was the case in *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR in which a dispute arose among the shareholders and directors of a company whose articles and memorandum of association had an arbitration agreement. The appellant, who was a shareholder, sued her fellow shareholders and also the company's

¹⁶ See Article 2 (1) of the Constitution of Kenya that declares the Constitution as being the supreme law of the land and which binds all persons.

¹⁷ Even though not expressly relied on by the Court in the case, see Section 4 (3) (b) of the Arbitration Act that states that an arbitration agreement is in writing if it is contained in an exchange of letters, and Section 4 (4) of the Arbitration Act that provides for incorporation of an arbitration agreement to a contract by reference to a document that has such a clause.

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external auditors. The appellant applied before the High Court for stay and reference of the matter to arbitration which the court declined. In upholding that decision, and upon analysis of the arbitration clause, the Court of Appeal held that the clause was for disputes among the shareholders themselves, and between the shareholders and the company; such a clause could not apply to disputes between the shareholders and external auditors, the latter of whom were strangers to the arbitration agreement.¹⁸

Further, parties ought to have strictly followed the stipulations in their arbitration agreement if the court is to assist them in staying their suit and referring the matter to arbitration. Thus, if there are preconditions to the commencement of arbitral proceedings that the parties ought to fulfil, then proof must be tendered of such fulfilment. Such preconditions include attempts at amicable settlement, reference of the dispute to senior management of the parties, mediation and negotiation. If such preconditions are not fulfilled, then the parties are at the wisdom of the court on whether to refer the matter to arbitration or let it run its course in the court litigation system. In the case of *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [2014] eKLR*, an arbitration clause enjoined the parties to attempt settling the disputes amicably with or without assistance of third parties before commencing arbitration proceedings. The High Court found that the parties had not attempted such settlement and the application to refer the matter to arbitration would have failed on that ground alone. Nevertheless, the High Court was quick to admit that despite such a failure, the court could still refer the matter to arbitration as empowered by Article 159 (2) (c) of the Constitution, and also under the Civil Procedure Act.¹⁹

¹⁸ See also the decision of the Court of Appeal in *UAP Provincial Insurance Company Ltd v Michael John Beckett Civil Appeal 26 of 2007* in which the court upheld the decision of the High Court not to stay and refer the matter to arbitration. This was because the dispute between the parties which would have been subject to arbitration had already been settled, and what was outstanding was enforcement of such settlement.

¹⁹ Paragraphs 21-28. See also the decision of the High Court in *Jatin Shantilal Malde & 9 others v Transmara Investment Limited & 2 others [2018] eKLR* where the court concurred with the *Nanchang* decision. The court reasoned that a party wishing to avoid an

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3.0 Interim Measures

Section 7 of the Arbitration Act provides that a party to an arbitration agreement can apply to the High Court, before or during arbitration proceedings, for an interim measure of protection. Such measures are varied and include interim injunctions, orders for preservation of assets or evidence, and security for costs. Justice Nyamu in *Safaricom Limited Vs Ocean View Beach Hotel Limited & 2 others (2010) eKLR* provided for factors which a court must consider while deciding on an issue of interim orders. In granting a restraining order against eviction of the appellant, the learned judge stated the factors to be:

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?

These factors have been followed by courts in subsequent cases. Issues have arisen on how long interim measures of protection granted should last: should it be until the arbitration is commenced, or until the arbitration is heard and determined? For example, Justice Makau in *Safari Plaza Limited v Total Kenya Limited [2018] eKLR* applied the factors and granted an injunction pending the hearing and determination of an arbitration. On the other hand, Lady Justice Nzioka in *SAJ Ceramics Limited v HMS Bergbau AG & another [2018] eKLR* took the view that in deference to the jurisdiction of the arbitrator, and to section 10 of the Arbitration Act that limits court's intervention in arbitration matters,

agreement can just file a suit without fulfilling the preconditions of the arbitration agreement, and then resist and application to stay and refer the matter to arbitration on the grounds of the non-fulfilment. The court in that case allowed the application for stay and referred the matter to arbitration.

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interim measures ought to be granted pending the referral of the matter to arbitration.²⁰ Upon the commencement of the arbitration, the arbitrator has powers to grant any interim measures that he or she is convinced by any party to give.

4.0 Jurisdiction of an Arbitrator

Section 17 of the Arbitration Act clothes an arbitration tribunal with the power to rule on its own jurisdiction. The tribunal can even rule on whether the arbitration agreement – through which they are appointed - exists or is valid.²¹ Justice Nyamu in the *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* case was of the view that

“section 17 gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration”, and that national courts are not “to rule on the jurisdiction of an arbitral tribunal except by way of an appeal under Section 17(6) of the Arbitration Act.”²²

²⁰ At paragraph 89. This decision corresponds to the *Safaricom Limited Vs Ocean View Beach Hotel Limited & 2 others* in which the Court of Appeal also granted an injunction strictly for 28 days to enable parties commence arbitration failing which the orders were to lapse. Nevertheless, it is arguable as to whether such limited injunctions are effective and supportive of arbitration proceedings given that parties would still have to troop back to court to apply for fresh injunctions once the arbitration starts. Even if the arbitrator grants an injunction, he or she does not have powers to enforce the same meaning the court will be called upon for enforcement. Such a scenario would entail another bout of litigation which could have been settled by granting an injunction pending the hearing and determination of the arbitration proceedings. Lastly, nothing in section 7 of the Arbitration Act indicates that the Court cannot grant an injunction pending the hearing and determination of arbitration proceedings.

²¹ Section 17 (1) of the Arbitration Act.

²² *Safaricom Limited Vs Ocean View Beach Hotel Limited & 2 others* (2010) eKLR. It is key to remember that in that case, Omolo and Waki JJ.A did not agree with Justice Nyamu’s reasons because he had decided on matters which were to be settled during the main appeal yet what was before the court was an application under Rule 5 (2) (b) of the Court of Appeal Rules.

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This decision has been followed and applied in many recent decisions including *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited* [2014] eKLR, and *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR.²³

Once arbitration has commenced, it appears that a party cannot apply to the court for stay of such arbitration proceedings. This was the case in *Mumias Sugar Company Ltd v Mumias Outgrowers Company (1998) Ltd* [2014] eKLR, where the Applicant applied to stay arbitration proceedings pending the hearing and determination of an intended appeal against a High Court decision refusing such stay. The Court of Appeal in dismissing that application agreed with the High Court that,

There can, however, never be a stay of arbitral proceedings by the court once the mechanism for arbitral proceedings has been instituted. Once parties have chosen a particular mode of dispute [resolution], they must be left to their own devices; the court can only intervene in arbitral proceedings as has been provided for in the Act."

Further, once arbitration proceedings start – which is the date when the respondent receives the request for the dispute to be referred to arbitration – the arbitrator becomes an interested party to the suit which was stayed and referred to arbitration. This was the decision of the Court of Appeal in *Nancy Wangui Njuguna & another v Nancy Njeri Gitau & another* [2016] eKLR in which the court held that a suit that had been stayed and referred to arbitration could not be legally discontinued or withdrawn while the arbitration was pending and without the arbitrator's knowledge. Also, that if the parties were no longer confident in the arbitration proceedings, then they should have terminated the

²³ See also the decision of the Court of Appeal in *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited* [2017] eKLR that reiterated that the arbitral tribunal is the appropriate forum to challenge the validity of an arbitration agreement.

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arbitral proceedings first in compliance with Section 33 of the Arbitration Act before discontinuing or withdrawing the case.²⁴

5.0 Setting aside of Arbitral Awards

Recourse against an arbitral award is only had to the High Court through an application to set aside the award under Section 35 of the Arbitration Act. The grounds upon which such an application can be based on are listed at Section 35 (1) and (2). The grounds include that the award was induced or affected by fraud, bribery, undue influence or corruption²⁵, or that the award is in conflict with the public policy of Kenya²⁶. For example, in *Cape Holdings Limited v Synergy Industrial Credit Limited* [2016] eKLR, the High Court set aside an award because the arbitrator had admitted a document to the proceedings at a late stage without allowing the other party to cross-examine witnesses on its contents; the court held that such action run afoul the law and was contrary to public policy.²⁷

²⁴ Cf. the decision of the Supreme Court of Kenya in *Council of Governors v Senate & another* [2014] eKLR where the Supreme Court at Paragraph 26 held that “[b]arring parties from withdrawing matters once filed in courts of law will be contrary to the constitutional principle of alternative dispute resolution as provided in Article 159 of the Constitution” and that “a party’s liberty to withdraw a matter cannot be taken away.”

²⁵ For example, in the recent decision of the High Court in *Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex* [2018] eKLR, the Court set aside an award that was found to have been based on a contract that had been founded on bribery and corruption of public officials.

²⁶ See the decision of Justice Ringera (as he then was) in *Christ for All Nations v Apollo Insurance Co Ltd, Nairobi HCCC No. 477 of 1999* where he stated that even though “public policy is a most broad 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.”

²⁷ The decision has been criticized in that the Court set aside the arbitration award but gave no directions as to how the dispute was going to be handled. See Kamau Karori & Ken Melly “Attitude of Kenyan Courts Towards Arbitration” in E.Onyema (ed), *Rethinking the Role of African National Courts in Arbitration*, (Kluwer Law International

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A current issue regarding section 35 is whether a decision of the High Court is appealable to the Court of Appeal in light of section 10 of the Arbitration Act, and also the right of appeal under the Constitution.²⁸ There are many conflicting decisions of the Court of Appeal as to whether a decision of the High Court under section 35 can be appealed against to the High Court. That question has been left for determination by the Supreme Court because it is now seized of two appeals on that issue.²⁹

6.0 Recognition and Enforcement of Awards

Section 36 of the Arbitration Act provides for the recognition and enforcement of awards. Recognition of domestic awards is guided by the Arbitration Act while for international awards, it is guided by the New York Convention 1958, or any other convention to which Kenya is a signatory relating to arbitral awards.³⁰

Only final awards are recognizable and enforceable by the court. A final award means one “that determines all issues referred to the arbitrator for consideration”; insertion of the word “final” in an award does not render it as such. In the case of *Kenfit Limited v Consolata Fathers [2015] eKLR*, an arbitrator gave an award but reserved the issue of costs for agreement between the parties or taxation. The Court of Appeal held that such an award was a partial award that could not be recognized and enforced. This works so as to avoid litigation in bits.

Nevertheless, the Court of Appeal has acknowledged that there are certain circumstances under which an award can be severed and parts of it referred to

B.V., 2018) at page 365-366 available at <https://bit.ly/2NXk3AY> as accessed on 1st October 2018.

²⁸ See for example, Eric Thige “Revisiting the Right of Appeal to the Court of Appeal under the Arbitration Act” (2018) 6(1) *Alternative Dispute Resolution* at page 1.

²⁹ This was also noted by Kiage J.A. in *Savings Tea Brokers Ltd v Kenya Tea Development Agency Ltd & 7 others [2018] eKLR*.

³⁰ Section 36 (1) and (2) of the Arbitration Act.

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the arbitrator for reconsideration.³¹ Also, in *Carol Construction Engineers Ltd v Kenya Agricultural Research Institute [2014] eKLR*, the Court of Appeal was emphatic that “once an Arbitrator publishes a final award, he becomes *functus officio* subject to only making corrections as provided by section 34 (1) (a) of the Arbitration Act”.

Section 37 of the Arbitration Act lists various grounds for refusal of recognition and enforcement of an arbitration award. They are not dissimilar to the grounds for setting aside an arbitration award.

Awards arising out of traditional dispute mechanisms are not arbitral awards to be recognized and enforced as such under the Arbitration Act. This is the situation that faced the Court of Appeal in *Ananias N. Kiragu v Eric Mugambi & 2 others [2017] eKLR* where the parties to the appeal agreed to have the appeal settled by Njuri Ncheke ya Ameru Elders. The Elders gave an award which the Appellant sought to be referred to the High Court for recognition and enforcement. The Court of Appeal dismissed the application and held that the Arbitration Act, and even court-mandated arbitrations under Order 46 of the Civil Procedure Act, have elaborate procedures on how the arbitrations are commenced, and the awards therefrom recognized and enforced. The Njuri Ncheke resolution mechanism having not being conducted under the Civil Procedure Rules or the Arbitration Act, the appellant could not seek to recognition and enforcement under the mechanisms of such systems.

7.0 Conclusion

Courts appear to respect the contours set for their intervention by the Arbitration Act even in light of the post-2010 Constitution. Nevertheless, some decisions appear to be an infringement of such contours, and can only be addressed in the hierarchical system of the courts.

³¹ This was expressly admitted by the Court of Appeal in *Mae Properties Limited v Subash Chander Kohli & another [2016] eKLR*.

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The foregoing notwithstanding, the time is ripe to consider an overhaul of the whole Arbitration Act to bring it into tandem with the Constitution of Kenya. Some of the disagreements such as the right of appeal to the Court of Appeal could have been avoided if the Arbitration Act had been reviewed to accord with the Constitution.

In order to achieve this, section 39 (3) of the Arbitration Act which provides for the right of appeal to the Court of Appeal ought to be a stand-alone provision. Such a provision should have specific details on the right of appeal and should not be made subject to the other preceding provisions being sections 39 (1) and sections 39 (2).

Further, section 39 is directed at questions of law concerning domestic arbitrations which leaves out issues concerning international arbitrations. Presumably, this also means that there can be no appeal to the Court of Appeal in questions arising in international arbitrations. As seen above, the Constitution has widened the right of appeal and unless the Arbitration Act is explicit that there is no right of appeal to the Court of Appeal in international arbitrations, parties will be left at the uncertain position of whether an appeal lies or it does not. A stand-alone provision on appeals to the Court of Appeal in international arbitrations ought to be laid down in the Arbitration Act.

The limitation of access to the court litigation system that is envisaged in the Arbitration can be maintained in the stand-alone provision of the right of appeal. This may be achieved by limiting appeals to the Court of Appeal only to certain issues, and even then only when the High Court or the Court of Appeal has granted leave to appeal. Also, the requirement for agreement on the right of appeal by the parties can be maintained as it serves the parties' autonomy and their desire to have their matters concluded fast.

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Performance Bonds Disputes in Construction. Can all Disputes be Resolved using the Arbitration Clause in the Contract?

By: **Hazron Maira***

Abstract

This paper examines performance bonds in construction with the objective of establishing whether in a contract with an arbitration clause, the dispute resolution mechanism can be used to resolve all disputes relating to the bond. The paper also reviews the tripartite contractual relationship between the employer, contractor and the surety providing the performance bond and finds that disputes relating to a call on the bond and those that relate to a breach of the terms of the bond clause in the construction contract are governed by different sets of laws. The operation of these laws gives guidance on how disputes relating to the performance bond should be resolved. The paper further discusses why disputes on the breach of the terms of the bond between the employer and the contractor are resolved only after the surety has executed a call on the instrument by the employer.

1.0 Introduction

The advantages of arbitration and the technical nature of construction process are two main reasons why most standard contract forms have an arbitration clause, with the essential purpose of arbitration being to determine disputes between the parties to it. It is also common for standard forms and some bespoke construction contracts to have a performance bond¹ clause requiring the contractor to get a surety from a guarantor (hereinafter referred to as the bank) guaranteeing the developer (hereinafter referred to as the employer)

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¹ The term "performance bond" is used synonymously with the terms "performance security" or "performance guarantee" in various publications and case laws. Other terms used are "demand bond" or "demand guarantee" or "first demand guarantee" (See *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd.* [2010] EWHC 2443 (Ch) at para 28).

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payment of a specified sum of money in the event of the contractor breaching certain performance terms under the contract.

There are two types of performance bonds; (i) conditional performance bonds which ordinarily would have conditions that must be complied with or fulfilled before making a call on the instrument. These conditions include a requirement for the employer to establish breach or breaches of certain term or terms of the contract and the call on the bond has to be for ascertained damages² and, (ii) unconditional or “on-demand” performance bonds which guarantees payment by the bank to the employer upon an appropriately worded demand accompanied by such documents as the demand requires and without proof of an existence of a liability under the underlying contract.³

Once a performance bond has been issued, the result leads to three separate contracts between each of the two parties involved in the tripartite arrangement. First, the performance bond contract which is between the employer and the bank, whereas the bank guarantees the employer payment of up to maximum bond value when called. Secondly, the construction contract between the employer and the contractor, with the performance bond clause permitting the employer to make a call on the bond in the event of a breach of certain performance terms by the contractor. Thirdly, the banking contract which is between the contractor and the bank, pursuant to which the bank agrees to issue the performance bond, and at the back of which, there exist an arrangement of

² *Paddington Churches Housing Association v. Technical and General Guarantee Company Ltd* [1999] BLR 244; *County Government of Homa Bay v Oasis Group International & Ga Insurance Limited* [2017] eKLR, *Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.* [1996] A.C. 199, 207: "It is well established that in such an action the [employer] has to establish damages occasioned by the breach or breaches of the conditions, and, if he succeeds, he recovers judgment on the whole amount of the bond, but can only issue execution for the amount of the damages proved."

³ *AES-3C Maritza East 1 Eood v Crédit Agricole Corporate and Investment Bank* [2011] EWHC 123 (TCC), at para 37.

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how the contractor would indemnify the bank in the event the bank honours a call on the bond by the employer.⁴

Most standard contract forms in construction provide for an “on-demand” performance bond whereas the employer does not have to prove the contractor’s breach of certain performance terms of the contract and the consequent losses and/or damages. With the bond clause incorporated in the construction contract, a question that arises is whether all disputes relating to the performance bond in the tripartite arrangement can be resolved using the arbitration clause. This paper addresses this question and the discussion that follows relates to “on-demand” performance bonds only. The paper reviews the commercial purposes of performance bonds, the privity of contract rule and its applicability in arbitration followed by a review of the legal principles that governs performance bonds, the implied terms of performance bonds and the duty of the party making a call on the bond to account for monies received upon a call of the instrument.

2.0 Commercial purposes of performance bonds

In the common law case of *Cargill International SA, Geneva Branch Cargill (HK) Ltd v Bangladesh Sugar & Food Industries Corporation*,⁵ Porter LJ identified the following as the commercial purposes of performance bond;

- a) To provide security to the employer for the fulfilment by the contractor of his contractual obligations
- b) That the employer may have money in hand to meet any claim he has for damage as a result of the contractor's breach

⁴ *Spierbridge Property Ltd v. Muir Construction* [2008] ScotCS CSOH_44, para 7; *Hodgson v National House Building Council* [2018] EWHC 2226 (TCC) at para 24: ("An indemnity, in its widest sense, comprises an obligation imposed by operation of law or by contract on one person to make good a loss suffered by another. Thus ... all contracts of guarantee fall within the broad definition." - citing Andrews and Millett on the Law of Guarantees, 7th ed., at 1-1013.

⁵ [1997] EWCA Civ 2757.

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- c) To provide the employer with an unquestionably solvent source from which to claim compensation for a breach by the contractor, at least to the extent of the bond, but payment can be obtained from the contractor's bank on demand without proof of damage and without prejudice to any subsequent claim against the contractor for a higher sum by way of damages.⁶

3.0 Privity of contract rule

By virtue of this common law rule, *"only a party to the contract could enforce the contract."*⁷

The applicability of the privity of contract rule in arbitration was outlined in the case of *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha, (The "Eastern Saga")*⁸ in the following terms;

"The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be."

Based on the above principle, it follows the bank cannot be a party to the arbitration agreement in the construction contract and resolution of any dispute

⁶ See also *Trading Corporation of India Ltd. v. ED & F Man (Sugar) Ltd.* (C.A. 17 July 1981), per Lord Denning M.R.; "performance bonds fulfil a most useful role in [construction]. If the [contractor] defaults in [performing the contract], the [employer] can operate the bond. He does not have to sue for damages, or go through a long arbitration. He can get damages at once which are due to him for breach of contract."

⁷ *Alfred McAlpine Construction Limited v. Panatown Limited* [2000] UKHL 43; per Lord Goff.

⁸ [1984] 2 Lloyd's Rep. 373, 379.

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between it and either the employer or contractor or both cannot be resolved using that dispute resolution mechanism however convenient that course may be to the party seeking it and however closely associated the dispute may be with another dispute between the contractor and employer.

4.0 Exceptions to the privity of contract rule in performance bonds contracts

There are two established exceptions to performance bond contracts. The first exception is the fraud exception or fraud rule best summed up by the maxim "fraud unravels all". In *United City Merchants (Investments) Ltd v. Royal Bank of Canada*⁹, Lord Diplock referred to a case about a performance bond under which a bank assumes obligations to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit and said that "[t]he exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, 'fraud unravels all'." He then affirmed that the courts would not allow their process to be used by a dishonest person to carry out a fraud.

In *Sinohydro Corporation Limited v GC Retail Limited*,¹⁰ a case that concerned a call on performance bond following an alleged delay in completion of Garden City Retail Mall Phase I in Nairobi, the Judge applied the maxim "*ex turpi causa non oritur actio*", or 'fraud unravels all' that enabled the 'fraud' rule to function as an exception to the privity rule and said the contractor could sue under subject the performance bond.¹¹

The second exception that can enable a contractor to sue would be if there is an express contract term restricting the circumstances in which the employer would be entitled to draw on the performance bond, and the condition restricting the call on the bond is not fulfilled so as to entitle the employer to

⁹ [1983] 1 AC 168.

¹⁰ [2016] eKLR.

¹¹ *Ibid*, at para 53.

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draw the money.¹² This principle was applied in the construction case of *Simon Carves Ltd v Ensus UK Ltd*¹³ that had a bond contract with a clause providing that “upon the issue of the Acceptance Certificate the Performance Bond shall become null and void (save in respect of any pending or previously notified claims)” and it was to be returned to the contractor. After the Acceptance Certificate was issued, an odour defect came to light and while reserving their position that the bond was null and void, the contractors extended the bond in a lesser amount. The employer was not satisfied the defect had been made good and just before the extended period was to expire, and despite having not challenged the contractor’s position, made a call on the bond. The contractor successfully applied for an injunction.

5.0 Legal principles governing performance bonds contracts

The principles on virtually all performance bond law are to be found in the English case of *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*¹⁴, and for this reason and the fact that an employer who was at fault made a successful call on the bond makes it appropriate to briefly outline the facts of the case;

In November 1976 a contract was made by which Edward Owen Engineering Ltd. (Edward Owen) agreed to supply and install glasshouses for Libyan customers. The total contract price was £502,030, payable in Libyan dinars and was to be construed in accordance with Libyan law. The shipment of the materials was to be by the end of April 1977, and erection was to be completed by the end of August 1977. The Libyan customers, before any contract was concluded stipulated that there should be a performance guarantee for 10 per cent of the contract price and lodged with a Libyan bank. It was to be a condition precedent to their entering into any contract at all. The agreed payment instalments were to be payable by an irrevocable confirmed letter of credit from

¹² *Sirius International Insurance Company (Publ) v FAI General Insurance Ltd.* [2003] EWCA Civ 470, at paras 27/28.

¹³ [2011] EWHC 657 (TCC).

¹⁴ [1978] 1 QB 159.

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the Libyan bank which was to be opened in favour of the Edward Owen payable at Barclays Bank International Ltd (Barclays).

After getting a counter-guarantee from Edward Owen, Barclays gave a performance bond for £50,203 to the Libyan bank and confirmed that their guarantee was payable "on demand without proof or conditions." On receiving that promise, the Libyan bank issued a guarantee bond in favour of the Libyan customers, who in turn instructed their bank in Libya to open an irrevocable documentary credit in favour of Edward Owen for payment of instalments. The letter of credit was sent by the Libyan bank to their London correspondents, who sent it on January 6, 1977, through Barclays to Edward Owen, but it did not comply with the contract. The letter of credit expressly provided that payment was only to be made when the Libyan customers authorised it. It was therefore plainly not a confirmed letter of credit and did not comply with the terms of contract. As soon as Edward Owen got the notification, they made every effort to get the Libyan customers to amend the letter of credit so as to enable the contract to be fulfilled.

On 29 March 29, 1977, Edward Owen wrote to the Libyan customers and notified them that the contract provided for a letter of credit to be confirmed and the advising bank in London had refused to confirm the letter of credit because of the way in which it is drawn up. They then stated that "since the letter of credit is not operative, it obviously follows that our guarantee has no effect." The contract was off, and despite being at fault, the Libyan customers demanded payment from the Libyan bank of £50,203 under the guarantee, which in turn claimed on Barclays.

On learning about the demand, Edward Owen issued a writ in the High Court against Barclays. They obtained an interim injunction *ex parte* - to prevent Barclays paying the Libyan bank. At the first instance hearing, the injunction was discharged and the plaintiff appealed.

Delivering judgment, Lord Denning M.R. said that a performance bond has

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many similarities to a letter of credit, and it had been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. He then referred to the statement in *Hamzeh Malas & Sons v. British Imex Industries Ltd.* [1958] 2 Q.B. 127 by Jenkins L.J. at page 129:

"... it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with the established practice."

To this general principle, the Judge said there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank and referred to the passage in the New York Court of Appeals case of *Sztejn v. J. Henry Schroder Banking Corporation* (1941) 31 N.Y.S. 2d 631 at p.634 providing that

"...where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller."

Lord Denning then reviewed how the confirmed letter of credit stand with regard to a performance bond or a performance guarantee with particular reference to that case and concluded by making the following statement that has been cited in many court judgments in cases relating to a call on the bond;¹⁵

¹⁵ See, for example, the Kenyan Court of Appeal case of *Kenindia Assurance Company Limited v First National Finance Bank Limited* [2008] eKLR.

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“All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.”

The Judge then adopted the following passage from *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd* [1978] Q.B. 146 at p. 761E-G in which Kerr J. affirmed how the parties should settle their disputes, and also articulated the rationale for courts' reluctance to stop payments of performance bonds and bank guarantees even when there is a disputes to be resolved;

"It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration. ... The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

From the above authorities, it follows that claims for breach of the terms of the underlying contract by the contractor (whether proven or not) cannot be a basis of intervention for a call on a bond and should be resolved in accordance with

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the terms of the arbitration agreement in the contract.¹⁶ The performance bond contract “is intended to be an autonomous contract, independent of disputes between the [contractor] and the [employer] as to their relative entitlements pursuant to the different contract between themselves.”¹⁷ It is of a different character entirely and will almost always have far simpler terms than the underlying contracts to which they relate, and are designed to provide ready and swift access to certain funds in the event that certain conditions are met.¹⁸ These conditions exclude establishment of facts asserted by the presented documents and the only exception is established or obvious fraud.¹⁹

Once the money is paid to the employer, unless there is an express provision to the contrary, the bank has no further role and the performance bond contract comes to an end. In the normal course of things, the contractor indemnifies the bank in accordance with the terms of the banking contract between it and the bank.²⁰ Once the contractor indemnifies the bank, the relevant banking contract, subject to any express terms, it too comes to an end. However, the construction contract between the employer and the contractor continues until when concluded or terminated. For purposes of resolving disputes, whether arising after conclusion or termination of the underlying contract, including disputes

¹⁶ See discussion in the non-construction case of *Alternative Power Solution Ltd v Central Electricity Board & Anor (Mauritius)* [2014] UKPC 31. At para. 68, the Privy Council Board said; “For present purposes the difficulty with those allegations is that they are allegations of breach of contract and thus matters for arbitration and irrelevant to the liability of Standard Bank under the [performance bond].”

¹⁷ *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] EWCA Civ 1679, at para 21, See also *Transafrica Assurance Co. Ltd v Cimbria (EA) Ltd* [2002] 2 EA 627 (CAU); “A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the [contractor] and the [employer] arising from the contract in respect of which the bond was given.” (Cited in *Sinohydro v GC Retail Limited (Supra fn. 10)* at para 68.

¹⁸ *Tetronics (International) Ltd v HSBC Bank* [2018] EWHC 201 (TCC).

¹⁹ *I E Contractors v. Lloyd's Bank* [1990] 2 Lloyd's Rep 496.

²⁰ See discussion in *Equity Bank Ltd v Dimken (K) Ltd* [2010] eKLR where *Equity* issued guarantees of higher sums than the contractor’s security amount and the bank ended up applying for Winding Up order in respect of the construction company.

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related to the terms of the performance bond on the sums paid to the employer, the arbitration clause survives.²¹

6.0 Implied terms of performance bond contracts

The implied terms of performance bonds can be inferred from the common law case of *Comdel Commodities Ltd v Siporex Trade SA*²² where the appellate court adopted the decision of a lower court's case of *Cargill International SA -v- Bangladesh Sugar and Food Industries Corporation* [1996] 2 Lloyd's LR 524 in the following terms;

- 1) It is implicit in the nature of a performance bond that, in the absence of some clear words to a different effect, when the bond is called, there will at some stage in the future be an "accounting" between the parties to the contract of sale in the sense that their rights and obligations will finally be determined at some future date.
- 2) The bond is a guarantee of due performance; it is not to be treated as representing a pre-estimate of the amount of damages to which the beneficiary may be entitled in respect of the breach of contract giving rise to the right to call for payment under the bond. If the amount of the bond is not enough to satisfy the seller's (or the employer's) claim for damages, the buyer (or the contractor) is liable to the seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the seller's claim for damages, the buyer can recover from the seller the amount of the bond which exceeds the seller's damages.

²¹ *Heyman v Darwins Ltd.* [1942] AC 356,374.

²² [1997] EWCA Civ 925.

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7.0 Duty to account

There are reported cases that give indications the beneficiaries of a call on a bond wanting to keep the entire sum under the performance bonds regardless of the amount of damage that party has suffered as a result of the other party's breach of the original contracts.²³ Such an attempt to keep the bond sum without accounting for losses incurred would therefore amount to a breach of the implied term of the instrument, and the injured party (contractor) would be entitled to refer the dispute for arbitration in accordance with the agreed terms. The obligation to account of money received (whether in arbitration or not) is considered to be a necessary correction if a balance of commercial fairness is to be maintained between the parties.²⁴

In the Scottish case of *Spiersbridge Property Ltd v. Muir Construction*²⁵, the employer made a call on the bond in the sum of Sterling £503,193 while there was a dispute between the parties as to whether the contractor was in breach of the building contract as alleged and, if so, as to the amount of any damages to which the employer was entitled. The issue to be determined by the court was when a demand has been made on a performance bond in an amount which is ultimately found to exceed the sum due to the party making the demand, to whom is that party obliged to account for that excess. Referring to the implied term proposed by the contractor that excess sums should be accounted to it, the Judge said that a term implied into the building contract has the distinct advantage of allowing the issue of what loss, if any, the employer has suffered as a result of the contractor's alleged breach of the building contract to be determined in litigation or arbitration between the parties to that contract.²⁶ And

²³ See for example *Comdel Commodities Ltd v Siporex Trade SA* [1989] 2 Lloyd's LR 13 where in the background, there was a substantive claim by *Comdel* in an arbitration against *Siporex* and the Judge observed there was conspicuous absence of evidence that *Siporex* who had made a call on a bond had suffered any loss at all and it seemed the amount of \$1,887,200 claimed "under the performance bond would be an uncovenanted benefit or windfall, of a very large amount".

²⁴ *Cargill International v Bangladesh Sugar* (*Supra* fn. 5).

²⁵ *Supra* fn. 4.

²⁶ *Ibid*, at para 18.

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it further has the advantage that the dispute is resolved between the parties who have in fact suffered the consequences of, on the one hand, the breach of contract and, on the other, the excessive call upon the bond.

8.0 Conclusion

When there is call on a bond, the bank must pay unless there is evidence of fraud of which the bank has notice or there is an express provision in the construction contract in relation to which the bond has been provided by way of security, and in clear express terms preventing the employer from making a demand under the bond. An arbitration agreement in a construction contract is not exported to the performance bond contract and any disputes between the bank and either or both parties are resolved by national courts. However, any dispute between the employer and the contractor on the performance bond should be resolved in accordance with the arbitration agreement after the bank has honoured its obligations under the bond contract.

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Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua

Making Mediation Work for all: Understanding the Mediation Process

By: **Kariuki Muigua***

Abstract

This paper offers a general discussion on the process of mediation as a continuation of negotiation. The author critically discusses mediation process as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases, with a general outline of what parties and mediators should expect in each of the phases. This paper is meant to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid when seeking to conduct and achieve a successful mediation with acceptable outcome. Some of the issues in mediation are however as varied as the types of mediations, based on the different types of disputes and parties, as well as the training of the mediator in charge.

1.0 Introduction

This paper generally looks at the mediation process. Since the process of mediation is a continuation of negotiation, the phases of mediation resemble those of the negotiation process. Seminal writers on negotiation and mediation have discussed the respective processes as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases.¹ In this paper the writer discusses the mediation process as a three phase process.

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¹ See generally, Mwangi, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006); Mwangi, M., *The Water's*

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This paper was informed by the desire to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid in order to conduct and achieve a successful mediation with acceptable outcome. It must, however, be pointed out that this paper does not by any means purport to address all the practice matters that may be encountered by a mediator since the problems may be as varied as the types of mediations, based on the different types of disputes and parties.

It should be noted that the negotiation and mediation processes are, to a large extent, similar. The main difference between negotiation and mediation is with the additional resources and expanded relationships and communication possibilities that a mediator brings to the conflict management forum. The entry of a mediator into a conflict transforms the structure of the conflict from a dyad into a triad and in this sense he becomes one of the parties to the conflict pursuing his own interests just as the other parties to the conflict.²

In discussing the mediation process, the writer takes cognisance of the fact that mediation is not a new concept in the conflict management discourse in this country. It is contended that it has been practiced since time immemorial.³ The discussion of the various phases of both negotiation and mediation as generally practiced will reveal that the two mechanisms are immensely informal. It is this informality that makes the two mechanisms expeditious, flexible, cost effective

Edge: Mediation of Violent Electoral Conflict in Kenya, (Institute of Diplomacy and International Studies, Nairobi, 2008).

² Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.290; See also Meschievitz, C.S., "Mediation and Medical Malpractice: Problems with Definition and Implementation", *Law and Contemporary Problems*, Vol. 54, No. 1 in, *Medical Malpractice: Lessons for Reform*, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

³ Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu. [Accessed on 9/08/2018].

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua and autonomous. That is why most Kenyan communities could use these mechanisms in resolving their conflicts before the introduction of formal legal systems. Consequently and as contended in this paper, mediation can potentially be distorted by legalism out of a misapprehension of the fact that it is not a new concept in Kenya and that it yields better results in the informal perspective.⁴

2.0 The Negotiation Process

Negotiation is a voluntary process that allows party autonomy to come up with creative solutions, where two or more people of either equal or unequal power meet to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁵

Negotiation is considered to be part of mediation in that the negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.⁶ 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.⁷

2.1 Preliminary/Pre-negotiation Stage

The preliminary/preparation stage refers to all those activities that take place before the around-the-table negotiations. It is helpful to state right at the outset that the negotiation process predates the around-the-table negotiations and does not end there. Many writers on conflict management normally by-pass the

⁴ See Amendments to the Civil Procedure Act (Cap. 21) Laws of Kenya; See also *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015).

⁵ See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994); Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement without Giving In*, (Penguin Books, New York, 1981), p.4.

⁶ Mwangiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

⁷ *Ibid.*

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua preliminary/preparation and post-negotiation/implementation processes despite their importance in the conflict resolution discourse. It is important since it ensures that all the necessary preparations are done before the parties come to the table for negotiations. Parties will thus determine why they want to negotiate. They will determine what the conflict or dispute is. What do they want to negotiate about?⁸

The preparation/preliminary stage or the 'pre-negotiation phase' begins when the parties in conflict consider that their dispute can be resolved by negotiation and as such communicate their intention to negotiate to one another. This is the "diagnostic phase where the nature of the conflict is thoroughly examined before remedies can be essayed."

This phase ends when parties agree to around-the-table negotiations or formal negotiations or when one party considers that negotiation is not the best option for the resolution of their dispute. Quintessentially, therefore, pre-negotiation is the span of time and activity in which the parties move from conflicting unilateral solutions for a mutual problem to a joint search for co-operative multilateral or joint solutions.⁹

It is also at this stage that the parties formulate the agenda and discuss it before beginning the talks. The constituents and all others who will be involved in the negotiation process and their functions and authority are also identified at this stage. Each party or side of the negotiations have to obtain as much information about the other party and the constituents so as to get a picture of the other side and thus be in a position to assess their needs, interests, motivations and their goals. This stage thus reveals the positions of the parties, levels of divergence and matters over which the parties are in agreement. Parties' autonomy over

⁸ Craver, C.B., "The Negotiation Process", available at www.negotiator magazine.com, [Accessed on 9/08/2018].; See also Fischer, R., & Ury, W., *Getting to Yes: Negotiating Agreement without Giving In*, (Penguin Books, New York, 1981), pp. 13-20.

⁹ Zartman, I. W., "Pre-negotiation: Phases and Functions", in *International Journal*, Vol. 44, No. 2, *Getting to the Table: Process of International Pre-negotiation* (Spring, 1989), pp. 237-253.

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the process is also evident at this phase, as it is at this stage that parties agree on how to set up a venue for the meeting. In an attempt to foster relations and ensure effective communications between the parties, the mediator must establish direct contacts so as to aid in setting up the agenda.¹⁰ There are other important aspects of the pre-negotiation stage. For example, there are two functional needs that it addresses. First it ensures that the parties give their commitment to negotiating their differences and secondly it helps in identifying the problem in that parties identify and remove obstacles to negotiation. During this phase parties agree to negotiate and to arrange on how those negotiations are to be held.¹¹ The pre-negotiation stage does not address the design of an outcome as that will be discussed at the around-the-table talks, but focuses on process. It is, in effect, negotiation over process. Its subject matter will concern procedures, structures, roles, and agendas. One aim of pre-negotiation is to reach a joint definition of the problems and subject matter that will have to be addressed - but it does not tackle those issues beyond defining them for future reference. Pre-negotiation can shade into negotiation if it goes extremely well, or substantive negotiation may need to recede back to procedural pre-negotiation temporarily. Pre-negotiation can take place even if there is no intention to move on to full negotiations.¹²

In summary, therefore, the major elements to be pre-negotiated from the hugely complex to the straightforward ones are: agreeing on the basic rules and procedures; participation in the process, and methods of representation; dealing with preconditions for negotiation and barriers to dialogue; creating a level playing-field for the parties; resourcing the negotiations; the form of negotiations; venue and location; communication and information exchange; discussing and agreeing upon some broad principles with regard to outcomes; managing the proceedings; timeframes; decision-making procedures; process

¹⁰ Sourced from www.negotiations.com, [Accessed on 9/08/2018].; See also Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op.cit, pp.113-115.

¹¹ Saunders, H.H., "We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases." *Negotiation Journal*, Vol.1, No. 3 (1985), pp. 249-262.

¹² Available at www.cibera.de, [Accessed on 9/08/2018].

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua tools to facilitate negotiations and break deadlocks; and the possible assistance of a third party.¹³

In the traditional African context, the pre-negotiation phase is best exemplified by the negotiation preceding marriage negotiations where beer could be brewed and food shared in preparations of the actual negotiations. In case of disputes, rituals could be performed to appease the spirits such as beer brewing and slaughtering of goats. The disputants could then eat together as a sign of their willingness to have the matter resolved amicably.¹⁴

2.2. Negotiation Stage/Actual Negotiations/Across-the-table Negotiations

This is the stage at which parties discuss and make bargains over the issues they may have framed. Parties discuss the issues in their conflict to either agree or disagree. Parties develop the foundation of their agreement by framing the issues. The core issues of the conflict are put together so as to understand the basic concept of the agreement parties are seeking. Parties consider creative solutions or options and discuss concessions. They advance proposals and counter-proposals, back and forth, until some manner of tentative agreement is reached.¹⁵

2.3 The Post-Negotiation/Implementation Stage

At this level, the parties discuss on how they can codify the agreement arrived at by formulating an action plan with specific timelines for effective implementation of the agreement and is thus a very important phase. It is aimed at making the agreement realistic so that it is not only viable but also workable. The commitment of the parties towards the negotiated agreement is tested at this phase. If the agreement cannot be acceptable to the constituents in the negotiation process then the agreement becomes impossible to implement. In

¹³ Ibid.

¹⁴ Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, A Division of Random House, New York), pp. 179-221.

¹⁵ Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018]; See also www.negotiations.com, [Accessed on 9/08/2018].

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua diplomatic negotiations, the implementation stage involves crucial processes such as ratification of agreements and treaties signifying the parties' intention to be fully bound by the treaty they have negotiated over.¹⁶

3.0 The Mediation Process

As already stated in the foregoing discussions, mediation is a continuation of negotiation and its phases resemble those of the negotiation process. Consequently, this section looks at what tasks are done in the various stages, that is, in the pre-negotiation, negotiation and post-negotiation stages in mediation.

