

Alternative Dispute Resolution



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ALTERNATIVE DISPUTE RESOLUTION

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Editor's Note

Welcome to the Alternative Dispute Resolution Journal Vol. 8 No. 1 2020, a publication of the Chartered Institute of Arbitrators - Kenya Branch (CI Arb-K).

Alternative Dispute Resolution is a peer-reviewed/ refereed publication that provides a platform where writers share their views and contribute to a robust discourse involving ADR practitioners, academics and general readers.

The journal is published twice a year in hard copy and also online at www.ciarb.org.

We are thus able to have a global reach. Indeed, the Alternative Dispute Resolution (ADR) Journal is now a high impact publication that is used widely by scholars interested in ADR and Justice.

Our writers have contributed to the works of international organizations that seek to develop effective conflict management mechanisms for use in International Trade.

The volume carries articles covering the whole spectrum of ADR including negotiation, mediation, conciliation and arbitration.

The articles featured in the volume cover a range of themes including: Settlement of Intellectual Property Disputes using Arbitration; Corruption and the impact it has on Arbitration; The future Arbitration has in Artificial Intelligence. The journal also contains two reviews of the case of *Nyutu Agrovet Limited - v- Airtel Networks Limited and another (SC Petition No. 12 of 2016)* and its ramifications.

The emerging area of Sports Arbitration Law has been discussed from a Kenyan and International Context.

As indicated before, ADR in Africa is not “Alternative”. It is the first point of call for managing conflicts.

Negotiation, Mediation, Conciliation and Traditional Justice Systems have existed in Africa for hundreds of years. These informal mechanisms continue to thrive and are now recognised by the formal legal framework as vital tools in the quest for access to justice.

The formulation of an ADR policy in Kenya is underway. While most ADR mechanisms remain informal, their recognition within a formal framework has gone a long way to legitimize and promote their use.

The Editorial Team believes in continuous improvement. We receive feedback from readers worldwide.

We have recently expanded our editorial team. Wilfred Mutubwa is now our Associate Editor. He brings on board his vast experience in academia and the practice of ADR. Our team of reviewers has also greatly expanded and diversified.

CIArb (Kenya) takes this opportunity to thank the Publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to continue producing a high impact journal.

Dr. Kariuki Muigua, Ph.D; FCIArb (Chartered Arbitrator)
Editor
Nairobi, February 2020.

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Promoting Sports Arbitration in Africa

By: *Dr. Kariuki Muigua**

Abstract

Sports are considered an essential part of the social and cultural aspects of most societies across the world. With the emergence of professional sports and subsequent commercialisation of the industry, the traditional understanding of sports as merely being occasions for recreational purposes is no longer tenable. Sports have now become important in not only the social and cultural but also the economic discourse around the globe with sports personalities being among the most highly paid individuals. Further, a lot of resources are invested by both governments and private entities to sponsor sporting activities. Consequently, the growth and success of sports have also led to the emergence of sports disputes. These disputes mainly revolve around issues such as termination of the contract, non-payment and suspension.

The paper explores the suitability of Alternative Dispute Resolution (ADR) mechanisms in the management of such disputes. The author argues that despite the advantages of these mechanisms, there are several shortcomings in both the legal and institutional frameworks governing the settlement of sports disputes through arbitration. The paper finally proposes reforms to enhance sports management.

1. Introduction

The role of sports in any given society can hardly be overemphasized. It has been argued that participating in sports can improve the quality of life of individuals and communities through promoting social inclusion, improving health, countering anti-social behavior and raising individual self-esteem and

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confidence.¹ Sports are essential to both developing and non-developing nations, through economic incentives, improving health, happiness, and inculcating values.² Sports are more than just a game.³

Sports are important to the culture of Africa societies and most people in the continent are passionate about football in particular. ⁴The euphoria witnessed across the continent during the 2010 FIFA World Cup is a perfect illustration of this fact. Further, sporting events such as the Olympic Games and English Premier League attract huge audiences across the continent. In Kenya, athletics holds a sacred place in the sports fraternity and athletes have brought much pride to the country through their impressive performances in athletic competitions such as World Marathons, World Athletic Championships the Olympics and other competitions.

Sports traditionally emphasized participation over winning. ⁵ However, this view of sports is no longer tenable since politics and economic incentives continue to encroach the sports arena. ⁶ The rise of professional sports has seen the focus shift from participation with emphasis now placed on winning to serve the economic incentives at stake. To cater for the training, travel, accommodation needs in sports, the concept of sponsorship has grown with

¹ Coalter Fred, *'The Social Benefits of Sport: An Overview to Inform the Community Planning Process'* Sport Scotland Research Report no. 98, available at http://www.sportni.net/sportni/wp-content/uploads/2013/03/the_social_benefits_of_sport_an_overview_to_inform_the_community_planning_process.pdf (Accessed on 27/11/2019)

² Develop Africa, *'The Benefits of Sports in Africa'* available at <https://www.developafrica.org/blog/benefits-sports-africa> (Accessed on 27/11/2019)

³ Ibid

⁴ Federal Ministry for Economic Cooperation and Development, *'More Space for Sport-1,000 Chances for Africa'* available at https://www.bmz.de/en/publications/type_of_publication/information_flyer/flyer/booklet_sport.pdf (Accessed on 27/11/2019)

⁵ McLaren Richard, *'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes'* Valparaiso University Law Review, Volume 35 no. 2, p 379-405

⁶ Ibid

individuals and corporations injecting money for these purposes.⁷ Athletes in both individual and team sports now need to enter into contracts with their respective managers, teams or sponsors to govern their affairs. The best athletes or teams in respective sports fields end up being sought by companies to market their products in lucrative endorsement contracts.⁸

With all these factors, it is not surprising that sports disputes have emerged. Such disputes take various forms including employment disputes due to termination of employment contracts of athletes or coaches, anti-doping rule violations and match fixing.⁹ While disputes are inherent in every human interaction, the nature of sports disputes and the underlying needs are peculiar. Sports disputes are unique in nature since there is a need for efficient and expeditious management of such disputes to ensure that the value of sports is maintained and the athletes and teams involved continue to pursue their sporting activities. It has been argued that for the management of sports disputes to be effective, it should be concluded before a particular competition takes place. For example, a finding by an arbitral tribunal that a particular athlete may compete at the Olympic Games would be of limited value if the arbitral award was issued after the competition in question has already finished.¹⁰

It is out of this unique feature of sports disputes that the field of sports arbitration has emerged at both the global and national levels. This paper seeks to critically examine the efficacy of arbitration in the management of sports disputes. The paper further attempts to analyse the role of Sports Tribunals in

⁷ Kumar R., 'Commercialization of Sports and Competition Law' available at https://www.researchgate.net/profile/Dr_Raj_Yadav2/publication/311912413_Commercialization_of_Sports_and_Competition_Law_ISBN_No-978-9381771532/links/58621b3408ae329d61ffc5fc/Commercialization-of-Sports-and-Competition-Law-ISBN-No-978-9381771532.pdf (Accessed on 27/11/2019)

⁸ Ibid

⁹ Rigozzi Antonio et al, 'International Sports Arbitration' <http://lk-k.com/wp-content/uploads/rigozzi-besson-mcauliffe-international-sports-arbitration-GAR-2016.pdf> (Accessed on 27/11/2019)

¹⁰ Ibid

the management of sports disputes and the extent to which this role has been facilitated. Finally, the paper proposes reforms for the efficient management of sports disputes in Africa.

2. Framework for Management of Sports Disputes

2.1 International Legal and Institutional Framework

2.1.1 The Olympic Charter

The Charter is a codification of the fundamental principles of Olympism and contains rules and by laws adopted by the International Olympic Committee (IOC) to regulate the operation and actions of the Olympic movement.¹¹ Chapter six of the Charter sets out a disciplinary mechanism framework in case of violation of the charter, the World Anti-Doping Code, the Olympic Code on the Prevention of Manipulation of Competition or any other regulation.¹² The charter gives jurisdiction to the Court of Arbitration for Sport to handle exclusively any dispute arising in connection with the Olympic Games.¹³

2.1.2 Fédération Internationale de Football Association (FIFA) Statute

The statute establishes FIFA as an association governing the sport of football. It recognises the importance of integrity in sports and seeks to promote fair play and ethics in order to prevent practices such as corruption, doping or match manipulation, that may jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.¹⁴ FIFA recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) to settle disputes involving players, clubs, confederations and member associations.¹⁵ An appeal against final decisions by FIFA's legal bodies, member association or confederations shall be lodged with CAS within 21 days from the

¹¹ Olympic Charter, 'International Olympic Committee' available at <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/E-N-Olympic-Charter.pdf> (Accessed on 27/11/2019)

¹² Ibid, chapter six

¹³ Ibid, Article 61 (2)

¹⁴ FIFA Statute, August 2018 Edition, Article 2 (g)

¹⁵ Ibid, Article 57 (1)

date of such a decision. However, such appeals are subject to exhaustion of all internal dispute management mechanisms.¹⁶ The statute obligates member associations, confederations and leagues to recognise CAS as an independent judicial authority and comply with its decisions. It further prohibits recourse to ordinary courts unless specifically provided for by regulations.¹⁷

2.1.4 World Anti-Doping Code, 2015

It is the fundamental universal document upon which the World Anti-Doping Program in sport is based. The code is a globally recognized commitment against doping in sports and has been adopted by numerous sports federations, national Olympic committees and anti-doping organizations.¹⁸ It is aimed at protecting the athletes' fundamental right to participate in doping free sport and enhancing equality and fairness in sports worldwide.¹⁹ The code defines doping and sets out anti-doping rule violations and a list of prohibited substances. Further, it entails a disciplinary mechanism and disciplinary measures that may be imposed in case of violation of the code.

Decisions made under the code may be appealed to the Court of Arbitration for Sport. Such appeals lie exclusively to CAS where the decision involves international events or international level athletes.²⁰ The code also allows appeals to independent and impartial bodies in accordance with rules established by the National Anti-Doping Organization where the decisions do not involve international events or international level athletes.²¹

¹⁶ Ibid, Article 58 (1 and 2)

¹⁷ Ibid, Article 59

¹⁸ James Nafziger and Stephen Ross, *'Handbook on International Sports Law'*
<https://books.google.co.ke/books?id=fnLlOA0JtgC&pg=PA61&lpg=PA61&dq=international+sports+code&source> (Accessed on 27/11/2019)

¹⁹ World Anti-Doping Code, available at https://www.wada-ama.org/sites/default/files/resources/files/wada_antidoping_code_2018_english_final.pdf (Accessed on 27/11/2019)

²⁰ Ibid, Article 13.2.1

²¹ Ibid, Article 13.2.2

2.1.5 Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport (CAS) is an independent institution whose role is to facilitate the management of sports related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.²² The institution was established in 1984 and comprises of nearly 300 arbitrators from 87 countries who are selected for their specialist knowledge of arbitration and sports law. According to the CAS around 300 cases are registered with it every year.²³

CAS has three divisions; *ordinary arbitration division* that settles disputes submitted to the ordinary procedure; *anti-doping division* that settles a dispute related to anti-doping and *appeals arbitration division* which reviews decisions by sports organizations such as FIFA and IAAF (emphasis added).²⁴

The operation of CAS is governed by the Code of Sports-Related Arbitration. The code sets out the procedural rules on the *seat, language, representation, time limits, costs and awards*. An award rendered by CAS is *final and binding on the parties* and is *enforceable internationally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* to the extent that it binds a state where enforcement is sought (emphasis ours).²⁵ Awards rendered by CAS do not constitute precedent but important in providing guidance in future disputes.

2.1.6 International Council of Arbitration for Sport (ICAS)

The purpose of ICAS is to facilitate settlement of sport related disputes through mediation or arbitration and to safeguard the rights of parties to a dispute and the independence of CAS.²⁶ ICAS is responsible for the administration and

²² General Information on the Court of Arbitration for Sport, available at <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (Accessed on 27/11/2019)

²³ Ibid

²⁴ Code of Sports-Related Arbitration, Part 3 (S 20)

²⁵ McLaren Richard, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' Op cit

²⁶ Statutes of ICAS and CAS, 'Joint Dispositions' S 2

financing of CAS.²⁷ The body plays supervisory functions over CAS and has the powers to appoint arbitrators and mediators to CAS and remove such arbitrators or mediators through its Challenge Commission.²⁸ This also extends to the CAS Secretary General who is appointed and may be removed from power by ICAS upon proposal of the president. It plays an important role in promoting sports arbitration by overseeing the administration and financing of CAS.

2.2 Legal and Institutional Framework for Management of Sports disputes in Africa

Unlike the CAS, there is no central institution for the management of sports disputes in Africa. Such disputes are managed by institutional mechanisms established by the various continental sports federations in Africa. However, the statutes establishing these federations *recognize the jurisdiction of the CAS as the global institution for the management of sports disputes* (emphasis ours).

The Confederation of African Football statute authorises appeals to the CAS to manage any dispute between the Confederation of African Football (CAF), national associations, clubs, players and officials.²⁹ These appeals relate to any decision or disciplinary sanctions given in the last instance by any legal body of CAF or FIFA, a national association, league, or club.³⁰ Such appeals must be lodged with CAS within ten (10) days following the notification of the decision.³¹

Further, some African countries such as Kenya have made strides in the establishment of national sports tribunals. However, other countries such as Nigeria and South Africa are yet to establish such institutions. Sports disputes

²⁷ Ibid

²⁸ Ibid, s 6

²⁹ Confederation of African Football (CAF) Statute, Article 55 (1)

³⁰ Ibid, Article 55 (3)

³¹ Ibid

in these countries are managed in the first instance by the internal mechanisms established by the various sports federations.³²

2.3 Legal and Institutional Framework for Management of Sports Disputes in Kenya

2.3.1 Sports Disputes Tribunal

The Sports Act³³ which is the principal legal instrument on sports in Kenya establishes the Sports Disputes Tribunal.³⁴ The jurisdiction of the Tribunal is set out under section 58 of the Act. The Tribunal is mandated to determine appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue, such appeals include those against the disciplinary decision and not being selected for a Kenyan team or squad. The jurisdiction of the Tribunal also extends to other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from decisions of the Registrar under this Act.³⁵

While granting jurisdiction to the Tribunal, the Sports Act has taken cognizant of provisions of the Constitution of Kenya that require Tribunals including the Sports Disputes Tribunal to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.³⁶ To this extent, the Act provides that the Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.³⁷ While this provision is not construed in mandatory terms, it nevertheless *demonstrates an intention to promote alternative dispute resolution in sports disputes* (emphasis added).

³² Omuojine, K, 'Dispute Resolution in Nigeria Football: The Need for a National Dispute Resolution Chamber' *African Sports Law and Business Bulletin* 2/2014

³³ No. 25 of 2013, Government Printer, Nairobi

³⁴ *Ibid*, S 55

³⁵ *Ibid*, S 58

³⁶ Constitution of Kenya, 2010, Article 159 (2) (c)

³⁷ Sports Act, No. 25 of 2013, S 59

Appeals against decisions of the Tribunal lie with the Court of Arbitration for Sport and the same cannot be challenged in national courts. However, they are subject to the judicial review jurisdiction of the High Court pursuant to the provisions of articles 47 and 165 (6) of the Constitution of Kenya, 2010.

2.3.2 Athletics Kenya Arbitration Panel

The panel is established under article 40 of the constitution and Rules of Athletics Kenya, which is the governing body for the sport of athletics in Kenya. The panel is mandated to settle disputes or differences between the Executive and any member, or between one or more members.³⁸ Disputes settled by the panel are non-disciplinary in nature and this excludes any dispute arising in the field of competition.³⁹

2.3.3 Football Kenya Federation (FKF) Constitution

The Constitution of Football Kenya Federation, which is the governing body for the sport of football in Kenya, contains provisions pertinent to arbitration. The Constitution seeks to give *priority to arbitration and limits the involvement of ordinary courts in the management of disputes related to the sport of football* (emphasis ours). To this effect, it provides that disputes within the football association in Kenya or disputes affecting football leagues, members of leagues, clubs, members of clubs, players, officials and other Association Officials shall not be submitted to ordinary courts, unless the FIFA regulations, the FKF Constitution or binding legal provisions specifically provide for or stipulate recourse to Ordinary Courts.⁴⁰ The constitution of FKF requires such entities to give priority to arbitration as a means of dispute settlement.⁴¹

To give effect to this provision, the constitution of FKF provides that such disputes shall be taken to an independent Arbitration Tribunal recognised by

³⁸ Constitution and Rules of Athletics Kenya, Article 40.3

³⁹ Ibid

⁴⁰ FKF Constitution, Article 69 (1)

⁴¹ Ibid, Article 69 (2)

Football Kenya Federation (FKF) or the Confederation of African Football (CAF) or to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.⁴²

3. Challenges in Sports Management

3.1 Doping

Doping is one of the most contentious issues in the sports arena across the globe. The World Anti-Doping Code defines doping as the occurrence of one or more of the anti-doping rule violations set out in the code.⁴³ These include the presence of a prohibited substance in an athlete's sample, use or attempted use by an athlete of a prohibited substance, possession of a prohibited substance, evading or failing to submit to sample collection among other things.⁴⁴ In Kenya, the Anti-Doping Act defines doping as the use of prohibited substances and methods in any sporting activity whether competitive or recreational in order to artificially enhance performance.⁴⁵

Violation of anti-doping rules has serious consequences, which include automatic disqualification of results and forfeiture of any prize, points or medals obtained in the competition.⁴⁶ A prominent case is that of Marion Jones an American athlete who won three gold medals and two bronze medals at the 2000 Olympic Games in Sydney, Australia but was stripped off the medals for admitting to doping violation.⁴⁷ Recently, one of Kenya's most celebrated athletes Asbel Kiprop who won a gold medal at the 2008 Olympic Games in Beijing, China in the 1,500 m category was banned for four years for a doping related offence.⁴⁸

⁴² Ibid, Article 69 (3)

⁴³ World Anti-Doping Code, Article 1, available at <https://www.wada-ama.org/en/what-we-do/the-code> (Accessed on 27/11/2019)

⁴⁴ Ibid

⁴⁵ Anti-Doping Act, No. 5 of 2016, S 2

⁴⁶ World Anti-Doping Code, Article 9

⁴⁷ Douglas D.D, 'Forget Me.....Not: Marion Jones and the Politics of Punishment' *Journal of Sport & Social Issues*, Volume 38 (No. 1), February, 2014, p 3-22

⁴⁸ 'Asbel Kiprop: Former Olympic 1,500m champion banned for four years for doping' available at <https://www.independent.co.uk/sport/general/athletics/asbel-kiprop-doping-ban-olympic-champion-1500m-a8879691.html> (Accessed on 27/11/2019)

Doping continues to be a challenge since it affects the integrity of sports. However, some critics have questioned the severity of punishment imposed upon athletes found guilty of doping and the investigation process to curb this vice. Others have alluded to violation of the right to fair hearing in such investigations.⁴⁹ Doping constitutes a major dispute area in sports.

3.2 Taxation

Tax related disputes have been on the rise in the sports arena. This issue arises since an athlete may be plying his trade in an overseas country thus subject to two tax regimes, one in the overseas country and the other in his/her home country. Lionel Messi and Cristiano Ronaldo, two elite footballers, from Argentina and Portugal respectively have been embroiled in tax evasion cases with Spanish authorities during their football career in Spain.⁵⁰ These cases are common across the globe.

In Kenya, sports personalities are not exempted from tax and are subject to taxation pursuant to the provisions of the Income Tax Act. Where sports income is earned overseas by a sportsperson who is a resident of Kenya for tax purposes, such income is considered to have accrued in or to have been derived from Kenya and is therefore taxable in Kenya.⁵¹ Under section 39 (2) of the Act, the tax paid overseas is offset against the tax computed locally on the income earned overseas. The sportsperson should furnish evidence of tax paid overseas in order to be allowed to offset it against tax computed locally.⁵² A clear understanding of the tax regime is thus necessary among sports personalities since it has been a major dispute area.