3.1 Pre-Negotiation Stage

In this stage, the following tasks must be looked into by the parties: they must decide whether to engage in negotiation or mediation; mediator's identity should be floated and accepted or rejected; the mediator gives the background of the conflict; mediator decides whether to act as mediator in the conflict; the mediator must ascertain that the conflict is ripe for resolution. The role played by the USA in the Israeli-Lebanese conflict outlines clearly the role of a mediator in the pre-negotiation phase in that conflict.¹⁷

The pre-mediation preparation for the mediation sessions should be treated as a joint responsibility to be undertaken by the parties, their lawyers, if any, and the mediator, since the successful conduct of the same relies on all of them.¹⁸ It has also been suggested that since in mediation the dispute resolution practitioner determines the phases of the process to be conducted, the process

¹⁶ Zartman, I. W. & Berman, M. R., *The Practical Negotiator*, (New Haven, CT: Yale University Press, 1982), pp. 42-87; Mwangi, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit, pp.113-114.

¹⁷ Inbar, E., Great Power Mediation: The USA and the May 1983 Israeli-Lebanese Agreement, *Journal of Peace Research*, Vol. 28, No. 1, Special Issue on International Mediation (Feb., 1991), pp. 71-84; see also, www.colorado.edu, [Accessed on 9/08/2018].; See also www.negotiations.com, [Accessed on 9/08/2018].

¹⁸ Cobb, C., 'Reflections on the Mediation Process: Ensuring a Successful Mediation,' June 13, 2017. Available at <http://milesmediation.com/reflections-on-the-mediation-process-ensuring-a-successful-mediation/> [Accessed on 9/08/2018].

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua may be sequential, starting with a series of private meetings, such as a pre-mediation and intake interview to establish if the case is suitable for such a process and to assess the willingness of the parties to negotiate in a constructive way.¹⁹

Apart from court annexed/mandated mediation²⁰, it is generally agreed that the number of sessions, their duration and the purpose of each session can be

¹⁹ Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' *Queensland University of Technology Law and Justice Journal*, Vol. 8, No. 1, 2008, pp. 194-212, at p. 199.

²⁰ The Mediation Accreditation Committee (MAC) developed a Code of Ethics that is to apply to all mediators taking part in the pilot program of the the court annexed mediation, and the same is expected to remain in force even after the program was rolled out to the rest of the country in May 2018. The mediation (Pilot Project) Rules, 2015 lays out the procedures and timelines for guiding the process under the Court Annexed Mediation. (Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015)). The *Mediation (Pilot Project) Rules, 2015*, also provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.

The mediation process within Court Annexed Mediation

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

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

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

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

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

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

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua tailored to the requirements of the case and the approach favoured by the mediator and the parties.²¹

3.2 Negotiation Stage

At this stage, the possible strategies to use in the negotiations are discussed. Unlike in courts and in arbitration where the judges and arbitrators give orders and directions to be followed, a mediator's role in mediation is non-directive. This is so because in mediation party autonomy implies that, parties have a say over the process and outcome of the process. Therefore, where a mediator imposes his or her views upon the parties, the outcome may not be acceptable and enduring. A mediator's role at this stage should thus be essentially one of aiding the parties to negotiate and come to agreeable, creative and acceptable solutions that they are happy to live with. This is the essence of autonomy and voluntariness in mediation process.²²

There are several *active listening techniques* at the disposal of a mediator that can be employed to help the parties come up with a solution to the conflict. These include: paying attention, listening attentively, listening to the voice of silence/what is not said, encouraging parties, clarifying

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

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

Filing of report: Upon completion of mediation, the mediator is expected to file a report which indicates whether or not a Mediation Settlement agreement was reached.

The mediator shall file a certificate of non-compliance where a party fails to comply with any of the mediator's directions or constantly fails to attend mediation sessions.

²¹ ICC Commission on Arbitration and ADR, *Mediation Guidance Notes*, ICC Publication 870-1 ENG, (International Chamber of Commerce, France, 2015), p.6.

²² See article by Federation of Women Lawyers, 'Mediation in Kenya', published in the Daily Nation newspaper at page 42 on 20/06/2012. FIDA has successfully mediated in many family conflicts in Kenya where parties do not want to go to court. Parties result to mediation since it is informal, flexible, confidential (especially in family disputes), voluntary, fosters relationships and gives the parties autonomy over the process.

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua /paraphrasing/backtracking/restating, reframing²³, reflecting, summarizing and validating. To be an active listener the mediator must ensure that he does not pay attention to his own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behaviour to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses²⁴.

It is also recommended that mediators should have very well-developed communication skills. Some of the *non-verbal communication techniques* that a mediator must display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said.

Mediators are encouraged to have the ability to get the parties to talk to each other, as well as ‘understanding when it may be necessary to allow the parties to save face and walk away with the settlement and their pride intact’.²⁵ As a way of management of interruptions during mediation process, it has been suggested that during the mediator’s opening statement, the mediator should insure that the parties understand and agree to the guideline that each party lets the other speak without interruption during the mediation.²⁶

²³ The mediator uses this technique as a way of reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding of whatever they are saying.

²⁴ Caucuses are private sessions that the mediator may have with a party to the dispute so as to get more information or clarity on a particular issue.

²⁵ Smith, C.R., ‘Mediation: The Process and the Issues,’ *Current Issues Series*, (IRC Press, Industrial Relations Centre, Queen’s University, Ontario, 1998), p. 6. Available at <http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf> [Accessed on 9/08/2018].

²⁶ Carbone, M.P., ‘Mediation Strategies: A Lawyer’s Guide to Successful Negotiation.’ Available at <http://www.mediate.com/articles/carbone7.cfm#comments> [Accessed on 9/08/2018]; ‘Module 4: Issues In Mediation,’ available at

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This may be achieved through various ways which include but not limited to: the use of non-verbal cues to indicate the interrupter should cease; ignore the interruption; stop the process and address the interrupter; or where it is difficult to proceed, the mediator needs to consider whether the parties need to be separated so that the process can continue or whether the mediation is untenable.²⁷ These techniques allow the mediator to know and meet the parties' needs; make proposals which allow both parties to save face and enter an agreement that neither is willing to propose and come up with creative solutions to the conflict.

3.3. Post-Negotiation Stage

In the negotiation process, we have seen that the post-negotiation phase is the most important in the whole process. Similarly, in the mediation process this is the case too. It is during this stage that what was negotiated is implemented. After parties have arrived at an acceptable, enduring outcome or solution the negotiators and the mediator have to come up with a method or strategy for effectuating that outcome. The criteria could, for instance, include assigning roles to the parties and a timeframe within which certain roles are to be carried out. And it is at this stage that parties find out if the negotiations were done in good faith and whether the other party will deliver on the promises it made during the negotiation stage. This is possible through monitoring. This stage also creates a forum for building and mending broken relationships, since mediation is a mechanism geared towards fostering relationships rather than creating tensions.²⁸

<http://www.ama.asn.au/wp-content/uploads/2012/07/MODULE-4.pdf> [Accessed on 9/08/2018].

²⁷ Knight, R., 'How to Refocus a Meeting after Someone Interrupts,' *Harvard Business Review*, 16 April, 2015. Available at <https://hbr.org/2015/04/how-to-refocus-a-meeting-after-someone-interrupts> [Accessed on 9/08/2018]; See also generally, Macmillan, R., *A Practical Guide for Mediators*, (Macmillan Keck Attorneys & Solicitors, Geneva). Available at <http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf> [Accessed on 9/08/2018].

²⁸ Zartman, I. W. & Berman, M. R., *The Practical Negotiator*, op. cit; See generally, Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In

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3.4 Mediation Approaches and Techniques

It has rightly been pointed out that there is considerable diversity in the practice of mediation internationally and within countries. Furthermore, mediation is used for various purposes and operates in a variety of social and legal contexts. As such, the mediator usually possesses different types of training, cultural backgrounds, skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.²⁹ For example, in traditional African society, several societal factors such as traditions, norms, kinship ties, joking relations, communal living and respect were instrumental in conflict management. In the traditional set up, mediation was seen as an everyday affair and an extension of a conflict management process on which it is dependent.³⁰ Mediation in the traditional setting thus operated and functioned within the wider societal context in which case it was influenced by factors such as the actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves.³¹ It is thus not a linear cause-and-effect interaction but a reciprocal give and take process. This reciprocity is the one that created an ideal

Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018].

²⁹ Drews, M., 'The Four Models of Mediation,' *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44. Available at <http://www.diac.ae/idias/journal/volume3no1/issue1/eng4.pdf> [Accessed on 9/08/2018].

³⁰ See Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," op cit.; Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," *Folklore*, Vol.14, 2000, pp.86-97; Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," *Journal of the Anthropological Society of Oxford*, Vol.24, 1993, 251-263; Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," *Beyond Intractability* (2005). Available at

https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_Resolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf [Accessed on 9/08/2018].; De Jong, F., "A joking nation: conflict resolution in Senegal," *Canadian Journal of African Studies/La Revue canadienne des études africaines*, Vol.39, No. 2, 2005, pp.391-415.

³¹ "The Cognitive Perspective on Social Interaction," available at https://www.ocf.berkeley.edu/~%7Ejfkhlstrom/SocialCognitionWeb/CogPerspect/CogPerspect_supp.htm [Accessed on 9/08/2018].

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua environment for conflict resolution among African communities as it involved the mutual exchange of privileges, goods, favours and obligations thus fostering peaceful coexistence and eliminating the likelihood of wars and conflicts. It influences and is, in turn, influenced and responsive to the context and environment of the conflict.³²

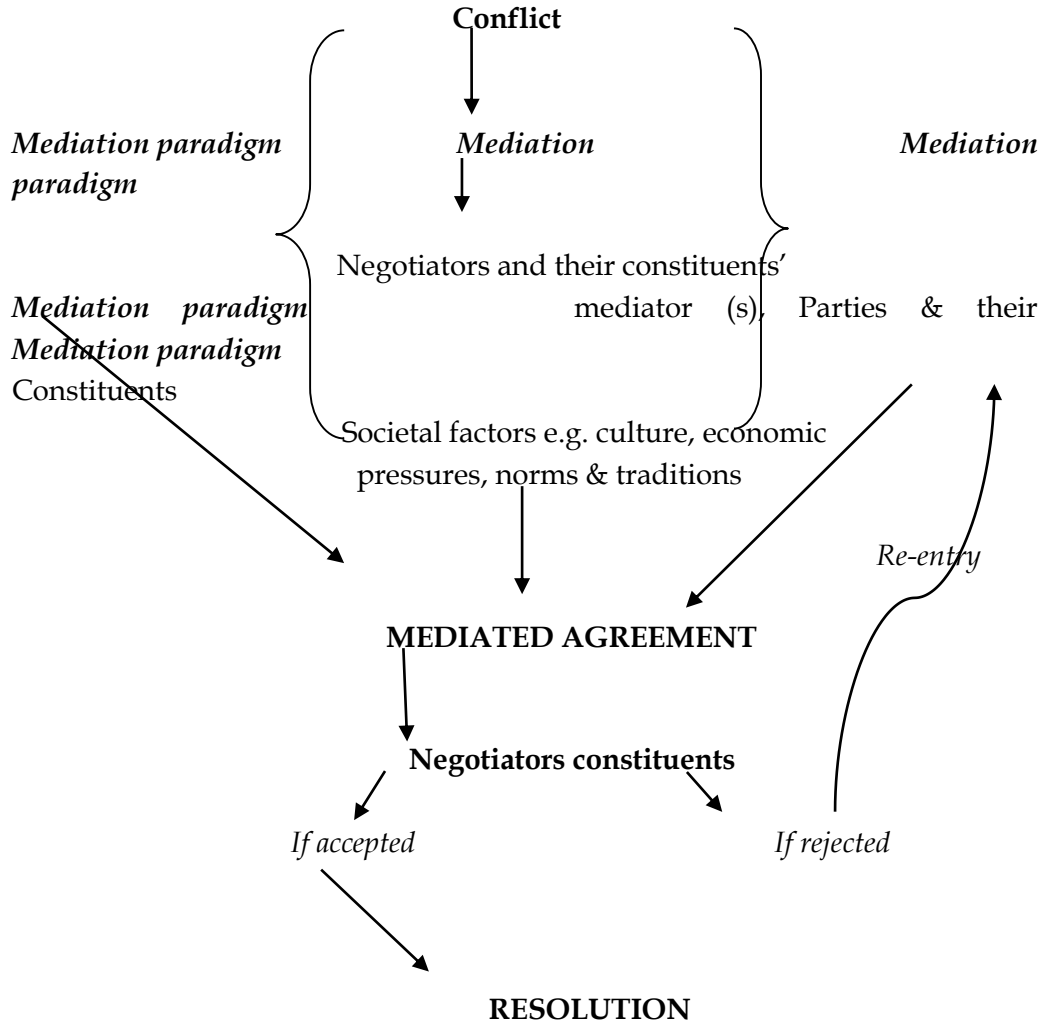
Since it is now acknowledged that conflict management is a more complex social phenomenon than earlier conceptualized, there is consensus that there are other factors and actors who have interests that influence the mediation process beyond the parties themselves. Such a wide environment in which the immediate parties to the conflict, mediator's constituents, and third parties who affect or are affected by the process and outcomes of the mediation and other factors such as societal norms, economic pressures, and institutional constraints directly or indirectly affecting the mediation process is what is referred to as the mediation paradigm.³³ [See *Fig. 1* below for an illustration of the mediation paradigm]. However, the concept has now been extended further to include sources of the benefits for the parties and third parties such as a mediator which are located in the conflict, region where conflict arose, international audience /neighbours, parties and third party constituents.³⁴

³² See Baregu, M., "Understanding Obstacles to Peace: Actors, Interests, and Strategies in Africa's Great Lakes Region," (International Development Research Centre, 2011). Available at <https://prd-idrc.azureedge.net/sites/default/files/openebooks/516-8/> [Accessed on 9/08/2018].

³³ Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-180.

³⁴ Mitchell, C., "The Motives for Mediation," in Mitchell, C.R. & Webb, K. (eds), *New Approaches to International Mediation* (Westport, CT: Greenwood Press, 1988), pp. 29-51; Mwangi, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.43-54.

Fig.1 Mediation Paradigm



***Source: The author.**

Fig. 1.2 illustrates the mediation paradigm with some of the main actors, that is, the conflict, negotiators and their constituents, the mediators, third parties and their constituents and other societal factors that influence the mediation process. It further reveals that the constituents are normally interested in the mediated agreement. This is because, if the negotiators do not consult them sufficiently

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua they may reject the agreement leading to the re-entry problem. However, where there are adequate consultations with the constituents the negotiators will find that the agreement they negotiated is acceptable and hence an end to the conflict. The mediation paradigm is thus useful in understanding the conflict context. The context of the conflict is the wider context, the societal aspects to the conflict reflecting the nature of the disagreement, the parties' perceptions of it, and the level and type of their conflict behavior.³⁵

There are about four models of mediation that are used in different jurisdictions and subject areas: Facilitative mediation- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; Settlement mediation- where parties are encouraged to compromise in order to settle the disputes between them; Transformative mediation- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; Evaluative mediation- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies.³⁶

Despite the foregoing, it should be noted that scholars have summarised about five elements of a successful mediation process that would work in various approaches:³⁷

³⁵ Bercovitch, J. & Houston, A., "Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts", *The Journal of Conflict Resolution*, Vol. 44, No. 2 (Apr., 2000), pp. 170-202; Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965); Mkangi, K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, [Accessed on 9/08/2018]; See generally Report by Mohamud, A, et al (eds), *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Practical Action, Nairobi, 2006).

³⁶ Ibid; See also Fenn, P. *Introduction to Civil and Commercial Mediation*, Part 1 (Chartered Institute of Arbitrators), p. 42:

Para. 4.12 provides for contingency approach to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings and the mediators play a variety of roles.

³⁷ Marsh, Stephen R. 1997a. What is mediation? Available at

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- a. First, there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution;
- b. Second, the mediator must 'protect the integrity of the proceedings' by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings;
- c. Third, there must be 'good faith from the participants' or the process will soon be frustrated and fail;
- d. Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained; and
- e. Finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.

It is also true that 'practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal development, membership of professional bodies and their organisational or agency standards and accreditation requirements.'³⁸

4.0 Facilitative Role of the Non-Mediator Lawyers in the Mediation Process

It has been suggested that where a party goes with a non-mediator lawyer in the mediation process, such a lawyer can perform various facilitative roles ranging from referring clients to mediation, helping during the mediation

<http://members.aol.com/ethesis/mw1/adr1/essayi.htm>) [Accessed on 9/08/2018], (As quoted in Smith, C.R., 'Mediation: The Process and the Issues,' (Industrial Relations Centre, Queen's University Kingston, Ontario, 1998), p.3.

³⁸ Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' *Queensland University of Technology Law and Justice Journal*, Vol. 8 No 1, 2008, pp. 194-212, at p. 209.

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua process, reviewing a mediated agreement, and communicating with the mediator.³⁹

In addition, in deciding whether or not to refer clients to mediation, such lawyers should assess the personality, capabilities, and motives of clients to determine whether they would appropriately contribute to and profit from mediation.⁴⁰

The lawyer may also participate in selecting a mediator or providing clients with a list of reputable mediators.⁴¹ Other roles include but not limited to: remaining available to clients to provide information and advice without depriving clients of autonomy in the mediation process; and advising clients about the enforceability of the decisions being made and the need for security to ensure the integrity of the agreement.⁴²

It has also rightly been pointed out that the wise lawyer takes care to understand the scope of the protection the law affords to statements made and acts done in connection with settlement negotiations.⁴³ It is therefore arguable that lawyers can play a facilitative role in mediation without interfering with either the mediator's role or jeopardizing the parties' ability to resolve their issues.

5.0 Conclusion

This paper has discussed the mediation process as a continuation of the negotiation process. It is an informal, flexible, voluntary and expeditious process. This is the sense in which mediation was practiced by Kenyan communities before the advent of formal legal mechanisms. The paper however highlights the general elements of a mediation process that is broad enough for

³⁹ See generally, Samuels, M. D. & Shawn, J.A., "The role of the lawyer outside the mediation process," *Conflict Resolution Quarterly*, No. 2, 1983, pp.13-19.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," *Hastings Lj*, No. 39, 1987, pp. 955-1029 at 955.

Making Mediation Work for all: Understanding the Mediation Process: Kariuki Muigua all the mediators to incorporate. Regarding the specific elements of the process, that will greatly depend on the mediator, their training, nature of dispute and parties, amongst others.

As outlined above, mediation may involve the three phases the preparatory stages, actual negotiations and the implementation stage. However, they are not cast in stone. They are not fixed procedures as happens in court. They allow flexibility during the negotiations and the mediation. Conflict resolution in the traditional African set up was such a process and most of these phases were involved albeit in an unconscious manner.

As seen above, the mediation process involves other constituents and not just the parties to the conflict. It has been suggested that it includes the mediator, constituents of the parties, constituents of the mediator and the third parties who affect or are affected by the process and outcome of the mediation. Furthermore, this environment also includes other factors such as societal norms, economic pressures and institutional constraints which affect the mediation process and the outcome either directly or indirectly.⁴⁴

Since Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) are now enshrined in the Constitution, their positive attributes should now be harnessed to foster peaceful co-existence and enhance access to justice in Kenya. It is thus hoped that the policy, legal and institutional framework on resolution of conflicts in Kenya is bound to shift to encourage ADR and other traditional means of conflict management. It thus becomes imperative for the practitioners to appreciate the minimum accepted ingredients of mediation process to enhance the process and acceptability of the outcome by the parties.

⁴⁴ Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-160.

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Arbitrating Community Claims as “Human Rights” claims in Sub-Saharan Africa

*By: Philip Bliss Aliker**

1.0 Introduction

On 19 December 2011, a super tanker operated by Shell International Trading and Shipping Company Limited called the MV Northia¹ dropped anchor a short but safe distance away from the Shell Bongo Floating Production Storage and Offloading vessel (“FPSO”) in the Bonga oil field² off the coast of Nigeria in the Gulf of Guinea operated by Shell Nigeria Exploration Production Company (“SNEPCo”). The purpose was for the loading of crude oil extracted from the sea which was to be transhipped from the Shell FPSO to the super tanker and to be taken for refining.

Loading of the vessel commenced on 19 December 2011. On the following morning, a sheen of oil was noticed in the immediate vicinity of the MV Northia which appeared to originate from the direction of the FPSO. The hull of the MV Northia was completely covered in oil. Engineers noted that the export line between the FPSO and the Northia had ruptured spilling crude oil into the ocean. The spillage of oil was admitted by SNEPCo. to the Nigerian Department of Petroleum Resources (“DPR”), the national agency responsible for oil activity. SNEPCO admitted a spill of 40,000 barrels. SNEPCO (under the supervision of its parent Royal Dutch Shell Plc (“RDS”) explained that in

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¹ MV Northia Particulars. The vessel was owned by Front Thor Inc. sailing under a Marshall Island Flag operated by Shell International Trading and Shipping Company Limited– call sign V7SL4. The MV Northia (IMO 9399480) was on a bareboat charter to Shell Trading and Shipping Company between 2010 and 2014.

² Oil block OML 118 (formerly OPL 212) situate 4° 33N', 4° 36E'.

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accordance with its obligations as operator of the oil exploration block, it has contained **and** cleaned up the spill. However, the oil is still prevalent on the coastline and the environmental damage is significant.

These are the background facts to litigation in London in the High Court of Justice QBD, Technology and Construction Court between the Bonga coastline communities numbering more than 30,000 individual claimants and RDS³, SITS⁴ and SNEPCO. The value of the claim and other related claims is valued at more than US\$3 billion. The formal admissions made by SNEPCO coupled with the incontrovertible role of SITS and RDS, all of which is a matter of public record⁵, would suggest that a dispute on jurisdiction and on the merits is unnecessary. But not so. Shell, like other defendant transnational corporations (“TNCs”)⁶, demonstrates the most determined commitment to avoid English litigation - at any cost.

The availability of “*British justice*” begs the question as to why England is relevant to events and circumstances concerning oil leaks in Nigeria, contaminated water supplies in Zambia and health and safety standards in Kenya. Why is it that African host community claimants seek to pursue claims in English Courts?

The short answer is that the national courts in sub-Saharan Africa are perceived by *African* host community claimants to be inefficient and unreliable. The irony that local courts should be preferred by TNC defendants is not lost on claimant host communities. Nor is the hypocrisy of the same TNCs’

³ UK company number 04366849.

⁴ UK Company number 00525037.

⁵ “*In 2011, Shell Nigeria Exploration and Production Company (SNEPCo) experienced a major leak offshore during the loading of an oil tanker*” (see 2011 Shell Sustainability Report, page 4).

⁶ Onkomah and Eaton J. “*The Nigerian Tragedy, Environment Regulation of Transnational Corporations, and Human Right to a Healthy Environment.*” Boston University International Law Journal. Vol. 15 (1997) at 261.

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insistence on arbitration in investment contracts⁷; TNCs will happily submit to the jurisdiction of local courts as defendants but not as claimants.

We are seeing a backlash by governments against the perceived unfairness of foreign courts and arbitral tribunals. It is therefore something of an irony that new Tanzanian legislation should now deprive Tanzanian host claimant communities from pursuing claims other than in Tanzania under Tanzanian law⁸. The irony is evident looking at three other African cases.

Three “African” cases currently working their way on appeal in the English Courts illustrate the deeply entrenched biases and the vast sums of money deployed to defend positions: -

- a. *AAA and Others v Unilever Plc and Unilever Tea Kenya Limited* [2017] EWHC 371 (QB) - “the Unilever Case”;
- b. *Okpabi (suing on behalf of the people of the Ogale Community* [2018] EWCA Civ 191- “the Okpabi Case”, and
- c. *Lungowe v (1) Vedanta Resources Plc and (2) Konkola Copper Mines Plc* [2017] EWCA Civ 1528 - “the Vedanta Case”

2.0 Transnational Corporation opposition to England: Jurisdiction Challenge and Cost

The standard approach taken by UK TNCs to claims concerning and arising substantially out of circumstances in Africa is to challenge the jurisdiction of the English court. The place of corporate domicile is critical to the prospects of success of any jurisdiction challenge. The reason, different considerations apply depending on whether a defendant is domiciled within an EU member state or domiciled in a third state (a non-EU state).

⁷ The Production Sharing Agreement between the Nigerian National Petroleum Company and Shell and its affiliates provides for arbitration.

⁸ Natural Wealth and Resources (Permanent Sovereignty) Act 2017.

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Following the European Court of Justice decision in *Owusu v Jackson*_Case 281/02) [2005] QB 801, the law is now clear. A court of an EU member state cannot decline jurisdiction in a claim brought against a defendant (of whatever nationality) domiciled in an EU member state in favour of jurisdiction in a non-contracting state⁹ or third state, including for reasons of *forum non-conveniens*. It matters not that the claim includes a defendant not domiciled in England. Therefore, subject to exceptional residual arguments about the appropriateness of England as the jurisdiction (and subject to *lis pendens*), the English court simply cannot refuse jurisdiction over UK domiciled defendants in favour of proceedings elsewhere. The position is recently confirmed by the Court of Appeal in *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528¹⁰. It is mandatory.¹¹

The practical effect of the *Owusu* decision is that tactically any party now seeking to pre-empt a jurisdiction challenge on the grounds of *forum non-conveniens* (*a fortiori*, in circumstances where the claim may arguably be better suited to trial in a third state), is well advised, if they can, to join an EU domiciled defendant in those proceedings. That a defendant may be a third state domiciled defendant does not abrogate the effect of *Owusu* which is, subject to the EU prorogation regulations (the Recast Directive)¹² to require the proceedings which involve an EU domiciled defendant to be pursued in that defendant’s EU state of domicile in any event. Therefore, it is now customary to refer to an EU domiciled defendant as an “*anchor defendant*” because it is that defendant that ensures that the EU/English court is required to exercise its exorbitant jurisdiction over a joint non-EU domiciled defendant. In terms, the

⁹ Jurisdiction as between EU member states is determined by the EU Regulation 1215/2012 (The Recast Directive).

¹⁰ *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528, per Simon LJ, paragraph 34.

¹¹ *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528, per Simon LJ, paragraph 34.

¹² EU Regulation 1215/2012 the Brussels Regulation (Recast). The Recast does not apply to arbitral proceedings but it does apply to legal proceedings in which arbitration agreements are in issue.

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anchor defendant shields the claimant from a jurisdiction challenge on grounds of forum non-conveniens and effectively compels the third state domiciled defendant to be joined.

The focus of any jurisdiction challenge concerning an English and a non-English domiciled defendants therefore begins with the anchor defendant. A successful jurisdiction challenge by an anchor defendant opens the way for a successful challenge by the non-UK domiciled defendant on the grounds of forum non-conveniens - because the Owusu protection is by then lost. The elimination of the Owusu protection is at the heart of the jurisdiction challenges in each of the cases to which reference is made in this paper. For high value host community claims running into hundreds of millions or even billions of dollars, the prize is worth a very costly protracted fight in court.

The basis of challenge to jurisdiction by an anchor defendant common to each of the cases to which reference is made in is that there is not as *“between the claimant and the defendant a real issue which it is reasonable for the court to try”* as provided by the Civil Procedure Rules 1998 Practice Direction 6B, paragraph 3.1(3)(a). The test for joinder of a non-EU domiciled defendant in respect of whom the court seeks to exercise its exorbitant jurisdiction to “drag” that defendant before the English court (for the discretion is exercised in the context of service) is that *“the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim”* as provided for by the Directions.

a) The Unilever Case (Kenya)

The Unilever case concerned claims for personal injuries brought by 218¹³ Kenyan claimants against Unilever plc, the ultimate parent holding company and its Kenya subsidiary, Unilever Tea Kenya Limited. The claimants sought to use the parent company domiciled in England as the anchor defendant in proceedings brought also against the Kenya subsidiary. The Kenya subsidiary was primarily responsible for the employment of the claimant tea pickers on a

¹³ AAA and Others v Unilever Plc and Unilever Tea Kenya Limited [2017] EWHC 371 (QB), paragraph 11.

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tea plantation near Kericho in Kenya owned and operated by the Kenya subsidiary. The employees were members of the Kisii ethnic group on the plantation situated within an area, the traditional home of members of the Kalenjin (Kipsigis) ethnic community.

In the period immediately following the 2007 Presidential election in Kenya, there followed a period of deadly violence-also known as the “*post-election violence*” (“PEV”). The claimants were set upon by members of the Kalenjin and Luo communities causing serious personal injuries. The claimants alleged that the UK parent and its Kenya subsidiary (which operated under the policies set by the parent), were responsible for not providing its employees with adequate protection during the PEV. The parent challenged the jurisdiction of the English court – disputing that it should be joined and argued that the dispute should be litigated in Kenya. The basis of the challenge was that there was not a reasonable claim against the parent on the facts. The pleaded breach of duty of the parent was, in terms, an allegation that it had failed to

“either anticipate and protect the claimants against a breakdown of law and order, or to keep law and order when it had broken down and to ensure that the claimants did not suffer as they did from criminal acts of the Kipsigis”.

The Kisii claimants opposed the challenge on a number of grounds including the unreliability of the Kenyan courts said to suffer judicial corruption and inadequate protection for the claimants.

It was held by the Mrs Justice Elisabeth Laing DBE that the claim, as pleaded against the parent only, was bound to fail”.¹⁴ The elimination of the anchor defendant opened the way for a challenge by the subsidiary on grounds of forum non-conveniens. However, in the event that the judge’s finding on the merits might be wrong, the judge held that the claimants’ claim against the non-English subsidiary would survive a stay.

¹⁴ *AAA and Others v Unilever Plc and Unilever Tea Kenya Limited* [2017] EWHC 371 (QB), paragraph 111.

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The case against the non-English subsidiary would survive for two reasons.

First, because of the political nature of the claim and the absence of any successful prosecutions arising out of the PEV events, the court considered that the claimants would not get substantial justice in Kenya.

Second, the judge was persuaded “*that there is a continuing problem with judicial corruption in Kenya*”¹⁵ and that this was “*common ground among the experts*”. Corruption is not a myth.

The case was argued by 3 QCs for the claimants, a QC and four juniors for the defendants. The hearing bundle comprised 8 files of domestic authorities, 16 files of pleadings and experts’ reports, 8 files of expert materials. The case was argued over four days – “*tenaciously*” and at vast expense.

b) The Vedanta Case (Zambia)

The Vedanta Case concerned 1,826¹⁶ Zambian host community claimants living in the Chingola region of the Copperbelt Province in Zambia. The claimants brought proceedings against Vedanta (a UK domiciled parent) and Konkola Copper Mines plc (“KCM”) (Vedanta’s Zambian subsidiary) for personal injuries, loss and damage (including loss of amenity and enjoyment of land) caused by alleged pollution and environmental damage by discharges from the Nchanga copper mines¹⁷. The mine is owned and operated by KCM, a public limited company incorporated in Zambia owned by Vedanta¹⁸.

¹⁵ *AAA and Others v Unilever Plc and Unilever Tea Kenya Limited* [2017] EWHC 371 (QB), paragraph 169.

¹⁶ *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 TCC, Chapter 2, paragraph 9

¹⁷ “*The mine commenced operation in 1937, when it was wholly owned by the Anglo-American Corporation Group, at the time of the British Protectorate of Northern Rhodesia. That country was granted independence and became Zambia in 1964. In 1970 the mine was part-nationalised, with 51% owned by State-controlled companies*” (*Lungowe v Vedanta Resources Plc* [2016] EWHC 975 TCC, Chapter 2, paragraph 12).

¹⁸ “*Vedanta is an extremely wealthy holding company: there are references in the papers to it being worth around £37 billion. It has 19 employees, of which eight are directors, with the others*

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Vedanta sought to challenge the jurisdiction of the English court. That challenge was based on five grounds, the first four of which related to the application of the principles in *Owusu* and the fifth related to whether there is a real issue to be tried between the claimants and Vedanta (Civil Procedure Rules 1998 Practice Direction 6B, paragraph 3.1(3)(a)).

Vedanta/KCM argued before Coulson J. in the High Court that the claims against Vedanta are “*an illegitimate hook being used to permit claims to be brought [in England] which would otherwise not be heard in the United Kingdom.*”¹⁹

The judge refused to grant a stay on the defendants’ jurisdiction challenge which decision was upheld on appeal to the Court of Appeal. The judgment is on appeal to the English Supreme Court.

The case was argued over three full days. Coulson J, stated that the case “*assumed all the trappings of a State trial*”²⁰ and it took a deal of time to generate a final judgment. The judge explained: -

“There were 19 full lever arch files containing evidence and exhibits, and a further 5 lever arch files containing well over 100 authorities. Live disputes between the parties ranged from detailed arguments as to the circumstances in which a parent company might owe a duty of care to those affected by the acts and omissions of its subsidiaries, to the dearth of private lawyers in Zambia and who is to blame for the failure of other environmental litigation in Zambia. Despite all of that, I was and remain of the view that the issues raised on the applications brought by the defendants are relatively straightforward and lead to what are, I hope, unsurprising conclusions.

in corporate or administrative support roles. By contrast, the Vedanta group employs 82,000 people worldwide through its subsidiary companies. Those are the operating companies, like KCM, involved in all kinds of mining and manufacture, as well as oil, gas and power generation” (Lungowe v Vedanta Resources Plc [2016] EWHC 975 TCC, Chapter 2, paragraph 15).

¹⁹ *Lungowe v Vedanta Resources Plc [2017] EWCA Civ 1528, per Simon LJ, paragraph 40.*

²⁰ *Lungowe v Vedanta Resources Plc [2016] EWHC 975 TCC, Chapter 1, paragraph 6.*

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The applications were heard over three days in mid-April 2016. The first full draft of this Judgment was prepared in the four days immediately thereafter.....”

The logistics of generating a judgment apart, Coulson J. was dismayed by the effort and quantity of material generated for the hearing on jurisdiction. He said the following: -

“In VTB Capital Plc v Nutritek International Corp [2013] 2 AC 337, Lord Neuberger said:

‘...hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost.”

*As I have indicated above, this case is a paradigm example of what Lord Neuberger was warning against. Furthermore, if the parties were prepared to put this amount of effort into what is ultimately a procedural hearing, then the court is entitled to ask itself how long, involved and expensive any substantial trial might be, **wherever it is fought** (emphasis added).”*

It appears that neither cost (Vedanta) nor concerns about judicial corruption (Unilever) suffices to dissuade defendant investors from taking a reasonable approach to resisting litigation in the UK in preference to litigation in Africa. That said, as the judge observed, when it came to the trial, wherever it is fought, the parties could be expected to fight tooth and nail to the bitter end.

c). The Okpabi Case (Nigeria)

The Okpabi case concerns an oil spill in Nigeria. Claims were made by 18 host community claimants on behalf of themselves and 40,000 individuals of the Ogale Community in Nigeria. An additional 2,335 claims were made by

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members of the Bille Kingdom. The Ogale are part of the Ogoni people of the Niger Delta. The horrors of the environmental damage to which the Ogoni have been subject is the subject of the United Nations Environment Programme (“UNEP”) Report, financed in part by Shell Development Company (“SPDC”) of the Shell Group published in August 2011 - a mere 4 months before the 2011 Bonga spill²¹.

The circumstances of the spill need take no time.

What is material is that Royal Dutch Shell (“RDS”) has sought to fight tooth and nail to challenge the jurisdiction of the English Court. The basis of that challenge (as in *Vedanta* and *Unilever*) is whether there is a real issue to be tried between the claimants and RDS (Civil Procedure Rules 1998 Practice Direction 6B, paragraph 3.1(3)(a)).

RDS was successful before Fraser J in the High Court and on appeal by the claimants, in the Court of Appeal. Okpabi, *Vedanta* and *Unilever* are on appeal to the Supreme Court – at yet even more vast expense.

Fraser J (before whom High Court challenge in *Okpabi* came after *Vedanta*) repeated the admonition of Neuberger LJ in *VTB* (cited by Coulson J. in *Vedanta*) and then said this: -

*“Most recently in the Technology and Construction Court, in **Lungowe and others v (1) Vedanta Resources plc (2) Konkola Copper Mines plc** [2016] EWHC 292 (TCC) (“the Vedanta litigation”) Coulson J referred, in the context of the jurisdictional challenges in that case, to the fact that ‘the central issue raised by these twin applications, namely where these claims should be tried, assumed all the trappings of a State trial’. The two instant sets of proceedings continued what must be described as an alarming trend. These applications involved a bundle for the hearing of 33 lever arch files, with 37 witness statements from 29 different individual witnesses, together with reports from a number of*

²¹ https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf

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experts dealing with Nigerian law issues. The authorities bundle numbered 123 different cases, articles and pieces of legislation, including cases from this jurisdiction, European cases, Nigerian, Australian and American decisions. The total number of 29 different individual factual witnesses includes that of Professor Siegel for the claimants to which I will return in further detail below. The skeleton arguments lodged by both parties were extensive; almost 100 pages for the defendants, and 137 pages for the claimants.

Three days were available for oral argument (reduced from the original four due to the need for a reading day). Both parties expressly agreed that these three hearing days were sufficient, and so they did not need to accept the invitation of a fourth day on a future date that was potentially available. This meant that some of the defendants’ reply submissions were made in writing after the hearing. However, these attached yet further factual material as appendices, to which objection was then taken by the claimants. I am of the view that the time available for the oral hearing was sufficient to deal with the four applications fairly. I am however firmly of the view that the views of Lord Neuberger must be observed. The current approach of parties in litigation such as this is wholly self-defeating, and contrary to cost-efficient conduct of litigation. This case is an ideal example of one with ‘masses of documents, long witness statements, detailed analysis of the issues, and long argument’ being deployed on both sides. The costs burden upon the parties must be enormous, and this approach is, in my judgment, diametrically opposed to that required under the overriding objective in CPR Part 1. It would be regrettable if the only way that compliance could be ensured were to be by the court imposing a strict limit on the number of witness statements that could be lodged, and also restricting their length. Experienced legal advisers ought not to need such strictures in order to concentrate their minds. However, a fundamental change of approach is required by the parties in cases such as these for applications of this nature”.

The cynical would say that the deployment by parties of disproportionately large resources is calculated to avoid justice. As indicated above, the motivation for claimant and defendant may be different but the objective is the same – to avoid litigation in African jurisdictions. The unreliability of the

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courts is to the advantage or disadvantage depending on which foot the boot is on. This shortcoming is disempowering to host communities. Human Rights Commissions in each of the member states of the East Africa Community present a viable alternative forum for the resolution of community claims.

3.0 Proposals for Change

It has been suggested that a new international body with inquisitorial powers should be set up to investigate, adjudicate and enforce environmental claims²² against not just governments, but also against TNCs – and to save costs. It is said that this adjudicatory body should have the following attributes: -

- a) the expertise to deal with claims;
- b) entitled to receive claims from individuals and communities;
- c) power to investigate claims using its experts and independent impartial consultants, and
- d) power to make awards, grant injunctive relief and remediation orders.

A world environmental commission or an Environmental Court is not *the* solution. The shortcomings in the resolution of host community claims transcend environmental issues. What is actually required is a versatile regime to deal with the variety of claims, including, for example, employment and health and safety claims. It should be possible for a TNC to meet host communities claims without fear that community claims will be commercialised by lawyers. It should be possible for TNCs to engage in remediation efforts to clean up environmental damage and remedy working terms and conditions without being concerned to face grossly inflated "compensation" payments.

It is counsel of perfection, but the appropriateness of any dispute resolution forum really ought to be related to the pre-impact assessment of the effects of

²² Onkomah and Eaton J. *"The Nigerian Tragedy, Environment Regulation of Transnational Corporations, and Human Right to a Healthy Environment."* Boston University International Law Journal. Vol. 15 (1997) at 303.

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any particular industry on its host community. The focus should be on dispute avoidance. The prospects of disputes should be considered *prior* to the investment. Prior consideration should be given to definition of “community” and the extent of the territory. The reasons for the investment should be clear. There should be a full risk assessment²³. The risks and the cost benefit of the investment should be understood in the context of the value that the community land and resources provide to a community. There ought to be a system put in place for the resolution of disputes between an investor and host community. The dispute resolution provision ought to be written into an agreement.²⁴ In the absence of this forward planning, the question is what is to be done for the future, bearing in mind party biases?

The existing Human Rights Commissions in sub-Saharan Africa are well suited for the resolution of community disputes going beyond environmental claims. The Uganda Human Rights Commission (“UHRC”) is one such example.

4.0 The Uganda Human Rights Commission

The UHRC is enshrined in Chapter 4 of the Uganda Constitution, 1995. The primary purpose of the UHRC is to protect and to promote the fundamental and other human rights and freedoms enshrined in the Constitution. The functions of the UHRC are listed under Article 52. The functions include *inter alia*, the right to investigate complaints (Constitution, Article 52(1) (a)).

The UHRC’s powers are listed under Article 53 of the Constitution and include *inter alia*, where the UHRC is satisfied that there has been an infringement of a human right or freedom, the power to order the payment of compensation (Constitution, Article 53(2)(b)) and any other legal remedy or redress (Constitution, Article 53(2)(c)).

²³ NAMATI and Columbia Centre on Sustainable Investment, *Negotiating Contract with Investors, Guide 2*,

²⁴ NAMATI and Columbia Centre on Sustainable Investment, *Preparing in Advance for Potential Investors Guide I, Chapter 6, page 24-29.*

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The UHRC has sufficient discretion to exercise its mandate over TNCs and other non-state entities. The scope of its mandate is critical²⁵. The UHRC, like her sister Commissions (Kenya²⁶ and Tanzania²⁷), is willing to engage in a much wider range of claims, and in particular not just claims concerning allegations of breach of human rights by governments and emanations of the state. The UHRC has demonstrated a willingness to engage in a much wider range of disputes- provided there is a discernible broad public interest.

The preservation of the independence of the UHRC is safeguarded by Article 55 of the Constitution which provides that: -

- (a) it shall be “*self-accounting*” and that all expenditure is charged on the Consolidated Fund (Constitution, Article 55(1)), and
- (b) the members of the Commission enjoy the same security of tenure as a judge of the High Court (Constitution, Article 55(2)).

Under the Uganda Human Rights Commission Act 1997 (“**UHRCA**”), the UHRC has statutory power to investigate and adjudicate on human rights complaints²⁸. It has a very well-established regime for investigation and adjudication. The UHRC has a range of dispute resolution tools at its disposal including mediation, conciliation (including traditional/ customary solutions) and adjudication by the UHRC Tribunal led by a Commission Chair who enjoys

²⁵ UHRC 2015, “*Complaints Handling Procedures Manual*”, page 3.

²⁶ Kenya National Commission on Human Rights Act 2011 and Article 59 of the Kenya Constitution.

²⁷ Tanzania Commission for Human Rights and Good Governance Act 2001 and Article 129 of the Tanzania Constitution.

²⁸ UHRCA 1997, section 7.

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the standing of a High Court judge²⁹. The Tribunal conducts its work under the UHRC Complaints Handling Rules³⁰.

Mediation is recommended for family matters, employment matters and non-complex land matters. The recommendation is for “guidance” only, the list is neither exhaustive nor mandatory. The remedies are in the discretion of the UHRC³¹.

The Uganda Human Rights Commission (“UHRC”) is: -

- (a) independent and impartial;
- (b) adequately funded;
- (c) capable of undertaking an impartial and thorough national investigation;
- (d) versatile and able to adopt a range of alternative dispute resolution processes for the resolution of the dispute, and
- (e) able to ultimately make decisions binding on the parties.

As an independent public body, the UHRC is uniquely well-placed to reconcile the protection of the rights of individuals and communities and the legitimate development objectives of government and investors. The view that local courts and tribunals are best suited to resolve disputes concerning TNCs in the extractive and mining industries is certainly the view of Tanzania.

The UHRC therefore demonstrates each of the attributes of the proposed adjudicatory body. In light of the hostility of Tanzania and that of other African nations to foreign proceedings, the need to look for a new approach to the resolution of community claims is now thoroughly compelling.

²⁹ UHRC Complaints Handling Rules Establishment of the UHRC under Article 51 provides that “*The chairperson of the Commission shall be a judge of the High Court or a person qualified to hold that office.*” ((paragraph 1.23)).

³⁰http://www.uhrc.ug/sites/default/files/ulrc_resources/complaints%20Procedures%20manual%20II%20_3_.pdf.

³¹ UHRC Complaints Handling Rules. Procedure Manual, paragraph 8.1.

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4.1 Necessity for Residual Arbitration

The use of the Commission to resolve disputes using all its tools requires to be underpinned by an agreement to arbitrate. Arbitration is necessary for two reasons.

First, there may be issues as to jurisdiction concerning the resolution of private law disputes. By agreeing to arbitrate the parties expressly confer jurisdiction to arbitrate on the Commission and its Tribunal.

For good measure, the Attorneys General should approve the contractual relations of the Commission and the TNCs; the Commission is a government agency.

Second, the use of mediation and other non-binding methods of ADR by the Commission might potentially lay open a TNC to blackmail by unreasonable host community claimants. An agreement to arbitrate therefore protects the TNC from falling hostage to its unilateral offer to submit to the Commission jurisdiction with unreasonable host community claimants. It imposes an arbitration “back-stop”. It is “med-arb” ADR.

The offer by the TNC to arbitrate may stand as a unilateral offer to arbitrate. The unilateral offer to arbitrate is well recognised in international law.³² The validity of such an offer is fortified by contractual terms which are expressed to benefit third parties³³. The usefulness of third-party beneficiary legislation is not to be underestimated.

We turn to the radical approach adopted by Tanzania which reflects considerable dissatisfaction with the current options for Investor State Dispute Settlement (“ISDS”) but which is by no means inimical to the use of the Tanzania

³² Such as ICSID offer to arbitrate investor-state disputes.

³³ Uganda Contracts Act 2010, section 65 (replicating the English Contracts (Rights of Third Parties) Act 1999. Also followed in South Sudan (Contract Act 2008, section 97) but neither in Kenya nor Tanzania.

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Human Rights and Good Governance Commission as a forum for the resolution and avoidance of host community disputes.

4.2 Tanzania’s Jurisdictional Restriction of Foreign Forums

Tanzanian hostility to the asymmetrical power abuse of TNCs in dispute resolution and the contempt for ISDS is reflected in her partial withdrawal from the community of dispute resolution nations³⁴. The Tanzania Natural Wealth and Resources (Permanent Sovereignty) Act 2017³⁵ has proscribed foreign jurisdiction in claims concerning Tanzanian natural resources assets. This will have a profound effect on how and where disputes are resolved.

The significance to international dispute resolution concerning Tanzanian assets is two fold.

First, with respect to the *subject matter of sovereignty*, the statute provides that “*permanent sovereignty over natural wealth and resources shall not be subject of proceedings in any foreign court or tribunal*”³⁶. In terms, all other jurisdictions outside Tanzania are deprived of any *subject matter* jurisdiction over natural wealth and resources.

Second, with respect to the *forum or place* of disputes, the statute provides that “*disputes relating arising from extraction, exploitation or acquisition and use of natural resources shall not be a subject of proceedings in any foreign court of tribunal*”. In terms, arbitration and litigation concerning the subject matter “*relating arising*” (there is no conjunction or punctuation) to natural wealth and resources in other jurisdictions is prohibited.

The precise scope of the statutory prohibition is yet to be determined. However, the terms are mandatory terms out of which parties cannot derogate under

³⁴ Tanzania does not attend UNCITRAL Working Group III.

³⁵ Natural Wealth and Resources (Permanent Sovereignty) Act 2017, section 11. The restriction has been inserted in the Public Private Partnership Act 2010 by the Public Private Partnership (Amendment) Act 2018 dated 8 June 2018.

³⁶ Natural Wealth and Resources (Permanent Sovereignty) Act 2017, section 11(1).

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Tanzanian law. A reconciliation of the prohibition with Tanzania’s international treaty obligations expressly recognised in its Constitution at Article 63(3)(e) is also yet to be determined.

Whether under the new dispensation Tanzania stands to make more use of its Commission for Human Rights and Good Governance³⁷ remains to be seen. There is that option. Indeed, that would be most convenient bearing in mind in particular the purpose of the statute to ensure that “*interests of the People and [Tanzania] are paramount and protected in any arrangement or agreement which the Government makes or enters in respect of natural wealth and resources.*”³⁸ Parties operating in Tanzania are now under a statutory obligation pursuant to Natural Wealth and Resources (Permanent Sovereignty) Act 2017, section 11(2) to prorogate jurisdiction to Tanzania. Section 11(2) provides: -

“For the purpose of subsection (1), disputes relating arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and accordance with laws of Tanzania [sic].”

Under EU law, Tanzanian law will apply to disputes arising in Tanzania under EC Regulation 593/2008 (“Rome I”) relating to *contractual matters* and EC Regulation 864/2007 (“Rome II”) relating to *non-contractual matters*. But the applicable law is not to be conflated with jurisdiction. The Brussels Recast³⁹ does not apply to arbitral proceedings. Time will tell whether Tanzania has thrown TNC English defendants a “lifeline” to escape the inevitability of *Owusu*. Under Tanzanian law, its law is the applicable law in contractual and non-contractual matters and Tanzania is the only place for these disputes. Enforcement is unaffected by the Tanzanian legislation. Jurisdiction to *enforce* international arbitral awards or a settlement under the UNCITRAL Settlement Convention is

³⁷ The Constitution of the United Republic of Tanzania, Article 129.

³⁸ Natural Wealth and Resources (Permanent Sovereignty) Act 2017, Preamble.

³⁹ EU Regulation 1215/2012 the Brussels Regulation (Recast), regulation 2(d).

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not precluded by the statute which requires only *adjudication* of any dispute to be in Tanzania under its laws⁴⁰. That is mandatory.

Transitional provisions in Tanzania are to be given effect under The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017. Section 6(2) lists those terms presumed or “deemed” to be unconscionable and are to be treated as such inter alia:-

- (a) Pursuant to section 6(1)(e), “*securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor*” and
- (b) Pursuant to section 6(1)(i), “*are subjecting the State to the jurisdiction of foreign laws and forum.*”

The legislative changes in Tanzania make it ripe to extend the mandate and scope of the work of its Commission for Human Rights and Good Governance.

5.0 Conclusion

The changes made to the investment laws in Tanzania are symptomatic of exasperation in Sub-Saharan Africa with the prevalence of asymmetrical power abuse in international dispute resolution and ISDS forums. No distinction is made between investor-state dispute resolution and foreign court proceedings. It is perceived as all bad. Tanzania’s reaction is radical. Other African states are watching⁴¹. The asymmetry in dispute resolution is unsustainable. African governments recognise that they have the tools to redress the balance of power. Small teams of foreign lawyers now lead local counsel. Going are the big ticket, vastly expensive legal teams of foreign lawyers. A paradigm shift is afoot. In the meantime, urged on by third party funders in a determined defiance of this shift amidst concerns about the reliability of local courts, host state communities

⁴⁰ Natural Wealth and Resources (Permanent Sovereignty) Act 2017, section 11(3).

⁴¹ A reconciliation of the jurisdiction obligations Owusu (EU) and Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (Tanzania) is for another paper.

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(including those in Tanzania) opt to pursue their claims outside sub-Saharan Africa. But Governments are leading the way to take back control of disputes. The time is right to broaden the use of Human Rights Commissions and to strengthen them.

The broadening of the mandate of regional Human Rights Commissions to include private law disputes would allow host communities and TNC to opt for arbitration by Commission Tribunals with independence and impartiality. Commissions are the constitutional safeguard of citizens' rights and apolitical; they have the trust of host communities. The wide range of remedies and solutions in "med-arb" avoids the perception by TNCs of the inevitable financial "shakedown". Most significantly, the use of the Commission is the best option for long-term sustainable relations between TNCs and host communities.

The focus of sustainability should not be viewed only in the context of dispute resolution. The greatest contribution to sustainability lies in dispute avoidance with host communities and TNCs engaging at the very outset of any project. Invigilation by the Commission at the outset would go a very long way to avoid disputes arising and to facilitate their resolution should they arise. The Uganda Human Rights Commission with its investigative and adjudicatory powers under clear written rules of procedure offers the best template for the effective expansion of the mandate of Human Rights Commissions.

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Robert Muthuri, Ph.D., Wanjiku Karanja & Francis Monyango

Applying Block chain to ADR: A Look into the Issues and Opportunities for Arbitrators

By: Robert Muthuri, Ph.D., Wanjiku Karanja & Francis Monyango*

Abstract

In the same way decentralized communication systems led to the creation of the Internet, other foundational technologies such as the Internet of Things, Cloud Computing, and Distributed Ledger Technologies (DLTs, e.g. blockchain) are leading the way in decentralizing how we store data and manage information. Many entities are pursuing various economic, political, or social applications of blockchain technology to develop alternative modes for transacting such as smart contracts, alternative finance such as digital currencies (cryptocurrencies), music distribution, insurance, voting, messaging, farming, etc. The rapid interest in and growth of DLTs has made it apparent that it is not possible to simply mash legal theory, cryptography and libertarian ideology towards governance algorithms for blockchain. Existing legal concepts must be transposed and re-interpreted into appropriate technological equivalents if smart contracts are to attain legal validity and enforceability.

In this paper, we inquire into currently developing adjudication mechanisms using blockchain as well as steps used or proposed for smoothing the transition into decentralised digital arbitration. We identify the benefits of the application of blockchain in Alternative Dispute Resolution (ADR). We further explore issues that will likely arise from the use of blockchain and that result in the need of ADR, as well as best practices for addressing such issues.

1.0 Introduction

Alternative Dispute Resolution (ADR) is the term that refers to any means of settling disputes outside of the courtroom.¹ Forms of ADR include ombudsman,

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¹ Alternative Dispute Resolution

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early neutral evaluation, negotiation, conciliation, mediation, and arbitration. ADR is encouraged for speedier settlement due to court queues and expensive litigation costs. Parties in a dispute may engage in ADR voluntarily but where there are contracts with arbitration clauses, then they are mandated to arbitrate.² In this paper we will focus on Arbitration, which is defined as an out of court resolution of a dispute between parties to a contract that is decided by an impartial third party, known as the arbitrator. It is often a faster and more cost effective process compared to litigation.³ Arbitration is meant to be a neutral, consensual and confidential process where the parties chose the arbitrator to determine a binding award. The New York Convention⁴, who's membership comprises over 140 States⁵, stipulates that international arbitration awards may be enforced by the national courts. In Kenya, these awards may be challenged at the High Court if they are against public policy.⁶

Arbitrators have already adopted technology for efficiency in communications such as email, cloud storage of case files, and e-discovery, etc.⁷ The use of technology is not, however, without controversy. The use of Artificial Intelligence (AI) tools to analyse arbitration or court decisions in order to statistically derive probabilities about how an individual case is likely to be decided has been challenged. For example, the Court in *Loomis v Wisconsin*⁸ used a proprietary risk assessment instrument in its decision. The petitioner

<https://www.law.cornell.edu/wex/alternative_dispute_resolution> as accessed on 30th July 2018.

² Ibid.

³ <https://www.adr.org/Arbitration> accessed on 31 July 2018.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, on 10 June 1958.

⁵ <http://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed on 31 July 2018.

⁶ Arbitration Act Section 37 (1)(b)(ii).

⁷ Information Technology International Arbitration Report ICC Commission Arbitration ADR

<https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/> as accessed on 30th July 2018

⁸ *Loomis v. Wisconsin* [2017]

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challenged the use of technology in his sentencing, raising the question whether robots can be arbiters in the justice system. Similarly, an ADR clause in a contract may state that a dispute may be arbitrated by a human or a robot. This conflicts with legal frameworks that require arbitrators to be persons.

Other issues arise in the case of robot arbitrators. For example, it may be difficult to identify the legal rationale behind the robot's decisions, which are rendered in code. Such reasons are indispensable, being a necessary constituent if the decision is to be considered an arbitral award. The robot may also have been trained using algorithms strictly based on the law thereby missing out on the equitable nuances a human arbiter brings to the table. Moreover, a human arbitrator is expected to determine each case by its merits whereas algorithms may rely heavily on pattern-matching based on past trends and may fail to consider the unique circumstances of the current case.

While national courts usually help in enforcing arbitral awards, a robotic arbitration of a smart contract may award a party in cryptocurrency whereby the other party's account is debited automatically. Although such enforcement is totally disconnected from the judicial system, in robotic-based ADR architectures, it is the norm.⁹

Some have argued however, that smart contracts have the potential to outperform existing processes in traditional (legacy) institutions due to their transparent and tamper-resistant databases, automated logic, etc. Some of these improvements include reduced transactions costs, increased efficiency, enhanced verifiability and auditability of transactions more generally, and more transparency and accountability.¹⁰

⁹ The role of AI robotics in Arbitration

<https://www.thisdaylive.com/index.php/2018/04/05/the-role-ai-robotics-in-arbitration/> accessed on 30th July 2018.

¹⁰ "COALA" (*Coalition of automated legal applications*) <<http://coala.global/>> accessed June 22, 2018.

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This paper will therefore first discuss the principles of ADR and the formats of ADR commonly found in practice. It then identifies the characteristics of blockchain technology that prime it for application in the extra-litigious resolution of disputes. It further explores the operation of ADR using applications of blockchain, contextualised in the ideological similarities between the two as seen in the resolution of the hacking of Ethereum's Decentralised Autonomous Organisation (*the DAO*). Finally, it explores one example of blockchain based arbitration infrastructure, and ends with a conclusion that intimates the way forward.

2.0 Blockchain Defined

In 2008, a pseudonymous programmer, Satoshi Nakamoto, in his whitepaper '*Bitcoin: A Peer-to-Peer Electronic Cash System*', set out a peer-to-peer system, in which transactions are completed in the absence of intermediaries and recorded in a public distributed ledger known as a blockchain.¹¹

This blockchain ledger is the technological foundation of the cryptocurrency known as Bitcoin. Nakamoto conceived Bitcoin as a cryptocurrency that could be transferred from one party to another online without the intervention of intermediaries such as central banks and other financial institutions.¹² Indeed, bitcoin, with its market capitalisation of approximately \$139 billion as at July 2018,¹³ remains the most prominent application of blockchain to date. Much of bitcoin's success can be attributed to its elimination of intermediaries as well as the high degree of anonymity it offers its users.¹⁴

¹¹ Satoshi Nakamoto, '*Bitcoin: A Peer-to-Peer Electronic Cash System*' (2008). <<http://www.bitcoin.org/bitcoin.Pdf> > accessed 30 July 2018.

¹² Ibid.

¹³ <https://coinmarketcap.com/currencies/bitcoin/> accessed 30 July 2018.

¹⁴ W Karanja, '*Application of Bitcoin Technology in Protection of Digital Intellectual Property*' (CIPIT Blog, 10 March 2015) accessed 30 July 2018. Notwithstanding these various benefits offered by Bitcoin, some of its success has also been attributed to speculative investment.

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While Nakamoto formulated blockchain as the key underlying component of Bitcoin, he also envisioned its application beyond cryptocurrencies. This is primarily due to its elimination of intermediaries as well as the transparency and immutability of its transactions.¹⁵ Its disruptive potential has therefore been likened to that of the Internet, with Swan positing that it is set to join 'mainframes, personal computers, the Internet and social networking' as the 'fifth disruptive computing paradigm' of this century.¹⁶ Likewise, Wright and de Filippi posit that blockchain shall 'shift the balance of power' away from centralized authorities in multiple fields including the legal field.¹⁷

Blockchain therefore poses an alternative to a centralised hierarchical structure. It represents a paradigm shift away from 'top-down' control structures to decentralised governance models that are grounded in consensus.¹⁸ With this comes the elimination of middlemen who, in the context of ADR, might be a Mediator or an Arbitrator.¹⁹ As described below, this technology's disruptive potential also presents opportunities for the positive transformation of the legal field, particularly in dispute resolution.

2.1 The Architecture

A blockchain's architecture consists of computers, known as nodes, which record transactions in a digital ledger. These transactions must be verified by majority of nodes in the network through a process known as consensus, before

¹⁵ D Schatsky, 'Beyond bitcoin: Blockchain is coming to disrupt your industry' (Deloitte University Press, 7 December 2015) accessed 30 July 2018.

¹⁶ Melanie Swan, *Blockchain: Blueprint for a New Economy* (O'Reilly Media, Inc 2015) xi.

¹⁷ Aaron Wright, Primavera De Filippi, 'Decentralized Blockchain Technology And The Rise Of Lex Cryptographia' (2015) 3.

¹⁸ Gov.UK, 'Distributed Ledger Technology: beyond block chain' (www.gov.uk, 19 January 2016)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf> accessed 30 July 2018.

¹⁹ Wright A and Filippi PD, "Decentralized Blockchain Technology and the Rise of Lex Cryptographia" [2015] SSRN Electronic Journal.

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they are added to the ledger.²⁰ Once they are verified, they are grouped into blocks which are then stored sequentially in a linear chain.²¹ Records on the blockchain are thus stored permanently. This immutability of blockchain transactions is advantageous as they can be audited and cannot be altered, thereby fostering transparency and trust in the network, the processes, and the data stored in the blockchain.

In the context of ADR, instead of vesting their trust in a 'neutral' but ultimately fallible third party arbitrator or mediator, disputing parties can instead trust the blockchain network. Trust in this instance would not emerge from the relationship between the parties and arbitrator, rather from the network effect of blockchain's consensus protocols.²² This is justified as decentralisation safeguards the network's integrity; it does not have a central point of failure, which improves its resiliency against malicious attacks. Furthermore, transactions are secured cryptographically and stored permanently. This significantly reduces chances of fraud as network participants can view the record of transactions at any time.²³ How, then, can these potential benefits of blockchain be reaped in the ADR space?

3.0 Features of Blockchain that Facilitate ADR

ADR is ideologically rooted in the solving of disputes without resorting to litigation.²⁴ There is a cognizance amongst legal practitioners that a singular definition of ADR is difficult to obtain as it encompasses a wide variety of

²⁰ S Asharaf and S Adarsh, *Decentralized Computing Using Blockchain Technologies and Smart Contracts: Emerging Research and Opportunities: Emerging Research and Opportunities* (IGI Global 2017) 12.

²¹ Nakamoto (n. 1).

²² Don Tapscott and Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World* (Penguin Publishing Group 2016).

²³ Sarah Underwood, 'Blockchain Beyond Bitcoin' [2016] 59(11) *Communications of the ACM* <doi:10.1145/2994581>

²⁴ Nancy F Atlas and others, *Alternative Dispute Resolution: The Litigator's Handbook* (American Bar Association 2000) 2.

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practices.²⁵ The thread that ties these practices is the need for parties to resolve their disputes without incurring the high monetary and time constraints associated with litigation. ADR also aims to resolve disputes while managing the power dynamics that may prevent a 'fair settlement' of disputes.²⁶

Blockchain technology wields immense potential to revolutionise ADR primarily due to its decentralisation. The absence of intermediaries amounts to a democratisation of trust²⁷ as participants in such transactions do not rely on third parties to verify their transactions. Moreover, this significantly reduces the risk of error as transactions are executed by dint of the blockchain's consensus protocol and not based on intermediaries' whims.

The blockchain ledger is essentially a database of immutable, verifiable, data. Disputing parties can use it in the ADR process as a secure and sequential record of their dispute as well as the ADR proceedings. This will contribute to the parties' confidence in the ADR process. Relatedly, a blockchain can be used to consolidate disparate databases.²⁸ Therefore, data stored in other databases can be easily consolidated into the blockchain creating a single ledger subsequently reducing costs and easing data sharing between the parties.²⁹ In this context, then, the blockchain technology functions as an aid to, rather than a replacement for, the ADR process.

²⁵ Nancy F Atlas and others, *Alternative Dispute Resolution: The Litigator's Handbook* (American Bar Association 2000) 1.

²⁶ Joseph Barrett and Jerome Barrett, *A History of Alternative Dispute Resolution* (Jossey-Bass 2004) xvi

²⁷ Delloite, 'Blockchain and the Democratization of Trust' (The Wall Street Journal, 31 August 2016).

<http://deloitte.wsj.com/cio/2016/08/31/blockchain-and-the-democratization-of-trust/> accessed 31 July 2018

²⁸ Monetary Authority Of Singapore and Delloite, *The future is here Project Ubin: SGD on Distributed Ledger* (2017).

²⁹ World economic forum and Delloite, *The future of financial infrastructure: An ambitious look at how blockchain can reshape financial services* (World Economic Forum 2016).

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Second, blockchain aids regulatory compliance. The robustness of its network facilitates the swift and accurate reporting of compliance by participants. This increases the efficiency of ADR as regulation is carried out immediately rather than retroactively.³⁰ Smart contracts are the primary vehicles for such regulatory compliance³¹ since ADR typically arises in response to disputes emerging out of contractual relationships.

3.1 Smart Contracts

As the blockchain technology grows in popularity, there is a renewed spotlight on smart contracts. An earlier software development,³² smart contracts operate independently, are tamper-proof³³, and are meant to execute exactly as they are programmed³⁴, all in the absence of a middleman.

Smart contracts are not agreements in the conventional sense of contract law. Nevertheless, they operate on the same principles given that clauses self-execute based on certain triggers in the computing environment. Blockchain-based smart contracts partially or fully execute on the blockchain infrastructure and are therefore visible to all users on that blockchain.

Smart contracts are attractive due to the certainty that they offer, particularly since failure by either contracting party to adhere to the contract results in the

³⁰ W Karanja, 'Blockchain Primer for Regulators: The Case of the Stellar Network' [2017] 14.

³¹ Don Tapscott and Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money, Business, and the World* (Penguin Publishing Group 2016) 72.

³² Catchlove P, "Smart Contracts: A New Era of Contract Use" [2017] SSRN Electronic Journal.

³³ Smartcontract.com, 'Smart Contract' (About SmartContract.com, 15 November 2016) <http://about.smartcontract.com/#smart-contract-oracles> accessed 31 July 2018.

³⁴ S Asharaf and S Adarsh, *Decentralized Computing Using Blockchain Technologies and Smart Contracts: Emerging Research and Opportunities: Emerging Research and Opportunities* (IGI Global 2017) 47.

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automatic execution of the remedies in the contract.³⁵ Smart contracts define the terms and remedies of the agreement and automatically enforce the contract's terms.³⁶ They thus stand to transform the legal practice as conventional contracts can instead be 'drafted' by computers and 'formalised into computer code'.³⁷

There is, therefore, growing importance for ADR clauses to be well catered for in so-called smart contracts. This is particularly a concern where blockchain-based smart contracts are used in Decentralised Autonomous Organizations (DAO), i.e., organizations entirely run via rules encoded in smart contracts. Dispute resolution is necessary for such contracts in a form analogous to that in the offline world.

ADR clauses can be coded into smart contracts. In the event of a dispute, these clauses would be automatically executed, thereby initiating the ADR process. These smart contract clauses would eliminate ambiguity wrought in the language of conventional contracts as it is probable for any possible eventuality or outcome to be coded into the contract.³⁸ However, they may overlook the fact that ambiguity is not always unwanted and is, in fact, purposely incorporated in contracts to represent the nuances of human interactions. Blind enforcement of the contractual terms can therefore result in very restrictive interpretations of the contract that do not capture the parties' intentions.³⁹ In other words, the use of smart contracts for initiating and governing ADR processes, risks allowing the formal wording of contracts to outweigh the intent of contracting parties.

³⁵ Wardyński & partners, *Blockchain, smart contracts and DAO* (Wardyński & Partners 2016) 7.

³⁶ Blockgeeks.com, 'Smart Contracts: The Blockchain Technology That Will Replace Lawyers' (*Blockgeeks*) <https://blockgeeks.com/guides/smart-contracts/> accessed 31 July 2018.

³⁷ Aaron Wright, Primavera De Filippi, 'Decentralized Blockchain Technology And The Rise Of Lex Cryptographia' (2015) 11.

³⁸ Wardyński & partners, *Blockchain, smart contracts and DAO* (Wardyński & Partners 2016) 7.

³⁹ Wardyński & partners, *Blockchain, smart contracts and DAO* (Wardyński & Partners 2016) 7.

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In the face of such rigorous formalities, one approach allows the introduction of a measure of consensus back into the ADR process. At the pre-hearing stage, an arbitrator could deploy multi-signature smart contracts to ensure that the arbitrating parties fulfil their obligations before any funds in the arbitral award are disbursed.⁴⁰ This involves embedding conditions in the smart contracts that only transfer the monies to either of the two parties and the arbitrator. This means no singular party can transfer the funds unilaterally as to do so, they would need the electronic signature from either the other contracting party or that of the arbitrator. This compels the parties to remain committed to the arbitration process.

Alternatively, smart contracts can occupy the role of the arbitrator or mediator. This can be accomplished through the connection of multiple smart contracts to form decentralized autonomous organisations (DAOs). Autonomous because they operate without any human intervention,⁴¹ DAOs are regulated by smart contracts⁴² that, on the blockchain, define the DAOs' rules.⁴³ DAOs' are designed to function like real-world companies or corporations but with complete automation of their governance procedures, no hierarchical control structure, or central authority.⁴⁴

The most famous DAO to-date is the *DAO* created on Ethereum's⁴⁵ blockchain in 2016. This organisation, through the sale of tokens, raised approximately \$150 million through crowdfunding in May 2016. It was created to operate as a digital

⁴⁰ Ibid.

⁴¹ Aaron Wright, Primavera De Filippi, 'Decentralized Blockchain Technology And The Rise Of Lex Cryptographia' (2015) 1.

⁴² Aaron Wright, Primavera De Filippi, 'Decentralized Blockchain Technology And The Rise Of Lex Cryptographia' (2015) 15.

⁴³ Aaron Wright, Primavera De Filippi, 'Decentralized Blockchain Technology And The Rise Of Lex Cryptographia' (2015) 1, 26.

⁴⁴ Christoph Jentzsch, *Decentralized Autonomous Organization To Automate Governance Final Draft - Under Review* (2016) 1.

⁴⁵ Ethereum is an open source public platform on which smart contracts, decentralised applications and DAOs can be built. <https://www.ethereum.org/> accessed 31 July 2018.

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venture capital fund through which blockchain projects could be funded after vetting by Ethereum community members known as curators.⁴⁶ Ethereum's hacking in June 2016 and subsequent 'theft' of approximately \$70 million is particularly profound due to the schism that it caused in Ethereum's community and the utilisation of alternative mechanisms to resolve this divide.

3.2 Hacking of the DAO

The DAO was hacked due to a flaw in its code that allowed the transfer of the funds it held to another, smaller, '*child DAO*'. Due to the high value of the tokens stolen, Ethereum was put under immense pressure to intervene to recover the stolen funds from *the 'child DAO'* hosted on its platform. In seeking to remain true to the decentralised ideological roots of blockchain, Ethereum was wary of intervening to recover the hacked funds.⁴⁷ Some of their community also believed that the hack did not constitute theft as the hacker merely exploited a bug in *the DAO's* code to obtain the funds. Code in this case could be considered akin to the law, at least within the platform and the community using the platform.⁴⁸ Others however felt that failure to act and recover the funds would destroy the public's trust in Ethereum and blockchain and set a dangerous precedent for potential hackers and other nefarious actors.⁴⁹ This crisis was exacerbated by the uncertainty surrounding the legal enforcement of applications of blockchain.

⁴⁶ Richard Waters, 'Automated company raises equivalent of \$120M in digital currency' (CNBC, 17 May 2016) <https://www.cnbc.com/2016/05/17/automated-company-raises-equivalent-of-120-million-in-digital-currency.html> accessed 31 July 2018.

⁴⁷ Ethereum.org, 'CRITICAL UPDATE Re: DAO Vulnerability - Ethereum Blog' (Ethereum Blog, 17 June 2016) <https://blog.ethereum.org/2016/06/17/critical-update-re-dao-vulnerability> accessed 31 July 2018

⁴⁸ Economist.com, 'The DAO: Theft is property' (Economist.com, 25 June 2016). <http://www.economist.com/news/finance-and-economics/21701136-cyber-attacker-outsmarts-smart-contract-theft-property> accessed 31 July 2018.

⁴⁹ Its terms are 'in the smart contract code existing on the Ethereum blockchain at 0xbb9bc244d798123fde783fcc1c72d3bb8c189413. ... The DAO's code controls and sets forth all terms of The DAO Creation.' Reddit.com, '/r/ethereum' (Reddit, 17 June 2016) https://www.reddit.com/r/ethereum/comments/4oiqj7/critical_update_re_dao_vulnerability/d4cy4v0/ accessed 31 July 2018.

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Ethereum thus presented its community with the following possible solutions to the issue: a 'soft fork', whereby they would freeze the stolen funds to prevent the hacker from transferring them out of the 'child DAO'; and a 'hard fork', through which the funds would be refunded with significant changes to the DAO protocol.⁵⁰ This dispute therefore centred on if the hacking constituted a breach of the DAO's terms and if those terms should be interpreted to reflect the intention of the parties, namely, the recovery of the hacked funds. Seeing as litigation against the hacker (who was unknown) or Ethereum was not practical at the time, a vote was put to the community on which proposal should be implemented. A strong majority (86%) of the community voted to 'hard fork' Ethereum's blockchain to recover the hacked funds.⁵¹

The application of ADR in the blockchain space is therefore not novel. Blockchain, like the 'real world', is a forum for the institution of contractual relationships and the resolution of any ensuing disputes. It similarly can be used as both a venue for the operation of ADR mechanisms as well as an ADR tool. The latter has been proposed for a decentralised arbitration and mediation network (DAMN)⁵² that incorporates the New York Convention.⁵³ The aim of this network is to provide the public with a variety of decentralised, borderless ADR mechanisms including: resolution by a mediating DAO, algorithms, one person, pools of random jurors, pools of experts, or even through the collaboration of the involved parties.⁵⁴ DAMN has been partially iterated in the Aragon network; a community governed digital jurisdiction designed as an

⁵⁰ Ethereum.org, 'CRITICAL UPDATE Re: DAO Vulnerability - Ethereum Blog' (Ethereum Blog, 17 June 2016) <https://blog.ethereum.org/2016/06/17/critical-update-re-dao-vulnerability> accessed 31 July 2018.

⁵¹ Ethereum.org, 'Hard Fork Completed' (Ethereum Blog, 20 July 2016) <https://blog.ethereum.org/2016/07/20/hard-fork-completed/> accessed 17 May 2017.

⁵² <https://github.com/thirdkey-solutions/damn/blob/master/proposal.asciidoc> accessed 31 July 2018.

⁵³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, on 10 June 1958.

⁵⁴ *Third Key Solutions, LLC* 'Decentralised Arbitration and Mediation Network (DAMN)' 2016 <https://github.com/thirdkey-solutions/damn/blob/master/proposal.asciidoc> accessed on 31 July 2018.

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online decentralised court system that operates outside traditional legal or national jurisdictions.⁵⁵ It can thus be used in arbitration to define the parties' rights, duties, and penalties, as well as the automatic rules that would govern and enforce such contracts. As described in the next section, since the hacking of *the DAO*, one particular platform, EOS⁵⁶ arbitration, has emerged as a leader in leveraging arbitration within the blockchain space.

3.3 EOS Arbitration

Just two years before Satoshi's seminal paper, Lawrence Lessig published the second edition of his seminal work *Code and other Laws of Cyberspace*⁵⁷. Lessig maintained the argument that code is law, i.e. the architectures of cyberspace can be used as a form of regulation. Indeed, Satoshi's efforts in inventing blockchain were to remove inefficient, rent-seeking middlemen, including governments, which had failed to mitigate the 2008 financial crisis.

However, effective regulation via code is still a long way from reality. The challenges of regulating decentralized platforms continue to be witnessed and humble the libertarians who believed code is supreme. In addition to being stateless, the first *DAO* claimed to avoid any form of organizational structure including delegated powers to directors. Instead, every digital token shareholder had a voting right to the projects in which *the DAO* would invest. Everything was run by code so token holders could have complete transparency to examine and audit. However, code will not always run as intended. This was even more so for the *DAO*, which, owing to its complexity and novelty, led to vulnerabilities that were later exploited in the hack mentioned above. The ensuing majority network vote for a hard fork shows that smart contracts had not yet incorporated all the nuances necessary for the network to run effectively. With the foregoing insights, The EOS.IO project, which launched on 1st of June 2018, sought to be more prudent by envisioning an arbitration process. The

⁵⁵ <https://aragon.org/> accessed 14 August 2018 Aragon Network a decentralised application (DAPP).

⁵⁶ <https://eos.io/> accessed 14 August 2018.

⁵⁷ Lessig, L. (2008). *Code*. New York: Basic Books.

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EOS.IO is a smart contract platform that aims to operate a large scale decentralized operating system where developers can deploy distributed applications in the same way they currently do on Windows or the MAC operating system. There is more endeavour to give structure to the platform that inclines towards the structure of a centralized government. A team of 21 so-called 'Block Producers' (BP), are chosen by the community to generate and validate the blocks that signify the execution of a smart contract transaction on the EOS blockchain. Block Producers are thereby seen as the executive arm of the blockchain. On the other hand, the EOS Community's Arbitration Forum (ECAF) oversees the arbitration process and they are therefore seen as the judiciary.⁵⁸ Nevertheless, the legal basis for EOS has been said to be ambiguous, with elements of contract law and articles of association from corporate law.

A few days after the EOS launch, all the 21 Block Producers unanimously froze five accounts that had been compromised during the registration process. Ordinarily, Block Producers require authorization from ECAF through an arbitration award before they can freeze an account. However, this particular freeze was done without arbitration, which seems to defeat the purposes of ECAF. It later emerged that the matter had been referred to an arbitrator, but the arbitrator had declined to give a ruling and handed the matter back to the community. Without an arbitration verdict, there was no legal basis for freezing the accounts. In doing so, the Block Producers contravened their BP agreement even though this was a necessary step to protect the accounts that had been compromised. This also revealed a gap in the EOS constitution. Again, it became clear that code was not sufficient law; as had the Block Producers declined to step in, genuine owners would have lost their EOS.

4.0 The way forward

Much can be learned from these early implementations of smart contracts. First, the tech world is no longer as bullish that code is absolute law. It has become clear that the code as intended to work and how it actually works are two

⁵⁸ "The EOSIO Core Arbitration Forum" (ECAF) <<https://eoscorearbitration.io/>> accessed August 1, 2018.

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different things. We should therefore be able to anticipate gaps and how to handle them. In the preceding EOS case, there should be an alternative when the arbitration mechanism fails. The BPs may have been contractually liable if they made a wrong decision e.g. if the five accounts had not actually been compromised. Ultimately, hybrid systems are now being proposed where the ‘intent of code’ is law.⁵⁹ This will help retain the predictability and certainty of smart contracts with a process for the community to determine the intent of smart contracts when they contain terms that cannot possibly be evaluated and enforced by code. In the EOS case, the proposal is to have the intent of the code determined by an arbiter or a super majority of the BPs. The addition of BPs to determine intent fixes the problem of where an arbitrator declines to issue a verdict, something well within their rights.

Even then, other issues remain. Currently, one needs to physically submit a grievance to ECAF. A truly smart contract ought to define the procedure to do so in case a grievance occurs. This not only includes submission but appointment of judges, collecting bond payments, rendering decisions and enforcing them.⁶⁰ Another issue that needs to be fixed is that of objective proof of account ownership. A banking smart contract can also be used to protect against fraud and theft of keys where transactions are subject to a 3-day delay after which they cannot be reversed. Accordingly, contract-appointed arbitrators are able to reverse transactions and freeze tokens.

It is possible that many ECAF-styled organizations will come to the fore to offer the foregoing arbitration services. World-renowned lawyers with excellent arbitration credentials have been proposed to join ECAF. There seems however, minimal capacity at the moment for arbitrators with the technical competence to arbitrate on the intent of bugs found in smart contracts or even analyse

⁵⁹ Larimer D, “The ‘Intent of Code’ Is Law – Daniel Larimer – Medium” (*Medium*) June 27, 2018)

<<https://medium.com/@bytemaster/the-intent-of-code-is-law-c0e0cd318032>>
accessed August 1, 2018.

⁶⁰ *Ibid.*

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requests for account freezes. This may have been the case for the arbitrator that declined to issue a verdict in the EOS issue described above. Even then, there are many efforts to bridge the gap to help lawyers learn code, from coding-styled units in law curriculums, to meetups such as Legal Hackers, the latter of which has chapters all over the world.⁶¹

5.0 Role of Lawyers in the Blockchain-ADR Paradigm

Lawyers and arbitrators in general are slowly overcoming their reluctance⁶² to apply smart contracts as a measure to guarantee enforceability of the traditional legal agreement they have been retained to prepare. They will therefore have to work closely with computer scientists to translate the operational clauses of an agreement to code, e.g. on the Ethereum platform.⁶³ In such cases, when disputes arise, smart contracts may be imperative in determining the parties' intentions. For now, an operational clause is one that has conditional logic in it such that if the condition is fulfilled, a pre-coded instruction is executed.⁶⁴ On the other hand, non-operational clauses will not be translatable into a smart contract for purposes of enforcement. These clauses require an individual to exercise personal judgment in order to advise a party of their obligation under an agreement. Examples include entire agreement clauses or clauses that require performance of the contract in a commercially reasonable manner.⁶⁵ That said, it is the arbitrators that evolve to understand the limitations of coding languages and the extent to which they represent parties' intentions that will become valuable, even indispensable.

⁶¹ "Global Chapters" (*Legal Hackers*) <<https://legalthackers.org/people/>> accessed August 1, 2018.

⁶² Susskind RE, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2010).

⁶³ Givari D and others, "How Does Arbitration Intersect with the Blockchain Technology That Underlies Cryptocurrencies?" (*Kluwer Arbitration Blog* May 6, 2018). <<http://arbitrationblog.kluwerarbitration.com/2018/05/05/scheduled-blockchain-arbitration-april-17-2018/>> accessed July 31, 2018.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

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6.0 Conclusion

ADR measures have existed since the inception of humanity. The application of blockchain in ADR is merely an iteration of human efforts to resolve disputes amicably. It represents the dynamism of not only human nature but of the practice of law.

In this paper, we have examined the nature of emerging blockchain architectures and the opportunities such architectures present for newly styled ADR. We have seen that code is not exactly law and other issues have to be considered while arbitrating emerging technologies. Nevertheless, things are moving fast with the eventual intent of developing code that is as proximate as can be to law. In this, we have outlined the challenges that lawyers, arbitrators, mediators and other stakeholders in the legal ecosystem have to overcome if they are to remain relevant in the larger decentralized ecosystem.