⁴⁹ Douglas D.D, Op cit

⁵⁰ Robert W. W, 'Tax Lesson's from Soccer's Messi & Ronaldo Tax Evasion Cases' *Forbes* available at http://www.woodllp.com/Publications/Articles/pdf/Tax_Lessons_From_Soccer.pdf (Accessed on 27/11/2019)

⁵¹ Income Tax Act, Cap 470, S 3; See also Ohaga J.M and Kosgei F. C, 'Organisation of Sports Clubs and Sports Governing Bodies' *The Sports Law Review*, Edition 4, January 2019, available at <https://thelawreviews.co.uk/edition/the-sports-law-review-edition-4/1177318/kenya> (Accessed on 27/11/2019)

⁵² Ibid

3.3 Employment Disputes

Under Kenyan law, an employee is defined as a person who is employed for wages or a salary.⁵³ Athletes especially those involved in team sports such as football and rugby fit in this category since they are under a contract with a specific club. The relationship between the athlete and the club is governed by the Employment Act, which sets out principles on the employment relationship, rights and duties in employment, termination and dismissal. Consequently, employment related disputes such as unfair dismissal and non-payment of wages are common in the Sports Disputes Tribunal in Kenya.⁵⁴ It is thus imperative to have an efficient mechanism for handling such sports related issues in order to promote the growth of sports.

4.0 Use of ADR Mechanisms in Management of Sports Disputes

Alternative Dispute Resolution (ADR) mechanisms including arbitration have now become the mainstream form of dispute management in sports associated disputes across the world as evidenced by the sporting codes, rules and regulations that provide for these mechanisms. The foregoing discussion has demonstrated that the Court of Arbitration for Sport is granted jurisdiction by several international sports organisations such as FIFA and IAAF to settle their disputes. The main reasons that make ADR mechanisms preferable over the courts in resolution of sports disputes is that such mechanisms can be expeditious, flexible, cost effective, confidential, result in a win-win situation in some instances as parties compromise, maintain and preserve business relations; and are conducted by people with expertise and experience in the relevant field of sport.⁵⁵

One of the advantages of Alternative Dispute Resolution mechanisms is confidentiality. In sports, there is the need by sportspersons and sports federations to avoid washing their dirty linen in public due to the publicity

⁵³ Employment Act, No. 11 of 2007, S 2

⁵⁴ Ohaga J.M and Kosgei F. C, Op Cit

⁵⁵ Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' African Sports Law and Business Bulletin, No. 2 of 2014

involved with sports.⁵⁶ This can be well addressed by the ADR mechanisms which ensure that disputes are resolved within the sporting family.⁵⁷ ADR mechanisms and in particular arbitration have been heralded as most private and confidential.⁵⁸ Parties are thus able to preserve their secrets during and after the dispute resolution process. At the global level, the issue of confidentiality has been succinctly addressed by the Court of Arbitration for Sport (CAS) whose arbitration rules provide that the arbitrators and CAS undertake *not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS* (emphasis ours).⁵⁹ Awards shall not be made public unless all parties agree or the Division President so decides.⁶⁰ This is unlike court proceedings, which are open to the public thus negating the concept of confidentiality.

However, ADR mechanisms including arbitration suffer from several drawbacks that could affect their suitability in the management of sports disputes. It has been argued that these mechanisms lack vigorous enforcement measures that are sometimes needed in dispute management.⁶¹ Unlike ADR mechanisms, courts have powers to summon witnesses, grant orders and injunctions and execute their decisions. The remedy of contempt is available for violations of a court's decisions. These measures are essential in facilitating efficient dispute management by ensuring that orders and decisions of the courts are adhered to.⁶² Further, through injunctions, a court is able to grant temporary reliefs pending the final determination of the dispute which may be necessary for preserving the subject matter of the dispute. ADR mechanisms

⁵⁶ Cloete R (ed). 2005. Introduction to Sports Law in South Africa. LexisNexis Butterworths, Durban p205.

⁵⁷ Ibid

⁵⁸ Kariuki Muigua, *'Alternative Dispute Resolution and Access to Justice in Kenya'*, Glenwood Publishers Ltd (2015)

⁵⁹ Court of Arbitration for Sport, 'Code of Sports-related Arbitration' Rule 43, available at https://www.tas-cas.org/fileadmin/user_upload/Code_2019_en_.pdf (Accessed on 27/11/2019)

⁶⁰ Ibid

⁶¹ Owen M. Fiss, 'Against Settlement' *Yale Law Journal*, Volume 93, Issue 6 (1984)

⁶² Ibid

such as mediation are not suitable when a party needs urgent protection like an injunction.⁶³

Further, there are no precedents in ADR and decisions made are not based on prior disputes.⁶⁴ However, at the global stage, sports dispute management benefits from *lex sportiva* which is the jurisprudence developed by CAS and acts as a guide in subsequent matters. On the other hand, courts rely on precedents where prior decisions by higher-ranking courts are considered in deciding a dispute. This has the advantage of creating certainty in dispute resolution and it is possible to predict the outcome of a dispute by looking at previous court decisions on disputes with the same facts (emphasis ours). This advantage could be defeated in ADR, which has the likelihood of creating uncertainty in dispute resolution since it is possible to have differing decisions on the same issues.

Finally, expeditious management of sports disputes through ADR mechanisms such as arbitration may be defeated where such disputes end up in court due to appeals. In Kenya, decisions of the Sports Disputes Tribunal may be appealed to the High Court. Where this happens, then usual ills facing the judicial process especially delays emerge and this affects sports disputes management. It is thus evident that despite their unique advantages, ADR mechanisms suffer from several setbacks that could pose a challenge in sports dispute management.

5.0 Efficacy of Arbitral Institutions in Facilitating Management of Sports Disputes

The Court of Arbitration for Sport (CAS) plays an important role in setting global standards on the settlement of sports disputes. In the absence of such an independent sports Tribunal, sports disputes would be managed by domestic courts or institutions where such disputes arose. This would likely result in conflicting decisions across jurisdictions owing to the differences in legal systems, culture and policy.⁶⁵ Further, where disputes relate to athletes, sports

⁶³ Kariuki Muigua, Op Cit

⁶⁴ Ibid

⁶⁵ See Ian Blackshaw, *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively Within the Family of Sport*, 2 ENT. L. 61, 61-62 (2003)

organisations or federations belonging to different nationalities, there a likelihood of bias and favoritism for those litigating in their home countries.⁶⁶ It has been argued that handing these disputes over to the CAS minimizes the potential for bias.⁶⁷ The process also guarantees fairness since CAS has no personal interest in the outcome of disputes giving parties to the dispute the benefit of having a neutral arbitrator that will administer fair results. Further, the CAS has the potential of facilitating efficient outcomes due to the skill and expertise of its arbitrators.⁶⁸

In making its decisions, the CAS has the duty of interpreting and applying rules and regulations established by sports governing bodies since disputes submitted to CAS would normally involve an athlete and such bodies. Consequently, CAS has over the years developed a rich jurisprudence in sports disputes which has been coined as *lex sportiva*.⁶⁹ It has been argued that owing to the contractual principle of party autonomy, *lex sportiva* is the governing law in certain sports contracts.⁷⁰ To this extent, CAS has contributed to ensuring certainty and consistency in sports disputes management.

However, there are several concerns that may hinder the effectiveness of CAS in the management of sports disputes. The location of CAS could impose huge costs on athletes or sports organisations during dispute settlement. Where a dispute has been lodged or referred to CAS, the parties will be expected to attend the proceedings in Lausanne, Switzerland where the CAS is located unless an ad hoc tribunal is formed in the area where such dispute arose. This creates the challenge of *accessibility and costs, especially where the attendance of witnesses is required*. Athletes and sports organisations may thus find themselves overburdened by costs. (emphasis ours).

⁶⁶ Melissa Hewitt, 'An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport' *Indiana Journal of Global Legal Studies*, Volume 22, Issue 2 (2015)

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ De Oliveira, L., 'Lex Sportiva as the Contractual Governing Law' *The International Sports Law Journal*, Volume. 17, issue 1-2, December 2017

⁷⁰ Ibid

Further, it has been suggested that there is a danger that some CAS actions and decisions could erode core national values. In rendering its decisions, there is a possibility that CAS will disagree with, a rule against, or render interpretations that run counter to what athletes or sports organisations might have wanted, and what the democratic majority might prefer based on the concept of justice in their countries.⁷¹ This is especially true in Africa where the traditional concept of justice was understood differently from the rest of the world. Justice processes were aimed at the *restoration of relationships as opposed to punishment peace-building and parties' interests and not the allocation of rights between disputants* (emphasis ours).⁷² Sports have always played an integral part in African societies. Games such as traditional wrestling, camel races and water games such as canoe and boat racing were deeply entrenched into the culture of African societies and provided occasions that brought the whole community together.⁷³ These games emphasized participation over competition.⁷⁴ This is partly true with modern sports due to commercialization of sports. However, it can be argued that sports in Africa still play a crucial role in social cohesion and promote the value of inclusivity. An arbitral award rendered by CAS may not fully consider these issues.

A challenge also arises in respect of appeals against decisions by CAS. These decisions can only be appealed before the Swiss Supreme Court. Under Swiss law, only lawyers admitted to the Swiss Bar or lawyers authorized by an international treaty to practice in Switzerland may represent parties in actions to set aside arbitral awards.⁷⁵ Thus, where an athlete was represented before the

⁷¹ Karen J. Alter, 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation', 71 *Law & Contemp. Probs.* 37, 39 (2008)

⁷² Francis Kariuki, 'African Traditional Justice Systems' available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> (Accessed on 27/11/2019)

⁷³ Michael Hirth, 'Games, Sport and Tradition in West Africa' Available at <https://pdfs.semanticscholar.org/34c4/92af4481fe81512f71c9a06bb77fe1c08cda.pdf> (Accessed on 27/11/2019)

⁷⁴ *Ibid*

⁷⁵ Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 217–265

CAS by a lawyer from his/her jurisdiction and decides to challenge the decision before the Swiss Supreme Court, the athlete will be required to seek the services of a lawyer admitted to the Swiss Bar. This requirement is likely to erode the confidence of the athlete in the process due to difficulties that could arise in dealing with a lawyer from a different jurisdiction.

6.0 The Sports Disputes Tribunal and Management of Sports Disputes in Kenya

The enactment of the Sports Act, 2013 and the establishment of the Sports Dispute Tribunal marked an important step towards promoting sports arbitration in Kenya. The Tribunal has been operationalized and has heard and determined various appeals and disputes lodged before it in relation to several sports organizations such as *Kenya National Paralympic Committee, Kenya Rowing & Canoe Federation, Kenya Rugby Union* and *National Olympic Committee of Kenya* among others.⁷⁶ The Tribunal has contributed towards streamlining the operations of sports federations in the country through measures such as canceling elections not held in accordance with the requisite rules and guidelines.⁷⁷ However, the operation of the Tribunal may be hindered by several challenges.

The wording of section 58 of the Sports Act raises several issues on the jurisdiction of the Sports Dispute Tribunal. The Tribunal derives jurisdiction from the statute but this is limited to rules by national sports organizations allowing appeals to the Tribunal and agreement between the parties.⁷⁸ As framed, this provision poses a jurisdictional challenge since Sports organizations can avoid the jurisdiction of the tribunal within their rules.⁷⁹ Further, section 58 (b) of the Sports Act poses a challenge in that parties have the power to determine the jurisdiction of the Tribunal. Where there is no such

⁷⁶ Sports Dispute Tribunal decisions, available at <http://kenyalaw.org/kl/index.php?id=9711> (Accessed on 27/11/2019)

⁷⁷ See for example Kwalimwa. D, 'Sports Tribunal Cancels FKF Polls' *Daily Nation*, Wednesday, December 4, 2019

⁷⁸ Sports Act, S 58 (a) and (b)

⁷⁹ 'Growth of Sports Arbitration in Kenya and Globally' *Sports Monthly*, Issue 143, November 2019

agreement, challenges on jurisdiction may be raised by either party in court. This was the issue in the case of *Dennis Kadito v Office of The Sports Disputes Tribunal & another* [2017] eKLR. In the case, the petitioner filed a claim before the Sports Disputes Tribunal seeking a commission of USD, 17500/= from Sofapaka Football Club in relation to the transfer of players. Despite serving the football club with the claim, it did not enter an appearance or file a defence. The Tribunal heard the dispute in the absence of the football club but made a decision determining that it had no jurisdiction to hear that particular dispute by virtue of section 58(b) of the Sports Act, 2013 on account of the football club's failure to enter appearance and file a defence or submitting to the Tribunal's jurisdiction.

The petitioner challenged the decision in court on the basis that section 58(b) of the Sports Act is unconstitutional for violating Article 48 of the Constitution on access to justice. In dismissing the petition, the court decided that:

'In the case of the category of disputes falling under section 58(b), these are any other disputes that maybe sports related but which parties agree to refer to the tribunal and even after agreeing to refer them, it is not automatic that the tribunal has to hear them. The tribunal has the option to decide whether to take over the dispute and hear it or decline jurisdiction... the words of the statute in section 58(b) are clear and unambiguous that parties must agree to refer any other dispute of a sports nature to the tribunal and the tribunal after examining the sort of the dispute has to agree to hear it.'

There is a need to revisit section 58 (b) of the Sports Act to provide certainty on the jurisdiction of the Tribunal and avoid instances where a party to a dispute may be denied access to justice by the failure of the other party to submit to the jurisdiction of the Sports Disputes Tribunal.

Another issue that emerges from the wording of section 58 of the Sports Act is that the Tribunal only enjoys appellate jurisdiction. It can only exercise original

jurisdiction upon agreement of parties to a dispute.⁸⁰ It would have been prudent to at least confer original jurisdiction on specific matters to the Tribunal.⁸¹ The Act creates a challenge by giving wide discretion to parties to determine which disputes can be determined by the Tribunal.⁸²

Another notable shortcoming in the Sports Act, 2013 is that the Act does not specify the remedies that can be granted by the Tribunal upon hearing a dispute. The upshot of this shortcoming is that a decision of the Tribunal can be challenged on the basis of the remedy granted. There is thus a need to revisit the Sports Act, 2013 to clarify these issues and make the Tribunal more vibrant and effective.

7.0 Way Forward on Sports Disputes in Africa

The foregoing discussion has demonstrated the nature of sports disputes and the need for efficient management of such disputes. The discussion has also examined the efficacy of arbitration in the management of such disputes by analyzing its advantages and disadvantages. With the increasing commercialisation of sports, disputes are bound to increase due to the growing need to re-evaluate and clarify sports relationships.⁸³ However, as demonstrated, there are several shortcomings in both the legal and institutional framework on sports arbitration which may hinder the efficacy of the process of sports dispute management. The paper proposes reforms on the issues raised as discussed hereunder.

⁸⁰ Ibid, S 58 (b)

⁸¹ 'Growth of Sports Arbitration in Kenya and Globally' Op Cit

⁸² Akech B, 'Public Regulation of Sports in Kenya' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423247#references-widget (Accessed on 27/11/2019)

⁸³ Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' Op Cit

7.1 Efficient Management of Sports

Sports disputes in Africa are major as a result of mismanagement by the various stakeholders involved such as clubs, sports organisations, players and governments. Sports in Africa have suffered several setbacks as a result of poor management and interference by movement officials.⁸⁴ There have been numerous cases of countries in Africa being banned from international competitions by federations such as FIFA due to government interference such as Kenya in 2006 and Nigeria in 2010.⁸⁵ Further, cases of mismanagement of sports resources have also been documented such as the case of the Kenyan team at the 2016 Olympic Games in Rio de Janeiro, Brazil.⁸⁶ There have also been instances of clubs mistreating their players through instances such as non-payment of wages and summary dismissal.⁸⁷

Such issues ultimately contribute to sport related disputes. The efficient management of sports becomes necessary to prevent some of these disputes. African sports organisations should enhance sports administration in their respective countries and promote the value of sports. National governments should also promote sports through the allocation of sufficient resources to avoid instances where sports teams have often found themselves stranded while on national duties abroad due to insufficient resources. Corruption which is also a contributing factor in some of these disputes, especially among sports federations, should be curbed through prosecution of those involved in such vices.⁸⁸

⁸⁴ Majan E, and Osoro N, 'Sports Management and Government Interference in Africa' *African Sports Law and Business Bulletin* 1/2013

⁸⁵ Ibid

⁸⁶ The Standard, 'Two Kenyan Athletics Officials in Court over Rio Games fiasco' available at <https://www.standardmedia.co.ke/article/2000213873/two-kenyan-athletics-officials-in-court-over-rio-games-fiasco> (Accessed on 27/11/2019)

⁸⁷ Africa Centre for Open Governance (africog), 'The crisis of football management in Kenya' available at <https://africog.org/wpcontent/uploads/2010/07/The20crisis20of20football20management20in20Kenya1.pdf> (accessed on 27/11/2019)

⁸⁸ Liwewe P, 'The Challenges Facing African Football' *The Africa Report* available at <https://www.theafricareport.com/9084/the-challenges-facing-african-football/> (accessed on 27/11/2019)

Further, there is a need for efficient post retirement measures for professional sports persons in Kenya. It has been argued that for many athletes, retirement is an idea that is not thought about in great detail.⁸⁹ The process induces dramatic changes in the social, personal and occupational lives of sportspersons, which could have negative impacts on them.⁹⁰ In some instances, the athletes go through poverty and substance abuse.⁹¹ Support can be given to athletes through career and financial advice upon retirement. Retired athletes should also be supported through measures such as appointments in sports federations and teams. Further, a professional sports person should consider establishing and joining associations that can protect their welfare. A good example can be drawn from FIFPRO which represents professional footballers at the global stage.⁹² This will enhance the image of sports in the country and encourage other people to take up the profession.

7.2 Adherence to Sports Rules by Athletes

One of the major causes of sports disputes discussed relates to the violation of sports rules by athletes such as anti-doping rules and tax rules. Athletes should be encouraged to abide by such rules in order to enhance integrity in sports. However, some athletes found themselves engaging in such acts of violation due to being misled by their agents or coaches for their selfish gains.⁹³ However, it is the athletes who bear the heaviest burden in the form of sanctions while some of the agents walk away scot-free.⁹⁴ There is a need for the CAS, WADA and other sports tribunals to consider such cases and protect innocent athletes

⁸⁹ 'Post Retirement for Professional Sports Persons in Kenya' *Sports Monthly*, Issue 143, November 2019

⁹⁰ Rintaugu. E et al, 'From Grace to Grass: Kenyan Soccer Players' Career Transition and Experiences in Retirement' *African Journal of Physical and Health Sciences (AJPHEs)*, Volume. 22 (1:1), March 2016, p 163-175

⁹¹ See the example of Henry Rono; Namunwa. K, 'Stranded abroad, legendary Henry Rono appeals for help to return home' *Business Today*, January 23, 2019, available at <https://businesstoday.co.ke/stranded-abroad-legendary-henry-rono-appeals-help-return-home/> (Accessed on 04/12/2019)

⁹² See the Activities of FIFPRO at <https://www.fifpro.org/en> (Accessed on 27/11/2019)

⁹³ Douglas D.D, 'Forget Me.....Not: Marion Jones and the Politics of Punishment' *Journal of Sport & Social Issues*, Volume 38 (No. 1), February, 2014, p 3-22

⁹⁴ Ibid

who might have been exploited by third parties by preferably imposing lesser sanctions than those prescribed.

7.3 Strengthening National Sports Dispute Management Mechanisms

Since disputes are bound to occur even where sufficient measures have been implemented to curb them, it is imperative to have efficient mechanisms to deal with them. Thus, national sports disputes management mechanisms in Africa need to be strengthened in both the legal and institutional dimensions. The example of the Sports Disputes Tribunal in Kenya highlights that the operation of such institutions may be hindered by loopholes in the legal instruments establishing them. Such laws need to have the input of sports experts. Further, it is important to strengthen the capacity of sports tribunals through the allocation of resources and efficient manpower.⁹⁵ National sports federations should endeavour to effectively utilize their internal dispute management procedures which recognise ADR mechanisms such as negotiation and mediation. This is to prevent such disputes from escalating to the CAS.