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*International Commercial Arbitration in Kenya: Opportunities and Challenges:
Solomon Gatobu*

International Commercial Arbitration in Kenya: Opportunities and Challenges

*By: Solomon Gatobu**

Abstract

This paper provides an analysis of the practice of International Commercial Arbitration in Kenya, outlining and discussing the various challenges that hinder the effectiveness of its practice in the country. The researcher defines what is understood by the phrase International Commercial Arbitration and gives a detailed analysis of the features of the same. The researcher continues to compare the international commercial arbitration with domestic practice of arbitration and comes to a conclusion that more often than not, parties consider engaging domestic arbitrations rather than international commercial arbitrations, and discusses the reasons for the same.

1.0 Introduction

Globalization has led to growth and expansion of international trade and commerce.¹ Part of that growth has also been witnessed in international arbitration as a means of resolving trade disputes between parties of different nationalities. Due to the fast-growing global trade, individuals as well as states appreciate that dispute resolution mechanisms in trade are critical to continued participation in it.²

Many developed and developing countries, have embraced more flexible ways of settling disputes outside the courtroom, to attract business to

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¹ Attiya waris and Muthomi Thiankolu, 'International Commercial Arbitration in Kenya' in Muigai, G (ed), *Arbitration Law and Practice in Kenya* (Law Africa, 2011) p. 195.

² Peter Mutuku Mbithi, 'International Commercial Arbitration in Kenya: Is Arbitration A Viable Alternative In Resolving Commercial Disputes In Kenya? Available at https://open.uct.ac.za/bitstream/13276/thesis_law_2014_mbithi_pm.pdf?sequence=1 <accessed on 21 April 2017>

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themselves, to open up their countries as destinations in which investment may not be challenged by litigation mechanisms which are foreign to their visitor investors. They have embraced commercial arbitration and enacted and reviewed legal frameworks to suit business, to attract investors to attract trade. Indeed, the use of courts in resolving trade disputes is said to be losing appeal and to the contrary arbitration gaining popularity in resolving such disputes.

It is against this background that this paper focusses on demystifying the basics of International Commercial Arbitration (ICA). The paper approaches the topic by attempting to define the meaning to the term ICA and breaks down what constitutes the same. For a simpler understanding a distinction is drawn as to what constitutes domestic and international arbitration and a criterion for establishing the same. An overview on the distinction between institutional and ad hoc arbitration also features. The author concludes by discussing why parties choose ICA.

2.0 Meaning of International Commercial Arbitration

International Commercial Arbitration (ICA) raises interesting issues as to its place, the law that should be applied and the procedure that should be followed. In Domestic Arbitration, where two parties located within a jurisdiction enters into a contract, there will arguably be little difficulty in applying domestic laws and following the procedure of the domestic courts. However, if one of the parties is located within a foreign jurisdiction like import and export trade, the foreign party is generally not subject to the domestic law and complications arise in case of a dispute and arbitration proceedings become applicable. The Kenya Arbitration Act³ defines ICA in the same terms as the UNCITRAL Model Law⁴. The Model Law defines it thus:

³ Section 3(3) of the Arbitration Act, 2009.

⁴ Article 1(3) of the United Nations Commissions on international Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 with amendments adopted in 2006, available at

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“(1) ...

(3) *An arbitration is international if:*

(a) *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*

(b) *one of the following places is situated outside the State in which the parties have their places of business:*

(i) *the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of 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 country.”⁵*

ICA therefore refers to a dispute resolution process which relates to parties or subject matter in different states, for business transactions. The UNCITRAL Model Law was specifically developed to address international commercial arbitration.⁶ However, the Kenya’s Arbitration Act, perhaps like other national legislations, is fashioned like the UNCITRAL Model Law but with additional provisions limited and relevant to domestic arbitration.

3.0 What is ‘Commercial’ within the context of International Arbitration?

Generally, Arbitration and other Alternative Dispute Resolution (ADR) mechanisms as understood in ordinary legal parlance may be applied to resolve either commercial or non-commercial disputes. Foreign disputes, employment disputes, land disputes among many other disputes may be

<http://www.uncitral.org/pdf/English/texts/arbitration/ml-arb/06-54671Ebook.pdf> (accessed on 20 April 2017).

⁵ Article 1(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 with amendments adopted in 2006.

⁶ See Article 1 of the UNCITRAL Model Law.

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settled through Arbitration but ICA has that element of business transaction in it.

Although not strictly defined in the text of the Model Law or the Kenya Act, a footnote under Article 1 of the Model Law relevantly states that: -

“The term commercial should be given a wide interpretation to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include but are not limited to the following transactions: any trade transaction for the supply goods and services; distribution agreements; commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road”.⁷

From that guiding definition, it is therefore noteworthy that ICA, unlike the ordinary Arbitration, is only applicable in resolving those disputes which arise in transactions of a business nature and not just any other dispute. For instance, a family dispute between spouses who reside in different countries cannot fit within the description of a dispute under ICA.

Kenya is a signatory to the New York Convention (NYC)⁸ and to the International Conventional on settlement of investment Disputes (ICSID) both of which deal with international commercial arbitration. Nonetheless, what is commercial should be given a broad and wide interpretation to cover any transaction of a business nature. The inclusion of the phrase “commercial relationship” under the Kenya’s Act is to be construed to mean that the Act contemplates Commercial arbitration.

⁷ See foot note No.2 under Article 1 of the UNCITRAL Model Law.

⁸ The Convention on the Recognition and Enforcement of Foreign Awards adopted by the United Nations General Assembly in New York on the 10th June ,1985, and acceded to Kenya on the 10th February,1989, with a reciprocity reservation.

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4.0 Key Features of International Commercial Arbitration

ICA bears a few key features that contra distinct it from litigation, domestic or national arbitration and other ADR mechanisms. The principle feature of ICA is that either the parties to a dispute or the subject matter of a dispute, or the procedural law to be used has connections with different national legal systems which makes arbitration international.⁹

Some scholars associate ICA with four fundamentals.¹⁰ Firstly, they opine that it is alternative to the national courts wherein parties by private agreement have an option of choosing a neutral forum. Secondly, that international commercial arbitration is a private mechanism of dispute resolution. To the contrary, it is the position of this paper that this may not be entirely true since enforcement of arbitral awards involves filing the same in national courts whose file registries are usually open to the public. Another characteristic of international commercial arbitration akin to other forms of arbitration is that the procedures, form, structure, applicable law and other details of arbitration are chosen and selected by the parties. According to Lew, Mistelis and Kroll international commercial arbitration results in a final and binding determination of the parties' right and obligations.¹¹

Finally, the arbitral awards resulting from ICA proceedings are enforceable directly under the New York Convention (1958) in 178 countries that have ratified the New York Convention without the need of having to follow lengthy procedures within the national courts for enforcement of foreign judgements.¹²

⁹ Hans Van Houtte, *The law of International Trade*, (: Sweet &Maxwell 1995), 384.

¹⁰ Lew, J.DM., Mistelis, L.A., Kroll, S.M. (2003). *Comparative International Commercial Arbitration*. The Hague/London/New York: Kluwer Law International, 7.

¹¹ *Ibid.*

¹² *The Convention on the Recognition and Enforcement of Foreign Arbitration Awards (1958)*, Article III

5.0 Domestic versus International Arbitration

Section 3 (2) of the Kenya's Arbitration Act defines domestic arbitration as one where 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) The parties are nationals of Kenya or are habitually resident in Kenya (Individuals);
- b) The parties are incorporated in Kenya or their central management and control are exercised in Kenya (body corporates);
- c) (a) & (b) above if between an individual and a body corporate;
- d) Substantial parts of the obligations of the commercial relationship are to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.¹³

In domestic arbitration, arbitration takes place within the state, the procedure of arbitration is governed by national law, the merits of the dispute are also governed by national law and the Constitution. However, in international arbitration there is an involvement and an interplay of other factors. For instance, the Kenya Act at section 3 (3) defines International arbitration as where: -

- (a) The parties at the time of the conclusion of that agreement have places of business in different states;
- (b) The following are located outside Kenya: -
 - i. The seat of arbitration as determined by the arbitration agreement; or
 - ii. Place where substantial parts of the obligations of the commercial relationship are to be performed, or the place with which the subject-matter of the dispute is most closely connected, outside Kenya;

¹³ Act No. 4 of 1995

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- (c) The parties expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

6.0 Criteria for establishing the 'International' character of ICA

In the face of proliferation of multinational corporations, a cross border element in transaction may not necessary mean that a transaction has an international character. It is therefore important to understand that which makes a commercial arbitration 'international'.

According to Varkeychan, an arbitration may be international because of a number of factors namely; that its subject matter or its procedure or organization is international; or the parties;¹⁴ involved are connected with different jurisdiction; or that there is combination of both. We proceed to discuss the criteria that may help in establishing the international character of International Commercial Arbitration as hereunder.¹⁵

6.1 The Objective Criterion

It is used mostly in French law and other civil jurisdictions where the focus is on whether there is an international commercial interest or the cross-border element such as, transfer of goods, services or funds across national boundaries) or the fact that the dispute is referred to a genuinely international arbitration institution, such as the ICC, the LCIA or ICSID.¹⁶ However, in the face of proliferation of multinational corporations, across border element in a transaction may not necessary mean that a transaction has an international character, for instance where two multinationals X and Y based in one country enter into contract for X to delivery of goods to Y'S office in another country.

¹⁴ Agnes K Varkeychan, Domestic and International Arbitration, online article published on 18th January 2011 at www.legalserviceindia.com/article/print.php (accessed 30th April 2017).

¹⁵ Ibid.

¹⁶ Ibid.

6.2 The Subjective Criterion

The focus here is on the different nationality domicile or place of business of the parties to the arbitration agreement. If the parties are domicile or habitually present or incorporated or centrally managed in a country, then it is considered as domestic arbitration and vice versa¹⁶. The subjective criterion may however significantly restrict the scope of international arbitration since it does not take into effect the place where a commercial transaction will be substantially performed or that parties may by choice elect to have the juridical seat of arbitration in a foreign country thus making the arbitration international.

6.3 The Modern Combined Criterion:

Kenya's Arbitration Act and the UNCITRAL Model Law follow this approach.¹⁷ The approach combines both the subjective and objective criteria. It looks at the places of business of the parties to an arbitration, place of arbitration if per the arbitration agreement, 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 mostly closely connected and agreement of the parties as to whether the arbitration agreement relates to more than one country.¹⁸

The modern combined criterion is therefore a more flexible and effective way in the determination of international character of ICA.

7.0 Distinction between Foreign Arbitration and International Arbitration.

7.1 International arbitration

International Arbitration may be defined as a process by which parties from different states can have their disputes determined by an impartial tribunal appointed by a commonly agreed method.

¹⁷ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985).

¹⁸ Ibid.

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The outcome is a binding award that can be enforced in other countries. The authority of an arbitrator derives from an agreement between the parties while a judge is appointed by the state. Because arbitration rests on an agreement, the parties can choose a tribunal which suits their specific needs. They may select one or three arbitrators and can specify the qualification of the arbitrators. Parties also have great flexibility to designate the procedure for the arbitrator.¹⁹

International arbitration should be considered in relation to all international transactions and disputes. The key advantages of arbitration are neutrality, procedural flexibility and international enforceability of awards.²⁰ Other possible advantages are preservation of business relationships and confidentiality. However, international arbitration is not suitable for all transactions and disagreements such as disputes involving public laws, criminal law and in intellectual property. Despite these benefits of arbitration, disputes involving multiple parties can raise jurisdictional problems and may not be suitable for arbitration.²¹ Kenya's Arbitration Act assigns a definition which distinguishes what an international arbitration is.²²

7.2 Foreign Arbitration

A foreign arbitration is an arbitration conducted in a place outside the country in question, and the resulting award is sought to be enforced as a foreign award. It may involve countries from different continents. Foreign arbitration takes place when parties select a foreign arbitration institution or agree to have an offshore ad hoc arbitration. Since numerous foreign arbitration institutions or ad hoc arbitration tribunals carry out this type of arbitration,

¹⁹ Clayton Utz, *A Guide to International Commercial Arbitration* (2012) Available at <https://www.claytonutz.com/ArticleDocuments/178/Clayton-Utz-Guide-to-International-Arbitration-2012.pdf?Embed=Y> Accessed 23 January 2017.

²⁰ Ibid.

²¹ [http://www.legalservicesindia.com/article/article/domestic-\\$-international-arbitration-511-1.html](http://www.legalservicesindia.com/article/article/domestic-$-international-arbitration-511-1.html) Accessed 23 January 2017.

²² Section 3 (3) of the Arbitration Act.

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differences of laws and the laid down practices of arbitration in different countries as well as diversity in foreign legal and commercial cultures are key issues in this type of arbitration.

Sometimes foreign arbitration takes place in areas where differences of laws exist in transaction between parties. For instance, one of the parties may be a foreign individual or legal person. This type of arbitration takes place in cases where the object in dispute is located overseas or the fact giving rise to the existence or termination of civil legal relations takes place abroad. This type of arbitration has more requirements on selection of arbitrators, application of law, language skills and the procedures of arbitration. Sometimes, the recognition and enforcement of arbitral awards may necessitate cross-bounder endeavors.

Section 3 (3) of the Arbitration Act states that an arbitration is international if the parties, at the time of the conclusion of that agreement, have places of business in different states; the seat and subject matter are located outside Kenya; the subject-matter of the arbitration agreement relates to more than one state.²³

8.0 Enforcement of Foreign Arbitral Awards

After the Arbitral Tribunal has made its award, its existence comes to end. This award constitutes a binding decision on the dispute between the parties. Consequently, if the award is not carried out voluntarily it may be enforced by legal proceedings both locally and internationally. Important regional and international treaties and conventions relate to the recognition and enforcement of foreign arbitral awards.

International businesses and industrialized trading nations have long sought to establish, predictable legal environment in which International Commercial arbitration can be conducted. This is the case because national arbitration laws have historically varied considerably from state to state. To reduce these

²³ Ibid.

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uncertainties, major trading nations have entered into international treaties and conventions designed to facilitate the transactional enforcement of arbitration awards and agreements. To enforce the foreign arbitration awards, there are currently conventions that can be applied, namely the New York Convention on the recognition and Enforcement of Foreign Arbitration Awards of 1958 and Geneva Convention on the execution of Foreign Arbitration Awards of 1927, though New York Convention on the recognition and Enforcement of Foreign Arbitral Awards is more popular and widely accepted.

According to New York Convention, specifically article III, any award issued by a contracting state can generally be freely enforced in any contracting state. This makes it easier to enforce a foreign enforcement award than a domestic award. In enforcement of the Foreign Arbitral Award there, is no limitation to award of damages. This makes the enforcement of these award easy since its possible for a party to obtain an injunction or an order for specific performance in an arbitration proceeding which could be enforced in another New York Convention Contracting State.

A party intending to enforce a Foreign Arbitration Award should apply to court and produce the following documents:

- a) Original award or copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- b) Original agreement for arbitration or a duly authenticated copy;
- c) Such evidence as may be necessary to prove that the ward is a foreign award; and
- d) Transition, if necessary, shall also be furnished.

9.0 Ad Hoc versus Institutional Arbitration

It is important to appreciate that in ICA, just like a domestic arbitration, the arbitration agreement or agreement of the parties can make the arbitration be

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said to be institutional or *ad hoc* in nature and that there are implications to the same.

10.0 Institutional Arbitration

Institutional arbitration comes about when the arbitration stipulates that the arbitration shall be administered by an arbitral institution or Centre.²⁴ It is said to be the popular version due to its certainty.²⁵ The role of the arbitration Centre is not to arbitrate but to provide the administrative and procedural support to enable an independent tribunal to hear and determine the dispute. Parties can choose to use the arbitration Centre either before or after a dispute has arisen, provided the agreement to do so is in writing.²⁶

International arbitration can therefore be defined as an arbitration conducted under the rules laid down by an established arbitration organization. Such rules are meant to supplement provisions of domestic Arbitration Acts in matters of procedure and other details such Acts permit. They may provide for domestic arbitration or for international arbitration or for both, and the disputes dealt with may be general or specific in character. In the international field, many commercial transactions and economic cooperation agreements between and foreign parties provide for the settlement of dispute by means of arbitration either on an ad-hoc basis or an institutional basis.²⁷

10.1 The Nairobi Centre for International Arbitration (NCIA)

The Kenya's Nairobi Centre for International Arbitration (NCIA) is established under an Act of parliament.²⁸ It provides for the establishment of a regional Centre for international commercial arbitration and the arbitral

²⁴ Rajuu S, 'Institutional Ad hoc Arbitration: Advantages and Disadvantages' (The Law Review, 2010) 548.

²⁵ Essam Al Tamimi, 'International Commercial Arbitration in the MENA: Institutional v Ad Hoc: A Wealth of Choice' in The International Journal of Arbitration, Mediation and Dispute Management, Vol.83, No.1 [2017]14

²⁶ Ibid.

²⁷ Ibid.

²⁸ Nairobi International Centre for Arbitration Act, No.26 of 2013 Laws of Kenya.

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court to provide for mechanisms of alternative dispute resolution and for connected purposes. Although relatively new, NCI is intended to promote, facilitate and encourage the conduct of international commercial arbitration.

10.2 The Chartered Institute of Arbitrators (CIArb) (Kenya Branch)

The Chartered Institute of Arbitrators (CIArb) Kenya Branch was established in 1984 and is one among the branches of the Chartered Institute of Arbitrators, which was founded in 1915 with headquarters in London.²⁹ It promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and adjudication.³⁰

The Institute is said to have over 20,000 members spread out in about 90 Countries in the World with branches in England, Wales, Scotland, Hong Kong, Europe, Nigeria, Kenya, Zambia, Mauritius, Australia, India, and North America among other Countries. It has affiliations with arbitration bodies and institutions in other Countries across the World and with the London Court of International Arbitration and International Chamber of Commercial in Paris. It is not -for-profit organization and gained charitable status in 1990.³¹

10.3 The Dubai International Arbitration Centre (DIAC)

In the United Arab Emirates (UAE) a federation of seven emirates established in December 1971, the DIAC, was established in 2007 as replacement of what used to be the Conciliation and commercial Arbitration Centre established in 1994.³² The DIAC is considered as a major international arbitration hub in the

²⁹ Information available at the CIArb web
<http://www.ciarbkenya.org/about.php><accessed on 21 April 2017>

³⁰ The Chartered Institute of Arbitrators (CIArb) Kenya Branch Rules 2012

³¹ The Chartered Institute of Arbitrators (CIArb) Kenya, About CIArb Kenya', available at <https://www.ciarbkenya.org/about-us/>

³² Essam Al Tamimi, 'International Commercial Arbitration in the MENA: Institutional v Ad Hoc: A Wealth of Choice '16.

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UAE region. The DIAC Rules are based on UNCITRAL Model Law with slight adaptations to of rules of other renowned arbitration centres.³³

10.4 The Cairo Regional Centre for International Commercial Arbitration (CRCICA)

In the Republic of Egypt, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) is the Country's principle arbitration institution. CRCICA administers arbitrations under its own rules which are based on slightly amended UNCITRAL Rules. Other renowned arbitration institutions include the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

11.0 Advantages of Institutional Arbitration

Once the arbitration agreement provides for arbitration by a named institution, the rules of the institution automatically apply which in some instances help to save time. There are trained staff to administer the arbitration and this ensures that once the tribunal is appointed, advanced payments where required are made. Institutional arbitration puts at the parties' disposal model clauses which results in World-class specialists who are also entrusted with the task of scrutinizing the draft awards.

12.0 Disadvantages of Institutional Arbitration

Institutional arbitration may be expensive. There may be delays resulting from the needs to follow the laid down procedures in screening the dispute and appointing the arbitrator (s).

13.0 Ad hoc Arbitration

Ad hoc arbitration (Whether domestic or International commercial arbitration) is not administered by an institution as the arbitration agreement does not specify an institutional arbitration. Ad hoc Arbitration is agreed and arranged by the parties themselves without recourse to any institution that shall govern the resolution of the dispute. The proceedings are conducted and the

³³ Ibid.

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procedures are adopted by arbitrators as per the agreement or with the concurrence of the parties.³⁴

Ad hoc arbitration can be domestic International or Foreign arbitration. It takes place when the arbitration clause in the agreement between parties provides for arbitration without designating any arbitral institution. *Ad hoc* Arbitration is mostly used by the state entities or parastatals due to their reluctance in submitting to Institutional Arbitration for sovereignty reasons.³⁵

13.1 Advantages of Ad hoc arbitration

The arbitration can be tailor-made to suit the parties' mutual needs if they cooperate. This allows for flexibility and commendation due to its independent nature. It may be shaped to meet the wishes of the parties and the facts of the particular dispute.

13.2 Disadvantages of Ad hoc arbitration

Ad hoc arbitration is fully reliant on the parties' cooperation where one party is difficult, the arbitration, will be difficult to administer. Compliance of any directives can only be secured after the tribunal has taken office.

Where parties fail to address the applicable institutional roles to incorporate in their agreement they end up with ad hoc arbitration by default. It is therefore advisable that when opting for ad hoc arbitration, parties should realize that they consent to a specific set of rules though modified or refer to UNCITRAL Model Law, otherwise they may end up engaging in a potentially disputative path for the resolution of their dispute.

14.0 Lex Mercatoria In International Commercial Arbitration

An introductory discussion of ICA like this may not be complete without delving into the topic of Lex Mercatoria. Lex Mercatoria roughly translates to

³⁴ Kwatra, G.K., *Arbitration Made Easy*, (Universal Law Publishing, 2011), p.12.

³⁵ Ibid p 129.

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what is called “Law merchant”.³⁶ These are laws drawn from different sources of law, e.g., Public International Law, Uniform Laws, general principles of law, Rules on International Organizations, Customs and Usage, reporting of arbitral awards and standard form contracts. They are basically ruling and practices which have evolved within the international business communities and have become autonomous source of law proper to the economic relations between citizens and foreigners according to Professor Goldman³⁷

In the context of ICA, the main role of *Lex mercatoria* has enabled the growth of laws and applicable uniform standards that have adopted to the needs of modern international trade and commerce. The uniform application is critical so that we do not have conflicting and various domestic laws purporting to govern international contract. *Lex Mercatoria* is said to have given raise to “economically sensible solutions”.³⁸

In critically ascertaining *these uniform rules and practices*, two approaches exist.³⁹ The list Method also known as the Collation of Rules, and the Functional Method also known as the Ad-hoc determination. Under the List Method, rules and principles have been prepared drawing upon UNIDROIT principles and the 1998 principles of European Contract Law.⁴⁰ It makes room for creeping codification which ensures that the list of transnational commercial principles is capable of being rapid and continually updated and revised in order to deal with arising issues.⁴¹

The functional method involves identifying a particular rule when a specific question arises. The advantage of this is that an answer can be identified for

³⁶ The New Lex Mectoria: The First Twenty-five Years. Michael Mustill 1988) 4 Arbitration Institution 86 at 109.

³⁷ Form Internationale, No. 3 (November 1883).

³⁸ The creeping Codification of *Lex Mercatoria* Peter Klaus Berger (1999, Kluwer Law International).

³⁹ Ibid 131.

⁴⁰ These principles Have been updated and reviewed up to as recent as 2016.

⁴¹ Application of the Lex Mercatoria in International Commercial Arbitration by Michael Pryles, p.3.

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any issue arising. The application of *Lex mercatoria* in ICA may be problematic in that the arbitral tribunal may subjectively just pick rules which in its opinion are just and reasonable and which may not have been what the parties intended when they made their contract.⁴² Indeed, *Lex mercatoria* has been accepted and rebuffed in almost equal measure. Some people feel there are currently laws that are sophisticated enough to resolve commercial disputes, that *Lex mercatoria* cannot properly be classified as a law as it does not have a definite source of authority, that it is difficult to ascertain and predict owing largely to its vast sources.⁴³

On the other hand, the supporters of *Lex mercatoria* feel that it serves its role well. They argue that it qualifies as a system of law because the parties have expressly chosen it to govern their contract; that it is apt where there is a conclusion that the relevant rules found in the laws of the states connected to the dispute are not applicable or just.⁴⁴ In so far as ICA is concerned, it is pointed out in this paper that the main impact of *Lex mercatoria* is that it helps to accommodate the considerations which may come into play in international commercial arbitration which may be different from the considerations in national or domestic arbitrations.⁴⁵

15.0 Why Parties Choose International Commercial Arbitration?

Individual and State party's international commercial transaction often agree to submit the dispute to arbitration due to a number of reasons as discussed hereunder.

15.1 Neutrality

ICA gives the parties the comfort of a neutral forum for dispute resolution. People doing business in a foreign country may perceive the local laws, and court system to be unfriendly to foreigners or to be more inclined towards the

⁴² Ibid 133.

⁴³ Ibid p12.

⁴⁴ Ibid p13.

⁴⁵ Ibid.

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citizens of that country. In addition, there are other constraints like, language, procedures, use of local advocates who may not be too familiar with how the business operates/its business practices. Parties can also select a tribunal for its skill, varied composition, expertise in specific fields which translates to less time spent grappling pertinent issues.

This may also give a higher possibility of a sensible award. International Commercial Arbitration therefore gives them a neutral forum under which they can have some confidence in the process.⁴⁶

15.2 Enforceability

If the parties do not arrive at a settlement themselves, the tribunal will issue an award. This award is final and binding within the confines of the law. The award can be enforced by court action, either through the national laws of the courts of the country under which the arbitration is conducted or internationally under the terms of reciprocal enforcement of judgements. For instance, under the New York Convention, the award can be enforced in 178 countries. This is distinguishable from other alternative dispute resolution methods like mediation, whose resulting decision is only contractually binding.⁴⁷

15.3 Flexibility

Given the fact that the parties retain economy over the proceedings, the process is considered flexible and accommodative.

15.4 Confidentiality

International Commercial Arbitration may be a private process in so far as the members of the public and/or the press are not allowed to be present during

⁴⁶ Allan Redfern and Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*. Fourth Edition, p27.

⁴⁷ *Ibid.*

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the proceedings.⁴⁸ Generally ICA is confidential and may only be made public with the consent of the parties. This requirement has been upheld by the courts in *Dolling-Baker v Merret*⁴⁹ whereby the court held:

“...the requirement of privacy must extend to the documents which are created for the purpose of the hearing”

This advantage can however be countered. The Court in *Ali Shipping Corporation v Shipyard Trogir*⁵⁰ acknowledged that there are boundaries to confidential obligations. An example is where the award is published say on the Institution’s website⁵¹, or where a party is seeking to enforce the award nationally where it may be necessary to divulge the contents of an award in order to get assistance in enforcement or instances of public interest specifically in investor-state arbitrations.

16.0 Challenges and Prospects of ICA in Kenya

Although ICA has been praised as a dispute resolution mechanism that provides more flexibility and predictability to the parties, there are also attendant challenges. Among the prominent challenges are highlighted herein.

16.1 High costs involved in ICA

The attendant costs are usually high. Consideration is made for the tribunal’s costs and fees, administrative fees and expenses, hire of room, transcriber and translator where necessary. The tribunal has limited powers (many of their directives have to be issued with the help of the courts e.g. summoning witnesses, enforcing awards by attachment among others). Seeking national court Intervention also increase the expenses.

⁴⁸ The rules of different institutions like ICSID, ICDR, LCI, UNCITRAL and WIPO contain provisions that persons not involved in the proceedings shall not be present during the hearing.

⁴⁹ [1991] 2 All E.R.890.

⁵⁰ 1998 Lloyds Rep.643 at 651

⁵¹ ICC Publishes edited copies of the awards to guide practitioners.

16.2 Domestic Courts Interference with the Arbitral Proceedings

The growth of ICA is still dependent on domestic courts and their attitude in interpreting arbitration agreements, extent of intervention in arbitral proceedings and enforcement of the arbitral awards. The involvement of courts in modern commercial arbitration generally begins even before the arbitral tribunal is established, when the courts are used to protect evidence, to avoid damage.⁵² Where a party approaches a domestic court with a dispute that is subject to ICA proceedings, the court ought to decline jurisdiction and refer the parties to arbitral proceedings as they intended.⁵³

The general objective of an Arbitration statute is to limit the instances of intervention by the domestic court. The Kenyan Arbitration Act, for instance, provides that “except as provided in the Act, no court shall intervene in matters governed by this Act”⁵⁴ There are also clear provisions on when the court can interfere with the arbitral awards.⁵⁵ However, it has been observed that the general attitude of domestic courts has been that of interference with arbitral proceedings.⁵⁶ Public policy as one of the grounds for interfering with arbitral awards has been cited as that ground which has afforded domestic courts a wide latitude in interfering with arbitral awards due to lack of clear meaning.⁵⁷ Domestic notions and interpretations of public policy therefore continue to stand as a real threat to the party autonomy, flexibility and arbitral

⁵² See Angualia Daniel, “Role of Domestic Courts in International Commercial Arbitration” available at <http://www.ssrn.com/abstract=1674760> <accessed on 21 April 2017>

⁵³ Ibid, see p 16.

⁵⁴ Section 10 of the Arbitration Act 2009. The provision is worded in similar terms as Article 5 of the UNCITRAL Model Law

⁵⁵ Section 35 of the Act provides for Setting Aside arbitral award and spells out the grounds for the same and when such application can be made to the High Court.

⁵⁶ Dorothy Aswani, “Building Kenya’s Future as a Global Hub for International Commercial Arbitration” in (2016) (4(2) *Alternative Dispute Resolution*. See also Francisco Blavi, “The Role of Public Policy in International Commercial Arbitration in (2016)82 *Arbitration. The International Journal of Arbitration, Mediation and Dispute Management*

⁵⁷ *Christ for All Nations vs Apollo Insurance Co. Ltd* [2002] 2 EA 336 Ringera, J.

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tribunal powers in ICA. It has been suggested that having different pieces of national legislation dealing with domestic arbitration and ICA may be a solution. Domestic arbitration may favour more court intervention as compared to ICA where non-interventionist approach is necessary.⁵⁸

16.3 Capacity Problems

A limited number of people practicing arbitration locally poses another challenge. Few judges and lawyers and other professionals have been trained in arbitration (and particularly ICA) and therefore the process is not yet fully embraced in the legal practice. Nonetheless, even the few local experts in ICA still face the challenge of bias problem more aptly thus:

“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 appoint arbitrators. 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.”⁵⁹

Perhaps part of the solution to address capacity would be to increase robust legal training in arbitration (and ICA) right from law schools and among judicial officers and practitioners as part of continuous professional development.

Despite the challenges, there are growth prospects for ICA in Kenya. The enactment of the Constitution has now put in place a provision that in exercising judicial authority, courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration

⁵⁸ Supra Note 2, see p 60.

⁵⁹ Aswan, supra note 54, see p 164.

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and tradition dispute resolution mechanisms.⁶⁰ Under the Constitution, national legislation is also to be put in place provide for procedures for settling intergovernmental disputes by alternative dispute resolution including negotiation, mediation and arbitration.⁶¹

Although the Constitution requirements do not expressly mention ICA, the emphasis placed on ADR may help in shaping judicial attitude to that of minimal intervention in arbitral proceedings including ICA proceedings conducted locally. The recent enactment of the Nairobi Centre for International Arbitration Act⁶² is another crucial milestone that serves to project the growth of ICA. The Act establishes the Nairobi Centre for International Arbitration (NCIA) who functions include among others to promote, facilitate and encourage the conduct of international commercial arbitration. Arbitration practitioners have observed that NCIA capacity to handle domestic and international arbitration requires to be constantly improved to enable it exploit maximum potential and to put the country in global map of international arbitration.⁶³

17.0 Conclusion

This paper has focused on breaking down the basic concepts of International Commercial Arbitration, by pointing out some of the key features as contradistinguished from domestic and international arbitration. The writer have approached the subject from a Kenyan perspective thus making references to relevant Kenyan law and past cases.

Whereas international commercial arbitration in Kenya has not been adequately embraced it is an idea whose time is now with us. The recent legal developments in Kenya particularly the enactment of the Constitution and establishment of the Nairobi Center of International Arbitration (NCIA) serve

⁶⁰ Article 159(2) (c) of the Constitution of Kenya.

⁶¹ Article 189(4) of the constitution of Kenya.

⁶² Act No.26 of 2013.

⁶³ Muigua, K ``Settling Dispute through Arbitration Kenya'' (3rd Edition,2017) p207

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to demonstrate the positive prospects of ICA. It has been pointed out in this paper that much more however needs to be done to improve both the institutional and professional capacity in this day and age of globalization and international trade.

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By: Peter Mwangi Muriithi* & Gordon Odhiambo Oduor**

Abstract

The motivation behind this paper is to evaluate the effectiveness of the East African Court of Justice in resolving disputes through arbitration. In doing so, the authors do an analysis on the history behind the establishment of the court, the court's jurisdiction, the legal framework guiding the court in resolving arbitration disputes, the progress the court has had in resolving disputes through arbitration, the challenges facing the court and suggest the way forward. The authors will further analyze the dynamics of arbitration disputes in the twenty-first century, and the impact of the national laws of the member states on the court's effectiveness.

It is worth noting that the paper focuses on East African Community with six (6) member states some of whom have so far have established legislative and institutional mechanisms in the area of domestic and international arbitration. These are: Kenya, Uganda, Tanzania, Rwanda, Burundi, and South Sudan.

1.0 Introduction

Globalization has led to growth of commercial and investment disputes as different transacting parties interact with one another in the course of business. This has resulted in demand for effective dispute resolution mechanisms that would address the emerging market trends at a global level. Africa, and even more so East Africa, is not new to this reality. The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable.¹

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¹ Alternative Dispute Resolution Methods, Document series No. 14, p.2 (Harare Zimbabwe 11 to 15 Sept. 2000) .available

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The existence of such a demand gap has made arbitration as means of resolving disputes a viable and attractive mechanism. Arbitration is a private system of adjudication. Parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system. Succinctly, arbitration involves a final and binding decision, producing an award that is enforceable in a court.² With increased globalization, arbitration has become the most preferred mechanism for settling international commercial investment disputes.³

The allure of arbitration mostly lies in the fact that it operates in exclusion of courts and 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.⁴

While the rest of the world has tried to strengthen its legal capacity in international arbitration, Africa has been left behind in this journey. The reality of globalization that has dawned on Africa has left it with no option but to try catch up with the rest of the world. This has led to formation of economic blocs such as the East African Community (EAC)⁵ and Common Market for Eastern and Southern Africa (COMESA)⁶, which have established legal institutions to

at<http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1 (Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 20th August 2018.

² Margaret L. Moses, *The principles and practice of International Commercial Arbitration* , page 1(Cambridge University Press).

³ Franck, S.D., "The Role of International Arbitrators," page

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⁴ Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017).

⁵ East African Community < <https://www.eac.int/>> lastly accessed on 3rd September 2018.

⁶ Common Market for Eastern and Southern Africa < <http://www.comesa.int/>> lastly accessed on 3rd September 2018.

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address trade disputes within their regions. It is on this basis that the East Africa Court of Justice was established as an organ under East African Community.

2.0 A Historical Perspective of The East African Court of Justice and its role in resolving International Arbitration Disputes.

The existence of the East African Community dates back to the colonial error where the first three-member states (Kenya, Uganda, the then Tanganyika) were colonies of the British Empire and governed under the umbrella of the East African Community. This was after Tanganyika was brought under the British administration⁷. Having regards to the existing social, cultural, economic, and their geographical juxtaposition, the three-member states saw it suitable to continue co-operation even after independence⁸. This was achieved by the ratification of the *Treaty of the East African Community of 1967*.

However, this relationship did not last for long due to ideological and political differences amongst the heads of states. Amongst the key reasons for the accelerated breakdown of the community was owing to the fact that the Treaty did not provide for a mechanism for conflict resolution in the event of disputes among the partner states. The first East African Community was formally dissolved in 1977, and the Member States negotiated a Mediation Agreement for the division of Assets and Liabilities, which they signed in 1984. However, as one of the provisions of the Mediation Agreement, the three Member States (Kenya, Tanzania and Uganda) agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation.⁹

Subsequent meetings of the three Heads of State led to the signing of *the Agreement for the Establishment of the Permanent Tripartite Commission for East*

⁷ Akiwumi, A.M. (1972) *'The East African Community'* 6 (2) *The Journal of World Trade Law*, 203.

⁸ Gathege P.S *'Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction'* Published LL.M Thesis, University of Nairobi, 2012, page 15.

⁹ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th September 2018.

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African Co-operation in 1993. Considering the need to consolidate regional co-operation, the East African Heads of State directed the Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty¹⁰. The *Treaty for the Establishment of the East African Community* was then signed in Arusha on 30th November 1999 and entered into force on 7th July 2000 with membership from three states: Kenya, Uganda and Tanzania. Rwanda and Burundi then joined in 2007, with South Sudan becoming a member in 2016.

The Treaty for the Establishment of the East African Community of 1999 provides for various thematical areas that relate to business transactions within the region and dispute resolution, including use of arbitration. These are, *inter alia*: the Principles of the Community¹¹, Establishment of the Organs and Institutions of the Community¹² (e.g., *The East African Court of Justice*¹³), Co-operation of Trade Liberalization and Development¹⁴, Co-operation of Investment and Industrial Development¹⁵, Co-operation in Infrastructure and Services¹⁶, Free Movement of Persons, Labour, Services, Right of Establishment and Residence¹⁷, and Relations with other Regional and International Organizations and Development Partners¹⁸.

It is under East Africa Court of Justice that International Arbitration is practiced as established under chapter 8 of *The Treaty for the Establishment of the East*

¹⁰ East African Community < <https://www.eac.int/eac-history>>lastly accessed on 4th September 2018.

¹¹ Chapter 2 of the Treaty for the Establishment of the East African Community, 1999.

¹² Chapter 3 of the Treaty for the Establishment of the East African Community, 1999. The organs are: the Summit, the Council of Ministers, the Co-ordinating Committee, Sectoral Committees, and the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.

¹³ Chapter 8 of the Treaty for the Establishment of the East African Community, 1999.

¹⁴ Chapter 11 of the Treaty for the Establishment of the East African Community, 1999.

¹⁵ Chapter 12 of the Treaty for the Establishment of the East African Community, 1999.

¹⁶ Chapter 15 of the Treaty for the Establishment of the East African Community, 1999.

¹⁷ Chapter 17 of the Treaty for the Establishment of the East African Community, 1999.

¹⁸ Chapter 24 of the Treaty for the Establishment of the East African Community, 1999.

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African Community of 1999. This paper focuses on International Arbitration as mode of resolution of disputes, as practised under East Africa Court of justice.

3.0 The East African Court of Justice (EACJ)

The East African Court of Justice, like the other organs of the Community, is established under Article Nine (9) of the Treaty¹⁹. Chapter Eight (8) of the Treaty further expounds on, *inter alia*, the role of the Court, the appointment of judges of the court, jurisdiction of the court, official language of the court, and the seat of the court. The Treaty provides that the role of the court is to be a judicial body which ensures adherence to law in the interpretation and application of and compliance with the Treaty establishing the Community²⁰.

As currently established, the East African Court of Justice has a threefold role: to decide, in accordance with treaty and rules of procedures, on contentious matters arising out EAC Treaty within the meaning of Article 27, paragraph 1, of the Treaty, to give an advisory opinion in accordance with Article 36 of the Treaty, and finally *to entertain arbitral matters in accordance with Article 32 of the Treaty and rules of arbitration*.²¹

4.0 International Arbitration as practiced under East African Court of Justice (EACJ)

Generally, classic courts' (including most regional courts like the European Court of Justice) that entertains contentious matters they do not entertain arbitral disputes. However, the East African Court of Justice is unique because it has a hybrid function of entertaining both litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.²² Article 32 of *The Treaty for the Establishment of*

¹⁹ Gathege P.S 'Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction' Published LL.M Thesis, University of Nairobi, 2012, page 33

²⁰ Article 23 of the Treaty for the Establishment of the East African Community, 1999

²¹ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 20th November 2018

²² Ibid No. 21

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the East African Community of 1999, gives the East African Court of Justice the requisite authority/jurisdiction to arbitrate various matters. To this end, Article 32 of The Treaty for the Establishment of the East African Community of 1999 delimiting the jurisdiction of the court verbatim provides: The Court shall have jurisdiction to hear and determine any matter:

- a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
- b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
- c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

The prima facie reading of Article 32²³ indicates that in order for the court to arbitrate over a matter, the parties must submit to its jurisdiction by way of an Arbitration Agreement or Arbitration Clause in a contract²⁴. This retains one of the seminal features of arbitration; party autonomy; which involves the parties willingly submitting to an arbitral process, having autonomy over the arbitrator and the process making the outcome mutually acceptable to the parties.²⁵

East African Court of Justice, jurisdiction to arbitrate matters is expressed in three ways. Summarily stated: Contracts or agreement to which the Community or any of its institutions is a party, disputes between partner states and commercial matters provided there is an Arbitration Clause conferring such jurisdiction to the court.