Kenya has made progress through the establishment of a Sports Tribunal. However, not all countries in Africa have done so. In South Africa, proposals have been made for the establishment of an ad-hoc Sports Arbitration Tribunal. Proponents of this idea have argued that such a Tribunal will be able to manage disputes in the sports industry expeditiously and promote the growth of sports in South Africa.⁹⁶ This argument has also been advanced in Nigeria where suggestions have also been made for the establishment of a sports tribunal to help athletes and sports practitioners get a fast and professional judgment on sports-related issues.⁹⁷ It has been argued that the conventional court in the land

⁹⁵ Mehrotra A 'The need for better dispute resolution systems in Indian sport and the Government's new Guidelines' Law in Sport, November 2016

⁹⁶ Lombard F, 'Committee Told That Sport Arbitration Tribunal is much Needed' Parliament of the Republic of South Africa, available at <https://www.parliament.gov.za/news/committee-told-sport-arbitration-tribunal-much-needed> (Accessed on 27/11/2019)

⁹⁷ Agbakoba calls for Sports Tribunal in Nigeria, 'The Guardian, 19/11/2019' available at <https://guardian.ng/sport/agbakoba-calls-for-sports-tribunal-in-nigeria/> (Accessed on 27/11/2019)

cannot address sports issues like a sports tribunal.⁹⁸ The establishment of sports tribunal can go a long way in facilitating the management of sports disputes in Africa.

African countries should also consider the establishment of sports courts due to the advantages which have been discussed including the availability of efficient enforcement mechanisms and temporary remedies. It has also been asserted that courts can play an oversight role in terms of public law and maintain checks and balances in sport through review of decisions of sports organisations and bodies.⁹⁹ However, this could be problematic due to the shortcomings associated with litigations such as delays and costs.

7.4 Setting up a CAS Platform in Africa

CAS has previously set up ad hoc divisions for specific sporting occasions in various parts of the world. CAS can further enhance its operation by decentralizing its activities to Africa. This is to cure the challenges of accessibility and costs that face the current set up. This can be implemented by setting up basic infrastructure such as registries in pilot countries. Further, CAS can embrace the use of technology such as video conferencing when conducting hearing sessions to limit the requirement of sportspersons and other parties having to travel all the way to Switzerland to attend such hearings.

7.5 Capacity Building in Sports Law

The field of sports law is yet to be fully embraced by most legal practitioners in Africa. With the important role that sports play in society and the increasing commercialisation of sports, there is a need for experts in the field of sports law to aid in the management of legal issues that continue to emerge from this field. Emerging legal issues in sports such as termination of sports contracts, disputes between teams over the transfer of players and violation of rules e.g doping

⁹⁸ Ibid

⁹⁹ Razano F, 'Judicial Review in South Africa-How Local Courts Approach Sports Disciplinary Decisions' *Law in Sport*, 05 February 2019

rules will be better handled by experts on such matters.¹⁰⁰ Appointments to the various sports tribunals should be based on knowledge and experience on issues related to sports. A good example is the Court of Arbitration for Sports (CAS) whose arbitrators are chosen for their specialist knowledge of arbitration and sports law. There is a need to enhance the training of legal professionals across Africa in sports law. This can be achieved by making Sports law part of the curriculum in legal institutions across the continent. Further CAS can provide tailor made courses in sports arbitration in collaboration with various arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) Branch and Nairobi Centre for International Arbitration.

7.6 Creating Awareness among Sports Personnel on Sports Related Issues

Some of the sports related issues such as the issue of tax evasion and doping are partly due to lack of awareness on such issues by athletes. There is a need for sensitization on these issues by sports federations, the government, clubs and stakeholders to enhance awareness among athletes. With such information, it would be easier for athletes to deal with the issues and avoid sports disputes.

8.0 Conclusion

Sports are essential and form part of the culture in African societies. There is a need to create an enabling environment for the growth of sports. With the rise of sports disputes, it is important to have such disputes settled expeditiously and minimise their impact on the development of sports. It is therefore vital that conflict management mechanisms be put in place to ensure that sports go on smoothly and the rights and interests of all parties are upheld.

It is also necessary to take into account specific and deferring cultural variances in dealing with sports disputes. Africa is a major contributor to global sporting activities. The promotion of sports arbitration in Africa is thus timely. It is an ideal that is worth pursuing now.

¹⁰⁰ Mitten M, and Opie H, 'Sports Law': Implications For The Development Of International, Comparative, And National Law And Global Dispute Resolution' Marquette University Law School Legal Studies Research Paper Series Research Paper No.10-31, June 2010

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Exploring the Prospect of Kenya as a Regional Centre for the Resolution of Sports Disputes through Arbitration

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Sports is a friendship,
Sports is life,
Sports is education,
Sports is life,
Sports brings people together

Abbreviations

ADR: Alternative Dispute Resolution
CAF: Confederation of African Football
CAS: Court of Arbitration for Sports
FIFA Fédération Internationale de Football Association (International Federation of Association Football)
FKF: Football Kenya Federation
IF International Federations
IOC International Olympic Committee
KPL Kenyan Premier League
NCIA Nairobi Centre for International Arbitration
NOC National Olympic Committees
NSL National Super League
NSO National Sports Organizations
SDT Sports Dispute Tribunal

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1. Introduction

The importance of sports in the national and international spectrum has widely been acknowledged. Sports remain a key tool for inspiring society towards the greater good since its very essence speaks to positive values such as motivation, focus, discipline and hard work.¹ The role of Sports in fostering national cohesion² and collegiality between states is equally recognized.³ This is because Sports act as a cultural meeting point for people across all ranges of diversity.⁴ Its contribution to the global and national economies is also widely recognised. Globally Sports is a massive industry whose huge returns are spread out at the regional and domestic levels. For example, Kenya's sportsmen and sportswomen continue to be one of the country's greatest franchises, bringing accolades and respect to the nation across the world. Arguably, the country has yet to maximise on the success of its athletes and the economic returns that can be realised.⁵

One risk towards the realization of these benefits lies in the manner in which sports disputes are handled. A 360-degree view of this complex industry shows the wide range of disputes that arise such as those relating to the athletes, sports

¹ P Taylor, L Davies, P Wells, J Gilbertson & W Tayleur, 'A review of the social impacts of culture and sport' (*The Culture and Sports Evidence Programme*, 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/416279/A_review_of_the_Social_Impacts_of_Culture_and_Sport.pdf accessed 18 January 2020.

² K L Jaksa, 'Sports and Collective Identity: The effects of athletics on national unity' (2011) 31(1) SAIS Review of International Affairs <https://muse.jhu.edu/article/425420> accessed 18 January 2020

³ L A Azeez, 'Spirit of Olympics & UN's Development Agenda' (*IPS News Agency*, July 2019) <http://www.ipsnews.net/2019/07/spirit-olympics-uns-development-agenda/> accessed 19 January 2020

⁴ A Mwisukha & V Onyvera, 'Contributions of sports towards national development in Kenya' (*Kenyatta University*, n.d) <http://humansciences.ku.ac.ke/images/stories/2016/contribution%20of%20sports%20towards%20national%20development.pdf> accessed 18 January 2020

⁵ D Ogega, 'Raw deal for sports in Kenya' (*Citizen Digital*, 20 August 2019) <https://citizentv.co.ke/sports/raw-deal-for-sports-in-kenya-270160/> accessed 18 January 2020

agents, sporting association, coverage by the media or treatment by various regulatory authorities.⁶ Such disputes have the potential to threaten the industry if one does not pause to ponder how existing or new platforms for dispute resolution can mitigate such threats.

It is therefore imperative for all stakeholders associated with the industry (legal practitioners in sports, sports-related institutions, corporations supporting sports initiatives, county government departments of sports, sports professionals, alternative dispute practitioners and even sports lovers in general) to invest in discussions and research that focuses attention on the construction of credible mechanisms. If the business of Sport is to thrive then disputes must be handled in an expeditious, effective and cost friendly manner, and not exposed to the long litigious process associated with the courts.⁷ This is not only good for the sports brand but may offer multiple benefits for Kenya in particular given its reputation as a leading global performer (and regional giant) in Sport and as a growing centre for ADR mechanisms, including arbitration, within the region.

With the appropriate progressive legislative and institutional framework in Sports arbitration, it is not premature to suggest that the country may be ripe to act as a regional centre to sports related disputes. This article is premised on the negative impact sports disputes have on the industry. In this regard, it starts by outlining the reality of these disputes before proceeding to discuss the shortcomings of the existing avenues utilised by disputants. The idea is to explore and focus attention on the benefits of ADR mechanisms (with an added emphasis on arbitration) towards countering these shortcomings. Beyond the benefits of such mechanisms, the article discusses the potential of positioning Kenya as a regional platform within the context of Africa through which disputes can be resolved. It is the view of the author that this will not only bring

⁶ H B Ozeke, 'Law in Sports: International Sports Arbitration' (*Lexology*, 15 March 2018) <https://www.lexology.com/library/detail.aspx?g=26d596bc-2e14-414e-a59d-ff23bbbe12f8> accessed 18 January 2020.

⁷ 'Resolving Disputes in Sports' (*WIPO*, 2019) <https://www.wipo.int/ip-sport/en/dispute.html> accessed 18 January 2020.

about a wide range of benefits for the athletes and relevant stakeholders operating in the continent but has also the prospect of unique economic and professional benefits for Kenya in particular.

2. The reality of Disputes in Sports

The Sports sector has been gripped by numerous disputes, which point to the timeous need for effective dispute resolution mechanisms. Bearing in mind the wide range of actors that make up this complex industry, it may be helpful to illustrate the prevalence of disputes within the sector by paying attention to their manifestation in the context of three actors in this sector: sports personalities, sporting associations, and sports regulatory authorities.

Sports personalities are of special importance in view of the fact that without the athlete there would be no industry. The experiences of these men and women are central given their role as the fulcrum of the commercial and social benefits that the industry derives. Most perspectives on the industry tend to focus on their lives within the theatre of sporting activating - its highs and lows. However, much of the athlete's life occurs behind the sporting arena. An integral part of this is how the sportsperson deals with disputes that arise from different contractual obligations. From the very time that athletes turn professional with consequential contractual obligations, they become susceptible to disputes.⁸ Such disputes may flow out of the athlete's contractual relationship with his/her agent, brand sponsors, or other obligations flowing out of their association with a sporting body. This aspect of disputes, often unknown to the spectator, has an immense impact on the athlete's productivity. The media has run stories on the lived experiences of renowned sports personalities embroiled in such disputes and the impact of these on their personal and professional lives. In the past year, we have read about disputes arising from the conduct of prominent athletes on and off the field. On the field, disputes have arisen because of the conduct by the athletes that are out of step

⁸ Farai Razano, 'Keeping Sport Out Of The Courts: The National Soccer League Dispute Resolution Chamber - A Model for Sports Dispute Resolution in South Africa and Africa' (2014) 2 African Sports Law and Business Bulletin 2.

with the associations' rules - racist outbursts, assaults on opponents, cheating including doping, etc. Similarly, controversies off the field –social media spats, alleged criminality (some as serious as rape charges), or where the athlete has waded into national political debates – have become the subject of disputes. Disputes have also arisen from ongoing contractual obligations in situations involving transfers between sports clubs, retirements or because of the athlete's associations with a specific brand and their products.

Sports based organisations such as sports associations and regulatory bodies will attract disputes in a wide range of matters.⁹ As bodies not unlike other private and public entities, they are structured around specific governance systems and conduct commercial operations. These presents significant scope for a range of disputes to arise such as commercial disputes related to contracts, remuneration, employment and participation on the field; disputes related to governance and operational concerns like elections and manner the activities of the organisation are conducted; aspects touching on the discipline of the sportsperson, coaches and relevant persons; and a broad range of other matters of particular relevance in international sporting events such as the manner the players are chosen in line with domestic questions of inclusion and diversity.¹⁰ It is important to note that unlike other public and private entities, the arena of sports is characterised by significant tensions based upon the intense competition among athletes.¹¹ The bonds between stakeholders in the industry are also tight infusing a strong inclination of bias over matters that are in contention. These aspects, as well as other commonalities within the industry (such as team selections, compliance with sports codes and rules, and the

⁹ See D Kwalimwa, 'FKF elections nullified' (*Daily Nation*, 3 December 2019) <https://www.nation.co.ke/sports/football/FKF-elections-nullified-/1102-53716723m3lh2z/index.html> accessed 27 January 2020.

¹⁰ See Sports Dispute Tribunal decisions on <http://kenyalaw.org/kl/index.php?id=9711>

¹¹ Farai Razano, 'Keeping Sport Out Of The Courts: The National Soccer League Dispute Resolution Chamber - A Model for Sports Dispute Resolution in South Africa and Africa' (2014) 2 African Sports Law and Business Bulletin 2.

importance of fair play and avoidance of cheating), create a unique atmosphere within which disputes are called into play.

It is believed that the frequency of sports disputes is on the rise. Various drivers may be responsible for this trend. Society today is generally more aware of their rights leading to a greater propensity towards litigation. This includes athletes who today have a greater support system (e.g. lawyers, agents, etc.) and more exposure through the reinforced capacity to enable them to be aware of their claims arising from specific contracts or constitutional arrangements under different sporting associations.¹² Similarly, the growth of professionalism has created the expectation of sporting practice and induced a bias towards formal procedures, amongst which includes dispute resolution. With the growth of the sports industry and associated brands, the stakes at any time are higher, which means that chances of disputes have increased proportionally. All of these factors, as well as the unique character of sports disputes, suggest the need to employ a distinct dispute resolution approach to suit the special circumstances of the athlete and sports organisations. In view of this article's objective to explore the suitability of Kenya as an arbitral centre for sport's disputes, it may be useful to briefly outline the organisation of sports in Kenya and its current dispute resolution platforms.

3. Resolution of Sports Disputes in Kenya

The primary legislation for Sports in Kenya is the Sports Act.¹³ It establishes an umbrella corporate entity – Sports Kenya with the function of coordinating national and international sports programmes.¹⁴ The Second Schedule of the Act provides for matters related to the constitution of individual sports organisations such as selection of the Kenyan; elections and terms for office bearers; subscription to anti-doping rules that conform with the World Anti-

¹² W H Douglas, 'Disputes in sports more prevalent than you think,' (*Mondaq*, 26 March 2012)

<https://www.mondaq.com/australia/x/168494/Sport/Disputes+in+sport+more+prevalent+than+you+might+think> accessed 29 January 2020.

¹³ No 25 of 2013.

¹⁴ Sports Act, s 3, 4.

Doping Agency Code; conformity to the policies of the Court of Arbitration for Sports (CAS) policies; and conformity with the rules for resolution of disputes and in particular the policy established by the Sports Dispute Tribunal.¹⁵ It is also important to mention the existence of the Confederation of African Football within the context of the various national football entities that fall under its umbrellas such as the Football Kenya Federation (FKF), the Kenyan Premier League Limited (KPL) and National Super League (NSL).¹⁶ CAF manages all forms of football within the scope of its own rules and directives by FIFA, and all national clubs must comply with its licensing requirements.¹⁷ The Sports Act establishes the Office of the Sports Registrar who is responsible for the licensing, registration and regulation of sports organisations within the country.¹⁸ Finally, and more specifically in the context of sports disputes, section 55 of the Sports Act establishes the Sports Dispute Tribunal (the Tribunal). More attention is paid to the Tribunal in the subsequent paragraphs, which discuss the range of dispute resolution processes.

Like other jurisdictions, Kenya has a range of dispute resolutions mechanisms – cascading from formal to informal. The constitutions of individual national sports organisations will normally have a constitution that provides for informal resolutions of small disputes (e.g. through face to face negotiations or through a mediator) before appeals to the board of the organisation, and subsequently to its internal tribunal. For example, an internal body within the Kenya Premier League – the Independent Disciplinary and Complaints Committee, manages football disputes.¹⁹ This body handles all matters that remain unresolved following informal processes initiated by disputants. An

¹⁵ Ibid, Second Schedule as read with s 46.

¹⁶ 'Member Associations' (*Confederation of African Football*, 2020)

<https://www.cafonline.com/member-associations/ken/> accessed 28 January 2020.

¹⁷ 'Background' (*Confederation of African Football*, n.d) <http://www.cafonline.com/en-us/caf/background.aspx> accessed 28 January 2020.

¹⁸ Sports Act, 2013 s 45 and 46.

¹⁹ F Wadegu, 'FIFA gives Kenya roadmap to dispute resolution' (*The Star*, 29 October 2019) <https://www.the-star.co.ke/sports/football/2019-10-29-fifa-gives-kenya-roadmap-to-disputes-resolution/> accessed 28 January 2020.

ultimate appeal lies to the Sports Tribunal in tandem with the jurisdiction it carries under the Sports Act.²⁰

As earlier mentioned, the Sports Act established the Sports Tribunal to facilitate arbitration of sports disputes.²¹ The Tribunal has a membership of 5-9 members including a Chair, two sports advocates and other members appointed by the Judicial Service Commission in consultation with sports organizations.²² The Act specifically allows the Tribunal to hear appeals with respect to decisions by national sports bodies (where the constitution of such bodies permit) and appeals in relation to decisions by the Sports Registrar.²³ It is also worth noting that the Anti-Doping Act provides the Tribunal with jurisdiction over anti-doping violations.²⁴ In such cases the Tribunal is guided by principles laid down by relevant national and international organisations such as the World Anti-Doping Code and the Anti-Doping Agency of Kenya.²⁵ Disputes that come before the Tribunal are handled on the basis of its own unique procedure. Those involving Kenyan athletes and bodies are resolved at first instance and appeal by a panel chosen by the chairman.²⁶ The exception to these are matters relating to doping, where the Act makes it clear that the Tribunal does not have jurisdiction. Such matters are referred to World Anti-Doping Agency with a subsequent appeal to CAS.²⁷ Furthermore, the Tribunal at first instance only resolves disputes of an international dimension, with an avenue for appeal to CAS.²⁸

²⁰ No 25 of 2013.

²¹ S 55 of the Sports Act.

²² *Ibid*, s 55 (2).

²³ *Ibid*, s 58.

²⁴ S 31 of the Anti-Doping Act, No 5 of 2016.

²⁵ *Ibid*, s 31 (2).

²⁶ *Ibid*, s 31 (4).

²⁷ J Ohaga & F Kosgei, 'Organization of sports clubs and sports governing bodies' (2019) *The Sports Law Review* <https://thelawreviews.co.uk/edition/the-sports-law-review-edition-5/1211686/kenya> accessed 28 January 2020.

²⁸ *Ibid*.

Due to the peculiar nature of sports disputes, the courts are usually reluctant to interfere in the resolution process. Thus, the resolution of disputes through the SDT has proven quite beneficial considering the nature of sports. Sportspersons have relatively short careers and therefore it is imperative to deal with disputes as quickly as possible.²⁹ As such, the Sports Disputes Tribunal offers a good venue to deal with these disputes as they arise in an expeditious manner which is strikingly different from the mainstream litigious processes in which a single case can drag on for as many as 10 years.³⁰ That said, the expectations that the Tribunal would insulate sports from the exigencies of litigation have been questioned because of certain shortcomings. As noted earlier, its jurisdiction is limited to appellate matters originating from national sports organisations (NSO) where the rules of the NSO provide for such an appeal.³¹ The Tribunal may also be seized of the jurisdiction where all parties to a dispute agree upon the same.³²

These limitations on the Tribunal's jurisdiction pose a challenge as it allows for NSOs to avoid its jurisdiction, and instead seek alternative avenues, including the courts. The litigation process can also arise because of another major shortcoming. The Sports Act does not provide the Tribunal with specific remedies upon hearing a dispute. Since it is unclear whether the tribunal can award damages, grant an injunction or quash orders emanating from NSOs, nothing prevents a party from appealing to the High Court to challenge the exercise of jurisdiction by the Tribunal in this regard. These potential avenues of litigation present a high risk to the business of sports, whose unique character avers the conundrum of court litigations.³³ Efforts should be placed to

²⁹ 'Kenya's sports dispute tribunal gains ground' (*Xinhua*, 16 December 2018)
http://www.xinhuanet.com/english/2018-12/17/c_137679732.htm
accessed 28 January 2020.

³⁰ *Ibid.*

³¹ S 58 (a) of the Sports Act, No 25 of 2013.

³² *Ibid.*, s 58(b).

³³ 'Kenya's sports dispute tribunal gains ground' (*Xinhua*, 16 December 2018)
http://www.xinhuanet.com/english/2018-12/17/c_137679732.htm accessed 28
January 2020.

strengthen the existing legislation so that arbitration through the tribunal (as well as other forums) forms the basis of sports dispute resolution in Kenya. In this regard, the next section presents an overview of arbitration and how it can be used in the sports world.

4. Sports Arbitration

Arbitration is one of the various methods of alternative dispute resolution (ADR) where parties through a private procedure resolve their disputes.³⁴ The decision of the arbitrator is binding upon the parties and can be enforced.³⁵ Arbitration offers various advantages such as: the private nature of the forum and the confidentiality it offers, the expeditious form it takes, and the fact that the arbitrator is likely to be an expert in the subject matter of the arbitration.³⁶ In view of the subject matter – Sports – it is important to recognise the other important forms of ADR, which exist alongside arbitration such as mediation and conciliation. Both forms are less formal and employ the use of a neutral third party who through a confidential process guides the parties in reaching a settlement.³⁷ Unless agreed otherwise, the agreement reached is not binding on the parties, unlike an arbitral award.³⁸ All the three forms of ADR continue to be employed to resolve sports disputes across the world in view of their inherent advantages *vis-a vis* the world of sports. They are confidential, a trait particularly important in view of situations where the career of a sportsperson will suffer a serious setback should the dispute proceedings come to the public eye, such as disputes around doping, breaching of contracts between the sportsperson and his/her club or federation.³⁹ This article focuses on arbitration

³⁴ 'What is arbitration' (*World Intellectual Property Organization*, 2020)

<https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 28 January 2020.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ HMJC McGuiness, *Alternative Dispute Resolution: Mediation and Conciliation* (Law Reform Commission 2016).

³⁸ *Ibid.*

³⁹ A Rigozzi & W McAuliffe, 'Sports Arbitration' (2013) *The European, Middle Eastern Arbitration Review* 15, 15.

in view of its unique advantage as a binding process often adjudicated upon by a sports expert.

Sports arbitration is employed in disputes between athletes, clubs, the federation in the context of a hierarchy of decision makers such as the NSOs and international sporting federations. NSOs derive their power from their constitutions, which empower private tribunals to make rules, prosecute and adjudicate upon the same. This poses the dilemma of a conflict of roles since the NSO is a rule maker, prosecutor and judge, and suggests the need for an appeal process in relation to its own decisions. As earlier observed, such a process has been established in Kenya through the Sports Disputes Tribunal.⁴⁰ Other examples of similar processes include the United Kingdom's Sport Dispute Resolution Panel,⁴¹ New Zealand Sports Disputes Tribunal,⁴² Canada's Sport Dispute Resolution Centre⁴³ and South Africa's Sports Commission.⁴⁴ In terms of international sporting federations, a similar dilemma of potential conflicts of interest arise, since these organisations, which lie at the top of the hierarchy, have conduct over the regulation of sports and enforcement of rules in the same way that NSOs exercise oversight at the national level.⁴⁵ In the interest of keeping sports at this level out of the courts, two institutions to which appeals may lie, which are of significant importance in the context of sports arbitration – CAS and the International Council of Arbitration for Sports (ICAS).

⁴⁰ Established under s 55 of the Sports Act 2013,

⁴¹ 'How are sporting disputes settled in the United Kingdom,' (*IN BRIEF*, n.d) <https://www.inbrief.co.uk/sports-law/resolving-uk-sporting-disputes/> accessed 28 January 2020.

⁴² 'About the Sports Tribunal' (*Sports Tribunal of New Zealand*, 2020) <http://www.sportstribunal.org.nz/about-us/about-the-sports-tribunal/> accessed 29 January 2020.

⁴³ 'About' (*CRDSC.SDRCC*, 2020) <http://www.crdsc-sdrcc.ca/eng/home> accessed 29 January 2020

⁴⁴ Sport and Recreation South Africa,' (*SRSA*, 2020) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/040601strategic.htm> accessed 29 January 2020.

⁴⁵ G Meew & MJ Richards, *More than Just a Game: Resolving Disputes in Modern Sports*. (14th Commonwealth Law Conference, London 2005).

5. Court of Arbitration for Sport

CAS has played a pivotal role to limit the intrusion of the courts into the domain of sports. Its establishment was preceded by legal challenges around doping. Many of these disputes were directed at the IOC, which becomes concerned that it would be diverted from its primary focus on the field of play to a dispute resolution forum.⁴⁶ The need to set up an independent arbitral forum become urgent, and in 1983 CAS was established with its base being Lausanne, Switzerland.⁴⁷ CAS is composed of 60 members appointed by the IOC, the International Federations (IF) and the National Olympic Committees (NOC) and the IOC President (who selects 15 members outside the IOC, IFs and NOCs).⁴⁸ Initially, the IOC met the CAS budget but reforms were made which saw the establishment of ICAS with the mandate of financing and running CAS.⁴⁹

As outlined in its Code of Sports Related Arbitration (the Code), CAS is divided into two divisions – the Arbitration Division and the Appeals Division. In line with the Code, the arbitration Division deals with disputes of first instance while the Appeals Division handles those disputes that arise out of rulings made by a sports entity.⁵⁰ Furthermore, the Code establishes four definitive procedures: the ordinary arbitration procedure; the appeals arbitration procedure; the advisory procedure; and the mediation procedure.⁵¹ The first two employ standard arbitration formalities such as written and oral proceedings, exchange of witness statements with the arbitral seat and governing law being Lausanne and Switzerland respectively. The third procedure – the advisory

⁴⁶ 'History of CAS' (*Tribunal Arbitral Du Sport/Court of Arbitration for Sports*, 2020) <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed 29 January 2020.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ P David, 'The Rise of Arbitration in the World of Sport' (2015) *International Trade/ADR in the South Pacific*, 151, 152.

⁵¹ 'History of CAS' (*Tribunal Arbitral Du Sport/Court of Arbitration for Sports*, 2020) <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed 29 January 2020.

procedure – refers to Consultation Proceedings in relation to the practice of sports, which may require CAS to render an advisory opinion.⁵² Finally, the mediation procedure is tailored upon what the parties to the dispute may agree upon.⁵³ Available to lend support to all these procedures are over 150 independent arbitrators who are experts in sports law and are appointed by the Secretary-General for a four-year renewable term.⁵⁴

While any dispute may be submitted to CAS where the arbitration agreement provides accordingly, the Code provides for CAS jurisdiction over any dispute connected with the sporting world.⁵⁵ Ordinarily, CAS will handle two types of disputes: disputes of commercial nature and disputes relating to disciplinary matters.⁵⁶ The first is handled by CAS at first instance and relates to disputes over contractual matters such as the athletes-sponsor/coach/agent contracts, employment contracts and player transfers, broadcasting rights, events, etc.⁵⁷ These arbitrations will also cover civil liability issues that are incidental to these matters e.g. injury to the athlete. The second group of disputes normally arise as part of an appeal process where the dispute is submitted following a ruling by a sports authority in situations where a rule within the sports codes is violated (such as assaulting an opponent, defying a referee, etc.)⁵⁸ The relevant sports authority will normally be competent to exercise jurisdiction over such matters at first instance.

An award rendered by CAS is final and binding upon disputants and can be enforced in line with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention).⁵⁹ A dissatisfied party may challenge a CAS award before ICAS in

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ L Casini, 'The making of a *lex sportiva*' (2011) 12 (5) German Law Journal 1317, 1322.

⁵⁷ *Ibid.*, 1323.

⁵⁸ *Ibid.*

⁵⁹ 'History of CAS' (*Tribunal Arbitral Du Sport/Court of Arbitration for Sports*, 2020)

certain exceptional situations: for the irregular constitution of the arbitral tribunal; for want of jurisdiction or ruling on matters beyond the claims submitted to it; for failure to afford a party an equal right to be heard; and if the award is incompatible with Swiss public policy.⁶⁰ In this regard, ICAS serves to safeguard the independence of the arbitral process and the rights of disputing parties. In its current form, ICAS is composed of 20 legal practitioners who are versed with sports and have no connection with CAS, either as part of the tribunal or as advocates of parties.⁶¹ Thus, the entire process comprises a picture where the efficacy of sports arbitration is seen in reality.

6. A Regional Centre for Africa

Staying true to the international nature of sports, the CAS has managed to establish itself as a global sports arbitration tribunal. Matters pertaining to sports disputes are expedited by an independent body and before experts in a manner that mitigates the disastrous impact that may arise from resolution mechanisms that are not fitting of the unique nature of sports. In order to promote access to CAS across the globe, two permanent centres, in addition to its seat in Lausanne, have been established: one in New York, USA and the other in Sydney, Australia.⁶² Moreover, in 1996 the ICAS established an ad hoc division in the CAS which is designed to settle matters arising during major sports events such as the Commonwealth Games, UEFA Championships and the Olympics, which are obliged to settle disputes within a 24 hour period.⁶³ More recently in 2012, CAS has also added alternative hearing centres in

<https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed 29 January 2020.

⁶⁰ P David, 'The Rise of Arbitration in the World of Sport' (2015) *International Trade/ADR in the South Pacific*, 151, 156.

⁶¹ 'History of CAS' (*Tribunal Arbitral Du Sport/Court of Arbitration for Sports*, 2020) <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed 29 January 2020.

⁶² G Meew & MJ Richards, *More than Just a Game: Resolving Disputes in Modern Sports*. (14th Commonwealth Law Conference, London 2005).

⁶³ *Ibid*, 36.

Shanghai, China, United Arab Emirates, Malaysia and Egypt.⁶⁴ These offices have made it easier for parties residing in the respective continents to access CAS.

A fundamental principle of access to justice is the removal of both quantitative and qualitative obstacles in order to enhance equal access to adjudicative platforms by all disputants. This includes financial, geographic, linguistic and logistical barriers that parties may face. While a lot has been done to improve access to the CAS in terms of the number of arbitrators available to determine matters, one may argue, particularly from the context of Africa, that in its current location, the Court remains remote and more can be done to promote its access to the developing world. From a demographic and sports perspective, the contributions of the continent cannot be understated. Africa remains the fastest growing continent. More than half of the global growth in the next 30 years is expected to occur in Africa.⁶⁵ It is worth noting that currently sixty percent of the current population is made of youth – a critical demographic that participates and forms the highest support base for sport.⁶⁶ The demographic trends are matched in economic terms with the continent being home to six of the top ten growing economies, with another 20 growing at the rate of 5% p.a. and over.⁶⁷ Many of these emerging economic powers have performed well on the international sporting stage. All of this makes a compelling case for locating

⁶⁴ A Rigozzi, S Besson & W McAuliffe, 'International Sports Arbitration' (2016) European, Middle Eastern and African Arbitration Review 1, 2.

⁶⁵ Y Adegoke, 'African economies will outperform global growth in 2020 despite a lag from its biggest countries' (*Quartz Africa*, 12 January 2020) <https://qz.com/africa/1783714/african-economies-to-watch-in-2020-debt-and-climate-crisis/> accessed 29 January 2020.

⁶⁶ 'Youth population trends and sustainable development' (*UN Department of Economic and Social Affairs Population Division*, May 2015) <https://www.un.org/esa/socdev/documents/youth/fact-sheets/YouthPOP.pdf> accessed 27 January 2020.

⁶⁷ Y Adegoke, 'African economies will outperform global growth in 2020 despite a lag from its biggest countries' (*Quartz Africa*, 12 January 2020) <https://qz.com/africa/1783714/african-economies-to-watch-in-2020-debt-and-climate-crisis/> accessed 29 January 2020.

more international sporting forums in Africa – including a regional centre for CAS.

An increasing number of sports disputes are emanating from Africa. These include cases around disciplinary issues around doping and those revolving around internal disputes within NSO. Some of these cases have received high prominence such as the Caster Semenya matter before CAS that sought to overturn the regulations by the International Association of Athletics Federation pertaining to female athletes with high levels of testosterone.⁶⁸ It would be in the interest of disputants based on the continent where to have such matters determined in a forum closer to the affected parties. This would further access to justice and recognising the growing importance of the continent in the world of sport. The choice of venue of arbitral proceeding has important logistical implications. It also impacts upon matters of procedure and enforcement, and in this sense the establishment of a regional centre in Africa may provide an opportunity for developing these aspects of arbitral practice in this part of the world. While the establishment of the CAS regional centre in Cairo is a boost in the right direction, one could argue that the location – far up north of the continent – does not address some of the concerns that are integral part for accessing justice such as physical proximity, linguistic affability etc. Moreover, Egypt has recently established the Egyptian Sports Arbitration Centre, which appears to run parallel to the intent behind setting up the CAS regional centre in Cairo.⁶⁹

The author of this paper believes that setting up a regional centre in Kenya could provide an appropriate platform in terms of the accessibility of CAS in this part

⁶⁸ J Carter & A Chaize, 'Caster Semenya Ruling and the pros and cons of the Court of Arbitration for Sport,' *Mondaq*, 10 September 2019) <https://www.mondaq.com/uk/Media-Telecoms-IT-Entertainment/843994/Caster-Semenya-Ruling-And-The-Pros-And-Cons-Of-The-Court-Of-Arbitration-For-Sport> accessed 28 January 2020.

⁶⁹ L E Shentenawi, F Ramzy & Y Sallam, 'Finally a Comprehensive Sports law in Egypt' (*AL Tamimi & Co*, July 2017) <https://www.tamimi.com/law-update-articles/finally-a-comprehensive-sports-law-in-egypt/> accessed 29 January 2020.

of the world. Various factor attests to the country's suitability to host a regional centre including its geographical suitability as well as its capacity within the scope of ADR. On the first point, Kenya remains one of the most active sports countries in Africa and has been prominent across a range of sporting codes. It is also a regional economic hub with a large international airport that provides access to global travel. In terms of the ADR capacity for the resolution of sports disputes, and as earlier noted, Kenya is one of the few countries on the continent with a Sports Disputes Tribunal. The tribunal is supported by a large number of professional arbitrators drawn from the Chartered Institute of Arbitrators (CIArb Kenya Branch) and the Nairobi Centre for International Arbitration.

There is a wide recognition of the high calibre of arbitrators who view their practice as a privilege and significant responsibility. Both those that serve on tribunals constituted under the auspices of the Sports Tribunal, NCIA or Chartered Institute of Arbitrators have been commended for their skill towards having matters heard and determined as quickly as possible. It is also worth noting that through these umbrella organisations it has an extended interaction with associations of arbitrators across the continent, an aspect that that would be ideal for establishing a regional centre. To support the growing interest in arbitral practice, several organisations including the Chartered Institute of Arbitrators provide quality training in ADR programmes across the region (including within the context of sports disputes). ADR is anchored in the legal and constitutional framework. In particular, Article 159 of the Constitution of Kenya acknowledges the utility of ADR in delivering access to justice by stipulating that judicial authority is to be guided by alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional resolution mechanisms.⁷⁰

Currently, the country is taking further steps to strengthen this existing framework through the promulgation of an ADR Bill and the adoption of an

⁷⁰ Article 159(2) (c), Constitution of Kenya, 2010.

ADR policy.⁷¹ All of this points to the promise that the country presents for the establishment of a CAS regional centre.

Before concluding, it is important to reflect upon a few factors that would underpin the effectiveness of setting up a regional centre within Kenya for CAS. First and foremost is the need to continue building even greater capacity among local arbitrators in matters of sports law and the disputes that arise therein. The composition of panels upon which the centre would draw upon needs to reflect persons with a strong background in sports law and administration, including former athletes such as the eminent chair of the country's Sports Tribunal. Persons acquainted with the sports domain may have the added advantage of getting to the heart of the disputes. On the other hand it is critical to have arbitrators with a strong legal background in order to ensure that decisions are hinged on sound legal interpretation.

Secondly, in view of the range of disputes that will come to the centre, it's important to ensure that flexible processes are tailored to meet the needs of the parties. This could include facilitating a med-arb process, setting up structures that would enable the forum to hear time critical cases at short notices (including over weekends) and providing the logistical and administrative support to hear matters via tele or video conference. Finally, it is important to emphasise that institutions are only as good as their leadership. The persons responsible for such a centre would have to enjoy enormous credibility in the world of sports and arbitration. Equally important, this person would have to be supported by a registrar reputed for his/her proactivity and efficiency.

⁷¹ 'Alternative Dispute Resolution Bill, 2019'
<http://www.parliament.go.ke/sites/default/files/2019-09/The%20Alternative%20Dispute%20Resolution%20Bill%2C%202019.pdf> accessed 28 January 2020 as read with 'Alternative Dispute Resolution Policy (Zero Draft)' (NCIA, 2019)
https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf accessed 28 January 2020.

7. Conclusion

The unique features of sports require that disputes be met with speedy and cost effective resolution mechanisms such as arbitration and mediation. These disputes are a reality and require to be addressed in platforms that guarantee neutrality, consistency, certainty, and in a manner that adheres to the principles of natural justice. When this happens the adjudicating forums gain credibility and the negative impact on the industry that such disputes could have is mitigated. In this regard, CAS should be lauded for its role in resolving sports disputes in an independent and efficient manner so that the efficacy of arbitration in sports is readily witnessed across the world. In order, for this success to be out-scaled so that they are experienced to a greater degree, the decentralisation of CAS to other regions may be a step in the right direction.

Africa, in particular, presents a credible case for the establishment of a regional office to meet the growing demands and contributions of the continent to the world of sports. The increased number of high profile sports disputes would also support this assertion. Where to locate such a centre would be an important part of such a discussion. Kenya presents a number of advantages in this regard - as a regional economic centre, a sporting powerhouse in its own right and a country with strong and growing ADR ethos and supporting legal regime. As CAS continues on its path of settling sports expeditiously and in a relatively cost effective manner, it may want to explore how these advantages can be diffused to meet the growing global needs. A regional centre in Kenya could be a strategic decision in this direction.

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*Exploring the Prospect of Kenya as a Regional Centre
for the Resolution of Sports Disputes through
Arbitration: Dr Ken Mutuma*

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Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects

*Nyutu Agrovet Limited - v- Airtel Networks Limited and another (SC
Petition No. 12 of 2016)*

*By: Wilfred Mutubwa**

1. Introduction

Kenya aims to assert itself as the regional economic hub of East and Central Africa. However, this is not without challenges. The rise of Rwanda, Ethiopia, and even Uganda pose a significant challenge to this ambition. In reaction to the competition posed by these countries, the government of Kenya have in the last decade or so embarked on the implementation of a radical transformative strategy that would not only attract Foreign Direct Investment (FDI) but also generally improve the environment for doing business. To this end, the government closely tracks its performance on the World Bank Ease of Doing Business Index.¹ The near obsession with this ranking instrument has caused the government to devise approaches to ensure the country's ranking improves. This has borne results as the country moved 5 steps from position 61 to 56 between 2019 and 2020. Kenya is now ranked third in sub-Saharan Africa after Mauritius and Rwanda.² Access to justice and significant costs of dispute resolution have remained a significant clog to achieving even better results in the ranking. In a further push to see improvement in the next assessment, plans

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¹<https://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf>. Accessed on 30th January 2020.

² Ibid.

are underway to waive court fees and to repeal the Advocates Remuneration Order, which prescribes the minimum fees charged by lawyers.³ The government has set up the Investment Promotion Authority, the Nairobi Centre for International Arbitration (NCIA) and a Business Registration Bureau, all in a bid to ease the doing of business in Kenya and to attract both domestic and foreign investment.⁴

It is against this background that the Supreme Court delivered its decision in the case of *Nyutu Agrovet Limited - v- Airtel Networks Limited and Another, Petition No. 12 of 2016*. This decision is significant in two respects. Firstly, the Supreme Court of Kenya is the apex court in the hierarchy of courts in Kenya. Therefore, its decisions form a binding precedent on all other courts in Kenya. Secondly, the court was called upon to determine whether there was a right of appeal to the Court of Appeal from a decision of the High Court following proceedings for setting aside an arbitral award.