²³ The Treaty for the Establishment of the East African Community of 1999

²⁴ Ntazilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' < <http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> Accessed on 6th September 2018

²⁵ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

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The aspect of the East African Court of Justice, having jurisdiction to arbitrate international commercial disputes, to the Court enormously widens its scope.

5.0 Critiquing The Effectiveness of East African Court Of Justice as an International Arbitral Court

In order to ensure efficiency in carrying out its duties as an Arbitral Tribunal, the court developed Arbitration Rules in 2012 (The East African Court of Justice Arbitration Rules, 2012).²⁶ This was in accordance with Article 42 of the treaty²⁷ which empowers the court to make rules to regulate its operation. Verbatim Article 42 of the treaty provides that: *the Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court.*²⁸

The East African Court of Justice Arbitration Rules, 2012 are applicable in arbitration of matters before the court in accordance with Article 32 of *The Treaty for the Establishment of the East African Community of 1999*.²⁹ The parties to arbitration before the court however have the right to modify or waive the application of the rules in arbitration of their dispute by the Court.³⁰

This is an attractive feature of the court as it renders credence to the arbitration attribute of parties having autonomy over the arbitration process, which in turn makes the outcome mutually acceptable to the parties.³¹ This enhances the effectiveness of the court as an arbitral tribunal as parties have liberty to determine the process they think will be effective in arbitrating their dispute. Consequently, the outcome is mutually acceptable to the parties.

Rule 3 of the East African Court of Justice Arbitration Rules, outlines the manner in which a party should commence arbitration before the court. This is via a

²⁶ Rule 1 (1) of the East African Court of Justice Arbitration Rules, 2012

²⁷ Article 42 of *The Treaty for the Establishment of the East African Community of 1999*,

²⁸ *Ibid* No. 28

²⁹ Rule 1(2)(a) of the East African Court of Justice Arbitration Rules, 2012

³⁰ Rule 1(2)(b) of the East African Court of Justice Arbitration Rules, 2012

³¹ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

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statement of claim which provides for :the name in full and the description of each of the parties; description of the nature and circumstances of the dispute giving rise to the claim(s); statement of the relief sought including to the extent possible, an indication of any amount(s) claimed; proposal as to the preferred number of arbitrators (one, three or more); copies of the relevant agreements and, in particular, the arbitration agreement; and any comments as to the place of arbitration, the applicable law and the language of arbitration. This to a great extent enhances the effectiveness of the court as an arbitral tribunal as the requirements in a statement of claim seeks to uphold the acceptable attributes of arbitration. This includes the parties' autonomy to choose an arbitrator, the applicable law, the jurisdiction of the court e.t.c.

Further, Rule 4 of the East African Court of Justice Arbitration Rules gives leeway to parties being represented or assisted by persons of their choice through the arbitral process before the court. This enhances the effectiveness of the court as the court can arbitrate a dispute in absentia of any of the parties provided they are represented. This is attractive to parties who seek to arbitrate commercial disputes, as they can appoint representatives for purposes arbitration of their commercial dispute.

This also minimizes delays to arbitration before the court that may be occasioned by parties' non-availability due to various commitments. Rule 5 of the East African Court of Justice Arbitration Rules, outlines the manner in which the Respondent ought to respond to a claim from a Claimant before the court. To enhance the effectiveness of the court as an arbitral tribunal Rule 6 of the East African Court of Justice Arbitration Rules, provides for default provisions. Where the Claimant fails to communicate his or her claim the court issues a termination notice. Where the Respondent fails to communicate his or her statement of defence to the tribunal, the court proceeds ex-parte. Where there is non-attendance by either party to arbitration before the court without sufficient cause, the court has liberty to proceed ex-parte. Lastly, if a party, duly invited to produce documentary evidence, fails to do so within the specified period, without sufficient cause, the Tribunal may make the award on the evidence

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before it. These outright provisions of the rules ensure expediency in arbitration of disputes before the court. These salient provisions of the rules serve to minimize any delay that may be occasioned by a party to arbitration before the court as an arbitral tribunal.³²

Further Rule 8 of East African Court of Justice Arbitration Rules provides that “the appointing authority shall appoint, from among the Judges of the Court a panel to constitute the Tribunal to conduct the arbitral proceedings, unless the parties have agreed on a Sole Arbitrator who, in the like manner, shall be appointed from among the Judges of the Court. The Chairman of the Tribunal shall be appointed by the appointing authority from among the Judges constituting the Tribunal. In making the appointment, the appointing authority shall have due regard to the necessity to secure the appointment of independent and impartial arbitrators”.

The provision further enunciates that the President of the Court who is the President of the Appellate Division appoints the judges or a sole judge to adjudicate the dispute in consideration of their expertise in that field. This to a great extent ensures effectiveness of East African Court of Justice as an arbitral tribunal. To ensure that the judges resolve the disputes effectively all judges are trained in arbitration without exception. This makes the judges well versed in arbitration.³³

Further to ensure the effectiveness of East African Court of Justice as an arbitral tribunal in circumstances where judges may need experts in certain fields beyond their technical knowledge, the Court may hire experts to assist the judges to get the information that may be required to guide them in arbitrating fairly and judiciously. This is well spelt out in Rule 26 of the Court’s rules of the East African Court of Justice Arbitration Rules.

³² Rule 6 (1) to (3) of the East African Court of Justice Arbitration Rules, 2012

³³ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 20th November 2018

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Rule 11 provide that an arbitral dispute is to be decided in accordance with the law chosen by the parties. Here, the parties have the leeway to choose the suitably applicable law to their dispute. Once, they are unable to do so the East African Court of Justice adjudicates the dispute under natural justice and fairness and the rules of law it considers to be appropriate given all the circumstances of the dispute.

It is noticeable that the East African Court of Justice as an arbitral tribunal has power under rule 14 to take interim measures. This is significant in ensuring the effectiveness of the court as it such measures can ensure justice is realized and the court as an arbitral tribunal does not issue orders in futility.

The award issued by the East African Court of Justice as an arbitral tribunal is final as provided by rule 36(1) of East African Court of Justice Arbitration Rules. The finality of the award by the court is important as it prevents over adjudication of a dispute, which is a seminal principle in arbitration. This is an important trait of the court that those who wish to arbitrate commercial disputes appreciate.

By submitting the dispute to arbitration under Article 32 of the Treaty, the parties are deemed to have undertaken to implement the resulting award without delay.³⁴ Rule 36(3) of East African Court of Justice Arbitration Rules, provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. This ensures the court as an arbitral tribunal is effective as its ward can be enforced through established procedures of the country in which enforcement is sought. Still, under the East African Court of Justice Arbitration Rules, specifically rules 21 and 22, the parties in the dispute must have stated in the agreement or contract the place of arbitration as well as the language in which the proceedings will be conducted.

³⁴ Rule 36(2) of East African Court of Justice Arbitration Rules

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The East African Court of Justice as an arbitral tribunal can act as an effective arbiter of international commercial disputes, especially where the parties are from different East Africa community states.

6.0 Challenges facing the East African Court of Justice as an International Arbitral Tribunal

6.1 Lack of or Inadequate Marketing of the East African Court of Justice as an International Arbitral Tribunal

There has not been zealous marketing of East African Court of Justice as an arbitral tribunal. Many people in East Africa Community have little knowledge of the fact that East Africa Court of Justice arbitrates disputes. This is a challenge as it limits the number of disputes submitted to the court for arbitration. The lack of deliberate marketing of the court as the suitable international arbitral tribunal results in few parties submitting to the court for arbitration. This also reduces confidence in parties who wish to submit to the court for arbitration.

6.2 Difficulties of Enforcing East African Court of Justice's Arbitral Awards

Rule 36(3) of East African Court of Justice Arbitration Rules, provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. This can be challenging especially where the procedure of enforcement in a particular country involves use of courts and lengthy and/or tedious processes. This may discourage parties to arbitrate disputes before the East African Court of Justice. This can also create an opportunity for court interference. For instance this can happen where a municipal court decides that the award given by the East African Court of Justice is against public policy and hence unenforceable in the country in which enforcement is sought.

Court interference intimidates investors since they are never sure what reasoning the court of the country in which enforcement is sought might adopt should it be called up onto deliberate on enforceability of an award by East African Court of Justice.

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6.3 Cultural, Economic, Religious and Political Differences within the East Africa community

Cultural, economic, religious and political differences within the state parties can act as a hindrance to arbitration at the East African Court of Justice. These differences may create varying opinions of issues, prejudices and conflicts of interests especially in international economic relations. This in-turn inhibits arbitration at East African Court of Justice.

For example, Kenya is known for her aggressive, competitive and capitalistic nature of doing business. On the other hand, Tanzania started off as a socialist country before adopting capitalism. Even throughout the transition, it has adopted a protectionist approach. This has led to divergent ideologies and policies by member states that hinder integration and full realization of institutions such as the East African Court of Justice.

6.4 Existence of many Arbitration Institutions within the East Africa Region

The East Africa region has many institutions that offer arbitration. These includes: Chartered instate of Arbitrators in Kenya, Nairobi Centre for International Arbitration in Kenya, Centre for Alternative Dispute Resolution in Kenya, Tanzania Institute of Arbitrators, Centre for Arbitration and Dispute Resolution in Uganda, Kigali International Arbitration Centre in Rwanda, and Burundi Centre for Arbitration and Mediation.³⁵ These institutions have overshadowed the arbitral role of the East African Court of Justice which is new compared to some. Some institutions like the Chartered Institute of Arbitrators are well marketed consequently and are well known to various parties who wish to arbitrate their disputes within the region.

6.5 Existence of other well-established International Arbitration Institutions across the Globe

In addition to the locally established arbitration institutions, there are also other well-established institutions that handle International Arbitration. These: the

³⁵ Emilia Onyema, *The Transformation of Arbitration in Africa; The Role of Arbitral Institutions*

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COMESA Court of Justice handling international arbitration matters that arise among parties within the member states, International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA) in London, the Permanent Court of International Arbitration at the Hague, and International Centre for Settlement of Disputes (ICSID) in Washington D.C. The above institutions offer alternatives to the Court (EACJ), and are mostly preferred by international investors (including those operating within EAC) due to their long professional reputation.

6.6 Perception of East Africa Court of justice as a Classic Court rather than an International Arbitral Tribunal

East African Court of Justice is generally perceived as a classic court that entertains contentious matters and doesn't entertain arbitral disputes. This is despite the fact that it is unique because it has a hybrid function.³⁶ This perception of East Africa Court of Justice as a classic court acts as a hindrance, to parties who would wish to arbitrate at the court. Parties to arbitration as an alternative dispute resolution mechanism chose arbitration because of its attributes over other dispute resolution methods. This being the case, where parties wish to arbitrate a dispute they abhor an institution which they perceive would in any way not uphold arbitration attributes. Hence, the unique hybrid function of East African Court of Justice can act as a hindrance to parties who would wish to arbitrate at the court.

6.7 Lack of precedents of East Africa Court of Justice as an International Arbitral Tribunal

One of the main attribute of arbitration is confidentiality. This involves parties selecting arbitrators privately and undertaking the arbitration process privately with no onlookers except parties to the dispute. Further the decisions/awards of arbitral tribunals or arbitrator are not published.³⁷ This being the case any

³⁶ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 20th November 2018

³⁷ Kariuki Muigua , *Settling Disputes through Arbitration in Kenya* 3rd Edition 2017 page 3

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arbitration undertaken at East African Court of Justice is not published hence there are no existing records of decisions/awards made by the court. This means that parties who would wish to arbitrate at East African Court of Justice have no existing precedent to consider and determine the efficiency of the court.

6.8 Varying Arbitration Legal Framework/Models governing the Member States

There exist varying arbitration law models in East Community. For example: Kenyan Arbitration Act (No. 4 of 1995) is drafted in line with UNCITRAL model law. On the other hand, Tanzania Arbitration Act which was enacted on 22 May 1932 is not drafted in line with the UNCITRAL model law.³⁸ This varying arbitration legal framework may act as a hindrance to arbitrate at East African Court of Justice where parties to a dispute are from such states as they may face difficulty in agreeing the choice of law that will be applicable.

7.0 Way Forward to ensure Effectiveness of East African Court of Justice

There is need for deliberate and well thought out marketing strategies of East Africa Court of Justice as an International Arbitral Tribunal. This will sensitize people especially citizens of the member states of the East Africa Community of the existence of East Africa Court of Justice as an International Arbitral Tribunal. Global marketing of the East Africa Court of Justice as an effective arbitral tribunal also creates awareness and debunks the perception that East Africa Court of Justice operates as a classical court which does not offer arbitration as a means of solving disputes.

There is need for improved relation and integration among the East Africa community member states since political, economic, and social differences affect the functioning of the East Africa Court of Justice as an Arbitral Tribunal. This will reduce cultural, political, economic, and social differences. Policies like East

³⁸ Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 6(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

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Africa Tourist Visa,³⁹ which is a single entry visa for foreigners visiting Kenya, Rwanda and Uganda simultaneously encourages integration.

Also open border policy for East Africa Member states citizens will go a long way in encouraging integration. This integration reduces the cultural, political, social and economic differences amongst East Africa member states creating a conducive environment for use of the East Africa Court of Justice as an international arbitral tribunal. There is need to have the East African Court of Justice Arbitration Rules amended to provide a more elaborate approach to enforcement of the arbitral awards by the East African Court of Justice. Rule 36(3) which deals with enforcement of awards is widely phrased giving room for misuse and over litigation.

Verbatim it provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. The provision can be amended to provide the court at which a party should seek enforcement. Also the rules should be amended to limit the number of times a party can appeal the arbitral award e.g limiting appeal only to high court and the decision of the high court to be final and binding. This brings about finality. This will limit court interference making East Africa Court of Justice an effective arbitral tribunal.

There is need for the East Africa Court of Justice to adapt internationally accepted arbitral principles, procedures, rules and norms to make it an attractive institution for international arbitration. Parties who seek to arbitrate disputes, need to be assured that the East Africa Court of Justice as an arbitral tribunal, arbitrates disputes following internationally accepted arbitral principles, procedures, rules and norms. This creates confidence to parties who seek to arbitrate disputes in East Africa Court of Justice. Further this will give the East Africa Court of Justice as an international arbitral tribunal, capability to

³⁹ <http://www.magicalkenya.com/visit-kenya/visa-information/east-africa-tourist-visa/> < lastly accessed on 28th January 2019

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effectively compete with other institutions offering arbitration as a means of solving disputes.

There is need for the East Africa Community member states to adopt similar model when drafting legal frame work to govern arbitration. Further the member states can agree to ratify various accepted international conventions governing arbitration. For example: UNICITRAL model law. This will make the East Africa Court of Justice an attractive institution for citizens of the East Africa Community as there would be no conflict of law and determination of choice of law will be straight forward and less tedious.

8.0 Conclusion

For a very long time, Africa has not been on the same page with the rest of the world on matters of International Arbitration given the delay in the economic growth. However, with existence of institutions such as the East African Court of Justice with jurisdiction over arbitration matters, the future is promising. All is needed is to strengthen the capacity of the court, and address the challenges as discussed above. With such implementation, East Africa and the rest of the continent will be able to benefit well from the use of the court in resolving International Arbitration Disputes, as well as effectively compete against other established International Arbitral Tribunals.

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Fred K. Nkusi, *Understanding the jurisdictional powers of the EA Court of Justice* <<https://www.newtimes.co.rw/section/read/207744>>

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The Treaty for the Establishment of the East African Community of 1999.

Treaty of the East African Community of 1967.

The East African Court of Justice Arbitration Rules, 2012

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Engendering The Use of ADR in Intergovernmental Disputes in Kenya's Devolved System of Governance: Opportunities, Emerging Issues and Challenges

*By: Sophie Amutavy**

1.0 Introduction

The Constitution of Kenya was promulgated in August 2010, and with this came elaborate and progressive legal provisions on *inter alia* the Bill of Rights, Kenya's system of governance, representation of the people and principles of judicial authority. As regards the governance system of the country, Kenya like many other African nations embraced the devolved system of governance. Devolution refers to the statutory delegation of both political and economic power from a central government to regional governments.¹

Kenya is divided into 47 counties as set out in the First Schedule of the Constitution.² The national government is mandated with governance on a national level while the counties are governed by county governments. The primary objective of devolution is to address regional marginalization by enhancing the participation of the people in the decisions undertaken by the State on their behalf. The Fourth Schedule of the Constitution provides for the distribution of functions and powers between the two levels of government. The functions assigned to county governments, referred to as devolved functions, were previously being performed by the national government. This is the decentralization aspect of economic and political power. For proper functioning of the devolved system, the Constitution provides that the two levels of

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¹ Kesale, Anosisye M., 'Decentralization by Devolution; Perceptions of Councilors on the Level of their Decision Making Authority in Local Government Experience from Tarime Town Council' (2016) 6(4) *Journal of Public Administration and Governance* PL 1.

² Constitution of Kenya 2010, Article 6(1).

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government are distinct and interdependent thus shall conduct their mutual relations based on consultation and coordination.³

The distinct nature of the two levels of government provides for the equality in autonomy which each level of government has, in relation to the functions and powers as provided in the Fourth Schedule of the Constitution. Each level of government has distinct legislative and executive mandates. Interdependence, on the other hand, emphasizes that the two levels of government are dependent on one another to protect the wellbeing of the people of the Republic.⁴ It also refers to the extent to which each level of government depends on the other for the successful implementation of their respective constitutional mandates. To underscore the cooperative nature envisaged by the Constitution, interdependence means that no level of government can undertake its mandate in isolation of the other level.

Article 186 of the Constitution provides that except otherwise provided, the functions of either level of government shall be as has been provided in the Fourth Schedule. To ensure that all functions are running smoothly for effective public service delivery, the Constitution also provides that necessary resources shall be provided for the performance of transferred functions.⁵

It is important to note that with devolution, Kenya was moving from a highly centralized system characterized by excessive power vested in the executive to a decentralized system where the citizens have an opportunity to take part in decisions made by the State. The implementation of a change of such magnitude cannot be without its challenges and the Constitution contemplated this by providing that in any dispute between the governments, the two levels shall make every reasonable effort to amicably resolve such dispute by Alternative Dispute Resolution (ADR).

³ Ibid, Article 6 (2).

⁴ Omolabake Akintan and Annette Christmas, Intergovernmental Dispute Resolution in Focus: The Cape Storm, (2006) 8(6) Local Government Bulletin, PL 3.

⁵ Constitution of Kenya, 2010, Article 187 (2) (a).

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2.0 Intergovernmental Relations in Kenya

Intergovernmental relations are the corner stone of a devolved system of governance. The concept of intergovernmental relations refers to the processes of interactions between different governments and between organs of state from different governments in the course of the discharge of their functions.⁶ Intergovernmental relations can be considered as a game akin to diplomacy and can be cooperative in nature, involving institutions and processes in consultation for co-decision making or competitive in nature, involving conflictual institutions. The manner in which governmental bodies conduct their relations has a direct impact on public service delivery. National integration is a key objective of a cooperative model of devolution, thereby making intergovernmental relations an important tool.⁷

Upon the inauguration of the county governments in Kenya in 2013, the relations between and amongst the governments began to be characterized by suspicion and conflicts. The disputes arose from the implementation of the devolved system and were mostly centred on transfer of functions and allocation of resources to such functions. County governments were eager to have the devolved functions and requisite resources transferred to them while the National Government was hesitant that at the time counties may not have had the capacity to undertake the transferred functions.

The process of transfer of functions was dependent on a thorough analysis done to ensure that counties can perform the functions transferred to them, which is an approach taken by majority of countries that have decentralized. This process is referred to as the unbundling of functions. The unbundling was considered

⁶ Kangu John Mutakha, 'Constitutional Law of Kenya on Devolution' (2015) Strathmore University Press, p.318.

⁷ Levy, N and Tapscott C (2001) "Intergovernmental relations in South Africa: The Challenges of Co-operative Government: Introduction" In Levy, N. and Tapscott, C. (eds) *The Intergovernmental Relations in South Africa: The Challenges of Co-Operative Government* (Cape Town: IDASA and The School of Government, University of Western Cape).

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based on sectors, after which the costing of such functions was done. The analyzed functions are then converted into expenditure assignments for which costs are assigned. From this analysis, it is expected that the devolved function is then transferred to a county government, as well as the resources for performance of such function. It is noteworthy however that on the basis of their uniqueness, some competencies are assigned to the level of government that would best serve the particular interests related to the function. These include functions such as police services and monetary policy among others.

From the onset, county governments experienced shortage in cashflow to perform the devolved functions, thereby leading to tension between the two levels of government. Additionally, Kenya had placed a three-year transition period within which the functions were to be transferred from the national government to county governments.⁸ The most apparent challenge to this is the transition period provided in the Constitution was not sufficient for the review of all policies and legislation to ensure conformity with the devolved system of governance. Therefore, while the functions in Part II of the Fourth Schedule to the Constitution have been transferred, a large portion of the operational policies and laws have not been reviewed to conform to Chapter 11 of the Constitution. This then means that in accordance with the enabling policies and legislation, various devolved functions are still being undertaken by the national government. County Governments, on the other hand, continue to perform these devolved functions leading to duplicity of roles and wastage of resources allocated for the performance of such functions. This has led to endless wrangles between the two levels of government.

3.0 Constitutional and Legislative Framework for Dispute Resolution in Intergovernmental Disputes

The Constitution promotes the cooperative model of intergovernmental relations as envisaged in Article 6(2) and emphasizes the importance of respect

⁸ Constitution of Kenya, Sixth Schedule, Section 15(1).

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for functional and institutional integrity of government at either level.⁹ While it is expected that in their conduct, the two levels of government exercise their power in a cooperative and consultative manner, it has been observed that the implementation of the devolved system of government has encountered teething problems. In contemplating these problems, the Constitution makes provisions for the settlement of disputes by means provided by national legislation, and that such national legislation shall provide for mechanisms for resolution of disputes through alternative dispute resolution.

The Intergovernmental Relations Act, 2012 (IGRA, 2012) is the national legislation enacted under the mandate of Article 189 (4) of the Constitution. The objects and purposes of the IGRA, 2012 include but are not limited to: provide a framework for consultation and cooperation between the national and county governments; provide a framework for consultation and cooperation amongst county governments and to provide mechanisms for the resolution of intergovernmental disputes where they arise.

The IGRA, 2012 defines intergovernmental disputes as a) between the national government and a county government; or b) amongst county governments.¹⁰ In making reference to Articles 189 (3) and (4) of the Constitution, the Act further provides that the national and county governments shall take all reasonable measures to resolve disputes amicably; and exhaust the mechanisms for alternative dispute resolution before resorting to judicial proceedings.¹¹ The Act goes further to provide the procedure after formal declaration of a dispute to any of the intergovernmental structures set out under the Act.¹² It is clearly set out that once efforts to negotiate over the intergovernmental dispute have failed, a party to the dispute may declare the dispute to the intergovernmental structures set out in the Act.¹³

⁹ Constitution of Kenya, Article 186.

¹⁰ The Intergovernmental Relations Act, 2012, Section 30.

¹¹ The Intergovernmental Relations Act, 2012, Section 31.

¹² *Ibid*, Section 34.

¹³ *Ibid*, Section 33 (2).

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3.1 Intergovernmental Relations Structures

3.1.1 The National and County Government Co-ordinating Summit

The National and County Government Co-ordinating Summit (the Summit) is established as the apex body of intergovernmental relations.¹⁴ The Summit comprises of the President, and in his absence, the Deputy President who shall be the Chairperson, and the 47 Governors representing the 47 County Governments.¹⁵ The Summit is mandated to provide a forum for consultations for the national and county governments, and is required to meet at least twice a year. In accordance with Section 33(2) of the IGRA, 2012, the Summit is tasked with resolution of intergovernmental disputes where negotiations have failed.

3.1.2 The Intergovernmental Relations Technical Committee

The Intergovernmental Relations Technical Committee (IGRTC) is established pursuant to Section 11 of the IGRA, 2012 and its functions include the facilitation and implementation of the activities and decisions of the Summit and the Council of Governors (the Council). As has been provided for in Section 33(2) of the IGRA, 2012 failure by parties to resolve an intergovernmental dispute through negotiation may then lead to formal declaration of the dispute to IGRTC for amicable resolution through ADR.

3.1.3 The Council of Governors

The Council is established pursuant to Section 19 of the IGRA, 2012 and comprises of the 47 elected Governors representing each county. The functions of the Council include providing a forum for dispute resolution between counties within the framework provided under the IGRA, 2012.¹⁶ Additionally, Section 33(2) of the IGRA, 2012 provides that an intergovernmental matter which fails to be resolved under negotiations may be referred to the Council for resolution through ADR.

¹⁴ Ibid, Section 7.

¹⁵ Ibid, Section 7 (2).

¹⁶ Intergovernmental Relations Act, Section 20 (1) (d).

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3.1.4 The Intergovernmental Budget and Economic Council

The Intergovernmental Budget and Economic Council (IBEC) is established in accordance with Section 187 of the Public Finance Management Act (PFMA), 2012 and comprises of among others, the Deputy President who is the Chairperson, representatives from the Council of Governors and the Cabinet Secretary responsible for intergovernmental relations. The purpose of the IBEC is to provide a forum for *inter alia* consultation and cooperation between the national and government and county governments.¹⁷ Towards this objective, IBEC has continued to resolve disagreements between the two levels of government and made binding decisions such as the approval of the mechanism for county governments to access overdraft services from the Central Bank of Kenya (CBK) with the National Treasury (TNT) being the guarantor.

3.1.5 Mediation Teams

Section 19 of the National Government Co-ordination Act, 2013 also provides for the establishment of mediation teams in case of any disputes between the national government and county governments. The above are among the intergovernmental structures tasked with ensuring amicable settlement of disputes arising from the implementation of the devolved system of governance.

3.2 Emerging Issues in Dispute Resolution in Intergovernmental Disputes

As stated earlier, once county governments became operational after the March 2013 general elections which ushered in the inaugural county governments, tensions between the two levels of government and amongst county governments were evident, with leaders in the Council openly clashing with the administration at the national government level.

3.2.1 Cost of Litigation

In its 5th meeting, the Summit raised concerns on the growing trend on litigation arising from inter and intra governmental disputes. The rising disputes being

¹⁷ Public Finance Management Act, 2012, Section 187 (2).

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Despite this paper being centred on use of ADR in resolution of intergovernmental disputes, it is important to consider the findings of the abovementioned study on intra governmental disputes. The study¹⁸ undertaken by IGRTC and the Ministry of Devolution revealed that since the inauguration of the county governments in March 2013, the inter and intra governmental disputes involved the following parties:

- i. The National Government and County Governments
- ii. County Governments and County Government
- iii. National Government agencies and County Governments
- iv. County Organ and another County Organ within the same county
- v. Between State agencies
- vi. The National Assembly and the Senate

The recurrent inter and intra governmental disputes being filed in court for judicial resolution have had a great impact on the budgetary allocation of legal fees for both levels of government. For instance, the National Government, whose allocation for legal services falls under the Office of the Attorney General and Department of Justice, apportioned KES. 1,567,059,470 for the financial year 2015/2016, KES. 1,629,508,767 for the year 2016/2017 and KES. 1,768,098,285 for the financial year 2017/2018.¹⁹

¹⁸ Report on the Cost of Litigation in Inter and Intragovernmental Litigation in Kenya, Intergovernmental Relations Technical Committee, May 2017.

¹⁹ Programme based budget, National Government of Kenya, for the year ending 30th June 2016.

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The Council of Governors on the other hand, through its audited reports, indicates that the Council's expenditure on legal fees being a total of KES. 49,134,138 for the financial year 2013/2014 and KES. 87,153,900 for the financial year 2014/2015.²⁰ The amounts discharged by the national and county governments towards legal services has been rising with each financial year, which may be an indication of a rise in inter and intra governmental disputes. The findings of the study further indicate that average cost of legal fees charged in inter and intra governmental disputes ranges from KES. 60,000 (sixty thousand) to KES. 200,000,000 (two hundred million). These amounts have largely been attributed to fees paid to external counsel due to the fact that majority of county governments do not have adequate internal capacity to handle the emerging legal matters. With matters being handled by external counsel, the uptake on resolution of such matters through ADR as prescribed in the Constitution and enabling legislation has been low.

3.2.2 Concurrent Functions

While the Fourth Schedule to the Constitution offers the distribution of functions between the national and county governments, it also makes provisions for concurrent functions. Concurrent functions are those that are conferred on both levels of government, and these include disaster management and betting, casinos and other forms of gambling. The implementation of concurrent functions has often led to the duplication of roles and resources leading to wastage and lack of coordinated projects.²¹

Aside from the above, concurrent functions often run the risk of not being performed with either level of government expecting the other to perform such a function, thereby resulting in failure on the part of the governments in the delivery of this service. Concurrent functions have continuously been a bone of contention, more so when neither level of government accepts responsibility for

²⁰ Report of the Auditor General on the Financial Statements of Council of Governors Secretariat for the year ended 30 June 2014 and year ended 30 June 2015.

²¹ Report on Emerging Issues on Devolution and Best Practices in Intergovernmental Relations, IGRTC.

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services not rendered, or as it often happens, either level feeling that the other level is acting *ultra vires* in the performance of certain aspects of the concurrent function.

4.0 Opportunities for ADR in Intergovernmental Disputes

Article 189 (4) provides that national legislation shall provide procedures for amicable resolution of intergovernmental disputes through ADR. Given that the Constitution vests the legislative authority of the country in Parliament²², Parliament through the enactment of the IGRA, 2012 fulfilled its mandate. The IGRA, 2012 is intended to ensure that parties to an intergovernmental dispute adhere to the obligations under the Constitution.

The dispute resolution mechanisms such as negotiation, mediation and arbitration provided under the IGRA, 2012 are steered towards a facilitative process. This is in conformity with the Constitution which calls for cooperative and consultative intergovernmental relations. From the initial stage of an intergovernmental dispute, the IGRA, 2012 encourages consultative discussions by giving parties the freedom to select the dispute resolution mechanism that would be most appropriate to the issue.²³ Parties are also permitted to involve intermediaries, thus giving parties a sense of control over the entire process. The main objective of the IGRA, 2012 is to preserve good relations between and amongst the governments. The Act places an obligation on both levels of government to ensure that all intergovernmental agreements provide appropriate dispute resolution mechanisms, with judicial intervention being the last resort.²⁴

The mechanisms also provide a cheaper and expeditious way of resolving disputes to ensure that public resources are spent efficiently in finding solutions on how the disputants can work harmoniously; and ensures that public service

²² Constitution of Kenya, Article 94 (1).

²³ Intergovernmental Relations Act, 2012 Section 33 (1).

²⁴ Ibid Section 32 (1) (a) (b).

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delivery is uninterrupted during the process of resolution of the dispute. In recognition of this obligation, courts are now increasingly referring parties to intergovernmental disputes for alternative dispute resolution, with judicial proceedings being the final step upon failure to resolve the dispute. In his ruling in *Constitutional Petition 280 of 2017*²⁵, Hon. Mativo, J, stated that it is now trite that the Act having been enacted pursuant to Article 189 (4) of the Constitution of Kenya (COK) must be understood purposively because it is umbilically linked to the Constitution. *Mumbi and Onguto, JJ, in International Legal Consultancy Group & Another vs Ministry of Health & 9 others*²⁶ held that after considering Article 189 (3) and (4) of the Constitution and Sections 10- 35 of the Intergovernmental Relations Act, 2012, it is apparent that all disputes between the two levels of government should be resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system.

Essentially, this means that parties in an intergovernmental dispute may only resort to judicial proceedings once the mechanisms set out under the Intergovernmental Relations Act, 2012 have failed. The establishment of the aforementioned intergovernmental relations structures mandated with the resolution of disputes in intergovernmental disputes has played a key role in ensuring that such matters are considered through ADR before judicial resolution. The Constitution has set out ADR as one of the guiding principles for courts and tribunals in the dispensation of their mandates.²⁷ In respect to intergovernmental disputes, the Constitution emphasizes the need for settlement of intergovernmental disputes through ADR mechanisms including negotiation, mediation and arbitration.²⁸ Additionally, the Intergovernmental

²⁵ Council of County Governors vs Lake Basin Development Authority and 6 Others, Constitutional Petition 280 of 2017, eKLR.

²⁶ International Legal Consultancy Group & Another vs. Ministry of Health & 9 Others, Constitutional Petition 99 of 2015, eKLR.

²⁷ The Constitution of Kenya, Article 159 (c).

²⁸ Ibid, Article 189 (4).

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Relations Act provides that parties to a dispute shall, subject to Article 189 of the Constitution, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by Articles 159 and 189 of the Constitution.²⁹

5.0 Mechanisms for Resolution of Intergovernmental Disputes Through ADR

Alternative Dispute Resolution (ADR) mechanisms refer to a collective term for a range of procedures and techniques through which disputes are resolved without resorting to litigation.³⁰ The mechanisms identified in the Constitution are negotiation, mediation and arbitration and are further explained below:

5.1 Negotiation

Negotiation refers to a voluntary bargaining process where parties identify their interests and attempt to find common ground on disputed matters.³¹ It is an expedient, unstructured process that is intended to preserve the working relationship of the disputants.³² This process takes place without the intervention of third parties such as judicial officers, arbitrators or mediators.

The IGRA 2012 provides that before formally declaring a dispute to any of the intergovernmental structures established by the Act, parties to such dispute must first take steps to amicably resolve the matter by initiating negotiations.³³ It is therefore expected that before parties to an intergovernmental dispute refer their disputes to any intergovernmental structure, the parties or their representatives will have initiated negotiations amongst themselves. Failure to

²⁹ The Intergovernmental Relations Act, 2012, Section 34 (1) (b) (ii).

³⁰ Simokat C. Environmental Mediation Clauses in International Legal Mechanisms 2008: 3 – 4, Electronic available at www.mediate.com [Accessed 05-12-2018]. Also see Grogan Work Place Law 2014: 495-497.

³¹ Otiende Amollo, Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya in *Alternative Dispute Resolution* (2014) 2(1), Chartered Institute of Arbitrators, Kenya, 2014.

³² Winnie Everett, Dawie Bosch and Edwin Molahlehi, *The Conciliation and Arbitration Handbook* (LexisNexis Butterworths 2004: 8-9).

³³ The Intergovernmental Relations Act, 2012, Section 33.

Engendering The Use of ADR in Intergovernmental Disputes in Kenya's Devolved System of Governance: Opportunities, Emerging Issues and Challenges: Sophie Amutavy resolve such disputes through negotiations then gives parties the leeway to formally declare disputes to the intergovernmental structures established under the Act.³⁴

5.2 Mediation

This is defined as a process that is voluntary in nature, informal and confidential; where an impartial third party, known as a mediator, is selected to assist the disputants reach an amicable solution.³⁵ The process is considered non-binding unless the parties opt to reduce the agreement reached into a binding agreement/ contract.³⁶ The mediator is expected to facilitate communication between the disputants, but it is the disputants who craft the final written agreement/ contract. This is referred to as the principle of self-determination in mediation and is a key aspect particularly in reaching consensus in intergovernmental disputes.

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"³⁷. In the duration of less than a decade in which Kenya began to devolve, the country has experienced teething problems which have mainly been based on the performance of functions and resources allocated to these functions; and implementation of legislation that is not in conformity with Chapter 11 of the Constitution. These problems have on numerous occasions affected the effectiveness and efficiency of both levels of government in public service delivery. The disputes emanating from the teething problems mentioned hereinabove are better handled through consultations and cooperation between

³⁴ Ibid, Section 33 (b).

³⁵ Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution*.

³⁶ Cotton J. *The Dispute Resolution Review* 2016: 594.

³⁷ Florence Shako, *Mediation in the Courts Embrace: introduction of Court Annexed Mediation into the Justice System in Kenya in, Alternative Dispute Resolution Vol.4, No.2, Chartered Institute of Arbitrators, Kenya, 2016.*

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the two levels of government, geared at coming up with practical solutions and agreements that are consensual to both parties.

The provisions of the -IGRA, 2012 in reference to formal declaration of a dispute and the procedure³⁸ thereafter essentially sets out the intergovernmental structures as mediating institutions in the resolution of intergovernmental disputes.

5.3 Arbitration

Arbitration is a formal yet private process in which disputants present their issues to another party for determination.³⁹ The process is considered the most formal alternative approach to judicial determination of disputes. Arbitration is an adversarial procedure in nature, where the disputants are offered a chance to present their dispute to one or more impartial third parties. Once this is done, the third parties are then expected to make a decision on behalf of the disputants. The decision reached by the neutral third party is legally binding upon both parties to the dispute and can be enforced through judicial processes.

6.0 Declaration of an Intergovernmental Dispute

The IGRA, 2012 places the commitment on parties to an intergovernmental dispute to make every reasonable effort to amicably resolve such a dispute by way of direct negotiations or through an intermediary. The Act then makes provisions for declaration of a dispute to the intergovernmental structures established pursuant to the IGRA, 2012, in the event that negotiations fail. Once a dispute is declared to an intergovernmental structure under the IGRA, 2012, the structure shall within 21 days from the formal declaration of such dispute convene a meeting of the parties. The purpose of the meeting shall be to determine the nature of the dispute, identify and agree on an appropriate

³⁸ The Intergovernmental Relations Act, 2012, Section 34.

³⁹ Farook Khan, *Alternative Dispute Resolution*, A Paper Presented at the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

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dispute resolution mechanism. The Summit is considered as the final structure to which an intergovernmental dispute may be referred, whereby if parties fail to resolve such a dispute, then the dispute may be referred to court for resolution.

7.0 Challenges in the Use of ADR in Resolution of Intergovernmental Disputes

Whereas the Constitution and the IGRA, 2012 provide an essential framework for amicable resolution of intergovernmental disputes, these statutes also have their limitations in terms of applicability. The study on the cost of litigation indicated the alarming rate at which resources are being spent on both inter and intra governmental disputes, yet the Constitution and the IGRA, 2012 only give recognition to intergovernmental disputes. Section 30 of the IGRA 2012 in particular defines intergovernmental disputes as those between national and county government; and amongst county governments. This places no legislative obligation on parties in intragovernmental disputes to seek amicable resolution of their disputes.

The national government through the Ministry of Devolution and Arid and Semi-Arid Lands (ASAL) is tasked with developing regulations for a dispute resolution mechanism under the IGRA, 2012.⁴⁰ Currently, the country does not have the regulations in place, which would place a responsibility on all stakeholders including the Judiciary. Lack of awareness amongst stakeholders on constitutional and legislative provisions on amicable resolution of intergovernmental disputes through ADR thereby affect the patronage of ADR services by the parties to inter and intra governmental disputes. Creation of awareness amongst both levels of governments, lawyers and judicial officers would likely lead to an increase in referral of such disputes for resolution through ADR, as has been envisioned in a cooperative model of devolved governance. Remuneration is a key aspect in the uptake on ADR with majority of legal professionals hesitant due to the lack of a comprehensive remuneration

⁴⁰ Intergovernmental Relations Act, Section 38 (2) (c).

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scheme for such matters. While consideration for services offered by lawyers towards matters such as litigation and conveyancing has been provided for the in the Remuneration Order, the same has not been provided for as regards remuneration for ADR matters. This has led to skepticism among lawyers with most having the notion that referral of matters to ADR shall affect their sources of revenue.

8.0 Recommendations and Conclusion

As stated earlier, the concept of intergovernmental relations is closely related to diplomacy and successful relations require a great deal of political goodwill amongst the actors. These relations are still in the initial stages with devolution still being under a decade old in implementation, therefore, the foundations set shall play a key role in the success of the devolved system. As Parliament continues to play in enacting legislation establishing intergovernmental structures, there is need for both levels of government to strengthen the existing intergovernmental relations structures. An active role by the leaders at both levels of government in the promotion of strong intergovernmental relations shall ensure complementary rather than competitive relations, and this synergy shall create an enabling environment for use of ADR in intergovernmental disputes.

The use of ADR in resolution of intergovernmental disputes must be understood vis a vis its effect on public service delivery. One of the main objectives of devolution is to promote effective and efficient public service delivery. As stated earlier, majority of the intergovernmental disputes arise from the performance of functions as stipulated in the Fourth Schedule to the Constitution. Resolution of intergovernmental disputes through judicial processes takes a long time and this in turn stalls the provision of services affected by such dispute. The two levels of government must therefore steer themselves towards purpose oriented intergovernmental relations which seek to create opportunities for sustained cooperation and coordination for implementation of a common vision.

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It is also of utmost importance and urgency that the Ministry of Devolution and ASAL develops the necessary regulations for dispute resolution, through a consultative process with the relevant stakeholders. These regulations shall place a legal obligation on parties to an intergovernmental dispute to undertake ADR mechanisms prior to seeking redress through judicial processes.

Additionally, public awareness on the constitutional and legislative obligations on the two levels of government shall play a positive role in promoting amicable resolution of intergovernmental disputes. Sensitization of key players such as the national and county governments, the Law Society of Kenya and the Judiciary will not only lead to amicable and expeditious resolution of intergovernmental disputes, but shall also lead to a significant reduction in the financial resources employed in the resolution of intergovernmental disputes.

In conclusion, a multi sectoral cooperative approach will go a long way in reducing the intergovernmental disputes that arise, and in the case where such a dispute has arisen, this approach shall ensure that public service delivery continues seamlessly as parties seek resolution in an amicable manner. The constitutional architecture envisions intergovernmental relations and ADR as the bridges that will inspire sustainable consultation and cooperation between and amongst the national and county governments.

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Alternative Dispute Resolution in Intergovernmental Relations

*By: Andrew Waruhiu**

1.0 Introduction¹

A devolved system of government was established in Kenya by the Constitution of Kenya 2010 (CoK 2010), which entails a combination of self-governance at the county level with shared rule at the national level.² In this arrangement, Intergovernmental Relations (IGR) is a necessary mechanism of managing the tensions, conflicts and threats that have arisen in order to ensure coherent governance that delivers services to the nation through the two levels.³

The importance of intergovernmental relations is recognized by the raft of intergovernmental bodies established by the Intergovernmental Relations Act (IGRA 2012). The Act established the National and County Government Coordinating Summit (Summit), which is designated as the apex body for intergovernmental relations.⁴ The Summit is headed by the President and consists of the Vice president and the 47 governors. The mandate of the Summit includes consultation and co-operation between the national and county governments, receiving progress reports and providing advice as appropriate, monitoring the implementation of national and county development plans, coordinating and harmonizing the development of county and national governments policies, and facilitating and co-ordinating the transfer of functions, power or competencies from and to either level of government⁵. However, the Summit's functions were hampered by lack of administrative support. As a result, points of conflicts between and within the two levels of

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¹ Paper first presented at the Intergovernmental Relations Workshop, December 4th, 2018, Kisumu.

² See Chapter Eleven of the Constitution of Kenya.

³ Part 5, Article 189, Constitution of Kenya.

⁴ Sec. 7, Intergovernmental Relations Act, No. 2 of 2012, Laws of Kenya.

⁵ *Ibid*, Sec. 8.

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu government were not satisfactorily addressed and most points of contention ended up in court seeking redress as the first line of action. Additionally, there has been limited understanding of the functions, roles and responsibilities of the IGR organs. The IGRA provides for the formation of a Secretariat, the Intergovernmental Relations Technical Committee, IGRTC, which is mandated to serve as the secretariat for both the Summit and the Council for County Governors, COG.⁶ The IGRTC assumed the functions of the Transition Authority⁷ whose mandate ended in 2016, and has since faced a raft of challenges over the years such as setting up operations and this has seemingly impacted negatively on the devolution process for reasons discussed in this paper. The IGR functions in the first two years of devolution were greatly hampered by the fact that the Summit and the Council of County Governors, (CoG), operated without administrative support. Alternative dispute resolution is one of the avenues that can help address the systemic challenges and issues emerging in the process of devolution.

This document is divided into four parts:

- Part 1 provides the background to the devolution policy, the Constitution of Kenya 2010, and subsequent enabling legislation. It outlines the use of ADR by various economic sectors that have embraced ADR. It also gives the legal position and foundation of ADR
- Part 2 provides an analysis of the status of implementation of the devolved system of government. It discusses the policy issues and challenges in intergovernmental relations.
- Part 3 gives a general overview and highlights the basic principles of Alternative dispute resolution and the challenges facing ADR
- Part 4 provides recommendations and give a way forward to the establishment of ADR in IGR and chart a way forward for the IGRTC to take a primary role in implementing ADR in the country

⁶ Ibid, sec. 15.

⁷ Established by the *Transition to Devolved Government Act, No. 1 of 2012, Laws of Kenya.*

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Part One: Background to the Devolution Policy, The Constitution of Kenya 2010, and Subsequent Enabling Legislation

The Constitution of Kenya 2010 was promulgated at a critical time in Kenya. The CoK was a call from citizens to reverse years of social decay and lack of or non-governance. As a transformative Constitution, it seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society. It reflects the value that Kenyans would like to affirm. It is an authoritative statement that emphasises on social and sometimes economic change, stipulation of principles which guide the exercise of state power, requires state organs to use the Constitution and subsequent legislation as a framework for policies and acts for shaping of state and society at large. Access to justice is a critical component for poverty reduction and sustainable development.⁸ One of the areas, where such change is required is the conscious and deliberate application or use of alternative dispute resolution mechanisms.

The Policy on devolved system of government 2016 (Devolution, 2016)⁹ calls for the promotion and strengthening of harmonious intergovernmental relations. The strategies highlighted were:

- a. Develop regulations to operationalize the Intergovernmental Relations Act, 2012;
- b. Develop policy to promote the use of alternative dispute resolution mechanisms in the first instance;
- c. Enact legislation to provide for Alternative Dispute Resolution mechanisms pursuant to Article 189(4) of the Constitution;
- d. Review the legislation and regulations to strengthen intergovernmental relations, in particular:
 - i. Strengthen the Intergovernmental Relations Technical Committee;

⁸ This is well captured under the United Nations 2030 Agenda on Sustainable Development Goals (See SDG Goal 16: Promote just, peaceful and inclusive societies).

⁹ Policy on devolved system of Government, Ministry of Devolution & Planning, 2016.

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- ii. Gazette the intergovernmental sector consultative forums;
 - iii. Establish intergovernmental relations focal points at both levels of government to facilitate a cooperative government;
- e. Establish and support a platform and a framework to facilitate dialogue for all elected leaders at both levels of government.

ADR is not new to Kenya. Traditionally, disputes were resolved through some form of ADR. The practice has grown progressively culminating into its recognition in the supreme law of Kenya and several pieces of legislation.¹⁰ The promulgation of the COK and the subsequent statutes has witnessed the entrenchment of ADR. It has now become a mainstay in our judicial system and should be rolled out to be the same in the society. For ADR to have efficacy, it must be understood and accepted. There is no turning away from this. The President of the Republic of Kenya¹¹ and the Attorney-General¹² have both separately pronounced themselves on this. All ADR mechanisms need to be exhausted before litigation.¹³ The High Court of Kenya has launched and now

¹⁰ See generally, Muigua, K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems', *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution*, 6(1):84-168.

¹¹ *Business Daily*, 'President Orders policy for county blocs in latest endorsement,' Monday, October 22, 2018. Available at <https://www.businessdailyafrica.com/news/President-orders-policy-for-county-blocs/539546-4817696-p3t48mz/index.html>. Last accessed December 2nd, 2018.

¹² Office of the Attorney General and Department of Justice, 'Alternative Dispute Resolution for State Counsel,' available at <http://www.statelaw.go.ke/1011-2/>. Last accessed December 2nd, 2018.

¹³ The issue of using ADR in management of intergovernmental relations disputes was also canvassed in the case of *County Government of Migori & 4 others v Privatization Commission of Kenya & another* [2017] eKLR, where the Court partly stated as follows:

There is no suggestion that the structures of alternative dispute resolution under the Intergovernmental Relations Act, 2012 cannot remedy the situation manifested in the dispute about whose function between the national and county government is the business of milling of sugar, that is whether it is an public investment function for the national government or a crop husbandry function reserved for the county governments. Indeed, whether it were considered that the sugar milling is a public investment or an agricultural function, the organs of the Intergovernmental

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu provides court-annexed dispute resolution. The rationale behind this is the stifling backlog of cases being handled in the courts and to improve access to justice. The main challenge is to demystify dispute resolution to include traditional and other forms of resolving disputes, promoting peace, reconciliation, community and national cohesion.

Relations Act are still capable of amicable settlement of the dispute in accordance with the Act and Article 189 of the Constitution by suitable transfer of functions as mandated under section 8 (f) of the Act. Only in the event of failure of reasonable efforts at settlement shall resort be had to judicial proceedings.

Although, there appears to be substantial questions presented to the High Court for interpretation of the Constitution as to the nature and extents of the County Government's agricultural function and the correlated agricultural policy function of National Government's and the latter's substantive public investment function with respect to the sugar milling factories which are the subject of the privatization programme challenged in the suits before the Court, the Constitution itself prescribes for harmonious resolution of any disputes that may arise between the governments. For this reason, a course of avoidance by the Court is a constitutional imperative, at least until the alternative dispute resolution methods have reasonably been employed without success.

Such reasonable efforts towards resolution of the dispute have not been exhausted or failed.

The Court cannot, therefore, be asked to resolve the dispute anyhow now that the matter is before the Court. That would be usurping the prior jurisdiction of the organs of Intergovernmental Relations Act, through which "*the governments shall make every reasonable effort to settle the dispute.*" To determine the dispute by constitutional interpretation of the constitutional court is unconstitutionally to deprive the governments at the two levels their constitutional mandate to resolve the matter by means of respectful co-operation method of the Constitution, and thereby defeat one of the very objects of devolution under dictates of Article 6 (2) and 189 (2) the Constitution, that -

"Art. 6 (2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

"Art. 189 (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities."

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The following sectors have embraced various forms of alternative dispute resolution:

1.1 The Judiciary and the Tribunals:

In line with the constitutional provisions and the Civil Procedure Act and Rules, the Court-annexed mediation has since been officially launched and matters are being conducted to reduce the backlog in court cases.¹⁴ The Mediation Accreditation Committee, MAC, has already been established as envisaged under the Civil Procedure Act (Chapter 21). In addition, the Mediation (Pilot Project) Rules, 2015 made under the Civil Procedure Act on 4th April 2016, marked the beginning of the Court Annexed Mediation.

Notably, after a successful pilot project of Court Annexed Mediation in Nairobi, the Judiciary rolled out the mediation as an Alternative Dispute Resolution method to other 10 counties namely: Mombasa, Eldoret, Kisumu, Nakuru, Nyeri, Machakos, Garissa, Embu, Kakamega and Kisii.¹⁵ The pilot phase that officially came to an end in 2017 was widely regarded as a success owing to the 55.7 per cent and 53.8 percent settlement rate in Family and Commercial Divisions, respectively.¹⁶

It is hoped that this will not only enhance access to justice but will also help in cultivating a positive attitude towards the use of ADR mechanisms before approaching courts and tribunals.

¹⁴ Odongo, D., "Judiciary launches Court Annexed Mediation to reduce backlog of cases," December 4, 2017. <https://www.capitalfm.co.ke/news/2017/12/judiciary-launches-court-annexed-mediation-reduce-backlog-cases/> Accessed on 27th January, 2019.

¹⁵ Judiciary of Kenya, "Judiciary rolls out Court Annexed Mediation to other regions," October 23, 2018 <https://www.judiciary.go.ke/judiciary-rolls-out-court-annexed-mediation-to-other-regions/> Accessed on 27th January, 2019.

¹⁶ Judiciary of Kenya, "Judiciary rolls out Court Annexed Mediation to other regions," October 23, 2018.

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1.2 Financial Services:

ADR is being embraced by the banking and financial services sector to resolve disputes and reduce the cost of doing business in Kenya. This need to be supported by improving the compliance and enforcement mechanisms through a national legislation and existence of strong consumer protection laws that ensure respect for the rule of law and consumer rights. The need to entrench the use of ADR in the financial sector saw the Kenya Banking Association team up with the Strathmore Dispute Resolution Centre to launch a pilot project for the use of mediation in resolving banking cases.¹⁷

1.3 Environment and Natural Resources and Traditional Dispute Resolution:

Away from the Constitution, ADR is also anchored under the Environment and Land Court Act. The use of ADR mechanisms in resolving environmental conflicts is also recognised under the *Community Land Act, 2016* which provides for the use of these mechanisms in addressing community land disputes.¹⁸ The Environment and Land Courts are also under obligation to promote the use of ADR in environmental and land disputes.¹⁹

Safeguards need to be implemented to protect community interests. Developing community capacities to implement and participate in alternative dispute resolution and conflict resolution methodologies that create sustainable peace, stability and equitable development need to be implemented. Over 70 % of cases in Kenya fall under property and can be resolved by mainstreaming ADR²⁰.

¹⁷ Strathmore University, "SLS's centre to host Inter-bank disputes mediation center," <https://www.strathmore.edu/news/sls%C2%92s-centre-to-host-inter-bank-disputes-mediation-center/> Accessed on 27th January, 2019; See Kariuki, Francis, "Sustainability in the Financial Sector in Kenya," *Kenya Bankers Association, Working Paper Series*, Vol. 1, No.1, 2015, pp. 1-52. <http://www.kba.co.ke/downloads/Working%20Paper%20WPS-01-15.pdf> Accessed on 27th January, 2019.

¹⁸ Sec. 39-41, Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016).

¹⁹ Sec. 20, Environment & Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

²⁰ Views taken from random telephone interviews with legal counsel of various counties

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1.4 ADR in the Construction Industry

The construction industry is the driver of economic development. However, it is also riddled with dispute including procurement disputes, during and after construction. Adjudication is the most common form of ADR used in management of disputes in the construction industry. Apart from the institutional Rules on adjudication, such as the Chartered Institute of Arbitrators' one, there is no general statute or Rules to generally govern adjudication. The field is however not entirely without guidelines, as there are the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer*²¹ and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*²². These not only provide for the use of adjudication in construction disputes but also outline the general procedure to be followed. They are widely used and internationally accepted.

1.5 ADR in the Public Sector:

There is a current initiative to develop ADR mechanisms for intergovernmental disputes, the development of a national dispute resolution policy will strengthen these initiatives and signal government policy direction, transforming public service delivery and public participation at county level. In 2014, the Public Service Commission came up with the Guidelines for Negotiation, Conciliation and Mediation²³ pursuant to the provisions of Article

²¹ International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer* (First Edition, 1999, FIDIC).

²² International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*, (First Edition, 1999, FIDIC).

²³ <http://www.health.go.ke/wp-content/uploads/2015/11/GUIDELINES%20FOR%20NEGOTIATION%20CONCILIATION%20AND%20MEDIATION.pdf>; For use of ADR in public sector, see also Public Service Commission Regulations, 2018, available at https://www.publicservice.go.ke/images/drafts/FINAL_PSC_REGULATIONS_AS_OCTOBER_2018.pdf

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252(1) (b) of the Constitution which empowers the Commission to apply conciliation, mediation and negotiation in dispute resolution.

The guidelines are meant to provide alternative dispute resolution (ADR) mechanisms which afford an opportunity to create solutions that are uniquely tailored to address issues at hand, and enable the Commission conduct conciliations, mediation or negotiation in a structured manner that is understood by all stake holders in the Public Service. The ADR procedures are meant to apply to all human resource management related disputes in the public service that can be resolved without litigation. The provisions of these guidelines should as far as possible be applied to all disputes before any other recourse is considered.

1.6 The Legal Position and Foundations of ADR in Kenya:

Kenya has a vibrant legal system which has supported dispute resolution adequately. On the promulgation of the CoK 2010, a progressive constitution was enacted. Before 2010, alternative dispute resolution mechanisms were not mainstreamed in Kenya and the practice was a peripheral option. Article 159 of the CoK now provides that provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. By both express and implication, the Constitution demands reverence/deference to cultural dispute resolution mechanisms within reason. In addition, Article 189 (3) and (4) specifically mandate the counties to enact ADR mechanisms. The IGRA has dedicated an entire part(iv), to dispute resolution mechanisms. This just goes to show how important dispute resolution will be in the devolved system of government.

1.7 Legal Framework

Following the promulgation of the CoK 2010, numerous legislations have incorporated ADR clauses. The following statutes are part of the legal framework that governs ADR in Kenya:

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a) Constitution of Kenya, 2010

The Constitution of Kenya, 2010 provides for principles in exercising judicial authority, and one of the principles stipulated is the use of ADR.²⁴

b) Arbitration Act, 1995

This is the principal Act governing arbitration in Kenya. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations.

c) Civil Procedure Act and Rules, 2010

Section 1A of the Act gives provisions for the overriding objective of the Court. The Civil Procedure Act and Rules 2010 have provisions that encourage settlement of disputes by arbitration and other forms of ADR such as mediation and conciliation. It is provided that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by the rules. It also provides that any interested parties who are not under disability and agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference. In addition, it specifies that No appeal shall lie against a mediation agreement.²⁵ Order 46 Rule 20 gives provisions for application of ADR; it is sufficiently comprehensive since it complements the provisions of the Arbitration Act, 1995.

d) Environment and Land Court Act, 2011

This Act makes provision for application of alternative dispute resolution mechanisms in environment and land disputes. It states that ‘nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution’. Furthermore, ‘where alternative dispute

²⁴ Article 159 CoK 2010

²⁵ Civil Procedure Act, S59 B (1) (a) (b) and (c).

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled'.²⁶

e) Employment and Labour Relations Court Act, 2011

The Employment and Labour Relations Court Act²⁷ promotes the application of ADR and especially conciliation, in solving industrial disputes. It is provided that if at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

f) Inter-Governmental Relations Act, 2012

The Inter-Governmental Relations Act gives provisions for utilization of ADR in settling disputes between Government entities. It establishes the procedure after formal declaration of a dispute, the nature of the dispute is to be determined and the identification of appropriate mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties.

g) Land Act 2012

The Act expresses that in the discharge of the functions of the National Land Commission, the Commission and any State officer or public officer shall be guided by the values and principles that in the discharge of their functions and exercise of their powers under the Act, the Commission and any State officer or public officer shall be guided by values and principles, *inter alia* that alternative dispute resolution mechanisms in land dispute handling and management.²⁸

Part Two: Overview and Highlights the Basic Principles of Alternative Dispute Resolution and the Challenges Facing ADR

Alternative Dispute Resolution, or ADR, refers to any means of settling disputes outside of the courtroom. Although certain ADR techniques are well established

²⁶ Land Act s.20.

²⁷ *Employment and Labour Relations Court Act, 2011* (Act No. 20 of 2011), Laws of Kenya.

²⁸ Land Act, 2012, s.4(m).

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu and frequently used—for example, mediation and arbitration—alternative dispute resolution has no fixed definition. The term alternative dispute resolution includes a wide range of processes, many with little in common except that each is an alternative to full-blown litigation. The main aim of ADR is to harmonize the interests of the parties concerned without necessarily focusing on the rights in order to achieve an amicable resolution that will be easily complied to by the parties.

2.0 ADR Mechanisms

Generally, ADR mechanisms encompass a number of mechanisms that are used to resolve disputes out of the court setting. Notably, these mechanisms have specific advantages and disadvantages that make them applicable to different types of disputes.

2.1 Early neutral evaluation/Neutral fact-finding

This is an ADR mechanism where an independent third party, usually a conciliator, helps parties in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement by way of clarifying misconceptions and perceptions to reduce tension and promote effective communication. The neutral party should also create an environment where the parties feel comfortable to engage in continued negotiations until a favourable and amicable compromise is reached. A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution.

2.2 Negotiation

Negotiation is a basic dispute resolution mechanism with parties having autonomy over the process of reaching a mutually acceptable decision without assistant from third parties. 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.²⁹

²⁹ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

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2.3 Mediation

Mediation is the voluntary, informal, consensual, strictly confidential and non-binding process in which the disputants submit to a neutral third party to assist them to reach a negotiated solution. The third party in the discussion facilitates the flow of information aiding the process of the parties to reach an agreement. The mediator must be acceptable to all disputants and all signatories to the settlement agreements must have binding authority.

2.4 Arbitration

Arbitration is a dispute settlement mechanism where a neutral third party, or arbitrator, is appointed by parties or an appointing authority to determine disputes between parties and give a final and binding award. It is a mechanism of settling disputes whether administered by a permanent Arbitral Institution or not.³⁰

Basic principles of arbitration are provided for in the Arbitration Act of Kenya.

2.5 Challenges facing ADR

Lack of an integrated national policy and adequate regulatory framework and strategy to support, harmonize, regulate and popularize ADR development: Currently, ADR is growing without a national policy giving formal direction. General acceptance by the vast majority of Kenyans stands out as one of the main challenges. This gap leads to challenges with ADR credibility and process finality, negatively impacts efficacy of ADR and limits the capacity of ADR to resolve disputes in the public, private and civil society sectors and hence, its capacity to reducing the cost of doing business and conflict resolution. There is need to come up with a national policy and regulatory framework.

2.5.1 Obligations of Parties to participate in ADR:

A degree of compulsion needs to be established ensure participation of parties in ADR. ADR is a voluntary process; whose success is dependent on the level of commitment of all parties. The ADR regulations will go a long way in ensuring adherence and commitment to the principles by the parties, which will be

³⁰Section 3 (1) Arbitration Act 1995.

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu enforced by the courts. This will ensure that justice becomes accessible³¹ and affordable and ADR system respectability is developed and maintained.

2.5.2 Confidentiality of Communication made during ADR:

Confidentiality is one of the main pillars of ADR. A lot of emphasis is placed on confidentiality. The obligations and the exceptions to confidentiality of communication made during ADR need to be underscored by a coherent legal framework. The Arbitration Act of Kenya does not address this expressly, however, confidentiality is a given and is considered a custom of trade. Parties to an arbitration are under an implied duty to maintain confidentiality of the arbitration proceedings even if the absence of such duty being expressly agreed. The debate that will eventually arise will be that since inter/intra governmental disputes are publicly funded, will confidentiality remain a mainstay in ADR? Access to decisions reached by employing various forms of ADR will help in duplication of tasks, save costs and serve as important wealth of knowledge to avoid disputes of similar nature occurring in other areas over time.

2.5.3 Admissibility of ADR proceedings:

Standards, policies and guidelines for the admissibility of evidence of things/statements done or made during an ADR process in future proceedings and compulsion of ADR practitioners to appear as witnesses also require clarifications in order that ADR can seamlessly be tied into court proceedings. Without this linkage, there will be no motivation to use ADR.

2.5.4 Enforcement of ADR outcomes:

For ADR to be relied upon by the various sectors defined in this concept, there needs to be a framework that assures process finality. This includes adoption of standard processes of recognition and enforcements of settlement agreements, negotiated by the various sectors and incorporated into policy and law and communicated to all stakeholders and courts, agreed approaches to enforcing awards as well as guidelines and standards of a proper settlement agreement or award.

³¹ Article 48, Constitution of Kenya 2010.

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2.6 Precedent Development Processes, Research and Development:

ADR has several hybrid mechanisms many of which are still relatively new concepts to the country. Effective research, training, and information sharing to promote the use of other forms of dispute resolution as a viable alternative to litigation.

2.7 Costs of Legal services

The need to reduce the outsourcing of counsel cannot be overemphasised. The County Attorney Bill 2018³² seeks to establish the Office of the County Attorney in all the 47 County Governments. The bill puts in place a structured manner through which governors can deal with legal issues. Through the appointment of the County Attorney and County Legal Counsel, County Governments will reduce the cost of procuring external Counsel who represent the County in legal matters. This bill will hopefully improve representation of the Counties in legal matters, service delivery and save taxpayers money spent on external lawyers. Counties are incurring relatively huge budgets on legal services compared to the budgetary allocation to these services.

2.7.1 Indirect costs

Litigation is a long drawn out process and extremely expensive. Litigation related costs have a direct bearing on delayed implementation of projects, strained relationships between parties, negative public image, and low investor confidence among others. The wastage of scarce county resource in unnecessary litigation cannot be justified. Savings on litigation can be ploughed back into economic projects thus improving development of infrastructure and the livelihoods of the people. The judiciary is also burdened with unnecessary cases resulting in justice being denied to other sectors and citizens of Kenya resulting in time and costs that the Judiciary spends on litigation cases that should not be there in the first place.

³²http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/OfficeoftheCountyAttorneyBill_2018.pdf. Accessed December 2018

Part Three: Analysis of The Status of Implementation of The Devolved System of Government

3.0 Causes of Intergovernmental Disputes

While it is acknowledged that the devolved system of governance is relatively new in Kenya, there are a few key issues that may be considered as the main causes of intergovernmental disputes in the country. This section highlights some of the problems that give rise to intergovernmental disputes.

3.1 Lack of Constitutional Clarity:

Lack of constitutional clarity in the assignment of functions to the two levels of government the Kenyan devolved system of governance continues to pose challenges. There is need for the Ministry in charge of Devolution and Intergovernmental Affairs working with IGRTC to develop through cooperation between the two levels of government, county governments, and existing intergovernmental relations mechanisms, on national legislation on functions and powers to clarify the constitutional assignment of functions and powers to the two levels of government as a deliberate conflict resolution instrument. Establishing a framework of proactive and continued assignment of functions and powers to county governments in line with growing capabilities to handle additional powers will go a long way in establishing the efficacy and acceptance of dispute resolution in the country.

The required clarity in this area is a matter that calls for concerted efforts at reviewing the legislation that govern intergovernmental relations mechanisms. This has been clearly spelt out in sections 8 through 15 of the IGRA. The interests of respective governments in disputes over concurrent powers, functions, intergovernmental fiscal relations³³ and interests has been addressed through actions under the general provisions. The secretariat should provide the authoritative forum to negotiate.

It must cultivate a sense of impartiality to all users so that concurrence and compliance of the force of law and continuous review of policy development for

³³ Council of County Governors v Attorney General & 4 Others [2015] eKLR para 97

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu intergovernmental disputes and encourage more constitutional reform/independent law. It is recommended that the IGRTC must take charge in facilitating the national and county governments to cooperate, consult and jointly interpret the functional lists to determine which aspects are exclusive to each level of government. Unless and until such clarity is achieved, there will continue to arise disputes directly related on supremacy battles between counties and different offices.

3.2 Institutional Conflicts of Interests

Perceived conflict continues to sour the working relationships between the IGRTC, CoG and the Ministry. The institutional structures of the IGRTC itself as a secretariat of both the COG and summit are spelt out in the IGRA. However, a few structural changes, including conscious and deliberate collaborative climate and shift of mind set, would address the institutional conflict of interest would result in a collaborative governance among the intergovernmental structures themselves in order to look at all possible reforms objectively. Inviting both the COG, and other intergovernmental bodies to the Board of IGRTC with voting powers would develop collaborative governance. Article 189(4) that lays emphasis on ADR in resolving inter-governmental conflicts by way of negotiation, mediation and arbitration among others; and Article 252(1)(b) on the general functions and powers of Constitutional Commissions and Independent Offices which include conciliation, mediation and negotiation.³⁴

IGRTC needs to establish itself as a neutral and impartial body to coordinate dispute resolution. The IGRTC as the secretariat of the summit, comprised of both the COG and summit needs to coordinate identification of conflict areas in the current constitutional framework, with the input of all actors including the IBEC. For the IGRTC to focus on this huge responsibility, it must be restructured and given the powers expressly under the IGRA 2012 and established as an autonomous and impartial body devoid of governmental and institutional

³⁴ Otiende Amollo, *Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya* in *Alternative Dispute Resolution Vol.2, No.1*, Chartered Institute of Arbitrators, Kenya, 2014

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu conflict of interest. It would then focus on intergovernmental relations, conflict identification and resolution while working with other intergovernmental bodies as partners in implementing early warning systems and with MODA to develop and continually review policy instruments, laws, regulations and procedures for collaborative governance and risk mitigation. Adopting ADR mechanisms such as Early neutral Evaluation/ Neutral fact-finding, will help in the identification of areas of dispute and causes and in the process of developing a widely accepted architecture and design of the intergovernmental structures. Through such a framework, allocation of additional powers to the country would be implemented in a structured manner and risks and capacities understood, mitigated, avoided or accepted with the concurrence of all parties.

3.3 Need to respect the principle of Subsidiarity:

This principle calls for the functions and powers be left to the lowest level which can best perform them, i.e., more powers should be delegated to counties. The powers delegated exclusively to one level of government should be exercised in cooperation and consultation with the other level of government such as foreign affairs, peace and internal security. Emerging areas of conflict constitute for example, functions transfer, development of trade policies independently by each county, elections, and county border fighting among different communities., etc. As counties scramble to raise county revenue, domestic trade, security, taxation and tariffs are now becoming emerging issues so development of infrastructure and governing policies that impact on trade and economic development on county trade must be prioritised. The ADR regulations under development³⁵ will deal with these wide-ranging emerging and potential conflicts, choosing an open and impartial space for discussion of any measure that affects or is likely to affect the other level of government. Policy choices of another level of government taken unilaterally in matters of trade and subject to dispute resolution.

³⁵ <http://192.168.0.116/devolutionasals.go.ke/wp-content/uploads/2018/03/Intergovernmental-Relations-Alternative-Dispute-Resolution-Regulations-2018-16.01.18-1.pdf>. Accessed December 2018

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3.4 Conflicts Arising Due to Transfer of Functions and Powers

An increasing number of disputes continue to reach court due to the mode or incomplete transfer of powers under the CoK. Particularly, the COG has been involved in taking the national Government to court over infrastructure developments being handled by entities and institutions. Under the IGRA 2012, agreements between parties must have provisions for dispute resolution and the regulations will provide that where there is a dispute resolution mechanism under a given agreement, those mechanisms must be exhausted before judicial proceedings. This has preserved the spirit of Article 187 on intergovernmental transfer of functions based on intergovernmental agreements and for this to be done through joint institutions under Article 189(2) and accomplished through cooperation, consultation, negotiation, and intergovernmental agreements.

Principal legislation which operationalizes transfer of functions is necessary to achieve and support both the Constitution and legislation needs to be addressed. Assignment of specific powers to county governments or joint entities achieved through negotiation and principal legislation and tying dispute arising to ADR mechanisms will give the regulations the teeth and enforceability /compliance. The approach in the regulation has been to recognize the current limits, including at the Summit level, where the final power is to recommend to parties' dispute resolution process through creating a route for advisory opinions from the supreme court.

However, the regulations are sensitive to the political nature of negotiation and delegation that needs to proceed and act in tandem with such referrals because in the final analysis, the courts can only interpret on the laws as written currently. The transfer of functions should be viewed as a policy dialogue that may yield fruits with respect to devolution decisions or may serve to initiate some learning opportunities through building of capacity, clarity in the vision of decentralization, and confidence in the benefits to be gained³⁶.

³⁶ Functional Assignment in Multi-Level Government (Volume II: GTZ-supported Application of Functional Assignment) – available at: http://www2.giz.de/wbf/4tDx9kw63gma/GA_Functional_Assignment_VolII.pdf

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3.5 Unbundling, costing and transfer of functions and powers:

The delayed unbundling and costing of functions have also been a cause of disputes. The Constitution anticipated a phased and asymmetrical transfer of the functions to the Counties which fact was not adequately adhered to by the now defunct Transition Authority. Regardless of the choice between a phased versus a “big bang” transfer of functions, the implementation of these functions strongly depends on the clarity of responsibility assignment between the two levels of government, and on the rules or management framework for handling or dealing with areas of functional overlaps as are bound to arise³⁷. Controversy and acrimony among the two levels of government regarding matters of unbundling, costing and transfer of functions³⁸ have persisted and so have cases of litigation. As the substantive intergovernmental body dealing with conflict/dispute resolution, the IGRTC needs to prioritize the aspect of the unbundling and transfer of functions and powers and address any outstanding issues and move with determined haste to settle all the outstanding issues through a cooperative and intergovernmental process and amend necessary laws.

3.6 Restructuring the old-order institutions

Some of the causes of conflict have been noted to be the retention of the old order institutions whose functions were devolved to county governments which duplicate functions at county levels and contribute to the persistent acrimony between the two levels of government. Transition governance has not been completed to make way for the new devolved system of governance. Local Authority structures and cultures still exist necessitate a reexamination of the old order institutions and cultures that used to perform the functions³⁹. Programmes such as Local Authority Service Delivery Action Plan (LASDAP), can be re-examined to either, transfer the personnel concerned to the level of government to which the functions are transferred; restructure the institutions

³⁷ Report on Emerging issues on transfer of functions to national and county governments – Kamothe Waiganjo

³⁸ Republic v Transition Authority & Another Ex Parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 Others [2013] eKLR

³⁹ Ibid.

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to make them consistent with the devolved system of government; or simply abolish the institutions. It is necessary to understand devolution, underlying drivers and intention especially because these structures are responsible for survive transformation across the country and at national level, including within the Ministry of Devolution and Planning. Equally, State Corporations at County levels need be unbundled and transferred to county governments where the Constitution assigns them to county governments or held jointly as may be provided by law.

3.6 The Roles of Sectoral Fora

Section 13(1) of the Intergovernmental Relations Act has provided for the formation of the IGRTC to create a platform for all the IGR bodies to cooperate, consult and negotiate the unbundling and transfer of functions and powers. These representations have not been specified and objectives are to be determined specifically by them.

Analysis and unbundling of all the functions to be carried out by these bodies must be fully analyzed and understood to bring about binding agreements and final resolution of disputes. A well thought out framework needs to be established for MODA and IGRTC to cooperate at forum level to enforce agreements, develop laws and policies to give teeth to such fora, as a powerful and deliberate conflict identification and mitigation tool. Failure to do this creates difficulties in getting clarity in the assignment of what functions may be exclusive and which ones are concurrent to the two levels of government. At the Ministry of Devolution and ASAL level, areas of concern have included human resource management especially, the health sector, consumer protection, education and research, which has been the subject of numerous litigation, agriculture plant and animal disease control functions across counties human rights and water management.

This area is tied with concurrency and exclusive jurisdiction which can be supported through intersectoral forum refocus as issue identification and negotiation for a which proceed the process of ADR mechanisms. Sections 24 to 29 of the IGRA 2012 have made provision for transfer and delegation of powers,

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functions and competencies from one level of government to the other. Section 24 in particular, recognizes that functions and powers may be transferred and delegated to not only other either level of government but also to “joint committees, authorities or entities”. These committees which could all play a critical role in the development of a country risk and conflict management framework have been left out of scope of this work. Their contribution and potential role in dispute resolution should not underestimated.

As part of developing an approach for ADR policy, the role of these bodies will be examined and these committees brought together to identify a process for intergovernmental agreements for the establishment of joint advisory management authorities out of these for a to enable both levels of government to look at areas which require further unbundling, the process of achieving this and how to manage disputes arising from this process. Such agreements and processes can then be respected as part of agreements arrived at under Sections 29-38 of the IGRA and be formally brought into the ADR process. With this framework in place and recognized through appropriate agreements and statutes, the ADR mechanisms can effectively come in for both levels of governments to cooperate, consult and negotiate about the possible options to make the process of unbundling of functions to work including resourcing and capacity building requirements at all levels of government, also a cause of intergovernmental disputes.

Part Four: Recommendations And Way Forward To The Establishment Of ADR

4.0 Public awareness and capacity building

Regain and maintain legal authority. The IGRA spells out the functions clearly. IGRTC to spearhead the promotion of ADR as constitutionally mandated. IGRTC to engage in aggressive civic education with the National and county governments, at all levels, to educate them on its role and function. Public awareness should be created in the counties to educate the county government officers (especially the newly elected elected/appointed county leaders/officers) and the public on the benefits of ADR. This will help

Alternative Dispute Resolution in Intergovernmental Relations: Andrew Waruhiu popularize and legitimize ADR. Given the causes of disputes mostly arising through the distribution and exercise of powers and functions, IGRTC as secretariat needs to work with MODA CoG, the Office of the Attorney General, and other intergovernmental bodies to develop legislation with provisions that establish a framework guiding how ADR can be rolled out and practiced throughout the country. The framework will provide for the consultation and negotiation processes, and agreements. Increase visibility and impartiality of IGRTC. A change in the law may be required to attain autonomy.

4.1 Engagement with Office of the Attorney-General

IGRTC to coordinate with the Office of the Attorney General to actively participate in the development of the national ADR Policy. The absence of a legal and institutional framework for ADR has resulted in over reliance on the courts and outside counsel. This will also address issues such as national accreditation and national curriculum development of ADR.

4.2 Establish a resource centre

Deep and candid reflections in understanding the unique context in which inter-governmental disputes arise is required. Experience from the past four years will serve as an extremely useful guide that can inform the development of an appropriate dispute resolution prescript to avoid problems of similar nature recurring in the country at any time. In particular, this experience will provide solutions necessary for the development of such a framework. The resource can undertake functions such as;

4.3 Data capture and management

IGRTC should establish a document management system. IGRTC to facilitate access to a registry of public information on disputes, agreements and treaties so that government (National/County) commitments can be monitored. IGRTC should establish an information database to take stock of current cases and disputes before court, negotiation, etc., and advise on dispute avoidance and early intervention measures. The main task should be assisting the IGRTC to assess and identify emerging issues in inter and intra governmental issues before they escalate. They should make periodic visits to the counties and gather

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information and make recommendations for the IGRTC to adopt for implementation. This will be an important tool on promoting and protecting Kenya's best interests in future disputes. IGRTC as the secretariat should take a lead in ensuring data that arises from disputes lodged at the various IGR bodies be captured, indexed and availed to relevant IGR bodies and to the public. Counties should consult with County assemblies Forum and County Attorneys to direct disputes to IGRTC and facilitate, coordinate and advise on ADR.

There is need to develop capacity building programs for ADR and to establish a database of accredited dispute Resolution Managers. This will be vital to system clarity. Specific capacity building programs need to be developed for them to coordinate their functions and develop institutional guidelines for problem shooting/ issue identification escalation and working with neutrals. Where such officers are lawyers, a mental shift needs to be obtained to now think as neutrals and not litigation experts;

There is also a need to develop a national capacity development, accreditation and learning framework for effective alternative disputes arbitration and orderly sector development.

In conclusion, the IGTRC should take an active role in marketing their image and to be perceived and accepted as an impartial body to all levels of government. To establish a collaborative platform where information gathering, and sharing be from a single source and a learning ground that future structures of participation will build on. It is thus of essence that county governments do take these lessons into consideration when planning and implementing citizen participation requirements.

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Online Dispute Resolution in Kenya: A Case Study of the European Union:
Muiruri E. Wanyoike & Josephine Wairimu

Online Dispute Resolution in Kenya: A Case Study of the European Union

By: **Muiruri E. Wanyoike*** & **Josephine Wairimu****

Abstract

Online dispute resolution is a product of alternative dispute resolution and the advent of the information age. The internet's ability to connect various people socially and economically has resulted in the inevitable conflicts and disputes arising between people and business that operate in the online sphere. A key case in point is the disputes that arise from e-commerce platforms such as Jumia, OLX, and Konga among other burgeoning online e-commerce retailers in Kenya. Given the international nature of such online retailers like Jumia, OLX, and Konga that mainly have physical presences in Kenya and Nigeria, most disputes are subjects to specific laws within particular jurisdictions.¹ For instance, intellectual property infringement disputes fall under the ambit of international law systems that have sound arbitration systems like the World Intellectual Property Organisation (WIPO).² These online retailers are the perfect case for the need for amicable settlement of disputes from online transactions. Therefore, this paper will discuss the need for the establishment of online dispute resolution mechanisms in Kenya while drawing comparisons of its establishment in Africa and using the European Union as a yardstick for the establishment of ODR locally.

1.0 Introduction

Online dispute resolution (ODR) is a method of dispute resolution that uses or incorporates information, communication, and technology (ICT) when solving disputes.³ However, in international legislation, there exists no official definition of ODR. Various authors refer to ODR as electronic ADR (eADR), online ADR (oADR), or internet Dispute Resolution (iDR). The synonyms cover disputes that are partially or fully settled over the internet, having been initiated in cyberspace but

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¹ Konga Online Shopping Limited v. Rocket Internet GmbH, Arnt Jeschke Case No. DSC2014-0001.

² Ibid.

³ Joseph W Goodman. "The pros and cons of online dispute resolution: an assessment of cyber-mediation websites" 2003 Duke Law & Technology Review 2, no. 1, 1-16.

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with an offline or outside source.⁴ ODR constitutes an implementation of the existing ADR mechanisms, which enables its use on the internet. This follows the major assumption of ADR- the presence of the third party during the process of reaching an agreement never changes; hence, the technological aspect is crucial in an ODR process.

2.0 Online Dispute Resolution and Alternative Dispute Resolution Mechanisms

ODR is a derivative of the popular Alternative Dispute Resolution (ADR) mechanisms, the technological aspect being its differentiating characteristic from ADR⁵. For instance, in negotiations, conflicting parties meet to discuss issues at hand and arrive at a mutually acceptable solution without the assistance of a third party.⁶ The parties fully control the negotiating process.⁷ Secondly, mediation is a form of ADR that involves a voluntary and consensual process of dispute resolution where the parties to a conflict, with the facilitation of (a) third party or parties, negotiate and find (a) solution(s) to their dispute(s).⁸ Lastly, arbitration is another mechanism of ADR where independent third parties or tribunals of the conflicting parties' choosing determine the solutions of the disputes subject to statutory law that prescribes the procedures and outcomes. Overall, the forms of ADR present disadvantages to parties in conflict, especially regarding online transactions.

The demerits of Alternative Dispute Resolution (ADR) as a result of advancement in technology necessitated the emergence of ODR. When other forms of ADR when

⁴ For a general discussion of the types of disputes that ODR encompasses, see Richard Birke, Louise Ellen Teitz, *American Law in a Time of Global Interdependence: National Reports to the XVITH International Congress of Comparative Law: Section II U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, at 206-07 (2002); Louse Ellen Teitz *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 FORDHAM L. REV.985, 990-95 (2001).

⁵ Alvin Gachie, 'Do we Need to Regulate Online Dispute Resolution in Kenya?' [2017] 1(1) *The Journal of Conflict Management and Sustainable Development*

⁶ Kariuki M, *Resolving Disputes through Mediation in Kenya*, Glenwood Publishers Ltd., 2012, 11.