2. Brief Facts

The decision of the Supreme Court of Kenya concerned the setting aside by the High Court of an arbitral award made in favour of the Respondent, following a commercial dispute between it and the Petitioner. The parties had entered into a distribution agreement in which petitioner was contracted to distribute various telephone handsets on behalf of Airtel. The dispute arose when an agent of the petitioner placed orders for the Respondent's products and upon delivery, the Respondent realised that the orders were made fraudulently. The Petitioner had also failed to pay for the goods and the agreement between the parties was thus terminated and a dispute in that regard arose.

³<https://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf>. Accessed on 30th January 2020.

⁴ See NCIA Act, 2013; <http://www.invest.go.ke/>; and <https://brs.go.ke/>. Accessed on 30th January 2020.

By agreement, the parties appointed Mr. Fred O.N. Ojiambo, SC, as the Sole Arbitrator in their dispute. It was expressly stated in the letter of appointment of the Arbitrator that the Arbitrator was to adjudicate on “*any dispute or claim arising out of or relating to the contract and/or alleged breach thereof.*” Upon conclusion of the arbitration hearing, the arbitrator delivered an award in favour of the Petitioner. It is this award that Airtel sought to set aside in the High Court and forms the basis of the subsequent appeals.

In the High Court, in an application brought by the Respondent under Section 35 of the Kenyan Arbitration Act, 1995 seeking to set aside the award in its entirety, the court had to decide *inter alia* whether the arbitral award had dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. The entire arbitral award was then set aside *purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge’s Ruling.*

Immediately after delivery of the High Court decision, the Petitioner orally sought leave to appeal to the Court of Appeal, which application was opposed by the Respondent on the basis that no right of appeal existed in relation to a decision made under Section 35 of the Arbitration Act. Despite the objection, the High Court granted the leave to appeal, noting that “*it will be a matter for the appellate court to determine whether the journey was a false start.*”

The Petitioner thereafter filed an appeal to which Airtel responded with an application seeking to strike out the record of appeal. A five Judge bench was constituted to hear the application. In its ruling, the Court of Appeal allowed the application. It unanimously held that the decision by the High Court made under Section 35 of the Arbitration Act was final and no appeal lay to the Court of Appeal; thus striking out the appeal and awarding costs to the Respondent.

Aggrieved by the findings of the Court of Appeal, the Petitioner filed the present appeal. The Petition was later certified under Article 163(4)(b) of the Constitution of Kenya as raising a matter of general public importance. Thus, the question for a determination as framed by the Supreme Court was whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the Arbitration Act.

3. Findings of the Supreme Court

The Court found that the Arbitration Act, 1995 and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Law do not expressly bar further appeals to the Court of Appeal. The court held that on the basis of dictates of the Constitution of Kenya 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus, in general, terms, after an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. In the Supreme Court's view, the purpose of Section 35 is

“to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration.”

This way, the court would be promoting the core tents of arbitration, which include

“an expeditious and efficient way of delivering justice that should not be done at the expense of real and substantive justice.”

While the Court acknowledged the need to shield arbitral proceedings from unnecessary Court intervention, it also acknowledged the fact that there may be legitimate reason seeking to appeal High Court decisions.

Furthermore, considering that there is no express bar to appeals under Section 35, the court was of the opinion that an *unfair determination* by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, the court warned, without offering specificity, that such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration.

It was argued for the Petitioner that access to justice includes the right to appeal. The Court held that the finality of arbitral awards does not deny access to the Courts. That when parties choose arbitration they cannot be heard to claim that one's right of access to justice has been denied or limited.

In his dissenting decision, the Chief Justice and President of the Supreme Court observed that one of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with the doctrine of *res judicata* that is deeply rooted in public international law. The Chief Justice noted that this principle finds expression in Section 32A of the Arbitration Act. According to the Chief Justice, the basis of the finality of arbitral awards in commercial disputes is founded on the need by commercial persons for expeditious and absolute determination of their disputes through final and enforceable outcomes.

The decision of the majority was to the effect that while the arbitral award is final, the ensuing court proceedings are not necessarily final. On the attempt to separate the arbitral award from the ensuing court processes, the Chief Justice was of a different persuasion to that of the majority. He was of the view that if the principle of finality is limited to the arbitral awards only and not to any court proceedings founded on them, as the appellant contended, then the objectives of arbitration would be defeated and the arbitration will be "*a precursor to*

litigation.” This is because of any Court proceedings that render an award unenforceable affects the principle of finality.

4. Comment

The following seven points of interest arise out of the Supreme Court’s decision.

1. The Court’s majority seems to be inclined towards the view that the Arbitration Act, 1995 is silent on whether or not appeals can be preferred, as of right, from Section 35 decisions by the High Court on the setting aside of arbitral awards. Far from it, the Act should be read wholly and not selectively. In essence, provisions of the Arbitration Act should be read conjunctively and not disjunctively. Section 10 of the Act is clear that

“Except as provided in this Act, no court shall intervene in matters governed by this Act”. Section 32 A, introduced by an amendment in 2009, is even more emphatic that “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”

It logically follows that if the Act does not specifically provide for an Appeal out of Section 35 rulings, then by dint of Section 10, no Court, not even the Court of Appeal or Supreme Court, can intervene beyond the circumstances defined in Section 35. It is pursuant to this interpretation that courts had, until this Supreme Court decision, held that arbitral awards were final and binding only subject to Section 35 Applications. It was generally understood that the decision of the High Court, on a Section 35 application, with regard to the validity of an arbitral award, was for all intents and purposes final.

2. The Jurisdiction of the Court of Appeal is circumscribed by Article 164(3) of the Constitution of Kenya. The provision reads:

“The Court of Appeal has jurisdiction to hear appeals from-

a) The High Court; and

b) Any other court or tribunal as prescribed by an Act of parliament."

This jurisdiction is further defined by Section 3(1) of the Appellate Jurisdiction Act. The provision reads:

"The Court of Appeal shall have jurisdiction to hear and determined in cases in which appeal lies to the court of Appeal under any law"

The effect of the qualification stressed in section 3(1) of the Appellate Jurisdiction Act is to limit the jurisdiction of the Court of Appeal to matters in which a written law prescribes such right of Appeal.

Therefore, for the Supreme Court to purport to read a right of appeal into Section 35 of the Arbitration Act 1995, in the absence of express statutory provision to that effect, is in my respectful and considered view, an egregious error and breach of Section 3(1) of the Appellate Jurisdiction Act Cap. 9 of the Laws of Kenya.

3. The Supreme Court suggests that appeals can lie from the High Court to the Court of Appeal, and even possibly to the Supreme Court, in limited situations and with the leave of Court. In other words, there is no automatic right of appeal from Section 35 decisions to the Appellate Courts. In the absence of statutory prescription of the right and grounds for such appeal, the Supreme Court attempted to draw parallels with the right of appeal in circumstances enumerated under Section 69 of the English Arbitration Act, 1996. In doing so, the Supreme Court makes two fundamentally erroneous normative prepositions.

Firstly, the court assumes that the English Act is either similar or in *pari materia* to the Kenyan Arbitration Act. While arbitration principles may largely be similar throughout many jurisdictions, the Kenyan and English

Acts are not the same. In fact, the Supreme Court rightly observes that the Kenyan Act is substantially modelled upon the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration law of 1985. The English Act, however, is not. The English Act is *sui generis* and a careful study of the history of its development will show that the English deliberately avoided a hook, line and sinker adoption of the Model Law.

Secondly, the Arbitration histories of Kenya and England are also different. While the English have nurtured and refined their arbitration practice for over six centuries, Arbitration in Kenya is hardly 70 years old. The current Kenyan Act is about 25 years old. Therefore, to import the grounds of appeal from the English Act, as the Supreme Court does, and to suggest that the same can be employed *mutatis mutandis* as grounds for the grant of leave to Appeal from Section 35 decisions of the High Court, is to attempt to merge two dissimilar premises. It is akin to transplanting a mature English oak to the virgin Kenyan soils without regard to the stark ecological differences.

It is a trite principle of a comparative approach to law that similarities in legal prepositions arising out of a common legal approach, or even history, can offer illuminating guidance in the interpretation, application or critique of the law. However, it is imperative that the premise is fundamentally symmetrical, for comparative purposes; or asymmetrical for contrast purposes. In other words, comparisons must be like-failure and contrast for opposite prepositions or approaches.

4. Furthermore, for the Supreme Court to enumerate grounds lifted from Section 69 of the English Arbitration Act as possible grounds for Appeals from decisions of the High Court under Section 35 of the Kenyan Arbitration Act, is to overstep its constitutional and statutory mandate. In the traditional Constitutional doctrine of separation of powers, courts interpret and apply the law, they do not legislate. The houses of parliament legislate. The Supreme Court, in this respect, exceeded its remit by entering into the

arena of legislation in an attempt to fill in what it presumed to be some lacunae in the law.

5. Conclusions must always logically flow from the body of the discourse undertaken in a Judgment. The Supreme Court makes important legal prepositions but proceeds to draw diametrically opposed conclusions. Perhaps in a well-meaning effort to assuage pro-arbitration observers that the court is pro-arbitration; the Court asserts that arbitral awards are, generally, final and binding. Yet in the same breath, the court proceeds to allow for assault on the arbitral award beyond the scope prescribed by statute. In what way can an award subject to review by the High Court or Court of Appeal, and possibly the Supreme Court, be final?

The reasoning of the Court is that the appeal mechanism suggested is meant to insulate the award from erroneous decisions of the High Court in applying the grounds set out in Section 35 of the Arbitration Act, 1995. The fault in this reasoning is the assumption that only Arbitrators and the High Court can be wrong and not the Court of Appeal or the Supreme Court. The Supreme Court, in this instance and many before, has reversed decisions of the Court of Appeal. Yet, even in this litigation itself, there are those who view the Supreme Court's decision as patently erroneous. In other words, there is no court in the judicial hierarchy that possesses a monopoly of rendering right or wrong decisions.

6. In the end analysis, the Supreme Court remits the matter back to the Court of Appeal for consideration on merit. This goes against the very grain established in the decision. The decision seems to suggest that it is for the High Court to consider whether the matter sought to be appealed against meets the very limited criteria defined by the Supreme Court before granting leave to appeal. In essence, the matter should have gone back to the High Court for the High Court to determine whether to grant leave to appeal or not.

7. Supreme Court decisions speak to a larger audience than the parties before it. The Court shapes jurisprudence on the interpretation and application of laws. This is because decisions of the Supreme Court form binding precedence on all the courts and tribunals below it. This is in keeping with the doctrine of *stares decisis* or precedence as applied in common law jurisdictions, to which Kenya subscribes due to its historical colonial links to Britain. It is for this reason that I find that the Supreme Court missed an opportunity to address the hierarchical order, place and status of the fragmented pieces of legislation addressing both domestic and international arbitration in Kenya. For example, the Nairobi Centre for International Arbitration (NCIA) Act, 2013; the Land Act 2012, the High Court (Organisation and Administration) Act, 2015, among others. It was an opportunity for the Court to give guidance on a consistent approach on the subject which seems to be addressed by several conflicting statutes.

5. Conclusions

Article 159(2) (b) of the Constitution of Kenya recognises, as part of principles of exercise of judicial authority in Kenya, that Alternative Dispute Resolution (ADR) mechanisms including arbitration, shall be promoted. It is a constitutional command and imperative. To promote arbitration would also mean to secure one of its fundamental principles, finality. Where parties choose arbitration as a means of resolving their disputes, they consciously choose limited court intervention, ending in the High Court, unless they agree before commencing arbitration, as prescribed by section 37, for an appeal limited to points of law, to the court of Appeal.

As Kenya seeks to position itself as the regional hubs for investment and arbitration, the Supreme Court decision is likely to be seen as a set back from the long line of decisions of the Kenyan Courts which were seen as being pro-finality of arbitration awards. The decision of the Supreme Court does not augur well with the ambition of Kenya being seen as a safe seat for international

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arbitration, particularly since the Arbitration Act 1995 regulates both domestic and international arbitrations seated in Kenya.

The proposal going forward is to engage in law reform, in an effort to bring clarity to this most fundamental question of the finality of arbitral awards, among many other glaring weaknesses inherent in the Arbitration Act, 1995.

Application of ADR Mechanisms to Manage Sports Disputes in Kenya

By: *Emmanuel Mwati Muriithi**

Abstract

This paper analyses the Alternative Dispute Resolution Mechanisms that are available to efficiently manage sports disputes in Kenya. The paper critically examines the Alternative Dispute Resolution (ADR) mechanisms that may be applied to manage sports disputes in Kenya and under what circumstances they may be applied. This includes the unique features of these mechanisms, their advantages as well as any challenges that may be encountered in the application of these ADR mechanisms. Finally, the paper offers practical recommendations that can be used to ensure that the sports dispute resolution and settlement process in Kenya is top notch and that parties to sports disputes have confidence that these mechanisms can be able to manage their disputes amicably and ensure that there is harmonization in the society.

1. Introduction

This paper focuses on the forms of Alternative Dispute Resolution (ADR) mechanisms that may be applied to manage sports disputes in Kenya being alive to the fact that in as much as the Kenyan legal system provides for the use of ADR mechanisms to manage disputes, it does not comprehensively outline the most effective ADR mechanisms that may be applied to deal with sports disputes and under what circumstances they may be applied to achieve the desired results.

There are a number of advantages of using ADR Mechanisms to manage sports disputes which include, *inter alia*, leniency when it comes to procedural matters, they are cost effective and these mechanisms are also expeditious. Most ADR mechanisms, apart from Arbitration, look into the core causes of a dispute in

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order to resolve the disputes completely without chances of the disputes flaring up in the future.¹

2. Negotiation

Negotiation is one of the key ways of resolving conflicts as it aims at ensuring that the parties are able to discern the issues that caused the dispute and discuss them so as to arrive at a solution that has been mutually agreed upon without one party feeling as if they have lost.²

It is an alternative way of resolving disputes that is informal in nature, flexible and grants the parties maximum autonomy over their disputes as well as ensuring that the parties are satisfied as they are the ones who find solutions to their dispute hence ensuring that the dispute does not recur in future.³

2.1 Negotiation as a mechanism to resolve sports disputes in Kenya

Negotiation can be really effective in resolving sports disputes as it looks at the common interest of the parties in their position or power notwithstanding. In the long run, the parties individual and mutual interests will have been satisfied by negotiation and all this takes place without a third party.⁴ In the event that the parties to the sports disputes are unable to resolve their disputes using negotiation then they can resort to mediation.⁵

¹ Kariuki Muigua, *Effective Justice for Kenyans: Is ADR really Alternative*, Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> (accessed on 20 January 2020)

² Ibid.

³ Kariuki Muigua, *Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies*, Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Justice.pdf> (accessed on 21 January 2020)

⁴ Kariuki Muigua, *'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> (accessed on 21/01/2020)

⁵ Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006)

Unfortunately, it is very prudent to note that the Draft Rules of the Sports Dispute has not provided for negotiation as a way of resolving sports disputes in Kenya. This is a sad state of affairs considering how, as discussed above, effective negotiation can be when applied to resolve sports disputes.

3. Mediation

The best definition of mediation for purposes of this paper is the one encapsulated in the Civil Procedure Act, which defines mediation as a process that is informal and non-adversarial in nature and is aimed at resolving disputes between two or more parties. However, it should be differentiated from judicial proceedings as it does not entail any attempts that are made by a judge as is normally the case in litigation.⁶

For mediation to take place, then there has to be a mediator who is a third party tasked with the responsibility of facilitating the mutual concessions between the disputing parties.⁷ Mediation may also be described as a continuation of negotiation, the only difference being the fact that in mediation there is a mediator who carries out the mediation process.⁸

3.1 Mediation as a mechanism to resolve sports disputes in Kenya

Pursuant to the Draft Rules of the Sports Disputes Tribunal, the tribunal may either on its own motion or at the request of the parties order any sub-issue to be mediated either before an independent person or a tribunal member.⁹ The major problem, which this paper addresses, is how mediation can be applied to resolve sports disputes as a whole, unlike what has been provided for in the Draft Rules of the Sports Disputes Tribunal, and under what circumstances should the tribunal order either an issue or a sub-issue to be mediated.

⁶ Civil Procedure Act 2010, s 2

⁷ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Colorado: Jossey – Bass Limited 2004).

⁸ *Ibid* 5 above

⁹ Draft Rules of the Sports Disputes Tribunal, Para 32

For mediation to be successful to resolve sports disputes then the mediator chosen by the tribunal must be accepted by the parties to the dispute and they should not have any interest in that dispute apart from ensuring that the parties are able to arrive at an amicable, peaceful settlement.¹⁰

GV Odunga J in *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others*¹¹ noted that the role of a mediator is to ensure that the parties to the dispute arrive at a peaceful settlement and in doing so he/she is neither applying nor interpreting the law. The mediator selected by the tribunal should therefore ensure that he conducts the mediation in a private and confidential manner with the main aim of ensuring that disputing parties are able to amicably resolve their dispute.

Mediation is effective in resolving sports disputes owing to the fact that the parties to the dispute in most instances have previously had a relationship between them, for instance, disputes between players and their coaches and in the long run they would seek to continue their relationship in the future.¹²

4. Arbitration

Just like in mediation, arbitration entails a consensual process that is private and confidential where the parties to a dispute agree to refer their matter to a third party for resolution. In this case, the third party is known as an arbitrator or an arbitral tribunal. After hearing the dispute, the tribunal comes up with a decision known as an arbitral award which is final and binding to all the parties to the dispute.¹³

4.1 Arbitration as a mechanism to settle sports disputes in Kenya

Arbitration is the most common method of settling sports disputes in Kenya. In fact, the Sports Act 25 of 2013 recognizes arbitration as an ADR mechanism that

¹⁰ M., Barkun, ' Conflict Resolution through Implicit Mediation', (1964) Journal of Conflict Resolution

¹¹ *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* (2014) eKLR

¹² J., Murray (1989) *Processes of Dispute Resolution: The Role of Lawyers*

¹³ R., Stephenson, (1998) *Arbitration Practice in Construction Disputes*

may be used to settle sports disputes and goes ahead to form a tribunal tasked with the management of sports disputes using arbitration.¹⁴

Proceedings before the tribunal which are dealt with through arbitration are private and confidential in nature. However, in exceptional circumstances where it is appropriate to make a public hearing or in the event that the parties so agree then the Tribunal through its discretion will hold such a public hearing. Still applying its discretion, unless the Tribunal considers otherwise then the decision of the Tribunal in that proceeding will be published.¹⁵

The arbitrators appointed to the tribunal are experts who have legal experience in sports related matters or have in any capacity been involved in sports matters.¹⁶ This means that the disputes are able to be resolved efficiently by those persons who are well versed with the relevant knowledge in the sports sector.

The tribunal tries as much as possible to make the arbitral process as flexible as possible by allowing the parties to agree on the time frames within which they will file or amend their pleadings.¹⁷ Of importance to note is the fact that the decision of the tribunal shall be final and binding on the parties and should not in any situation whatsoever be questioned before any court of law.¹⁸

5. Mediation - Arbitration (Med-Arb)

This is a form of ADR mechanism which combines both mediation and arbitration and it transpires in situations where the parties to a dispute first agree to resolve their dispute through mediation but if that fails they then proceed to settle their dispute through arbitration.¹⁹

¹⁴ Sports Act 25 of 2013 sec 58.

¹⁵ Draft Rules of the Sports Disputes Tribunal, Para 26

¹⁶ Sports Act 25 of 2013 sec 55

¹⁷ Draft Rules of the Sports Disputes Tribunal, Para 19

¹⁸ Draft Rules of the Sports Disputes Tribunal, Para 29 (a)

¹⁹ C., Osborne, (2007) *Civil Litigation: Legal Practice Course Guides*.