⁷ Ibid 3

⁸ Ibid 3.

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combined with ICT, the result is ODR.⁹ Therefore, ODR is conceived as the transposition of conventional ADR mechanisms online without substantive differences from their conventional counterparts except being more convenient and effective thanks to technological advancements.¹⁰

3.0 The Relationship between Technology and Online Dispute Resolution

ODR began with the emergence of technology. It dates back to the early 1990s to a prediction made, that as the internet continued to evolve, there will be an increase in its usage.¹¹ Currently, several individuals and entities prefer to transact online given its ease of use and convenience. The World Wide Web witnesses a significant increase in the number of its users daily.¹² Bill Gates stated that “the internet is becoming the town square for the global village”.¹³ This is due to the rapid development in the ICT sector, a pressing need for a dispute resolution mechanism that was more direct and efficient developed. The significantly rapid development of ICT sector has led to an increase in the number of internet users and internet facilities across the world.¹⁴ It, therefore, became increasingly difficult to ignore the changes brought to the world of dispute resolution by the rapid developments in the ICT sector hence the emergence of ODR. This was echoed by Kofi Anan who opined that “it has been said that arguing against globalization is like arguing against gravity”.¹⁵

⁹ Mercedes M A and Gonzalez N M, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’, 44:1 *Inter-American Law Review* 2012, 44.

¹⁰ Zheng S T, *Electronic Consumer Contracts in the Conflict of Laws*, 152.

¹¹ Katsh E & Rifkin J, *Online Dispute Resolution. Resolving Conflicts in Cyberspace*, San Francisco: Jossey-Bass, 2001, 21.

¹² Melis Atalay. “Regulating the Unregulable: Finding the Proper Scope for Legislation to Combat Copyright Infringement on the Internet” 2013 *Hastings Comm. & Ent. LJ* 36, 167.

¹³ *Ibid.*

¹⁴ Rowena Cullen. “Addressing the digital divide” 2001 *Online information review* 25, no. 5, 311-320.

¹⁵ United Nations 59th Annual DPI/NGO Conference. Secretary-General Kofi Annan's opening address to the fifty-third annual DPI/NGO Conference 2006 <http://www.un.org/dpi/ngosection/annualconfs/53/sg-address.html> accessed on 26th February 2019.

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The purpose of technology in the society is to make life better, and this includes the resolution of disputes. The landscape of dispute resolution is equally in the growth process of technology.¹⁶ However, experts have argued that technology would challenge the efficacy of conventional and traditional dispute resolution mechanisms.¹⁷ Despite its disruptive nature, the technology still holds the promise of an improved and just dispute resolution landscape; a landscape that is based on fewer physical, conceptual, psychological, and professional boundaries.¹⁸ The intent of online dispute resolution is to address the challenges of consumers and suppliers.¹⁹ Consequently, technology is changing virtually every of human development and interactions. Since technology interferes with the way we do things as humans; hence, it not only changes how we deal with things and situations but also changes how we perceive things and situations. This is because communication plays an integral part of any successful dispute resolution mechanism.

4.0 Online Dispute Resolution in Africa

The number of internet users in Africa has dramatically increased in the continent with countries like Nigeria, South Africa, Kenya, Egypt and Angola being the leading centres in the continent²⁰. With an increase in the number of internet and users of technological gadgets, disputes are inevitable. It became increasingly necessary to design efficient mechanisms for resolving internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems.²¹ The savvy African countries have advanced

¹⁶ Fisher. R & W. Ury, *Getting to Yes*, Houghton Mifflin Harcourt, Boston, 1981, p. 17.

¹⁷ Ibid.

¹⁸ Orna R. E & Katsh E., *Reshaping Boundaries in an Online Dispute Resolution 2*.
Environment, International Journal of Online Dispute Resolution, Vol 1, 2014, p5.

¹⁹ Ojiako, Udechukwu, Maxwell Chipulu, Alasdair Marshall, and Terry Williams. "An examination of the 'rule of law' and 'justice' implications in Online Dispute Resolution in construction projects" 2018, *International Journal of Project Management* 36, no. 2, 301-316.

²⁰ Africa Internet Users, 2018 Population And Facebook Statistics' (Internetworldstats.com, 2019) <<https://www.internetworldstats.com/stats1.htm>> accessed 25 February 2019

²¹ See Lucille M. Ponte, *Boosting Consumer Confidence in E-business:*

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technologies and adequate e-commerce standards in place.²² For instance, Nigeria an African tech hub, with energetic entrepreneurs boasts of startups such as Jumia and Konga making the country a striving place for ODR. The presence of a market in Nigeria that arises from online activities by sellers and consumers provides a platform ODR. Further, Nigeria has taken a leap from other African countries in implementing ODR by the introduction of a UK ADR directive that is in line with ODR usage.²³ Nigeria, in conjunction with the Lagos Arbitration Court, have eased the use of the ODR platform to speed up the filing of documents and consequent resolution of matters

5.0 Case study: Online Dispute Resolution for Consumer Disputes in the European Union

5.1 Introduction

The European Union (the “EU”) is a social, political and economic association of countries located in Europe, which was established by the Maastricht Treaty²⁴ and

Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions, 12 ALB. L.J. SCI. & TECH. 441, 442-44 (2002) (“In cyberspace, e-consumers with purchasing problems have no clear means of redress for their concerns because cyberspace has no uniform laws and no unified court system. The global nature of the Web challenges national sovereignty and traditional court authority and amplifies concerns about choice of law and the enforceability of court judgments. The lack of well-established and credible online conflict resolution mechanisms dampens consumer confidence in the online marketplace and hurts e-tailers involved in cross-border transactions.”) Id. (citations omitted); Teitz, Providing Legal Services, supra note 1, at 990-95; and Robert C. Bordone, Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal, 3 HARV. NEGOTIATION L. REV. 175, 176 (1998).

²² Alison E. Holm, Benoit Decreton, Phillip C. Nell, and Patricia Klopff. “The Dynamic Response Process to Conflicting Institutional Demands in MNC Subsidiaries: An Inductive Study in the Sub-Saharan African E-Commerce Sector” 2017, *Global Strategy Journal* 7, no. 1, pp. 104-124.

²³ Ononogbu, Ijeoma. "Transformation of Dispute Resolution in Africa" 2015 *IJODR* 2, p. 77.

²⁴ Treaty of Maastricht on European Union, 7 February 2012 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0026&from=EN>

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later amended by the Treaty of Lisbon.²⁵ One of the aims of the formation of the EU was to create a single economic block, which could ease the burden of trade both within member states and externally. With the advent of technology and the increase of trade within the EU, there was a need to address issues of consumer protection and dispute resolution.

Article 114 and 169 of the Treaty on the Functioning of the European Union (the “**TFEU**”)²⁶, provides for consumer rights and mandates the European Union to establish measures that “promote the interests of consumers and ensure a high level of consumer protection”. In this regard, the European Parliament and the Council of the European Union enacted the Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the “**ODR Regulation**”), which came into force on 19 January 2016. The ODR Regulation amended Regulation (EC) No 2006/2004²⁷ and Directive 2009/22/EC.²⁸

The aim of the ODR Regulation is to provide a platform (the “**Platform**”) which provides for the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, which guarantees party autonomy in the resolution of their disputes and excludes the intervention of the court in the resolution of disputes. This is in tandem with the universal principles of Alternative Dispute Resolution (“**ADR**”). The Platform which has been in operation since 15 February 2016²⁹, contains the following features:

²⁵ Official Journal of the European Union, C 306, 17 December 2007 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN>

²⁶ Consolidated version of the Treaty on the Functioning of the European Union <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN>

²⁷ Regulation (EC) No. 2006/2004 called upon the consumer protection authorities to assist in the enforcement of consumer protection laws especially within the ambit of cross border transactions. Regulation (EC) No 2006/2004, 27 October 2004 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R2006&from=EN>

²⁸ Directive 2009/22/EC provided for mechanisms through which the regulatory authorities may obtain an injunction to protect the consumers’ rights.

²⁹ Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under

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- i. an electronic complaint form to be filled in by the complainant;
- ii. a notification system that alerts the respondent of the issue in dispute;
- iii. the referral of the dispute to a competent ADR body, all of which have been displayed on the platform;
- iv. a case management system to track the progress of the case and to conduct the dispute resolution process online;
- v. a system to file any of the case documents required by the ADR body;
- vi. a translation system which can translate the ADR procedure in any of the official EU languages;
- vii. a time management system to ensure that the ADR procedure is carried out expeditiously;
- viii. a feedback system for the parties to share their views on the Platform and the ADR body; and
- ix. a general information tab to provide information to the public on ADR, ADR bodies, guidance on initiating the ODR process on the Platform, contact point for each EU member state and data on the use of the Platform in the EU member states.³⁰

5.2 The process of initiating a consumer complaint under the ODR Regulation

i. Submission of a complaint on the Platform

Article 8 provides that the complainant shall be required to fill in and submit the electronic complainant form. The information contained in the form and any attached documentation shall be used to designate the dispute to the relevant ADR body.³¹

Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf

³⁰ Article 5, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>

³¹ Pursuant to Annex 1 of the Regulation (EU) No 524/2013 this information includes:

- i. contact details of both the complainant and the respondent;

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ii. *Processing and Transmission of the complaint*

Under Article 9, the Platform will only process a complete electronic form and will alert the complainant in the event that the details are not sufficient to proceed with the ODR process. The Platform will transmit the complaint to the respondent notifying them that a dispute has been lodged against them as well as the contact of the ODR representative in their state. The respondent and complainant will be required to select an ADR body (from the list of entities provided). Where this is not done, the complaint will not be processed.

Where the respondent is a trader, the Platform will require him within ten (10) calendar days, to provide whether he has committed to using a particular entity. If not, he will be required to select an ADR body³² from the list provided.

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- ii. language used by either party;
 - iii. the type of good or service to which the complaint relates;
 - iv. whether the good or service was offered by the trader and ordered by the consumer on a website or by other electronic means;
 - v. the price of the good or service purchased, the date on which the consumer purchased the good or service, whether the consumer has made direct contact with the trader;
 - vi. whether the dispute is being or has previously been considered by an ADR entity or by a court;
 - vii. the type and description of the complaint;
 - viii. if the complainant party is a consumer, the ADR entities the trader is obliged to or has committed to use in accordance with Article 13(1) of Directive 2013/11/EU, if known; and
 - ix. if the complainant party is a trader, which ADR entity or entities the trader commits to or is obliged to use.

³² Article 9(5) obligates the Platform to provide to the parties details of the ADR bodies which include the:

- i. name, contact details and website address of the ADR entity;
- i. fees for the ADR procedure, if applicable;
- ii. language or languages in which the ADR procedure can be conducted;
- iii. average length of the ADR procedure;
- iv. binding or non-binding nature of the outcome of the ADR procedure; and
- v. grounds on which the ADR entity may refuse to deal with a given dispute in accordance with Article 5(4) of Directive 2013/11/EU.

iii. *Resolution of the dispute*

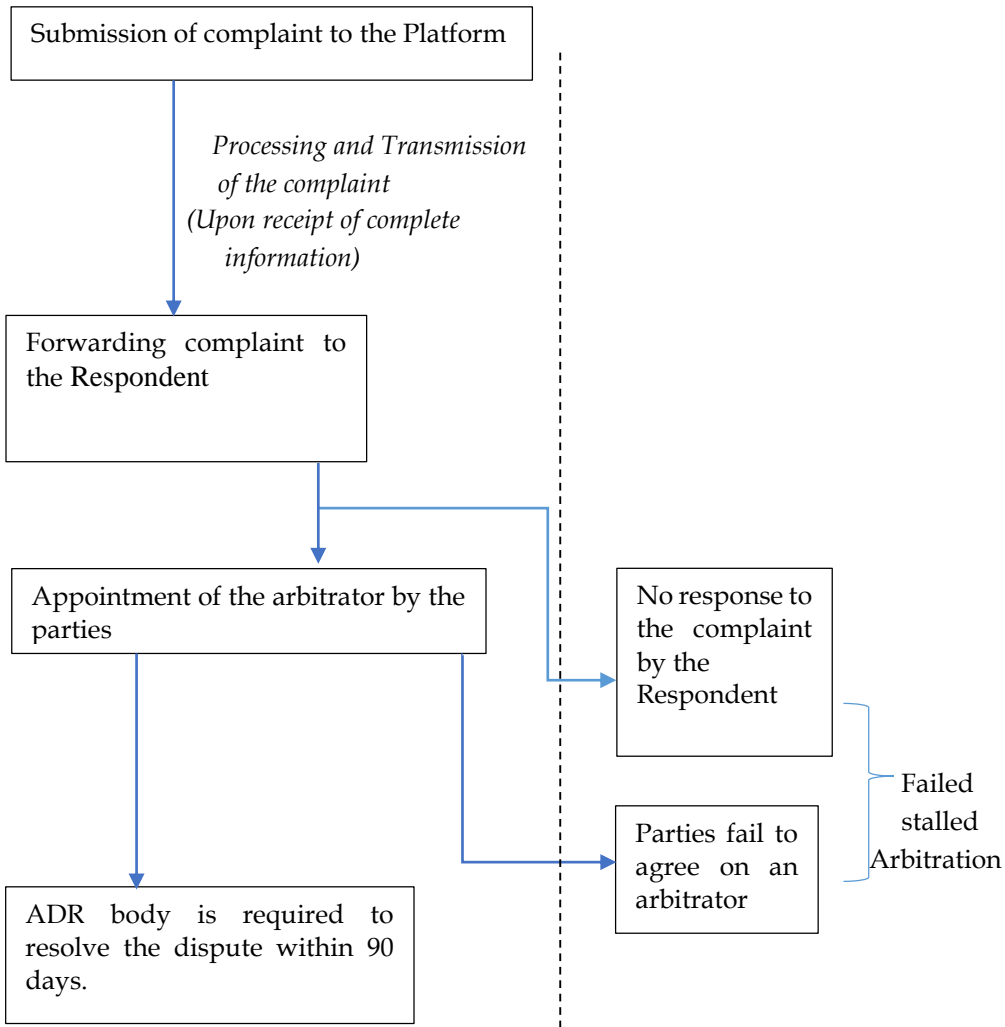
Once the ADR body has been selected, the dispute will be resolved by the entity. The ADR body is required to:

- i. conclude the ADR procedure within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute³³;
- ii. not require the physical presence of the parties or their representatives, unless its procedural rules provide for that possibility and the parties agree;
- iii. to immediately transmit details of the date of receipt of the complaint file, the subject-matter of the dispute, date of conclusion of the ADR procedure and the result of the ADR procedure to the ODR platform; and
- iv. not be required to conduct the ADR procedure through the ODR platform.³⁴

³³ Article 8(e) of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0011&from=EN>

³⁴ Article 10, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>

The ODR process has been outlined below:³⁵



³⁵ Adaptation of the diagram has been inspired by the Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes
https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf

6.0 The case for Online Dispute Resolution in Kenya

The Constitution of Kenya provides for the right to access justice to all its citizens.³⁶ However, this right has been impeded by various factors like the lack of appropriate instruments to achieve justice coupled by the inefficiency in pursuing other mechanisms such as litigation that incurs high costs.³⁷ Kenya initiated ADR as one of the ways of enhancing access to justice.³⁸ The Civil Procedure Act provides that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.³⁹ The Civil Procedure Act also stipulates that a suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for referral.⁴⁰ The Consumer Protection Act intends to promote and provide for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.⁴¹ As a form of ADR, ODR can, therefore, be embraced as a means to access justice in Kenya. This is in light of Kenya being one of the tech-savvy countries in the continent. However, the lack of a legal framework that is independent to govern and regulate ODR in Kenya stands to impede the process.

6.1 Way Forward for ODR in Kenya

The path forward for ODR in Kenya will be mainly affected by the current legal framework and the application of technology.

6.2 Current Legal Framework

The Constitution is arguably the best promoter of ODR under its articles on the promotion of access to justice and the utilization of ADR methods in resolving disputes.⁴² However, the Constitution has not explicitly provided for the

³⁶Article 48, Constitution of Kenya (2010).

³⁷Justice Kajimanga C., *Enhancing access to justice through ADR: The Zambian Experience*, Chartered Institute of Arbitrators Kenya, 2013, 36.

³⁸Article 159, Constitution of Kenya (2010).

³⁹Section 1A (1), Civil Procedure Act (Act No 12 of 2012)

⁴⁰Section 59 C, Civil Procedure Act (Act No 12 of 2012).

⁴¹Section 3(4)(g), Consumer Protection Act (No 46 of 2012)

⁴²Article 48, Constitution of Kenya (2010).

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implementation of ODR which makes it important to have a statutory basis for ODR in Kenya similar to the laws applying to Arbitration.⁴³ Furthermore the Civil Procedure Act provide for the overriding objective which envisions a just, expeditious, proportionate and affordable means of resolution of civil disputes which may be attained by the use of technology.⁴⁴

The Arbitration Act has explicitly provided for the party autonomy in the dispute resolution alongside the freedom by parties to decide on the procedure to use.⁴⁵ With reference to arbitration as a means of dispute resolution, this can be interpreted to allow for certain online procedures such as resolving the dispute through electronic correspondence including emails, teleconferencing, or even an online platform. However, this is inadequate for the implementation of an ODR regime in the country. For example, the issues relating to submission of documents, presentation of evidence, and witness hearings can be done via online channels but might fail to meet the minimum standards of confidentiality, network interface, and deliberate frustration of the arbitration process by simply failing to show up. The Consumer Act, as noted above allows for “business to consumer” dispute resolution methods available under the law⁴⁶. However, the fact that ODR is yet to be recognized forces most businesses to resort to the conservative models including mediation, arbitration and litigation despite the view among legal scholars that ODR is more suited for most of the arising disputes.⁴⁷ In conclusion, there is an urgent need for the development of a legal ODR regime similar to other jurisdictions that would pave a way forward for the implementation and adoption of ODR in Kenya.

6.3 Application of Technology

It is only in the rare case that the law manages to move faster than technology; the law more often than not is playing catch-up with the developments in the field of

⁴³ Arbitration Act No. 4 of 1995.

⁴⁴ Section 1A, 1B(1)(e), Civil Procedure Act (Act No 12 of 2012)

⁴⁵ Section 20, Arbitration Act (1995).

⁴⁶ Section 88, Consumer Protection Act (No. 46 of 2012).

⁴⁷ *Supra* note 3

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technology and ODR is no exception. For example, Tanzania has the “iResolve”⁴⁸ Online Dispute Resolution system platform with a similar goal despite the fact that the country lacks a comprehensive ODR statutory regime⁴⁹. Of course, the validity of these and other such platforms will lie in the legal gray area until challenged in the respective courts or a statutory regime emerges.

The role of technology in arbitration is the primary area where the law might interact and regulate ODR. Technology can either operate as a passive enabler of ODR by providing a platform for raising the arbitration issues and disputes then a human takes over the process and guides the disputing parties towards a resolution, or the technology can take over the active role of the arbitrator and make judgments from the case presented.

Presently, the technology to accomplish the former is currently matured enough to be implemented in Kenya through collaboration between the ICT professionals and legal professionals⁵⁰. This can be seen clearly in the above platforms that are already implementing ODR locally regardless of the legal implications⁵¹. On the other hand, the progress of technology is yet to progress to the extent where an independent system or software is considered trustworthy enough to make decisions and rulings as an arbitrator. This will most certainly be accomplished through the use of Artificial Intelligence (AI) and similar technology which is still at its infancy but already demonstrating significant abilities even within the legal field.⁵² The legal basis of technology as an arbitrator or judge will be one of the most hotly debated jurisprudential questions in the legal field in the future. However, that time is yet

⁴⁸ Iresolve.co.tz, 'IResolve Tanzania's Online Dispute Resolution System' (Iresolve.co.tz, 3 March 2018) <<https://iresolve.co.tz/webmak/>> accessed 29 November 2018.

⁴⁹ Wahab MS. 'Online Dispute Resolution for Africa. Online Dispute Resolution: Theory and Practice; A Treatise on Technology and Dispute Resolution'. 2012.

⁵⁰ The Internet and ADR Educating Lawyers about Online Dispute Resolution, available at >http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/internetadr.html< accessed on 29th November 2018.

⁵¹ See supra note 36

⁵² Alarie B, Niblett A, Yoon AH. How artificial intelligence will affect the practice of law. *University of Toronto Law Journal*. 2018;68 (supplement 1):106-24.

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to come and the scope of this paper limits us to highlighting that the use of technology as the arbitrator in ODR is yet to be applicable in Kenya and elsewhere.

6.4 The Pros of Online Dispute Resolution in Kenya based on the Principles of Arbitration

Among the forms that ODR manifests itself is the Assisted Negotiation (Online Mediation). Online mediation as a form of dispute resolution involves a scenario where the parties of a conventional mediation can perform the mediation entirely online with the help of ICT variations such as video conferencing and emails or a combination of both.⁵³ It involves the use of intelligent software agents that facilitate the negotiation process in an intelligent manner. The software helps the conflicting human parties resolve their conflict without involving a third party or tribunal which can be impartial.⁵⁴ This is in light with the general principles of arbitration, whose objective is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay.

Online arbitration has similar aspects to online mediation, the main difference is in the binding nature of the final award. In online mediation, the process is non-binding until the final agreement is signed unlike in online arbitration. The submissions of documents, evidence and witness hearings in online mediation are all performed through online means such as email, teleconferencing, video conferencing.⁵⁵ This is in line with the principle of arbitration which stipulates that a contract becomes final and binding when buyer and seller agree on a transaction verbally, by email, by teleconferencing or by video conferencing. Therefore, ODR helps resolve disputes without the unnecessary intervention of courts or assistance of impartial tribunals. This makes ODR a fast and less expensive mechanism of

⁵³ABA Taskforce on Electronic Commerce and Alternative Dispute Resolution Taskforce, what is Online Dispute Resolution? A Guide to Consumers, 2002, 3.

⁵⁴Peter Braun1 , Jakub Brzostowski1 , Gregory Kersten2 , Jin Baek Kim2 , Ryszard Kowalczyk1 , Stefan Strecker2 , and Rustam Vahidov, e-Negotiation Systems and Software Agents: Methods, Models, and Applications, accessible at <https://pdfs.semanticscholar.org/3325/47540971488c3df04a8fbaa781bff96e794.pdf>

⁵⁵ Ponte L and Cavenagh T, Cyber justice, 'Online Dispute Resolution for E-Commerce' Parson Prentice Hall, 2005, 84.

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resolving disputes. ODR also helps with party autonomy⁵⁶ as it provides a guiding principle in determining the procedure to be followed in an e-commerce arbitration. In Kenya, the judiciary has taken steps in incorporating electronic mechanisms that include online systems into the judicial system. The highlight of this can be seen through the efforts of the Judiciary Transformation Framework attempts to incorporate ICT into various parts judicial proceedings.⁵⁷ Furthermore, in Kenya, the judiciary is taking strides in the development of a teleconferencing platform into the justice system.⁵⁸ For example, the digitalization of land documents will consequently be supplemented by the ICT-supplemented judiciary. Additionally, Small Claims Court will be an essential part of the incorporation and promotion of ODR in Kenya since it is easier to settle small claims through ODR in a manner that is more efficient, just, timely and less costly.

6.5 Recommendations

As discussed earlier, the aim of ADR, in general, is to promote the expeditious settlement of disputes through non- conventional means, which minimize or eliminate the interaction with a traditional court system. However, in reality, the intervention of the court may not totally be removed, as parties to the dispute will need, the court's assistance to enforce certain ODR arbitral orders and the ODR arbitral judgment. This may be delayed due to administrative bureaucracies of the courts. In order to navigate such issues, bodies such as the Chartered Institute of Arbitrators (CIArb) and the Nairobi Centre for International Arbitration (NCIA) should stand in the gap and create a partnership between the courts and any ADR practitioners to advance the expeditious resolution of disputes.

ODR is a method of ADR that is wholly dependent on technology. However, this technology may not be accessible to some consumers located in remote parts of the country. Furthermore, there are a vast number of consumers who are not technologically savvy and do not know how to use technological devices. In the

⁵⁶ A principle endorsed not only in national laws but also by international arbitral institutions and organizations.

⁵⁷ The Kenya Judiciary, Judiciary Transformation Framework 2012-2016. 1.

⁵⁸ Ibid 20

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future, it would be important to break down ODR into easily accessible platforms such as text messaging services, which promote concepts such as negotiation and mediation of disputes.

ODR as a form of ADR is grounded on the principles of party autonomy. Therefore, the ODR process may stall in the event that the parties are at a deadlock. This is unlike the court system where a party may proceed to have the case determined *ex-parte*, where one party refuses to appear before the court. The ODR systems should be modeled in such a way that it offers parties a solution to their claim even where either party is non-responsive. Cybersettle⁵⁹ offers an online settlement of insurance claims by using a system, which incorporates a “double-blind offer and demand system” which conceals the offers and demands being made by either party.⁶⁰ Thereafter, the system reconciles the offers and demands made using an algorithm that proposes a settlement amount to the parties. The parties may accept this settlement amount or may proceed with negotiations.

7.0 Conclusion

From the foregoing, it can be seen that the need for an ODR system in Kenya is critical due to the increase in cross-border trade and the development of technology. With the implementation of an ODR system in the Kenyan market, this will open an avenue for the protection of consumer disputes in a cost-effective, timely and efficient manner.

⁵⁹ <http://www.cybersettle.com/>

⁶⁰ Esther van den Heuvel, *Online Dispute Resolution As A Solution To Cross-Border E-Disputes: An Introduction To ODR*
<http://www.oecd.org/internet/consumer/1878940.pdf>

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Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

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Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe
Constitution of Disputes Boards: What are the Salient Issues to Consider?

By: **Bwalya Lumbwe***

1.0 Background¹

1.1 What is Dispute Board?

Of the several methods of dispute resolution available to parties to a contract, arguably the most commonly adopted are litigation or arbitration. In litigation you have a judge while in arbitration you have an arbitrator chosen by the parties or appointed by an authorized entity or person. In each method a decision on the dispute is reached after the presentation of evidence on the events that occurred in the past. In adjudication, which is common in the construction sector, an adjudicator similarly reviews evidence of past events before arriving at a decision on the dispute. However, in projects that adopt adjudication, the decision is reached in a much shorter period than either litigation or arbitration.² Adjudication, arbitration, and litigation are quite often adversarial in nature and are activated only after a dispute has crystallized or arisen.

A Dispute Board ('DB') on the other hand, is typically appointed at the commencement of a project and before any events occur that may lead to disputes, termed a standing Dispute Board and will typically be of one or three members. The standing DB undertakes regular site visits; thus, it is actively involved throughout the life of the project up to the project's conclusion or final handover.³ On the other hand an ad-hoc Dispute Board is appointed only when an issue or disagreement turns into a dispute.

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¹ Paper first Presented at the Chartered Institute of Arbitrators (Kenya Branch) International Conference, 7th-9th November 2018, Leisure Lodge and Golf Resort, Ukunda, Kenya.

² Cyril Chern, *Chern on Dispute Boards* (3rd edn, Informa Law 2015) 3.

³ *Ibid.*

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A standing Dispute Board thus becomes part of the project and can 'influence' the contracting parties' performance. Compared to other methods of dispute resolution in the construction industry, the board acts in 'real time' dealing with disputes as and when they occur.⁴ A standing DB can hence, be said to be a 'witness' to both regular and contentious site events as they occur, because of their close association to the project through site visits and access to site information such as status reports, correspondence, minutes of meetings etc.

A standing DB can be called upon at very short notice to resolve a dispute or advise on a dispute.⁵ The parties can agree that a decision of the DB is binding and final. The common contractual position in international contract forms however, is that a decision of the dispute board is binding on both parties and is required to be promptly complied with, regardless of whether a party is dissatisfied with the decision. A dissatisfied party will however be at liberty to refer the matter to either arbitration⁶ or sometimes litigation. The former is much more typical.

A standing DB is designed to be responsive, convenient, and amicable and quite often promote both dispute avoidance and resolution, either separately or combined and is typically tasked with 'monitoring' the progress of a project, engaging in regular dialogue and 'identifying' and resolving issues before they become disputes between parties.⁷ A standing DB encourages parties to solve their own problems while creating an atmosphere where the parties communicate and leading therefore, to a far less adversarial approach to dispute resolution.⁸ This is why dispute boards are said to be a very successful form of dispute resolution as statistics below will indicate.

⁴ Ibid.

⁵ Dante Figueroa, *Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block*.

⁶ e.g. FIDIC 2017 Yellow and Red Books, cl 21.

⁷ Dante Figueroa, *Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block*

⁸ Chartered Institute of Arbitrators, Dispute Boards < <http://www.ciarb.org/dispute-appointment-service/dispute-boards> > accessed 23 Sept 2018.

The term Dispute Board is used as a generic in this paper. Dispute Boards are variously referred to as Dispute Adjudication Boards, as in the International Federation of Consulting Engineer ('FIDIC')⁹ 1999 forms of contract, Dispute Resolution Board, Dispute Review Board which typically only issues non-binding opinions.¹⁰ Under the FIDIC 2017 contract forms, the name Dispute Avoidance and Adjudication Board¹¹ has been adopted to emphasis the avoidance of disputes before they fester into major disagreements. A DB other than making decision on disputes, will also typically offer non-binding opinions on contentious issues or disagreement as to between the parties and under certain conditions.¹²

Dispute Boards are most frequently used in international construction and infrastructure projects.¹³

2.0 Effectiveness of Dispute Boards

An ongoing study by the Dispute Resolution Board Foundation ('DRBF')¹⁴ presented at a conference in May 2017 on the effectiveness of the DB process in construction shows the following statistics:¹⁵ From a reported 512 DB Decisions, only 32 or 6% were referred to arbitration. Of the 32 cases, only 7 or 22% of these were later overturned. This means that 25 or 78% of Decisions of the DBs that were referred to arbitration were upheld by the arbitral tribunals. The bulk of the DB Decisions 480 or 94% of the sample size were accepted by the Parties and thus avoided expensive follow-on dispute resolution procedure

⁹ Standing for, in French: Federation Internationale des Ingenieurs-conseils.

¹⁰ Cyril Chern, *Chern on Dispute Boards* (3rd edn, Informa Law 2015) ch2, Types of Dispute Boards.

¹¹ cl 21.3.

¹² FIDIC 2017 Yellow/ Red Books cl 21.3.

¹³ Lexisnexis, The use of dispute boards in international disputes <<https://blogs.lexisnexis.co.uk/dr/the-use-of-dispute-boards-in-international-disputes/>> accessed 25 Sept 2018.

¹⁴ See <<http://www.drb.org/>>

¹⁵ Geoff Smith, Leo Grutters, Update on the DRBF Survey, Dispute Resolution Board Foundation DRBF, 18th Annual International Conference, Tokyo, Japan, May 2018, Paper can be found at <<http://www.drb.org/publications-data/library/>>

Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe like arbitration and litigation. Smith and Grutters, the researchers, also report that from a sample 280 Dispute Board Opinions given only a handful went on to a formal referral requiring a DB Decision. They go on to conclude that DBs have the capacity to positively influence the overall costs of construction-based dispute resolution.

In an earlier study of 2016, it was reported that DBs are increasingly being viewed as an effective solution to dispute resolution, because between 72 per cent and 85 per cent of the cases, the parties accept the Decisions without resorting to arbitration.¹⁶ Whichever statistics are considered, it is quite clear that DBs are a successful form of dispute resolution in construction.

Smith and Grutters, offer the following reasons for the success of standing boards practicing active dispute avoidance:¹⁷

- '- A Standing Board has more opportunity to get to know the Parties as well as the Contract with all its specifics.*
- Opinions act as "wake-up" to the Parties and potentially prevent "gut-feel" or impulsive actions.*
- Active Dispute Avoidance aims to guide the Parties to settle their issues themselves.*
- Ad-Hoc Boards, by nature, do not have the opportunities to achieve this.'*

¹⁶ Dante Figueroa, *Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block*.

¹⁷ Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018 , Paper found on < <http://www.drb.org/publications-data/library/> >

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Resulting from the success, FIDIC conditions of contract forms of 2017, popularly known as Red, Yellow and Silver Books¹⁸ no longer have ad-hoc DBs, preferring the use of standing DBs.¹⁹

3.0 Legal and Dispute Board Costs

Worldwide the construction industry has reputation for disputes and conflicts. Cyril Chern states in his book²⁰, that in Australia, 50% of all legal costs related to construction are those connected to dispute resolution. Chern further states that, in about 10% of projects, 8-10% of the project costs are associated with legal costs.²¹ Contrast this with the cost of constituted DBs whose cost is said to be between 0.04-0.26% of the total project costs.²²

Chern further states that users of the method view the expenses incurred as a form of insurance against more costly procedures like arbitration and which like litigation come with uncapped costs.²³

However, overall costs resulting from other dispute resolution processes have to be seen in a wider contest as can be gathered from this quote from the World Bank ADR Guidelines 2011 publication:

¹⁸ Otherwise known as the Conditions of Contract for Construction, Conditions of Contract for Plant and Design Build and Conditions of Contract for EPC/Turnkey Projects.

¹⁹ Geoff Smith, Leo Grutters, Update on the DRBF Survey, Dispute Resolution Board Foundation DRBF, 18th Annual International Conference, Tokyo, Japan, May 2018, Paper can be found at < <http://www.drb.org/publications-data/library/> >

²⁰ Cyril Chern, *Chern on Dispute Boards* (3rd edn, Informa Law 2015) 5.

²¹ Ibid.

²² DRBF Practice and Procedures Manual < <http://www.drb.org/concept/manual/> >, Section 1, Chapter 4 as per email from DRBF Executive Director, Ann Russo to me, 14 Oct 2018. This figure captures projects that refer disputes to the Board or that had difficult problems, including an average of four dispute recommendations. Cyril Chern at p25 of his book refers to different figures of between 0.015-0.045% though he has not provided the source, whereas Musonda and Radwala state that these are DRFB figures but do not also provide an exact a reference.

²³(n19) 25.

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*'Many countries in which the IFC provides advisory services rank poorly in the areas of contract enforcement and an efficient judicial system. This has a negative effect on the business climate and increases the risks for businesses. A number of studies and assessments (Doing Business, Investment Climate Assessments, Enterprise Surveys, and other analytical studies) have shown that efficient access to justice is key to the investment climate agenda for emerging market economies. ADR has proven to be an effective approach to enhancing access to justice.'*²⁴

In the same publication is the following:

*'Enforcing contracts and resolving disputes is part of the daily business in the private sector. World Bank Group (WBG) studies and reports such as the annual Doing Business report, Investment Climate Assessments, and Enterprise Surveys reveal that efficient access to justice plays a key role for businesses. A well-functioning justice infrastructure is a part of the World Bank Group's investment climate agenda. Alternative dispute resolution (ADR) has proven a valuable pillar in enhancing access to justice, bringing rapid and less costly consent-based dispute resolution to businesses in many emerging economies.'*²⁵

Given the success of Dispute Boards once constituted and run properly, the importance of an efficient dispute resolution system other than litigation is quite clear from the above quotes. In another World Bank publication²⁶ it was found that it takes 611 days to enforce a contract through the High Court, Commercial Division in Lusaka, Zambia for a claim averaging \$3,900.00 and that the cost as a percentage of the claim is 38.7 % or \$1,509.00. Figures for most other countries

²⁴ Alternative Dispute Resolution Guidelines, World Bank Group, 2011
, < http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf >
v, accessed 26th Sept 2018

²⁵ Ibid 1.

²⁶ World Bank, Doing Business Zambia 2018, Reforming to Create Jobs Comparing Business Regulations for Domestic Firms in 190 Economies, 44.

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Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe are available²⁷ but the table below provides an overview of time taken and costs in various regions of the world.

Indicator	Zambia	Sub-Saharan Africa	OECD²⁸ high income	Overall Best Performer
Time(days) ²⁹	611	658.8	577.8	16Singapore
Cost ³⁰ (%of Claim value)	38.7	44.0	21.5	9.00Iceland

Contrast the time required in litigation with the standard FIDIC form period of within 84 days in which the DB is required to issue a Decision from receipt of the reference.³¹ Additionally there are huge savings in cost as already indicated above resulting from the use of DBs in the construction industry. It is therefore, no surprise that the DRBF reports a rapid rise in the use and constitution of DBs now being used in about \$270 billion worth of projects in construction and which has achieved numerous avoidances of disputes with significant savings in dispute resolution costs.³²

As a result of the above it is expected that more constitution and utilisation of DBs will result, at least in large scale or complex construction projects. However,

²⁷ See < <http://www.doingbusiness.org/en/reports>>

²⁸ OECD-The Organization for Economic Co-operation and Development (OECD) was established in 1961. Today, the OECD is a forum of 34 industrialized countries that develops and promotes economic and social policies.

²⁹ The time required to enforce a contract through the courts is based on the following criteria: time to file and serve the case, time for trial and time to obtain the judgement and time to enforce the judgement.

³⁰ The costs required to enforce the contract through the courts as a % of the claim takes into account the Attorney/ lawyer's fees, court fees and enforcement fees.

³¹ c120.4 in the FIDIC 1999 Red/Yellow Book, c121.4.3 in the FIDIC 2017 Red/Yellow. There is provision for varying the time but this is still likely to be much shorter than litigation.

³² <<http://www.drb.org/>> accessed 30 September 2018.

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it is not always the case that DBs are constituted as provided for as we shall see below.

4.0 Constitution of Dispute Boards

How are dispute boards constituted? In most instances in the construction industry, the dispute board is a creature of contract.³³ Meaning that the contract will set out the DB constitution or selection procedure.³⁴ However, there are many cases, where contracting parties sign up to constitute a standing dispute or ad-hoc DB but fail to do so. Examples from some countries and the experience of development institutions and firms follow below.

4.1 Tanzania

A Tanzanian paper³⁵ presented in October 2017, included a study on the constitution of DBs under the FIDIC-Conditions of Contract for Plant & Design Build ('Yellow Book') 1999.³⁶ Standing DBs were provided for in 10 contracts but were constituted and active in only 2 of the contracts. The constitution of a DB was in progress in one of the contracts. Thus, no Disputes Boards were constituted in 7 of the contracts.

It's not clear why the parties failed to constitute the DBs as that there is a provision in the contract to resolve failure to constitute a DB.³⁷ Under such circumstances, when a dispute arises, parties will try and constitute an ad-hoc DB which then needs to understand the projects history and all this costs money and time.³⁸

³³ See Chartered Institute of Arbitrators, < <http://www.ciarb.org/dispute-appointment-service/dispute-boards>> accessed 18 September 2018

³⁴ For example, the FIDIC Yellow Book 2017, cl 21.1

³⁵ Prof. Ninatubu M. Lema, *Managing Claims and Disputes in the Implementation of Major Building Projects in Tanzania Using FIDIC Yellow Book [1999 Edition]* FIDIC African Users Conference, Livingstone, Zambia, 11-12th October 2017.

³⁶ Note that the standard 1999 Yellow book has an ad hoc dispute board appointed by a date 28 days after a Party gives notice-Ref Clause 20.2. However, the Notes on the Preparation of Tender Documents appended to the book, provides for the substitution of an ad hoc DB with a standing board in line with the FIDIC Red Book provisions.

³⁷ FIDIC 1999 Yellow Book, cl 20.3

³⁸ Cyril Chern, *Chern on Dispute Boards* (3rd edn, Informa Law 2015) 105-106

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4.2 Zambia

In Zambia, all public sector procurement is subject to the Public Procurement Act 2008 and the Public Procurement Regulations, 2011³⁹(‘Regulations’) under the Zambia Public Procurement Authority (‘ZPPA’). The Standard Bidding Documents (‘SBDs’) for procurement of works under international bidding has adopted the FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition 2010 (‘FIDIC Pink Book 2010’).⁴⁰ This is a version the FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer (‘FIDIC Red book 1999’). Both forms require the constitution of a standing Dispute Board.⁴¹ For open national bidding of works, there is a provision for adjudication.⁴²

Under the Regulations, the use of standard bidding documents or solicitation documents which includes the Conditions of Contract is mandatory.⁴³ It follows then that the use of the FIDIC Pink Book as Conditions of Contract is also mandatory as they are a part of the solicitation documents. Some deviations are allowed with the approval by ZPPA but only in very limited and specific circumstances which do not include changes to the DB process.⁴⁴ The provision for the constitution standing DBs is thus is mandatory. Hence parties that do not constitute a board are therefore in breach of the ZPPA Regulations.

³⁹ See < <https://www.zppa.org.zm/procurement-legislations-and-handbooks>> accessed 28th Sept 2018

⁴⁰ see < <https://www.zppa.org.zm/procurement-legislations-and-handbooks>> [28 September 2018]. Participating Banks are currently: The World Bank, African Development Bank (AfDB), Asian Development Bank (AsDB), Black Sea Trade and Development Bank (BSDB), Caribbean Development Bank (CDB), Council of Europe Development Bank (CEB), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IADB). Participating Agencies are currently: AusAID, Australia, AFB, France, JICA, Japan, EXIM, Korea

⁴¹ cl 20.2

⁴² see < <https://www.zppa.org.zm/procurement-legislations-and-handbooks>>

⁴³ regs 9 and 137. The Public Procurement Regulations, 2011 are found at < <https://www.zppa.org.zm/procurement-legislations-and-handbooks>>

⁴⁴ reg 152, The Public Procurement Regulations, 2011

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In Zambia projects that are funded by donors will, mostly at the donor's insistence, have a DB constituted.⁴⁵ I have yet to hear of a locally funded publicly procured project that has a dispute board constituted. It is thought that this is not due to the absence of such projects, but due the fact that parties have simply not constituted the DBs.⁴⁶ The reason as why parties fail to constitute the dispute boards despite their success are discussed later.