5.1 Med-Arb as a mechanism to resolve sports disputes in Kenya

This ADR mechanism will be efficient to resolve sports disputes owing to the fact that it will enable parties to sports disputes, by combining both mediation and arbitration, to be in control of the entire dispute resolution process and at the end, the final decision or the arbitral award will be final and binding on the parties.²⁰

To avoid conflict of interest, it is imperative that the person who is mediating over the sports dispute should not be the one who arbitrates over the same dispute. The downside of having the same person is that that person may become privy to confidential information involving one or both of the parties to the sports disputes which can make him bias when making an arbitral award.²¹ This will, of course, be to the disadvantage of one or both of the parties to the sports dispute. In the event that it is one person who will facilitate both the mediation and arbitration, in the resolution of the sports disputes, then it is vital for him to be careful about how he applies the confidential information that he acquires during the mediation process to arbitration.²²

The tribunal should be diligent in deciding on which sports disputes will be best settled through med-arb. It should go ahead and enlighten the parties on what this mechanism entails give the parties to the sports disputes the pros and cons of this ADR mechanism as well as informing them of the consequences of dealing with their dispute through med-arb. This is so as to enable the parties to have confidence in the process as well to readily accept the outcome of this ADR mechanism.²³

²⁰ C., Bridge, 'Mediation and Arbitration - Are they Friends or Foes?' (2012) <https://www.campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf> (accessed 14 January 2020)

²¹ A., Liberman, 'MED-ARB: is there such a thing?' <http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/> (accessed 14 January 2020)

²² *Ibid*

²³ Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers Limited 2015)

6. Arbitration – Mediation (Arb-Med)

Arb-Med is a form of ADR mechanism where the parties to the dispute first take their dispute to arbitration and thereafter opt to refer their dispute to mediation for resolution.²⁴

6.1 Arb- Med as a mechanism to resolve sports disputes in Kenya

To effectively use Arb-Med to deal with sports disputes in Kenya, the tribunal should first hear the sports dispute, render a decision but it should not reveal it to the parties, then the tribunal should refer the parties either on its own motion or at the request of the parties to mediation.²⁵

In the event that the parties are able to resolve their dispute through mediation then the tribunal's arbitral award will be discarded but in the unlikely event that they are not able to resolve their dispute through mediation, the tribunal's award will be revealed to the parties to the sports disputes and the effect of this is that it will be binding on them.²⁶

In the same vein, the tribunal should be diligent in ensuring that those involved in the arbitration process are not the same ones conducting the mediation. This is to avoid any bias from the arbitrator who after resolving the sports dispute might have already made a decision on which party is successful hence not making a proper informed decision when mediating.²⁷ Likewise, the tribunal should ensure that the mediators that it chooses to hear a sports dispute between the parties are well knowledgeable on matters relating to sports so as to assist the parties to arrive at successful outcomes.

²⁴ C., Weisman, 'Med/ Arb – A Time and Cost Effective Hybrid for Dispute Resolution,' (2011)https://www.wysr-law.com/files/med-arb_a_cost_effective_hybrid_for_dispute_resolution.pdf (accessed 14 January 2020)

²⁵ *Ibid*

²⁶ *Ibid* 18 above

²⁷ *Ibid* 16 above

7. Challenges in enforcing ADR Mechanisms to manage Sports Disputes in Kenya

ADR mechanisms are usually intended to assist parties, in this case to sports disputes, to either resolve or settle their disputes amicably without requiring them to take their matter to court. However, in as much as this is the case, the Sports Act has not comprehensively provided which ADR mechanisms may be applied and under what circumstances they may be applied. The situation is even worse owing to the fact that the Draft Rules of the Sports Disputes Tribunal have not yet been gazetted. Similarly, even if they were to be gazetted they still do not provide for the various ADR mechanisms that may be applied to manage sports disputes.

This leaves a lacuna in the law as parties to sports disputes are left stranded as what mechanisms they may apply to resolve their sports-related disputes.

8. Way Forward on the application of ADR Mechanisms to manage sports disputes in Kenya

The Chief Justice, in accordance with Section 61 of the Sports Act, should consider having the Draft Rules of the Sports Disputes Tribunal gazetted. As of now these rules have been adopted but not yet gazetted.

The Chief Justice should in consultation with the chairperson of the Sports Disputes Tribunal, consider the adoption of rules that prescribe the various ADR mechanisms that can be applied to resolve sports disputes and under what circumstances they can be applied. This is necessary owing to the fact that as of now there are no rules that prescribe the various ADR mechanisms that can be applied to resolve sports disputes and under what circumstances they can be applied.

The Sports Disputes Tribunal should consider establishing and maintaining a wide list of arbitrators and mediators from which parties to sports disputes can choose from. The parties should then be given the discretion to choose which mediators or arbitrators they want to resolve their sports disputes.

9. Conclusion

With regards to sports disputes, ADR mechanisms are usually intended to assist the parties to manage their disputes amicably without requiring them to take their matter to court. However, in as much as this is the case, the Sports Act No 25 of 2013 has not comprehensively provided which ADR mechanisms may be applied and under what circumstances they may be applied. The situation is even worse owing to the fact that the Draft Rules of the Sports Disputes Tribunal have not yet been gazetted and even if they were to be gazetted they still don't comprehensively provide for the various ADR mechanisms that may be applied to manage sports disputes. This therefore leaves a lacuna in the law as parties to sports disputes are left stranded as to what mechanisms they may apply to resolve their sports-related disputes.

ADR mechanisms are now part of Kenya's legal framework as they have now been encapsulated in the Constitution of Kenya.²⁸ If used effectively they can lead to access to justice in the sports sector and above all they can be, *inter alia*, expeditious, cost effective and flexible.

²⁸ Constitution of Kenya, Art. 159

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Kariuki Muigua, Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies, Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Justice.pdf>_(accessed on 21 January 2020).

Kariuki Muigua, '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>_(accessed on 21/01/2020).

C., Bridge, 'Mediation and Arbitration - Are they Friends or Foes?' (2012) <https://www.campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf>_(accessed 14 January 2020).

A., Liberman, 'MED-ARB: is there such a thing?' <http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/> (accessed 14 January 2020).

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Corruption and Arbitral Integrity: Issues and Perspectives on Corruption and the Sanctity of Arbitral Tribunals

*By: Paul Mwaniki Gachoka**

Abstract

The overarching goal of this academic discussion is to consider the constantly avoided question of corruption and the integrity of arbitral tribunals. In the dispensation of justice between parties, an arbitrator's conduct is ideally considered beyond reproach like Pompeia's, the wife to Caesar. However, with the frailty of the human flesh and temptations abounding in plenty, it is no longer legally and ethically safe to trust that arbitrators would wholly abide by that principle.

But most critical is the aspect of corruption constituting not a wrong between parties but a politico-moral ill constantly sought to be avoided by society at all costs. In Kenya specifically, corruption has always been the hydra-headed monster that indiscriminately devours the heart of the nation. Sadly, the corruption monster is slowly finding a seat at the very altar of arbitral tribunals; an altar where the public has put its trust as the last safeguard.

At great lengths, this paper will discuss the foundations of the independence and integrity of arbitral tribunals as these concepts form the trust relationship upon which parties hold onto dearly. Further, the paper will seek to delineate the ways in which corruption permeates into the inner sanctum of arbitral dispute resolution. Notably, the paper acknowledges that there exist myriad ways that corrupt activities can be transacted and will not delve into each of them but will greatly consider the players involved.

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However, the epitome of this piece will be to chart a way forward. It is to start a reflection on upholding the traditional yet very important tenets of arbitration. Indeed, it the hope of this paper that the current crop of arbitrators and the arbitrators to come will endeavour to place the interest of justice above their selfish interest of material gain.

1. Introduction

On 4th November 2019, the Hon. Jorge Chavez Tamiriz of the Third Court of Investigation in Crimes of Corruption ordered the preventive detention of fourteen arbitrators pending the determination of allegations of bribery in relation to forty-two different disputes referred to arbitration.¹ At the heart of the corruption allegations was the Peruvian government and the Brazilian construction company Odebrecht.

Odebrecht directors admitted to having bribed several Peruvian authorities and arbitrators in exchange for lucrative construction contracts. Among the detained arbitrators was a renowned international commercial arbitrator, Fernando Cantuarias Salaverry, a Member of the Board of Reporters of the Institute of Transnational Arbitration (ITA).² Some of the arbitrators in the Odebrecht corruption scandal are reported to have allegedly received over three million dollars as bribes.³

¹ Billy Franco, "Arbitrators who were imprisoned in Peru have been released, but remain subject to significant restrictions on their freedom pending corruption investigations" 5th November 2019 available at https://www.dlapiper.com/en/uk/insights/publications/2019/12/arbitrators-imprisoned-in-peru/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (Accessed on 15th January 2020)

² The Associated Press, "Judge orders 14 Peruvian attorneys jailed in Odebrecht case". 5th November 2019 available at <https://apnews.com/3be395f8752a4d6f974592f771bca98f> (Accessed on 15th January 2020)

³ Carlos Ríos Pizarro, 'Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators' 10th December 2019 available at <http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and->

However, the arbitrators appealed the ruling and the decisions were reversed albeit with other restrictions including travel restriction and the imposition of house arrest orders. Despite the sense of reprieve, it was not lost that one of the accused arbitrators admitted having been the conduit of wiring the money. This piece of news was a great shock to the players in the arbitration arena including the International Chamber of Commerce (ICC), the International Board Association (IBA) and the Spanish Chamber of Commerce.⁴

The above-narrated occurrence of corruption in the arbitration circles is but one of many incidences where bribery allegations have been levelled against arbitrators. However, it is shocking that only a handful of these allegations see the light of day as most are swept under the carpet. Nonetheless, the Odebrecht Scandal portrays an arbitral system that is not foolproof. It is indeed instructive, to pause and ask pertinent questions on the same. For instance, if allegations of corruption can be levelled against esteemed arbitrator held in high regard, what about the young arbitrators who haven't yet reaped honest dividends from their practice as arbitrators.

1.1 The Perceived Integrity and Independence of Arbitral Tribunals

The age-long philosophical principle of judicial officers exhibiting unparalleled independence in the performance of their duties is equally the adopted measure for arbitral tribunals world over.⁵ It is observed that the duty of arbitrators to act independently stems from the voluntariness upon which parties submit themselves to the jurisdiction of arbitrators. Parties who submit to such jurisdiction believe that the arbitrator(s) will only be influenced by the facts and the law appurtenant to the case.⁶

sinnners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/(Accessed_on_15th January 2020)

⁴ Ibid

⁵ The right to a fair trial requires judges to be impartial. The right to be tried by an impartial tribunal implies that judges (or jurors) have no interest or stake in a particular case and do not hold pre-formed opinions about it or the parties.

⁶ Bernardini, Piero, *The Role of the International Arbitrator*, Arbitration International, Vol.20, n.2.,2004

Integrity and ethics also form a key concept of an arbitrator.⁷ High ethical standards, professionalism and competence are qualities demanded from an Arbitrator. In the absence of such qualities, parties before the arbitrator or any other parties seeking to have a dispute settled by way of arbitration lose faith in the arbitral process. To protect the integrity of the arbitration, professional bodies governing the practice in various jurisdictions have richly invested in training and development aimed at instilling and installing high professional and ethical standards to their members.

However, with the phenomenal growth of arbitration as a suitable alternative dispute resolution mechanism in the settlement of mainly commercial disputes, ethical concerns have also arisen in respect of the integrity of the arbitration process as a whole.⁸ The ethical questions range touch not only on the arbitrator's conduct but also on the conduct parties, and interested parties such as governments, non-governmental organizations and multinational corporations.

These players in the arbitral process are key in ensuring that a fair and just decision is reached upon by an arbitral tribunal. However, inasmuch as it would be ideal for an arbitral process to proceed smoothly without external interference, it has become the case that one of the parties or the interested party would seek to gain undue advantage through the arbitral through overt methods.⁹ To this end, it culminates in corruption and affects public policy.

⁷ Ahmed S. El-Kosheri & Karim Y. Youssef, *The Independence of International Arbitrators: An Arbitrator's Perspective*, in *International Chamber Of Commerce, Independence Of Arbitrators: 2007 Special Supplement* 43, 51 (2008).

⁸ Marx, Herbert L, *Arbitration as an Ethical Institution in Our Society*, *The Arbitration Journal*, Sep. 1982, Vol 37 No. 3.

⁹ *The Fights Against Corruption in Latin America: Implication for lawyers*, IBA/ICC Anti-Corruption Conference available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=ac939292-1981-4765-a51b-3a5b83378891> (Accessed on 21st January 2020)

2.0 Public Policy and Arbitral Corruption

The definition of the term public policy has not received scholarly consent. However, the elements of public policy can be noted from attempted means to determine what constitutes public policy. Peter North and James Fawcett have defined public policy to mean, ‘*some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception*’¹⁰. To this end, public policy entails protecting values that are so dear to society that any attempt to violate such norms would threaten the social wellbeing of a state.

Corruption is one of the vices that threatens and undermines public policy¹¹. Perhaps it is now commonplace that corruption has created and continues to create more harm across the world. Transparency International defines corruption this vice as, “*the abuse of entrusted power for private gain.*”¹² In the current context arbitral corruption refers to the arbitrator’s abuse of the power entrusted unto them for private gain. In the Kenyan legislative context, arbitrators have an array of powers in the dispensation of arbitral disputes. For instance, an arbitral tribunal can give interim orders to preserve the subject matter¹³, order provision for security for costs, determine the admissibility of evidence¹⁴ and issue final awards.

Arbitral corruption, therefore, occurs when an arbitrator uses his powers for private gain or because of self-interest. This form of corruption occurs in various ways. For instance, a party or interested entity can approach the arbitrator and

¹⁰ Peter North and James Fawcett, Cheshire and North’s, *Private International Law* (Butterworths, 13th ed., 1999) at p. 123.

¹¹ Mark Pieth, *International Cooperation to Combat Corruption*, in PETERSON INST. FOR INT’L ECON., *CORRUPTION AND THE GLOBAL ECONOMY*

¹² Transparency International, “*What is corruption?*” Accessed on 16th January 2020 and available at https://www.transparency.org/what-is-corruption#define_ (Accessed on 17th January 2020)

¹³ Section 18 of the Arbitration Act, Chapter 49 Laws of Kenya. (Government Printer, Nairobi)

¹⁴ Section 20 of the Arbitration Act, Chapter 49 Laws of Kenya (Government Printer, Nairobi)

offer a bribe in exchange for a favourable outcome.¹⁵ Alternatively, a party may promise to give up part of the award if it is the matter is decided in his favour.¹⁶ The manner in which arbitral corruption would occur are many and it's best to leave the methodologies to the participants themselves. Nonetheless, preserving the integrity of the arbitration process remains paramount.

3. Arbitral Corruption and the Constitution of Kenya

Arbitration as a forum for dispute resolution finds anchorage in the Constitution of Kenya 2010. It is a contemplation of the constitution that parties can pursue alternative forms of dispute resolution in their quest for justice.¹⁷ Indeed to give life to the constitution, the Arbitration Act, Chapter 49 of the Laws of Kenya provides how parties can solve their dispute through arbitration. However, in pursuing arbitration as a mode of dispute resolution, parties are not free to avoid the constitutional environment. Article 10 of the Constitution of Kenya provides for the national values and principles that bind all persons including arbitrators.¹⁸ Particularly it provides that all persons while performing any duties under any law observe the rule of law, integrity and transparency.¹⁹ Thus, in the performance of their duties, arbitrators are to ensure that observe the rule of law and are transparent and independent.

¹⁵ William Fox, *Adjudicating Bribery and Corruption Issues in International Commercial Arbitration*, 27 J. ENERGY & NAT. RESOURCES L. 487, 487 (2009).

¹⁶ Claudia T. Salomon & Sandra Friedrich, *Obtaining and Submitting Evidence in International Arbitration in the United States*, 24 AM. REV. INT'L ARB. 549, 550 (2013).

¹⁷ Article 159(2) of the Constitution of Kenya 2010(Government Printer, Nairobi)

¹⁸The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them -

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

¹⁹ Article 10(2) of the Constitution of Kenya 2010

Chapter six of the constitution underpins the tenets of leadership and integrity. Although the provisions under chapter six of the constitution only bind state officers, it is important to highlight arbitrators ought to abide by it. Notably, some arbitrators handle matters involving government agencies, property and sometimes state officers. Although in dealing with such matters arbitrators operate private persons, it should not be lost that they are determining matters of public interest and should be expected to hold themselves in good standing. Thus, from a constitutional perspective, it is indeed supreme for arbitrators to abide by the letter of the grundnorm in the performance of their duties. Further, arbitrators are to abide by all other relevant laws, including the Arbitration Act that governs the performance of their duties.

4. Reported Instances of Alleged Arbitral Corruption.

World over, arbitral corruption continues to find traction. Indeed, it is not uncommon to find a party in before an arbitrator moving to court and filing cases against the arbitrator based on alleged corruption²⁰. The foregoing are instances where parties have approached the judicial system in their countries to find legal redress against alleged arbitral corruption. For purposes of clarity, it is to be noted that these are only alleged cases of arbitral corruption.²¹

4.1 Amtrust Financial Services, Inc., Vs Antonio Somma and Marco Lacchini.

The Plaintiff, in this case, Amtrust Financial Services Inc., instituted civil proceedings at the United States District Court of New York against Antonio Somma and Marco Lacchini, an Italian arbitrator, claiming that the Arbitrator had been offered ten percent of the total arbitral award. Before the filing of this suit, the Plaintiff had petitioned an Italian Court to remove Marco Lacchini as an arbitrator in the proceedings and the arbitral proceedings were consequently suspended.

²⁰ Vladimir Pavic, *Bribery and International Commercial Arbitration: The Role of Mandatory Rules and Public Policy*, 43 VICTORIA U. WELLINGTON L. REV. 661, 676 (2012).

²¹ Noting that some of these cases have been appealed, we only cite them based on the status of the matter as at the time of writing this paper.

However, the matter did not finally decide as the arbitrator and the parties decided to solve the matter out of court.

4.2 Kisumu National Polytechnic v Messrs Cell Arc System Limited [2019] eKLR

Kisumu National Polytechnic, the Applicant in this matter moved the court to set aside the arbitral award published by the Sole Arbitrator, Mr. Festus Mukunda Litiku. The Polytechnic challenged the arbitral award on the basis that the Arbitral Award was tainted with gross *mala fides*, undue influence, fraud, dishonesty and was in flagrant breach of the common law and common decency. Particularly the Applicant claimed that the arbitrator visited the polytechnic premises during the pendency of the Arbitration contrary to the Arbitration Rules with a view to soliciting an inducement. However, the applicant rejected the arbitrator's request.

The court albeit not confirming that the arbitrator solicited for a bribe held that the arbitrator having visited the premises of the applicant was against the CI Arb Rules and set aside the arbitral award in entirety.

4.3 Mistry Javda Parbat & Company Limited v Grain Bulk Handlers Limited [2016] eKLR

In this case, the Applicant, Mistry Javda Parbat & Company Limited challenged the Arbitration between them and the Respondent, Grain Bulk Handlers Limited on the grounds of bias and procedural impropriety. The arbitration was before the Honourable Arbitrator, Philip Bliss Alier. Notably, Mr. Philip Bliss Alier is a Fellow of the Chartered Institute of Arbitrators, a Barrister in England and Wales and admitted to the State of New York as a Foreign Legal Consultant. The grounds of challenging the arbitrator's suitability to conduct the arbitration included claims that the arbitrator carried out himself in a manner that exhibited bias, failure to treat the parties equally and failure to observe the sacrosanct principle of party autonomy.

It is notable that in this case, the Arbitrator postponed the award several times and only issued the award hours after the Applicant raised objections as to his conduct throughout the Arbitral process. In its ruling, the court held that the Arbitrator had handled the arbitral process so incompetently. The court specifically stated that;

“the Arbitrator, having so incompetently handled the said arbitration, and having delivered no award, and having wasted the time of the parties herein, ought not to be remunerated for there is no valid consideration for such remuneration”

4.4 Ethics & Anti-Corruption Commission v National Cereals & Produce Board & another [2014] eKLR

The basis of this case was a tender for the supply of maize at the time when Kenya experienced a shortage of maize. The first Respondent, in this case, advertised a tender for the supply of close to 180,000 metric tonnes of white maize. The second respondent, Erad Supplies & General Contractors Ltd, was awarded the tender to supply 40,000 metric tonnes of white maize at the agreed price of US\$ 229 per metric tonne.

A dispute as to the performance of the contract arose and the matter was referred to the sole arbitrator, Mr. E. T. Gaturu. In his award, the arbitrator awarded the 2nd respondent US\$ 1,960,000 as loss of profit of US\$ 49 per metric tonne; US\$ 1,146,000 as storage costs due to suppliers. However, the 1st Respondent was dissatisfied and moved to the High Court to set aside the award on the basis that the arbitrator had exceeded his jurisdiction and that the award was against public policy.

The arbitrator's award was upheld by the High Court and this culminated in several Applications including an appeal to the High Court. With extreme allegations of corruption, the EACC sought to be included in the matter. It is crucial to note that the matter is *sub-judice* and this paper will not delve into the finer details of the case.

5. The Reporting Mechanism of Arbitral Corruption

Albeit corruption constituting a criminal offence²² in Kenya, arbitral corruption has proven difficult to identify a specific reporting mechanism. This is coupled by the fact that arbitrators in Kenya are given the power to arbitrate by different institutions such as the Chartered Institute of Arbitrators, the Law Society of Kenya and the Judiciary. Sometimes parties agree among themselves on whom to arbitrate. Unfortunately, most of these institutions lack a well-defined mechanism on how to investigate arbitral corruption.

5.1 The Ethics and Anti-Corruption Commission

The criminalization of corruption finds its place in the Anti-Corruption and Economic Crimes Act. The Act provides for the manner of investigation and reporting mechanism. This is also supplemented by the Ethics and Anti-Corruption Commission Act²³ which establishes the Ethics and Anti-Corruption Commission (EACC) which is contemplated under the constitution.²⁴ The anti-graft main resolve is to tackle the corruption cases in the country. This extends both to the government sector and the public sector.²⁵ Therefore, the EACC is one of the arenas upon which arbitral corruption can be handled.

5.2 The Professional Conduct Committee of the Chartered Institute of Arbitrators

Furthermore, the Chartered Institute of Arbitrators, Kenya has developed a set of rules aimed at curbing arbitral corruption and other disciplinary issues facing arbitrators.²⁶ The Rules establish a Professional Conduct Committee whose role

²² Section 46 of the Anti-Corruption and Economic Crimes Act. (Government Printer, Nairobi)

²³ No.22 of 2011(Government Printer, Nairobi)

²⁴ Article 79 of the Constitution of Kenya 2010.

²⁵ Section 11(d) of the Ethics and Anti-Corruption Act- the commission may investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

²⁶ The Chartered Institute of Arbitrators Regulations 2017.

is to investigate, discipline, suspend or expel a member of the institute. The committee consists of lawyers and laymen.²⁷ However, the rules do not give a step by step guideline on how parties can report alleged cases of arbitral corruption.

5.3 The Arbitral Tribunal

Another avenue in which parties can address allegations of arbitral corruption lies in the heart of the arbitral tribunal itself. Parties before the arbitrator can raise their concerns about the impartiality of the arbitrator himself. Generally, arbitrators are enjoined to disclose any matters that may affect their impartiality or independence.²⁸ Further, parties are allowed to raise concerns about the independence or impartiality of the arbitrators before the arbitral tribunal.

If a party challenges the impartiality of an arbitral tribunal, the arbitrator may decide to withdraw entirely. However, if the arbitrator refuses to withdraw, a party is allowed to move the High Court to determine the matter.²⁹ The court may then determine whether there are indeed justifiable grounds to have the arbitrator withdraw. Unfortunately, in this instance, there are no repercussions to arbitrators who are found to lack impartiality and independence.

5.4 Judicial Scrutiny of Arbitral Awards

Section 35 (1) and (2) of the Arbitration Act provides for setting aside of arbitral awards by the High Court. More specifically the Act provides that an arbitral award may be set aside if the making of the award was induced or affected by fraud, bribery, undue influence or corruption.³⁰ Further, the Act provides that the award may be set aside if it conflicts with the public policy of Kenya.³¹ In this case, a party who alleges that an arbitral award was made through corrupt practices can challenge the award in the High Court. Unfortunately, this altar of

²⁷ Rule 10 of the Chartered Institute of Arbitrators Regulations 2017.

²⁸ Section 13(1) of the Arbitration Act. 1995.

²⁹ *Ibid.*

³⁰ Section 35(2) of the Arbitration Act 1995.

³¹ Section 35(3) of the Arbitration Act 1995.

dispute resolution does not provide for the punishment of an arbitrator who is found to have made an award tainted with corruption.

6. Final Reflections on the Tackling of Arbitral Corruption

From the foregoing, it is evident that arbitral corruption is indeed a threat to the spirit of arbitration. It is observable that the avenues for tackling arbitral corruption are minimal and further they fail to provide for a comprehensive mechanism for punishing arbitrators who engaged in corruption. Therefore, it is indeed proper for associations governing arbitrators to first rethink the code of ethics of their members thoroughly. Arbitrators ought to be educated on their expected high standards of ethical behaviour beforehand. This can also be enhanced by having a background check of the arbitrators before they take up the task of arbitration.

Moreover, bodies such as the CIArb ought to develop a proper set of guidelines on the reporting and tackling of arbitral corruption. These rules should provide for the forms of corrupt practices, the mode of reporting, the timelines of determining disputes and the appellate procedure among others. This will ease the burden of aggrieved parties in their quest for justice.

Last but not least, arbitrators and parties must be sensitized about corruption and its negative effects on arbitration. Notably, corruption not only affects the arbitration at hand but also affects future engagements between the arbitrator and the parties. Therefore, it is paramount for parties and arbitrators to be sensitized on the negative impact of arbitral corruption pronto.

Tackling Corruption Allegations in International Commercial Arbitration

By: **Henry K. Murigi***

Abstract

Corruption is an old matter that keeps presenting itself in various forms with each changing society based on human interactions and relations. The reality is that the problem of Corruption is found in most sectors of society. Since arbitration is founded on the interaction between warring parties, it would be naïve to insist that it is insulated from corruption. In international law, States are obligated to embark on deliberate and decisive measures to fight or combat corruption. This obligation has not risen to the status of jus cogens but is an acceptable universal norm.

In international law, disputes are to be resolved using peaceful means including arbitration. The challenge is that arbitral proceedings are consensual and allegations of corruption may arise from any side. There is a lack of clarity on how arbitrators should respond to corruption allegations generally when pleaded by parties to a dispute. The principle of Kompetenz Kompetenz equally poses similar challenges where the arbitrators have to determine their own jurisdiction to determine disputes even when the allegations may be poised on their conduct. Equally, parties to a transnational dispute that is resolved through arbitration are not infallible to allegations of corruption which is a global concern. This paper seeks to investigate how corruption should be tackled during arbitration in international commercial transactions.

1. Introduction

Arbitration is one of the most important approaches to a peaceful settlement of disputes envisioned in the United Nations Charter.¹ It is only second to judicial

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¹ **Article 33 (1)** provides that “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial

settlement in terms of the most organized frameworks of the settlement of disputes. The nature of international arbitration is that it is consensual and based on the agreement of parties. With the increasing attention given to the question of corruption, it has become apparent that there is a need to investigate the transnational transactions.² While it is clear that there exist mechanisms for dealing with corruption in the judicial settlement, there is a lack of clarity on how arbitrators should respond to corruption allegations when pleaded by parties to the dispute. The principle of *competence-competence*³ equally poses a similar challenge where the arbitrators have to consider their jurisdiction to hear and resolve a dispute. Parties to an international dispute that is resolved through arbitration are not infallible to allegations of corruption that is a global concern.⁴

This paper explores the effect of allegations of corruption in any arbitration, the international law response to corruption in arbitration and the role of the arbitrator in determining. The paper will also consider the meaning, brief history of both corruption and arbitration, the complexities and controversies when an allegation of corruption against another part, or against the arbitrator and the effect of such allegation to both the agreement and the arbitral proceedings. Tackling corruption in international commercial arbitration can be best studied through its effect, the responses from international law and the role of the arbitrator. This paper seeks to demonstrate how corruption is adjudicated in international arbitration. The research adopts an extensive reading of the international law conventions and treaties, bilateral agreements, protocols, also other conventions touching on international arbitration and corruption.

settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

²Wang, H., & Rosenau, J. (2001). Transparency International and Corruption as an Issue of Global Governance. *Global Governance*, 7(1), 25-49

³ This is a principle of law that a tribunal or court has the competence to determine a question of its own jurisdiction to hear any matter.

⁴ Wang, H., & Rosenau, J. (2001). Transparency International and Corruption as an Issue of Global Governance. *Global Governance*, 7(1), 25-49

1.1 Background and Context of Corruption and Arbitration

Before embarking on literature that answers the research question raised, it is critical to place some context on the subject. In this part, the paper presents in brief the historical context of corruption and the contemporary debates. Thereafter, the paper will focus on arbitration, the historical context and current initiatives.

a) A historical account of Corruption

Right from mediaeval times all through to biblical times, corruption was not condoned more so for those who presided over disputes or held public office⁵. Saint Augustine's pessimism about corruption was influenced by what he considered as the problem of original sin or what he referred to as the 'corrupt root' of human nature.⁶ Thomas Hobbes in the *Leviathan* discusses the role and qualities needed for judges and speaks of the necessity that their judgments should not be corrupted by the pursuit of personal reward.⁷ For Hobbes, all laws depend on the authority and interpretation of judges who are appointed by the sovereign to apply the laws honestly and in line with the intended meaning.

Consequently, Hobbes quickly and aptly pointed out the danger of judicial decisions procured through the corruption of judges or witnesses Williams (1965). For Hobbes, corruption in cases of judicial application of the law was tantamount to the vicious subversion of sovereign power, but could also refer to what Schmitz (2018) calls 'cognitive corruption' or the distortion of judgment for money, affection or misconstrued self-interest, all of which also subvert sovereign authority.

An even narrower conception of corruption can be seen in the present-day ideas where people are less concerned with the conditions for popular government and, indeed, consider corruption an abomination according to Schmitz (2018). This is demonstrated for instance in his recurrent criticism and public outrage when bribes are used to purchase judicial opinion or the corruption of advocate

⁵ Daniel 6:4, Hosea 9:9.

⁶ Saint Augustine, 1998 [413-26 AD], p. 556.

⁷ Chapter 26 of *Leviathan*

or arbitrator who is bribed to secure the interest of others than the public good or what Rousseau would call the general will. Colloquial language used such as “why hire a lawyer when you can buy a judge”⁸ demonstrates what Hobbes envisioned as the state of nature full of competition for survival. The individual with a court case will ensure that they succeed at all costs and the pursuit of justice often takes a back seat. This places the focus on the dispute resolution mechanism such as arbitration and the players therein.

b) Definitional Difficulties on Contemporary Corruption

This paper concedes that there is a difficulty in convincingly defining corruption. There are however several perspectives to resolve these difficulties. Firstly, from a criminal law perspective “economic crime and corruption offences have deep rooted conspiracies involving huge loss of funds and need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious threat to the financial health of the country”.⁹ Secondly, scholars have defined corruption as an individual decision that seeks the maximization of goods for personal benefit at the cost of society Shelley (2014).

What is interesting however is that there is no universal definition of corruption in the international law spheres.¹⁰ The United Nations Convention against Corruption (UNCAC) was an international law attempt to ensure that states put in place all measures to eradicate corruption. As part of the initiative, several states have ratified this convention including Kenya.¹¹ To resolve the definitional difficulties in Kenya today the law defines corruption as to include offences such as bribery, fraud, embezzlement or misappropriation of public

⁸ Retrieved from an article found in <https://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts/> (Accessed on 5th November 2019 at 13:43:34)

⁹ Supreme Court of India Nimmagadda Prasad vs. C.B.I., Hyderabad on 9 May, 2013 a decision by a Bench consisting of Justice P. Sathasivam, M.Y. Eqbal

¹⁰ Corruption is not defined in the United Nation Convention against Corruption (UNCAC) and other regimes.

¹¹ Under Article 2(5) and 2 (6) of the Constitution of Kenya 2010 international law is applicable to Kenya having ratified the United Nations Convention against Corruption

funds, abuse of office, breach of trust, dishonesty in taxes among other offences that relate to public office.¹²

The third challenge that arises is determining whether to look at the wider scope within which corruption occurs or to confine it to the person. Miller (2017) argues that there are two forms of corruption that are institutional corruption and personal corruption. The latter deals with the moral character of persons and consists of the damaging of their moral fitness. Schmidt (2018) defines corruption as a principal agent problem where a person is entrusted with power for the purpose of carrying out a particular fiduciary responsibility when using the measure of discretion in service of personal agenda. The definition of corruption could thus be extended to the question of discretionary power where a decision maker pretends to lack discretionary power. Declining jurisdiction by an arbitrator is a way of exercising discretionary power which at some point may become an abuse of power and can be arguably defined as corruption. To this end, therefore, the definition of corruption that is adopted in this paper is the betrayal, abuse or misuse of entrusted power for personal gain and at the expense of the greater society (public policy) as defined by Dobel (1978).

c) Arbitration

The Arbitration process begins with the realization by the parties to an agreement that a dispute will arise and they predetermine that they will resolve the same using a neutral third party named arbitrator David et al (2015). Parties may select arbitrators in every new dispute and will then present their cases and let the arbitrator(s) make their determination. The decision of the arbitrator will be binding on the parties. This is more prevalent in transnational commercial disputes between contracting parties.

d) History of Arbitration

During the classical period, arbitration was a model used to resolve disputes Grynaviski et al (2015). An examination of arbitration during the paradigmatic case of the Hellenistic period (338–90 BCE) casts doubt on the existing literature

¹² Section 2 of Anti-Corruption and Economic Crimes Act, 2003

that suggests that Arbitration is a recent phenomenon. Hierarchy, as opposed to anarchy, better characterized the political context in which arbitration took place Grynawiski et al (2015). This hierarchical setting was a necessary condition for international arbitration where the practice of arbitration was a tool to legitimize hierarchical powers. Grynawiski et al (2015) insist that in the classical period arbitration as a particular means of dispute resolution was used as an ideological device to build and legitimize international order.

The relations between the United States and Britain were on the verge of all-out war in 1794.¹³ A dispute arose between America and Britain over claims by Americans that the British had destroyed some of their union merchant ships. This gave rise to the Alabama claims by the Americans and an establishment of a tribunal to hear and resolve this dispute. The tribunal comprised representatives from America, Britain, Italy, Swaziland and Brazil determined the claims and gave an award in favor of the Americans.¹⁴

The award formed part of the Treaty of Washington which aided in improved relations between America, Britain and Canada. These events launched a movement to seek to codify international law principles of arbitration as a means of peaceful resolutions of international disputes. Some of the other initiatives include the international peace conference in 1899 that was held in Hague which has been argued to be the greatest achievement in a peaceful settlement of disputes Muller *et al* (1993).

¹³ This was because the U.S. market was dominated by British exports, while American exports were blocked by British trade restrictions and tariffs. This was done in the context of the Treaty of Paris where Britain still occupied northern forts (present day New York, part of Vermont, Detroit Michigan, and Ohio among others) that it had agreed to surrender in the treaty of Paris. There was a proposal for a trade war which would lead to direct hostilities toward Great Britain. John Jay an American diplomat was sent as a special envoy to Great Britain to negotiate a new treaty. This was to be referred to as the Jay Treaty. This treaty eliminated the control of Britain on America.

¹⁴ The final award of \$15,500,000 was paid out by Great Britain in 1872 and British apologized for the destruction caused by the British-built Confederate ships, while admitting no guilt.

Thereafter, the Permanent Court of International Arbitration was created by the Convention for the Peaceful Settlement of International Disputes¹⁵. This later developed into the International Chamber of Commerce founded in 1919. In 1959, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was adopted with a view to ensuring compliance of arbitral awards. Presently, most states adopt the United Nations Commission on International Trade Law (UNCITRAL) as progressive rules for handling commercial disputes in addition to the New York Convention.

2. Theoretical Framework

Corruption and bribery are an international phenomenon that impedes the performance of international and commercial agreements William F, (2009). Dobel (1978) attempted to introduce a theory of corruption by locating the works of Plato, Aristotle, Thucydides, Machiavelli and Rousseau.¹⁶ The theory of corruption, according to Dobel involves five propositions. First, a corrupt state is to be accompanied by a breakdown in attributes of civic loyalty and virtue. Second, the breakdown introduces competition between the classes in a society based on inequalities that are driven by the human capacity for pride and selfishness which are accompanied by an extensive inequality in wealth, power and status.

Third, the moral quality of life based on the inequalities created by class generates factions that become the objective centres of wealth, power, police and policy. Fourth, these factions are then spread across the entire citizenry and the police, law enforcement, and public offices become the tools of factions and class. Last, the final corruption of the state involves the failure of the citizenry to voluntarily support the primary structures i.e. education, family, life, religion, and military.¹⁷

¹⁵ The term Court and permanent were debated since they seem to suggest the formal nature of Arbitration

¹⁶These are realist theorist who view the world system as being anarchic full of competition for survival. The selection of these four historical figures is not to be viewed as negating the influence of other scholars.

¹⁷Moral corruption is used to mean the loss of capacity for loyalty, where the progressive privatization and self-interests becomes the normal motive for most actions

The pillars of the theory of corruption need to be tested in the context of the fight against Corruption in contemporary societies and more so in the context of arbitration. Miller (2017) locates certain pillars under which corruption thrives which in my view adequately explain the theory advanced above by Dobel (1978). Ackerman (1999) argues that there are four dimensions for analyzing corruption.¹⁸ Nye (1967) argues that corruption is too important a matter to be left to moralists and calls for a detailed study of the effect of corruption on development. His argument finds good company in Sayeed (2004) who argues that corruption is an awkward disruption to business but from the point of view of a scientist it can be analyzed as an effective tool of offering balance only that it goes against morals.

Arbitration is governed by the foundational principle of *Rex Mercatoria* which is the underlying principle that requires parties to a trade to be in control of their own dispute resolution mechanism. This paper adopts the theory that this principle is applicable to transnational public policy under the notion of *Societas Mercatorum* (a society of merchants). The theory assumes that the parties, as well as the arbiter, are driven by certain moral standards that are permissible for all globally. Corruption is thus prohibited globally under international law and consequently, in arbitration, it should not be condoned. Sayed (2014) argues that the principle of dual intentionality is achieved through a universally established prohibition of corruption. This paper adopts the theory of transnational public policy that according to Sayad (2014) presents itself in two ways one which is a reaction to offending relationships and the other is a prohibitive perspective against all forms of corruption in arbitration. To this end, Kelsen's theory of law according to Kelsen (1978) requires that a rule agreed upon by consent and which is demonstrated by the reality should continue to constrain human conduct to avoid the imposition of sanctions. A rule such as transnational public

¹⁸The first takes into account the background organization of state and society given and how corrupt incentives arise within the public program. Secondly, recognize that corruption has different meanings in society. One person's bribe is another person's gift. Thirdly, consider how the basic structure of the public and private sectors produce or suppress corruption. Fourthly, the reforms anchored under the international regime to consider the role of international organizations and multinationals to either escalate or deescalate corruption.

policy prohibitive of corruption should attract sanctions which explains why the arbitrator is bound to do two things. One hears a dispute on allegation of corruption and makes a determination that it is not a matter of jurisdiction and secondly report the matter to investigative agencies once convinced on a balance of probability that there is proof of corruption.

2.1 Effects of Corruption allegations in International Commercial Dispute

a) Sources and Principles of International Arbitration

The United Nations Charter provides for the sources of international law on arbitration which include treaties and conventions.¹⁹ In the context of arbitration, the debate is whether truly international law and in particular bilateral treaties or general principles of law are the driving force for the foundation of this dispute resolution mechanism. Shaw (2008) argues that there is a hierarchy of international laws. There are two main competing theories that explain the philosophical foundations of the sources of international law according to Moure (2006). The first is the positive legal theory and the other one is natural law theory.²⁰ Each of these theories have a bearing on this topic especially when you introduce the corruption dynamic which deals with morality (natural law) and legality (positive law).