4.3 Taisei Corporation of Japan

Taisei Corporation is a leading Japanese contractor operating in Japan as well as in several other countries. The firm reported that of the 5 projects with a DB provision, only 3 were constituted. In two cases where there was no constitution, the contract allowed for the appointments to be made by the Employer country's engineering association. Taisei believed that the impartiality of the appointees was not secured, though they had signed on to this method, hence they resisted the formation of the DB. It is thus important that parties ensure that an independent and impartial appointment entity is agreed to and named in the contract before execution.⁴⁷

4.4 Japan International Cooperation Agency ('JICA')

JICA reports that in 2016 it had a portfolio of \$13 billion as oversees development assistance ('ODA') a large part of which covered infrastructure development.⁴⁸ Application of JICA's Procurement Guidelines and Standard Bidding Documents ('SBDs') are mandatory for projects financed by JICA.

⁴⁵ e.g. The Kazungula Bridge Project involving three countries, Zambia, Botswana and Zimbabwe on the Zambezi River

⁴⁶ e.g. The Construction of the Long Acres Mall Along Alick Nkhata Road, Lusaka (Shopping Mall, Office Block and Associated Works)

⁴⁷ Satoru Tsutae, Our Experience of DB, Taisei Corporation, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library/> >

⁴⁸ Tomohide Ichiguchi, JICA's Experience on Dispute Boards, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library/> >

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Its Procurement Guidelines state that “In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall include mechanisms such as dispute boards or adjudicators, which are designed to permit a speedier dispute settlement.” Furthermore, in contracts with civil works amounting to US\$ 45 million or more, a standing DB consisting of one or three members should be established. Similar guidelines are adopted by other Multilateral Development Agencies such as the World Bank.⁴⁹

Despite the above provisions JICA has a negative experience with the constitution of DBs as can be seen from the following. JICA reports that 80 contracts had a provision for the constitution of DBs. Of this number, 53 were standing DBs and 27 were ad-hoc. Only 8 or 15% of the standing DBs were established and only 3 or 11% of the Ad-hoc.⁵⁰

JICA found that this failure to constitute a majority of DBs was because there was a lack of awareness and understanding of the DB process and its benefits by both the employer and contractor even though the constitution of the DB was condition of contract. Other reasons include the argument that parties did not feel that it was necessary to constitute the DBs as the countries laws already establish suitable conflict resolution mechanisms. Yet another reason was that parties have other suitable mechanisms of resolving the differences between them and that the parties maintain good working relations and as such the Engineer was based placed to resolve the differences.

Lastly, parties indicated that it is was difficult to convince the powers that be of the benefit of dispute boards.

⁴⁹ Refer to foot note 38 for the list of those that ‘adopt’ the FIDIC Pink Book as Conditions of Contract as part of SBDs. JICA is one such entity.

⁵⁰(n47) slide 15.

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4.5 Selected Dispute Board Constitution Practices

4.5.1 The Municipality of San Paulo, Brazil

Employees in the Municipality of São Paulo resisted the introduction of DBs in contracts unless legal backing was available in spite of their success in resolving disputes.⁵¹ In response to this resistance, São Paulo introduced a law in February 2018⁵² to regulate the use of DBs in its contracts, and to foster the adoption of this dispute mechanism in the contracts with the municipality and their controlled entities. The law provides the parties with the freedom to choose from dispute review board (to issue non-binding recommendations), a dispute adjudication board (to issue contractually binding decisions, subject to a court appeal) or a combined dispute board, which can issue recommendations or decisions.⁵³

Therefore, in São Paulo it is a requirement of the law that all contracts undertaken have a form of DB constituted. Furthermore, the law requires the appointment of a DB within 30 days of the execution of the contract. It follows that, if a contract does not have a mechanism of a DB constitution or set up in line with the law, it will be obligated to constitute one.⁵⁴ The law compels the constitution of a three-member DB, preferably with two engineers and one lawyer, jointly appointed by the city of São Paulo and the private parties.⁵⁵

⁵¹ Fernando Marcondes, *Dispute Boards in São Paulo – Background to Bill PL 577/2017*, December 2017.

⁵² Law N° 16.873, of February 22, 2018.

⁵³ Joaquim de Paiva Muniz, Baker McKenzie, 'City of São Paulo regulates Dispute Board in administrative agreements' April 25, 2018, < <https://globalarbitrationnews.com/city-of-sao-paulo-regulates-dispute-board-in-administrative-agreements/> > accessed 23 Sept 2018

⁵⁴ Joaquim de Paiva Muniz, Baker McKenzie, 'City of São Paulo regulates Dispute Board in administrative agreements' April 25, 2018, < <https://globalarbitrationnews.com/city-of-sao-paulo-regulates-dispute-board-in-administrative-agreements/> > accessed 23 Sept 2018.

⁵⁵ *Ibid*

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4.5.2 Indonesia

Indonesia has also recently passed a law for the resolution of disputes in construction services.⁵⁶ It is not clear from the framing of the law as translated into English, whether it is mandatory or optional to use the methods listed which include negotiations, mediation, conciliation, arbitration and DBs rather than go to court. The law clearly sets out to promote all forms of dispute resolution including the constitution of DBs. It is not however clear whether the Courts can 'force' parties or just encourage parties to go for one or some of the methods listed for dispute resolution rather resolve the disputes through the courts.

4.5.3 African Dispute Board Representation

In a DRBF study of 2017 already referred to above, Smith and Grutters state that from a sample size of 231 Dispute Boards constituted, 99 were in Africa, with 51 from Eastern Europe representing 43% and 22% respectively. The pair conclude that Africa and Asia are the predominant areas in which Dispute Boards are used.⁵⁷ Of the 231 Projects, the FIDIC Red book has been used the most at 62 times or 27 % followed bespoke contracts which take up 56 or 26%, then the FIDIC Pink book is next with 51 or 22 % and the Yellow book with 35 or 15%. Most employers using the FIDIC form of contract will use the FIDIC President's List⁵⁸ or National Lists⁵⁹ as a basis for the constitution of the DBs. This list is that of professionals trained and approved by FIDIC in the in contracts DB processes,⁶⁰ which process differs a great deal to other forms of dispute

⁵⁶ Sarwono Hardjomuljadi, Indonesian Way on Alternative Dispute Resolution of Construction Services in Indonesia, DRBF Annual Conference Tokyo Japan slide 11, May 2017. This is Law No 2 of 2017, Art. 88. Paper can be found at <<http://www.drb.org/publications-data/library/>>

⁵⁷ Geoff Smith, Leo Grutters, Update on the DRBF Survey, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at <<http://www.drb.org/publications-data/library/>>

⁵⁸ <<http://fidic.org/president-list>> accessed on 28 Sept 2018

⁵⁹ <<http://fidic.org/node/812>> accessed on 28 Sept 2018

⁶⁰ The listed individuals are experienced in all forms of FIDIC Contracts, in dispute resolution, and are skilled in construction contract adjudication and Dispute Boards. President's List adjudicators have proven ability by having passed the rigorous testing administered by the FIDIC Body of Adjudicators (FBA), after which the adjudicator is

Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe resolution such as arbitration, adjudication, mediation etc.⁶¹ FIDIC does not insist on the use of their list where the FIDIC form is used, however its quite clear why Employers want to stick to the list.

An examination of the President's List which totals 68, reveals that there is only one Sub-Sahara African on the list. The other listed Africans are four South Africans citizens, though two have dual citizenship and one Egyptian also with dual nationality. It is therefore safe to conclude that Africans are well under-represented in DB appointments under the FIDIC form of contract. Tanzania is the only African country with a FIDIC National list of approved adjudicators with 5 members.⁶² These members are not on the President list as the National List serves a different purpose.⁶³ The suspicion is that African Representation on other lists is likely to be quite low as well. However, there are other entities that have similar lists as below.

4.6 Other Lists and Practices

As stated above DBs differ greatly to most forms of dispute resolution such as arbitration, adjudication, mediation. Other than the use of the FIDIC President's and National Lists, Employers and contractors can use other lists of practitioners by others such as the Dispute Board Federation,⁶⁴ The Dispute Resolution Board Foundation,⁶⁵ International Chamber of Commerce and American Arbitration Association being the major ones.⁶⁶ Not all the organizations carry out dispute board training but the most active other than FIDIC is DRBF. Some entities like the ICC serve only as appointing bodies to constitute the DBs from their lists. The Chartered Institute of Arbitrators is a recent entry but does also not carry out any training in DB resolution processes but only offers an appointment, constitution or selection service.

invited for inclusion on the President's List. See < <http://fidic.org/about-fidic/adjudicators> >

⁶¹ Cyril Chern, *Chern on Disputes Boards*, Informa, p9

⁶² See < <http://fidic.org/node/812> >

⁶³ Ibid

⁶⁴ see < <https://dbfederation.org/> >

⁶⁵ see < <http://www.drb.org/> >

⁶⁶ Cyril Chern, *Chern on Disputes Boards* (3rd edn Informa 2015) 106-126

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There is now a tendency for employers to advertise for services of DB membership and usually there is a requirement that the applicant be listed on the FIDIC Presidents or National list or be a member of The Dispute Resolution Federation.⁶⁷ Applicants are requested sometimes to state their fee scale. These practices appear to be a reaction to what Employers perceive as excessive fees charged by DB members. This approach may lead to a drop in the quality of DBs constituted as appointments are likely to be made based on lowest fee and not on quality.

Direct solicitation from lists of other professional organizations is another way of constituting Dispute Boards and practiced in Botswana.

4.6.1 Training

From statistics above FIDIC is the dominant form of contract using DBs and in my view is by far the most important entity carrying out training in this field. As indicated above African representation on DBs under FIDIC forms appears to be quite low. African thus needs to do something about this and quickly. Countries like Zambia where the FIDIC Pink Book is adopted should also strive to have a FIDIC National list. DRBF and regularly undertakes training courses aimed at the promotion of DBs and its processes but the courses are not as intensive as FIDIC.

5.0 Legal Backing for Dispute Board Constitution and Use

As we have seen, in the case of San Paulo, it may be necessary in certain jurisdictions due to resistance of Employers who decide on what contract form to use to support the use of the DBs process by law. As we have also seen, even where parties have contractually signed up to the constitution of DBs, there may still be resistance by parties. In these instances, it may be necessary to support the process by law as well. An example of legal backing for a dispute resolution process other than arbitration in construction can be found in England and

⁶⁷ The Ethiopian Road Authority is one such entity.

Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe Wales, which has statutory adjudication, and which has been very successful in reducing decision referrals to arbitration and litigation.⁶⁸

In countries like Zambia the law is adequate, but enforcement of the constitution of DBs appears to be the problem. This may be due to the fact that there is no direct penalty for the failure to constitute a DB, though through the Regulations, one can find a convoluted way of sanctioning parties. This problem is easily solved for example, by simply introducing a regulation that will not allow a works contract to commence unless a DB is constituted.

Funding providers like JICA in my view have enough clout to force the constitution of DBs and legislation may not be needed in their circumstances. Simply not authorizing funding may work till a DB is constituted should work. In support of enabling legislation the World Bank states:

*'Adjudication-based models such as arbitration and adjudication require enabling legislation to allow for an alternative judicatory forum (other than the courts) and to give effect to the decisions, such as arbitral awards.'*⁶⁹

Dispute Boards are a form of adjudication and the introduction of legislation to give effect to the Decisions of the DB's is necessary in many jurisdictions. With regard to the constitution of the Dispute Boards, legislation will also assist in the enforcement.

6.0 Conclusion

In conclusion it's worth noting the old idiom that states that 'An ounce of prevention is worth a pound of cure.'⁷⁰ Prevention is a major function of a DB

⁶⁸ see Andrew Burr, *International Contractual and Statutory Adjudication* (1st edn, Informa Law 2017).

⁶⁹ World Bank, *Alternative Dispute Resolution Guidelines*, Investment Climate Advisory Services of the World Bank Group, June 2011 p17.

⁷⁰ Benjamin Franklin.

Constitution of Disputes Boards: What are the Salient Issues to Consider?: Bwalya Lumbwe process. Even where there are disputes, the cost is fairly small compared to arbitration or litigation. It said that for a small cost there are enormous benefits.⁷¹ The majority of Parties accept the Decisions and Opinions rendered by DBs without recourse to the next stage of dispute resolution, be it arbitration or litigation showing the effectiveness of the system.

Dispute Boards are an efficient access to justice system which is key to achieving a good investment climate particularly for emerging market economies. DBs have proven valuable in enhancing access to justice, bringing rapid and less costly dispute resolution to businesses in many emerging economies and many other parts of the world. Legislation with clear penalties for failure to constitute DBs and enforcement of Decisions of the DBs will help in their advancement. The starting point in enhancing the DB system and achieve further gains, is however to promote their use and ensure that they are constituted as standing boards and manned by properly trained professionals.

⁷¹ Peter Scott Cadwell, *Dispute Boards: Cost/ Benefit Analysis < Dispute Boards: Cost/ Benefit Analysis>* accessed 01 September 2018.

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The Scope of Blockchain Technology and Access to Justice: Applicability of Blockchain Technology in the Med-Arb Process

By: **Dennis M. Nkarichia*** & **Muiruri E. Wanyoike****

Abstract

Several international conventions and municipal laws acknowledge access to justice as a fundamental human right. Given that access to justice is a legal concept, it develops within the socio-economic and political space of any jurisdiction, hence spilling over to the availability of legal services. Access to justice is not only limited to courts and tribunals but constitutes mediation and arbitration. Mediation and arbitration, unlike judicial procedure, is simpler and rapidly gaining favour among disputing parties. Currently, technology like blockchain has provided new space for access and rendering of legal services and justice, especially regarding mediation and arbitration. Inasmuch as the blockchain technology eases the access to justice, it presents legal issues like ensuring that there are standardised and acceptable levels of access to justice in various spaces. Thus, this article will focus on defining access to justice regarding four spaces, time for quick decisions, fairness in dispute resolution that calls for technical expertise, responsiveness to dynamic industry requirements for resolving disputes in the context of technological changes, and reduce legalese hobbles specialized industries.

Keywords: Access to Justice, Mediation, Arbitration, Blockchain.

1.0 Introduction

Access to justice has been defined as the ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances¹ and

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¹ A grievance is defined as a gross injury or loss that constitutes a violation of a country's criminal or civil law or international human rights norms and standards.

The Scope of Blockchain Technology and Access to Justice: Applicability of Blockchain Technology in the Med-Arb Process: Dennis M. Nkarichia & Muiruri E. Wanyoike should be done in compliance with human rights standards.² Access to justice is more than improving an individual's access to courts or guaranteeing legal representation.³ It needs to be defined in terms of ensuring that legal and judicial outcomes are just and equitable. Understanding effective access to justice requires a focus on the legal and judicial outcomes the ability of people to address their justice problems in a fair, cost-efficient, timely and effective manner.⁴ Therefore, an effective understanding of people's legal needs and experiences in accessing justice then seems to be a prerequisite for designing appropriate solutions to justice problems in the current technological world.

2.0 Technology and its Impact on Access to Justice

Technology has revolutionized the delivery of services throughout the public and private sectors of the world. Legal aid organizations and courts across the world have made great strides in the development and use of technology to access justice.⁵ Web-based delivery models that include websites, interactive resources, remote assistance, document assembly, e-filing, web services, and social media and online learning have revolutionized the delivery of legal services in many countries and improving access to justice for low-income individuals in the said countries.⁶

However, this progress is not universal across the world.⁷ Despite the availability of online information as a result of technology, it can be difficult for the targeted low-income population in developing countries to find and understand this information hence access justice. Technology usability needs to be improved and complicated legal information needs to be translated into

² United Nations Development Programme, *Programming for Justice: Access for All: Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005).

³ UNDP, "Access to Justice," 2004.

⁴ OSJI-WB Technical Brief (2016).

⁵ Cabral, James E., Abhijeet Chavan, Thomas M. Clarke, and John Greacen. "Using technology to enhance access to justice." *Harv. JL & Tech.* 26 (2012): 241.

⁶ *Ibid.*

⁷ *Ibid* 5.

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simple language. Therefore, while replication of successful delivery models and continued innovation such as blockchain technology should be encouraged, attention and resources must also be allocated to improving accessibility and usability of the technologies.⁸

For comparative purposes, the digitization efforts in Kenya are yet to bear fruits as the Judiciary continues to grapple with the traditional challenges of access to justice is yet to bring its full force to bear on digitization and electronic handling of issues. However, some tentative and exploratory steps can be discerned from the bigger picture as courts seek to offer digital copies of Cause Lists and court matters listed for the next day. The Kenya Law Reports, a public funded entity that seeks to retain judicial records has in recent years provided electronic copies of sizeable number of Superior Court decisions to facilitate jurisprudential development.

Legislations are also fully digitized since 2010, but that remains the extent to digitization and conversion to the internet era for the judiciary. Expecting full-throttle embrace of blockchain technology within such an environment may be too optimistic, but private sector acceptance of the underpinning technology has been healthy.

3.0 What is Blockchain Technology?

Blockchain technology has been praised as an innovation that has revolutionized how society trades and interacts. The technology has allowed mutually mistrusting entities to perform and integrity protected data storage.⁹ A block is a data structure which allows storing a list of transactions. Transactions are created and exchanged by peers of the blockchain network and modify the state of the blockchain.¹⁰ As such, transactions can exchange

⁸ Hanna, Nagy K. *How Can Digital Technologies Improve Public Services and Governance?* Business Expert Press, 2017.

⁹ Satoshi Nakamoto. Bitcoin: A peer-to-peer electronic cash system. 2009.

¹⁰ Christidis, Konstantinos, and Michael Devetsikiotis. "Blockchains and smart contracts for the internet of things." (2016): 2292-2303.

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monetary amounts, but are not restricted to financial transactions only and allow the execution of arbitrary code within so-called smart contracts.¹¹

4.0 Characteristics of Blockchain Technology

One of the most relevant characteristics or properties of blockchain technology is that it allows public verifiability.¹² Anyone can verify the correctness of the state of the system. This makes the technology transparent. However, the amount of information that is transparent to an observer can differ and not every participant needs to have access to every piece of information since privacy is also important for blockchain technology.¹³ There exists an inherent tension between privacy and transparency since a fully transparent system allows anyone to see any piece of information while a fully private system provides no transparency.¹⁴ Lastly, blockchain technology ensures the integrity of information is protected from unauthorized modifications and that the retrieved data is correct.¹⁵ The integrity of information has been closely linked to public verifiability because public verifiability consequently mean that anyone can verify the integrity of the data or information. As a result of these properties, blockchain as a technology has gained much attention beyond the purpose of financial transactions to distributed cloud storage, smart property, Internet of Things, supply chain management, healthcare, ownership, and royalty distribution, and decentralized autonomous organizations.¹⁶

5.0 Illustration of Blockchain Technology in Use

A good example of a country using blockchain technology is Georgia. By using blockchain technologies, the national agency of public registry in Georgia can provide its citizens with a digital certificate of their assets, supported with a

¹¹ Ibid 8.

¹² Wüst, Karl, and Arthur Gervais. "Do you need a Blockchain?" *IACR Cryptology ePrint Archive* 2017 (2017): 375.

¹³ Ibid 11.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

The Scope of Blockchain Technology and Access to Justice: Applicability of Blockchain Technology in the Med-Arb Process: Dennis M. Nkarichia & Muiruri E. Wanyoike cryptographic proof published to the Bitcoin Blockchain.¹⁷ The main reason why the Georgian government opted for blockchain technology was in order to provide citizens and governments with a system that ensured an auditable process, data safety, and transparency. The importance of the project in Georgia is that it showed that governments that transfer their property registries to a blockchain based system develop a more transparent and well-recorded system which benefits the people and the country's economy.¹⁸ The successful implementation of the cutting-edge blockchain system into the Georgian land registry led to the support of the Georgian Ministry of Justice, who asked Bitfury¹⁹ to establish the entire blockchain ecosystem for the Republic of Georgia.²⁰

6.0 Theoretical use of blockchain technology in the Kenya Legal Fora

At a basic level, blockchain technology could be deployed in a variety of cross-cutting areas in the delivery of justice in Kenya to either provide a level of security for electronic court filing records or to serve as a repository for court records. In the first instance, blockchain technology would be deployed to facilitate an electronic filing system to be utilized by the Judiciary and other dispute resolution entities while ensuring accessibility to all citizens with an internet connection. Under such a premise, either through the Kenya Law Reports, the Judicial Training Institute, or through the Registrar of the Judiciary, a central depository could be created for all court users.

Within the depository, legal services providers (*inter alia*, law firms, NGO's operating in legal spaces, law schools, and legal consultants) would be issued with a

¹⁷ Pisa, Michael, and Matt Juden. "Blockchain and economic development: hype vs. reality." *Center for Global Development Policy Paper* 107 (2017).

¹⁸ Galen, Doug. "SOCIAL IMPACT." PhD diss., Stanford Graduate School of Business.

¹⁹ Bitfury is the leading full service Blockchain technology company and one of the largest private infrastructure providers in the blockchain ecosystem. Bitfury develops and delivers both the software and the hardware solutions necessary for businesses, governments, organizations and individuals to securely move an asset across the blockchain.

²⁰ Ibid 12.

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unique identifier and digital tokens that allow them to access court records for specific matters they are handling and modify them by uploading new documents into the repository. The counterpart's legal service provider for each specific case would be deemed to have been served the document once they are uploaded and would receive an electronic notification of the same on their handset as a text message or via their email. Once they have accessed the documents to acknowledge service of the same, a digital record of the transaction is created and kept in a digital bundle, *the block within a larger chain of transactions related to each case*. Supplementary documentations could be uploaded to the system without undermining the verifiability and integrity of the system by deploying a native software predicated upon blockchain technology.

The digital repository idea could be further enhanced through the adoption of smart contracts and e-contracts in land transaction that seeks to eliminate fraudulent dealing in land. The lands registry would be digitized and subsequently backed by blockchain technology to ensure any alterations and changes to the system could be easily discernible to facilitate the adjudication of disputes over the actual owner of disputed property. Given that land ownership dispute comprise over thirty percent of the disputes within the Kenyan judicial system (resulting in the creation of a *sui generis* Environment and Land Court as a court of con-current jurisdiction with the High Court) the use of blockchain technology for land transactions would significantly eliminate the long delays in determining the actual and true owner of various property rights over land. These, however, remain mere suggestions and theoretical conceptualizations of a concerted effort to realize access to justice through the adoption of technology in critical areas. Collaborative efforts amongst the private legal practitioners, public institutions operating within the delivery of justice spaces, and international actors are required to provide for a socio-legal evolution that is receptive and supportive of digitization.

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7.0 Applicability of Blockchain Technology in Access to Justice

The Georgian case provides a good example of how blockchain technology can be applied in different sectors of a country's ecosystem such as the judicial system. The properties and characteristics of blockchain technology can greatly benefit the judicial system, most importantly access to justice. Blockchain technology has a huge promise on peoples' justice needs.²¹ Other countries like Estonia, Ghana, Sweden, Ukraine, and Honduras have followed Georgia in using blockchain technology to register land titles and ownership rights. The use of blockchain technology in these countries is a great boost and there is hope that it will make land transactions more affordable, transparent and secure.²² Apart from registering titles and transacting ownership rights, there are other ways in which blockchain can be used to access justice hence solve disputes.

First, in the field of family justice there already exists an example of the use of blockchain technology. E-marriage and marriage certificates are now being encoded in public and private blockchains.²³ There are further suggestions to innovate the technology in other fields of the family justice system like inheritance and prenuptial agreements.²⁴ This will provide individuals, especially women with benefits of smart contracts that they can use to secure and enforce their rights. Secondly, the labour and corporate worlds stand to hugely benefit from the use of blockchain technology. A lot of people in the world need protection against exploitive practices, contract breaches, unfair dismissal, unpaid wages, and dangerous working conditions. Blockchain technology could be a remedy to such disputes.²⁵ All contracts, including employment contracts and their clauses, can be registered in a blockchain system. It will enable complex schemes of intermediaries to be held accountable

²¹ Atzori, Marcella. "Blockchain technology and decentralized governance: Is the state still necessary?" (2015).

²² Pilkington, Marc. "11 Blockchain technology: principles and applications." *Research handbook on digital transformations* (2016): 225.

²³ Wheeler, Sally. "Visions of Contract." *Journal of Law and Society* 44 (2017): S74-S92.

²⁴ *Ibid* 22.

²⁵ Scholz, Trebor. "Platform corporativism." *Challenging the corporate sharing economy*. New York, NY: Rosa Luxemburg Foundation (2016).

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through transparency and data containing information about employment can be exchanged between different labour inspectorates and watchdogs.

Clearly, there is sufficient evidence to support the great potential of blockchain technology in accessing justice and delivering just and fair decisions to millions of people across the world who need justice. There is growing evidence that justice systems and the rule of law contribute to sustainable development and inclusive growth of a country.²⁶ Indeed, the accessibility and efficiency of justice services directly affect the way employment how land disputes are resolved, government accountability is promoted, and how businesses make decisions to invest and enter contractual relationships.²⁷ Findings from legal needs surveys reveal that the most frequent legal problems faced by people are civil ones.²⁸ Although the legal problems vary between countries, most common issues include “consumer problems, employment issues, land and property disputes, family problems, conflicts with neighbours and debt”.²⁹

8.0 What is Med-Arb?

Med-Arb is a combination of mediation and arbitration. However, it is often overlooked as an alternative mechanism in dispute resolution.³⁰ In Med-Arb, parties attempt to reach a voluntary agreement with a third-party, neutral first through mediation, and if that is not successful, through arbitration.³¹ San Francisco lawyer and arbitrator, Sam Kagel is often credited with developing

²⁶ Mahoney, Paul G. "The common law and economic growth: Hayek might be right." *The Journal of Legal Studies* 30, no. 2 (2001): 503-525.

²⁷ Ibid 25.

²⁸ Pleasence P. et al. (2013), *Paths to Justice: A past, present and future road map*, Nuffield Foundation and Centre for Empirical Legal Studies, p. 62, available at www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.

²⁹ OSJI-WB (2016), *Public access to effective and just dispute resolution – Technical Brief*, available at <http://deliver2030.org/wp-content/uploads/2016/03/Technical-Brief-Public-access-to-effective-and-just-disputeresolution.pdf>.

³⁰ Weisman, Martin C. "Med-Arb: The Best of Both Worlds." *Disp. Resol. Mag.* 19 (2012): 40.

³¹ Ibid 24.

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Med-Arb to settle a nurses' strike in the 1970s.³² Today, it is still most commonly found in the labour and international corporate arenas, but it is also increasingly being used in commercial settings.³³ Med-Arb gives parties the best that mediation and arbitration have to offer, providing incentives to resolve issues promptly, efficiently and in a less costly manner.³⁴ Facing the prospect of an adverse, non-appealable determination in arbitration, parties have an incentive to resolve their disputes at mediation: the few studies examining Med-Arb have generally found that parties were substantially more motivated to settle in mediation because they wanted to avoid the loss of control that would come in the arbitration phase.³⁵

8.1 Importance of Med-Arb when Accessing to Justice

The few studies of the process clearly support the notion that Med-Arb does seem to reduce costs and increase the efficiency of the dispute resolution process.³⁶ Further, studies have also shown that Med-Arb is most likely successful in cases where there are complex interrelated issues in the dispute and the arbitration hearing is expected to be lengthy.³⁷ A majority of the Med-Arb cases do not go up to the final stage which arbitration. These cases are usually complex commercial disputes that involve a variety of issues.³⁸ The few cases that reach the final stage find the number of issues to be arbitrated significantly reduced as a result of the agreements obtained during the mediation stage.

³² Henry, Karen L. "Med-arb: An alternative to interest arbitration in the resolution of contract negotiation disputes." *Ohio St. J. on Disp. Resol.* 3 (1987): 385.

³³ *Ibid* 24.

³⁴ Dean Pruitt, Process and Outcome in Community Mediation, 11 *Negot. J.* 365 (1995).

³⁵ *Ibid* 11.

³⁶ See David L. Gregory, The Internationalization of Employment Dispute Mediation, 17 *N.Y. Int'l L. Rev.* 2, 28 (2001); Thomas J. Brewer & Lawrence R. Mills, Combining Mediation & Arbitration, 54 *Disp Resol J.* 32, 34 (1999); Gerald F. Phillips, It's More Than Just Med-Arb: The Case for Transitional Arbitration, 23 *Alternatives to High Cost Litig.* 141 (2005).

³⁷ Blankenship, John T. "Developing your ADR attitude: Med-Arb, a template for adaptive ADR." *Tenn. BJ* 42 (2006): 28.

³⁸ *Ibid* 31.

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8.2 Applicability of Blockchain Technology in Med-Arb

Med-Arb's flexibility and the variations that can be incorporated in a Med-Arb process makes it an efficient tool for advocates, arbitrators, mediators and their clients in complex commercial cases that involve the use of blockchain technology. This is because there are various ways in which law and technology influence each other. The law and technology interact through a complex system of dependencies and interdependencies to regulate the behaviour of individuals and seek solutions. The advent of modern information and communication technology has in a big way revolutionized the relationship between the law and technology, with technology such as blockchain increasingly used as a compliment or a supplement to the law.³⁹

8.3 Advantages of using Blockchain Technology in Med-Arb

Blockchain technology, a decentralized, secure and incorruptible database or public ledger that constitutes the foundational tool for peer-to-peer value creation and trust-less transactions have emerged and revolutionized access to justice and the law in general.⁴⁰ As a trust-less technology, the blockchain eliminates the need for trust between parties, enabling the coordination of individuals who do not know and therefore do not necessarily trust each other.⁴¹ These unique characteristics of blockchain can be useful in Med-Arb cases where the two disputing parties neither trust each other nor trust the mediator or, an arbitrator. Smart contracts introduced by blockchain technology that can be directly executed in a decentralized manner by every node of the network also make blockchain technology disputes unique and complex.⁴² The rules are automatically enforced by the blockchain technology system, even if they do not reflect any underlying legal or contractual provision.⁴³

³⁹ De Filippi, Primavera, and Samer Hassan. "Blockchain technology as a regulatory technology: From code is law to law is code." *arXiv preprint arXiv:1801.02507* (2018).

⁴⁰ Wright, Aaron, and Primavera De Filippi. "Decentralized blockchain technology and the rise of lex cryptographia." (2015).

⁴¹ Ibid 34.

⁴² Bahga, Arshdeep, and Vijay K. Madiseti. "Blockchain platform for industrial internet of things." *Journal of Software Engineering and Applications* 9, no. 10 (2016): 533.

⁴³ Ibid 36.

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8.4 Disadvantages of using Blockchain Technology in Med-Arb

The advances of smart contracts in blockchain technology have led to the lines between what constitutes a legal or technical rule becoming more blurred since smart contracts can be used as both a support and as a replacement to legal contracts.⁴⁴ This can be seen as an advantage to dispute resolution mechanisms like Med-Arb. A majority of smart contracts used in blockchain technology are not directly associated with an actual legal contract, and depending on how they have been entered into, they may or may not give rise to an actual contractual relationship in the traditional meaning of the word.⁴⁵ However, from a purely technological standpoint, smart contracts in blockchain can be used to emulate, or at least simulate the function of legal contracts through technology.

9.0 Conclusion

Access to justice and technology enjoy a complicated, and to a large extent interconnected, relationship. On one hand, countries are struggling to exercise their sovereignty over the Internet, by regulating code to regulate individual users. On the other hand, the code is increasingly employed in a wide variety of sectors⁴⁶ of a country to regulate behaviour. This can be done either jointly with, or in addition to, existing laws. As much as there are exciting potentials to explore with blockchain technology, there exist legal challenges that might arise from the use of the technology.⁴⁷ Law is intentionally ambiguous so that it can

⁴⁴ Buterin, Vitalik. "A next-generation smart contract and decentralized application platform." *white paper* (2014).

⁴⁵ Peters, Gareth W., and Efstathios Panayi. "Understanding modern banking ledgers through blockchain technologies: Future of transaction processing and smart contracts on the internet of money." In *Banking Beyond Banks and Money*, pp. 239-278. Springer, Cham, 2016.

⁴⁶ Neyland (2006) provides a detailed list of socio-technical systems used to regulate individuals, these include: "Systems for the regulation of identification (such as biometrics), movement (such as traffic management) and nonmovement (such as airport security), disposal (such as waste management), saving (such as banking regulations), spending (such as point of sale machines) and retrieval (such as illegal download tracking) form just some of the many developments in this area."

⁴⁷ Crosby, Michael, Pradan Pattanayak, Sanjeev Verma, and Vignesh Kalyanaraman. "Blockchain technology: Beyond bitcoin." *Applied Innovation* 2 (2016): 6-10.

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be more easily applied on a case by case basis. It is the overlapping of multiple legal provisions which creates a solid regulatory framework, with multiple limitations and exceptions in order to accommodate the complexity and unpredictability of human society,⁴⁸ while technology, being code, is extremely strict and intrusive in its enforcement mechanisms.⁴⁹ Hence, if not properly designed, regulation by technology especially in access to justice might actually oppose the interest of the individual it is meant to protect. Therefore, while replication of successful and continued innovation such as blockchain technology should be encouraged, attention and resources must also be allocated to regulate the law on blockchain technology, improve accessibility and usability of the technology.

⁴⁸ Barton, John H., Judith L. Goldstein, Timothy E. Josling, and Richard H. Steinberg. *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*. Princeton University Press, 2008.

⁴⁹ Clarke, Roger. "Human identification in information systems: Management challenges and public policy issues." *Information Technology & People* 7, no. 4 (1994): 6-37.

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Case Review: Kenya Airports Authority v World Duty Free Co. Ltd T/A Kenya Duty Free Complex: Wilfred Mutubwa

**Case Review: Kenya Airports Authority v World Duty Free Co. Ltd T/A
Kenya Duty Free Complex**

By: Wilfred Mutubwa*

1.0 Background/Introduction

At the centre of the ruling delivered by the High Court of Kenya at Nairobi (Tuiyott J) were three sets of agreements entered into by the Government of Kenya or its agency, the Kenya Airports Authority (KAA), on the one hand, and several private commercial entities on the other hand. The first agreement was entered into in 1989, between the Government of Kenya and an entity by the name House of Perfume. The KAA came into existence in May 1991. Two other sets of agreements were concluded in the year 1995 and 2003. The KAA then entered into three lease agreements with the World Duty Free for lease of KAA run aerodromes in Mombasa, Moi International and Nairobi Jomo Kenyatta International Airports. The leases related to premises in the said airports.

The High Court's decision turns on two important matters. Firstly, is a decision of the International Centre for the Settlement of Investment Disputes (ICSID) arbitral tribunal (Hon. Rodger QC, HE Judge Gilbert Guillaume and V.V Veeder QC) delivered in the year 2006. It is noteworthy to state that this decision was premised on arbitration proceedings instituted pursuant to the 1989 Agreements between the Government of Kenya and the House of Perfume. The arbitral tribunal concluded:

“The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of Ordre public international under the applicable laws”

The second important fact is that the matter before Tuiyot J related to arbitral proceedings and an award published by the Hon. Mr Justice Edward Torgbor C.Arb. The proceedings before Hon. Torgbor were commenced by an appointment made in the year 2008 by the then Chief Justice of the Republic of

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Kenya Hon. Justice Evan Gicheru. The dispute revolved around the year 2003 agreements between the KAA and World Duty Free.

At the time of appointment of the Justice Torgbor Arbitral tribunal, two cases between the parties had been settled by way of a consent recorded in the High Court of Kenya on the 10th day of July, 2002. The matters concerning the 1989, 1995 and 1999 agreements had therefore been settled by the decision of the ICSID tribunal and the consent orders of the High Court of Kenya.

2.0 Decision of the Court

The Court's dictum turns on one causal point: that the decision offended international public policy against corruption. As a consequence, the Court concluded that arbitral award, based on illegally procured contracts was bad in law and hence invalid *ab initio*.

The court's reasoning as regards the enduring principle of illegality and public policy against corruptly procured contracts cannot be faulted. To that extent, the Court is spot on. However, this article addresses several aspects of the decision which merit legal reflection.

Firstly, the arbitral proceedings before the Hon. Mr Justice Edward Torgbor regarded the 2003 contracts. This is the contract on which arbitral proceedings and claims were brought before the Torgbor arbitral tribunal. The High Court, in its conclusions, faults Justice Torgbor for failing to apply the conclusions of the ICSID tribunal handed down in the 2006 ICSID Arbitration. In essence, the ICSID tribunal had held that the contract between the Republic of Kenya and the World Duty Free was discoloured with bribery and was therefore in contravention of International Public Policy against corruption and could therefore not be enforced. The Claim was therefore dismissed.

I find two points interesting in this regard. One, arbitral decisions do not form precedent for future arbitral matters, even if based on the same set of facts. This is an elementary attribute of arbitral proceedings. This fact was lost to the court,

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which, contrary to arbitral law and practice, expected the Torgbor tribunal to apply a decision of a tribunal of equal competence to facts before it as precedent and reach similar conclusions of fact and law.

Two, the Torgbor tribunal had, correctly in my view, noted that the matters the subject of the decision of the ICSID tribunal were neither pleaded before him nor were they defined in the issues before him. Indeed, parties are bound by their pleadings. Courts in Kenya have held, times without number, that parties cannot expand, even through craft, the scope of their case through submissions. Courts will strictly adjudicate disputes between parties based on their pleadings; and that a party can only succeed to the extent of their specific prayers. The rationale for this is to ensure that either party is fairly forewarned of the case against them so as to effectively call evidence and prosecute/defend their positions. To countenance any other approach would undercut or prejudice the fairness of the judicial process.

In arbitral proceedings, pleading play a further and critical role. Pleadings circumscribe the jurisdiction of the tribunal. To put it in other words, an arbitral tribunal cannot be seen to entertain matters outside the proceedings of the parties, unless express or implied authority is given to it. To do so would amount to acting *ultra vires* its jurisdiction and open the arbitral tribunal's decision to imminent challenge. The sum total of the foregoing analysis is that for the court to expect the arbitral tribunal to engage in an exercise of considering extraneous matters and argument not forming the respectively pleaded cases of the parties, was not only novel to the practice of arbitration but a direct affront to its principles as underwritten in decades of policy and practice.

The Court observes that the Torgbor tribunal should have considered the arguments with respect to bribery, which the Court proceeds to observe, were not pleaded, and evidence thereon nor led, and only formed part of submissions at the end of the proceedings. In arbitration practice, an arbitrator does not bear the responsibility of investigating matters neither pleaded nor established

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before him. The agreement to refer disputes to an arbitral tribunal, also known in arbitration parlance as the “arbitration/agreement clause”, is sacrosanct and is at the epicentre of the arbitrator’s jurisdiction. It is his main reference point. It is what gives validity to his eventual award. The Hon. Mr Justice Edward Torgbor was appointed under the 2003 agreements and not the 1989 contracts, by the Chief Justice of the Republic of Kenya (the default appointing authority under the arbitration agreement). There is no allegation of any misconduct on the part of the arbitrator. The arbitrator could, therefore, do no more than interpret the 2003 contracts and the claims brought thereunder. No other contract was before him. To consider and determine any other questions could clearly fall beyond his jurisdiction.

Lastly, one would want to consider the Court’s decision in light of the consent recorded in the High Court in the year 2002 between KAA and WDF. The Judge helpfully narrates the facts that led to the 2003 contracts including two suits, No. 192 of 1999 and 464 of 2000, compromised by a consent dated 19th July 2002 and recorded before the High Court in Nairobi. It is worthy of note that the High Court, Tuiyott J, in the current case is a Judge of the High Court, a Court of equal or concurrent jurisdiction with the Court which recorded the 2002 consent. It is yet another trite preposition of the common law that Courts of equal jurisdiction cannot sit on appeal of its contemporary’s decisions, consent or otherwise. In essence, Tuiyott J cannot annul the 2002 consent. By purporting to find the agreements signed pursuant to a consent endorsed before a court of equal jurisdiction, twelve years earlier, as being null and void *ab initio*, Tuiyott J has effectively upset the Judgment and orders of a judge of equal jurisdiction. What remains of the consent recorded in 2002? By finding that the 2006 ICSID decision affected all contracts between the “parties” entered into between 1989 and 2002, Tuiyott J may very well be suggesting that the 2006 ICSID decision was both retroactive/ retrospective and prospective in operation.

Tuiyott J’s decision is now pending appeal before the Court of Appeal of Kenya. It will be interesting to see what the Court of Appeal will ultimately say on the matters fore-discussed.

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