To understand the legal framework on international arbitration it is important to underscore the guiding principles. There are four main principles recognized by the United Nations Commission on International Trade Law (UNCITRAL)²¹

¹⁹ **Article 38 (1)** of the International Court of Justice (ICJ) Statute the sources of international law are broadly three namely; treaties, customary international law and other sources.

²⁰ Customary international law may be considered as part of the natural law while treaty, convention and international agreements can be strictly speaking categorized under positive law.

²¹ The United Nations Commission on International Trade Law (UNCITRAL), was established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 (see annex I). It was established to provide the framework that ensure there is harmony and modernisation of relations between parties from the initial stages to the resolution of disputes through arbitration.

model law under which international commercial arbitration is governed. These principles are party autonomy, separability, *competence-competence*, territorial principle and enforceability. Any allegation of corruption within an arbitration must first contend with these principles before it can be said to have any effect on the tenor and outcome of the arbitration.

The first principle is party autonomy which expressly permits the parties to specify the international nature of the subject matter²², choose institutionalized arbitration and rules²³, agree on the manner in which written communications are deemed received²⁴, determine the number of arbitrators²⁵, determine the procedure for arbitrator appointment²⁶, agree on a procedure for arbitrator challenge²⁷, determine the procedure for conduct of the arbitral proceedings²⁸, determine the language(s) to be used²⁹, agree to the manner and time frames governing presentation of claims³⁰, agree to oral hearings³¹, agree as to defaults³² and experts appointed by the tribunal³³, choose the law(s) which will govern the proceedings³⁴ and authorize the arbitrators to decide *ex aequo et bono* or as amiable compositeur³⁵. Parties are free to determine the decision-makers, i.e. the arbitrators, which are usually one or three and generally chosen by the parties as well as the place of arbitration.

The second principle is the separability. The UNCITRAL Model Laws treat the arbitration clause separable from the main contract for the purposes of

²²Art. 1(3)(c) UNCITRAL Model Law

²³ Art. 2(d). UNCITRAL Model Law

²⁴ Art. 3(1) UNCITRAL Model Law

²⁵ Art. 10(1). UNCITRAL Model Law

²⁶ Art. 11(2). UNCITRAL Model Law

²⁷ Art. 13(1). UNCITRAL Model Law

²⁸ Art. 21. UNCITRAL Model Law

²⁹ Art. 22(1). UNCITRAL Model Law

³⁰ Art. 23(1). UNCITRAL Model Law

³¹ Art. 24(1). UNCITRAL Model Law

³² Art. 25. UNCITRAL Model Law

³³ Art. 26. UNCITRAL Model Law

³⁴ Art. 28(1). UNCITRAL Model Law

³⁵ Art. 28(3). UNCITRAL Model Law

according to the arbitral tribunal the competence to decide on its own jurisdiction. Article 16(1)³⁶ creates two fictional scenarios David et al (2015). The first is that the arbitration clause should be treated as an agreement that is separate and independent of the main agreement. This means that a party cannot challenge the validity of the main agreement in Court. The underlying consideration is that any objection as to the validity of the substantive agreement is equally an opposition to the arbitration clause. The second scenario is that *ex nihilo nihil fit* ("nothing comes from nothing") David et al (2015). The assumption here is that an award can only be made from a valid agreement. As such to declare the principal agreement void would render the agreement nugatory.

The third principle is *competence-competence* which is a widely accepted feature of modern international arbitration and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections on such an issue. The objection may be couched in a manner that raises issues as to the existence or legitimacy of the arbitration contract. This may also be available to the Court should a party be aggrieved by the decision of the arbitrator. The content of the arbitration agreement may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the *competence-competence* principle is to enable the arbitrators to rule on their own jurisdiction as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award.

The last principle is territoriality. The UNCITRAL Model Law unequivocally accepts the territorial principle. This principle is embodied in Article 1(2)³⁷ which provides that the Model Laws are applied within a State especially when the place of arbitration is indicated to be within the territory of that State. However, there are some exceptions to that principle to the extent that some

³⁶ UNCITRAL Model Law

³⁷ UNCITRAL Model Law

articles are applicable irrespective of whether the place of arbitration is in the enacting State or elsewhere. However, territoriality only would not be sufficient to regulate the law that is applicable especially when the dispute involves multiple jurisdictions in terms of the people concerned and events surrounding the issues of jurisdiction.

b) Decided Cases on Effect of Corruption in Arbitration

Certain decided cases can aid in determining the effect of corruption in arbitration. The Supreme Court of Pakistan in the case of *The Hub Power Company Limited (HUBCO) through Chief Executive and another v. Pakistan WAPDA through Chairman and others*³⁸ it was held that allegation of corruption made in the case had no bearing on the validity of the agreement and that since parties had resorted to resolution of the dispute through the courts, arbitration was not applicable. The Court heard that there was evidence of corruption through bribery and kickbacks but these allegations did not have a bearing in the dispute before the court³⁹. The Court was of the view that such a matter, according to public policy, required a finding about alleged criminality and could not be referred to arbitration. The issue before the Court was whether the arbitration agreement between the parties was binding upon them notwithstanding the coming into force of the Bilateral Investment Treaty. The Court found that this was not binding on the Pakistani Government hence there was no reason to participate in the arbitration.⁴⁰

³⁸ (PLD 2000 SC 841)

³⁹ The Judge in Chambers had found that “From a bare reading of this part of the application, it is manifest that though allegation of receipt of kickbacks and bribe have been made to explain the factual background as to how allegedly the contract was obtained but there is nothing in the application that the respondent claimed arbitration on these points also, therefore, *HUBCO* case is not applicable to the facts of the case in hand. It has further been clarified by the learned Attorney General that the respondent would neither file any claim based on these allegations in arbitration proceedings nor ask for arbitration qua them or produce any evidence in respect thereof in these proceedings and would follow the law strictly as laid down in *HUBCO* case (supra). The claims of the respondent would be based on the terms and conditions embodied in the agreement itself”.

⁴⁰ The Agreement was alleged to have been obtained through fraud or bribe. Allegations of corruption were supported by circumstance which provided basis for further probe

Fortunately, the court determined that the respondent Federation was at liberty to seek independent remedy on the allegation of corruption if such a remedy would be available to it under the law qua those allegations.

*International Systems & Controls Corp v Industrial Development and Renovation Organization of Iran et al*⁴¹ the arbitral tribunals were reluctant to accept submission of evidence of corruption and declined Jurisdiction while failing to rule on the evidence tabled. The dissenting judge argued that unwillingness to making a finding on alleged corruption in Iran facilitated the choice of awkward jurisdictional departure which was unjustified. Yves Fortier, (2015) argues that arbitrators should determine whether to seek allegiance to parties or to dutifully seek allegiance to the international community thereby upholding the greatest moral standards and public policy. Lucinda (2019) argues that the arbitrator risks being investigated for being an accessory to a crime where they fail to investigate or determine allegations of corruption as well as reporting to the relevant authorizes.

3. International law to Corruption in International Arbitration Proceedings

a) International Legal Framework on Transparency in Arbitration

An argument can be made that corruption is mainly a domestic problem and should be left for the individual state to tackle it internally even when it touches on multinational companies. To introduce anti-corruption mechanisms as an international value would represent unacceptable attempts to impose western values to the idea of sovereign states in other regions. However, research suggests that there has been consistent outrage and widespread intolerance for

into the matter judicially, and, if proved would render the agreement as void. Dispute between the parties was not commercial dispute arising from an undisputed legally valid contract, or relatable to such a contract, for, on account of such criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, dispute primarily related to the very existence of valid contract and not a dispute under such a contract.

⁴¹ 256-439-

2 (1986) 12 Iran-USCTR 239.

corrupt practises is indicative that corruption is not acceptable on the global scale Ayittey (1994).

Ackerman (1999) suggests that the international community has a significant role to play in responding to corruption the most relevant being two pronged. First, international efforts should focus on reducing the willingness of the multinational businesses to pay bribes as well as involving them in the reform efforts against corruption. Here she acknowledges that some multinationals are more powerful with larger economies than those of governments so that they may have considerable influence on some governments. Second, Ackerman (1999) suggests that there is a need for international programs for controlling the flow of illicit funds and check corruption by impeding the transfer of secret funds abroad. Here she admits that corruption control is a focus of international interest and domestic and international reforms are always one corruption scandal late. Certainly, this is the case of catch up in international commercial arbitration.

There have been several attempts by the international business community to deal with corruption which include criminalisation of overseas bribery, the establishment of transparent systems and competitive public procurement. The main effort is housed in the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions which was an initiative under the UNCITRAL model laws to enhance criminalisation of bribery.⁴²

This is the foremost and only international anti-corruption legal framework that progressively considered the supply side (or the giving side) of the bribery interaction and not just the recipient of the bribe.⁴³ This convention provides

⁴² The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. This convention has been ratified by 44 States.

⁴³ <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> Accessed on 5th November 2019 at 18:50:34

the offence of bribery of foreign public officials⁴⁴, the responsibility of legal persons⁴⁵, and mutual legal assistance⁴⁶ among other provisions that enable accountability of foreign public officials. It should be pointed out that some of the international law initiatives tend to become part of customary international law.

b) The Hague Convention on Pacific Settlement of Dispute

The Hague Convention for the Pacific Settlement of Disputes⁴⁷ can be said to be an international law initiative seeking to introduce settlement of the dispute through peaceful means. This was before World War I and II. Perhaps this framework introduced the thinking that disputes can be resolved without causing injury or damage. More importantly, this convention permitted that disputes can be resolved by a judge of the choice of the parties. This interpretation was adopted by the Permanent Court of International Justice in the case of *Qatar versus Bahrain*⁴⁸ which was suggested to be the most effective dispute settlement mechanism Shaw (2008).

c) North and South America Anti-Corruption Initiatives

One of the notable international initiatives in the organization for the American States is the Inter-America Convention against Corruption (IACAC), which is part of the international regime that governs North and South America.⁴⁹ This convention had one main purpose which presented itself in many dynamics. The idea was stimulated and supports the improvement by each of the States Parties of the mechanisms that were necessary for the prevention, detection, and

⁴⁴ Article 1 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

⁴⁵ Article 2 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

⁴⁶ Article 8 and 9 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

⁴⁷ 1899 Hague Convention

⁴⁸ 2001 ICJ Reports

⁴⁹ (IACAC) came into effect on 6th March 1997 and has now been adopted 34 member countries of the Organisation of American States.

punishment and eradication of corruption.⁵⁰ It also exists to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of the measures and actions to prevent, detect, punish and eradicate corruption when public functions are being performed and corrupt activities are detected.⁵¹

Some of the mechanisms of this convention include elaborate Preventive Measures⁵², it also defines Acts of Corruption⁵³, illicit enrichment⁵⁴ and interestingly a detailed consideration for Bank Secrecy.⁵⁵ Altamirano, G. (2007) argues that the IACAC was the first multilateral instrument to establish a comprehensive legal framework aimed at combating corruption of government officials by criminalizing domestic and transnational bribery. Rooted in the countries that were studied and indeed generally globally, there is a thought that there a culture of transparency averseness permeates government instructions in delivery of service. He suggests that corruption should be addressed through a methodical, multidimensional approach, emphasizing both deterrence and law implementation. The article studied the influence of the convention on Guatemala, Honduras, Jamaica, and Trinidad & Tobago which had enacted legislation pursuant to IACAC. Interestingly, the article suggests that the international community should support the State parties to strengthen enforcement institutions and make corruption a high-risk activity.

Another initiative is ensuring that multinationals dealing with governments take decisive actions in determining whether to actively participate in corruption, refuse to deal in corrupt activities and report corruption to local authorities. This, when argued in the context of realism, appears to be a practical impossibility and would require a high level of commitment for multinationals. Ackerman (1999) agreeably suggests that illegal businessmen and corrupt rulers (read arbitrators) feed on each other. This calls for initiatives such as anti-money

⁵⁰ Article 2 (1) IACAC

⁵¹ Article 2 (2) IACAC

⁵² Article 3 IACAC

⁵³ Article 5 IACAC

⁵⁴ Article 8 IACAC

⁵⁵ Article 14 IACAC

laundering such as the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances adopted in 1988.⁵⁶ Under this convention, for instance, if there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.⁵⁷

The World Bank Groups International Centre for the Settlement of Investment Disputes (ICSID) is confronted with disputes that arise from contracts and sometimes interacts indirectly with issues related to corruption. Under this framework, there is a panel that sits to hear complaints involving corruption in World Bank projects. However, the panel is weak instrumentally according to Ackerman (1999) since the panel's findings are subject to the Bank's board veto and in any event, the recommendations are not made public. There is a larger framework such as the World Trade Organisation that is concerned with the global trade environment. Nichols (1997) suggests that the transnational bribery would be controlled through the WTO and not by WTO since the concern of WTO is governing relations among nations and not individuals or multinational organisation. Here the suggestion is that more general principles of dispute resolution mechanisms is one way of fighting corruption and not give the loser a means of lodging complaints. In addition, it is readily admitted that making formal arrangements for combatting corruption opens us more avenues for its growth and metamorphosis.

d) Emerging Jurisprudence on Anti-Corruption in Arbitration

In the notorious case of Bank Credit and Commerce International (BCCI)⁵⁸ it has been established by research that investigating corruption, its conception,

⁵⁶ This convention has 190 parties.

⁵⁷ Article 32

⁵⁸ This was a case of serious corruption allegations. The Bank was registered in Luxembourg with its head offices in Karachi and London. A few years after it was opened the bank had 400 branches in 78 countries making it the seventh largest private bank in the world.

execution and ways in which cover ups are done is very difficult and almost impossible Haris (2003). When investigated, it was established that the failure of BCCI was linked to a lack of international supervision of widespread companies and the complexity of transnational dynamics involved in the companies. Angelos (2005) argues that the failure of the bank found shows a clear need to strengthen the supervision of internationally spread groups like BCCI.

One of the main issues is the finality of the arbitral award and it is not subject to appeal. Several decisions have been rendered by the court touching on this question. They include *Appeal relating to the jurisdiction of the ICAO Council Case*⁵⁹, *Ambatielos; (Greece v. United Kingdom) on the obligation to Arbitrate*⁶⁰, *Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; Second Phase*,⁶¹ *Arbitral Award made by the King of Spain on December 23rd 1906*⁶² among other cases. What is abundantly clear from these cases is that the Court is reluctant to upset the impugned decision even where there are irregularities on the face of the record. Secondly, the court will equally be reluctant to define the relationship between jurisdiction and compromissory clauses⁶³, especially where there is ambiguity. Thirdly, the Court has maintained a sharp focus on its own function and that of the parties to a dispute where they chose to enter into arbitration. The courts have expressed unwillingness to trespass on the function of other professional bodies.

All the convention cited above reveals that the anti-corruption is an international law imperative. Sayed (2014) argues that this is a fully fledged rule of customary international law. In the *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963*⁶⁴ it was held that Award that corruption is an international evil

⁵⁹ 1977 I.C.J Rep 46

⁶⁰ 1952 I.C.J Rep 28

⁶¹ 1950 I.C.J p 221

⁶² 1906 ICJ Rep 192 at p 214

⁶³ This are clauses within a contract that specify the type of dispute resolution mechanism and the residual mechanism where the dispute is not resolved.

⁶⁴ Case No 1110 (1963) Award in ICC Case No 1110' (1994) 10 Arb Int 277, 290.

since it is contrary to good morals and to international public policy common to the community of nations. In the case of *EDF (Services) Ltd v Romania*⁶⁵ the tribunal insisted that an accusation of corruption is a very serious matter and must demand the highest and most convincing evidence. In that case, it was also determined that it was generally accepted as a matter of fact that tribunals and must maintain a high standard of proof of corruption.

*International Systems & Controls Corp v Industrial Development and Renovation Organization of Iran et al*⁶⁶ the arbitral tribunals were reluctant to accept submission of evidence of corruption and declined Jurisdiction while failing to rule on the evidence tabled. The dissenting judge argued that reluctance to grasp the nettle of alleged Imperial corruption in Iran' had led it to choose a 'graceless jurisdictional exit which was unwarranted. In the *World Duty Free Co. Ltd. v. The Republic of Kenya*⁶⁷, the tribunal found that public policy exists to protect the public but not necessarily the litigating parties. This case involved a large population of tax-payers and other citizens of Kenya at the Jomo Kenyatta International Airport. In *Thunderbird v. Mexico*⁶⁸, there was an allegation of corruption by the investor's counsel emanating from the securing of favorable government opinion.

The arbitral award was silent on the allegation of corruption but all the same, did not rule in favor of the party accused of corruption citing that there was a legitimate expectation that would arise from an illegal opinion issued by the government. Also in *Inceysa v. El Salvador*⁶⁹ the investor submitted false financial documentation and misrepresentation of qualifications and all the same won the contract. Corruption was hinted at by both the press of the host state and during the ICSID proceedings. The tribunal decided that it did not have

⁶⁵ ICSID Case No ARB/05/13, Award, 8 October 2009, para 221.

⁶⁶ 256-439-

2 (1986) 12 Iran-USCTR 239.

⁶⁷ ICSID Case No. ARB/00/7, Award of October 4, 2006, para. 157.

⁶⁸ (2006)

⁶⁹ (Aug 2006),

jurisdiction to hear this matter since the investment was obtained through illegal means and violated the agreement.

4. The Role of Arbitrators in International Commercial Arbitration

The application of foreign anti-corruption mandatory commercial arbitration has been subject of scholar's debate and contestations. On the one hand, the general agreement leans toward the universal application of foreign mandatory law on anti-corruption as a matter of public policy and the rule of *Rex Mercatoria*.⁷⁰ These are those who support the idea that corruption in arbitration should be dealt with under national regimes and not international regimes Grynawiski et al (2015). This argument insists that the arbitrator is in part required to consider international law to consider all laws including municipal laws. On the other hand, some argue that there is no such thing as foreign mandatory law on anti-corruption due to the principle of autonomy.

What the arbitrator must do therefore is to establish several aspects of the law regarding corruption. Firstly, it is to establish whether the Anti-Corruption law invoked mandatory. Here the arbitrator is required to establish whether the application of anti-corruption is mandatory and whether it violates the principle of the party's autonomy. Secondly, once a decision is taken as to whether foreign mandatory laws are not applicable the arbitrator should decline jurisdiction. Here the arbitrator is required to arrive at decision in determining the foreign mandatory law in declaring that the arbitral policy is not applicable. Thirdly, there is an expectation that arbitration is a transnational matter of public policy.

This is derived from the notion of *societas mercatorum* which is one of the original principles of arbitration. Transnational public policy is argued to be the legal reality as well as founded on the universal moral rule. This brings us to the fourth point which is the universality of anti-corruption practice. Yves Fortier, (2015) argues that arbitrators should seek the determine whether to seek allegiance to parties or to dutifully seek allegiance to the international community. Lucinda A. Low (2019) argues that the arbitrator risks being

⁷⁰ Rex Mercatoria is one of the principal pillars in international Arbitration

investigated for being an accessory to a crime where they fail to investigate or determine allegations of corruption.

a) Responses by Arbitrator on Corruption Allegations in Arbitration

One of the issues that are of concern for this paper is what should an Arbitrators do when faced with allegations of corruption. The challenges of allegations of corruption in arbitration have become rampant which presents themselves at the interlocutory stage of the proceedings Reisman (1992). It is suggested that this is one of the areas that serious reform which should be considered before it is invoked as part of the broader anti-corruption efforts. Shaw (2008) argues that *compromis* is a ground for nullity of arbitral proceedings and corruption of a member of the tribunal or a serious departure from a fundamental rule of the procedure are other possibilities of nullity.

There are several responses to the allegation of corruption in arbitration. Sayed (2004) argues that there are two main responses to corruption in arbitration. The first one is a *repressive attitude* which is consistent with the tendency that there exist objective moral values that can be arrived at by an arbitrator. At the heart of this response is the conflict between positive law and natural law. The arbitrator has the authority to discard the application of human (positive) laws if they go against the moral ideals of the choice of the parties (natural law). The argument here is that the arbitrator should find refuge in public policy as the main ground for repressive attitude toward corruption. Sayed (2014) argues that the repressive attitude is arrived at by utilitarian moral reasoning as suggested by Jeremy Bentham.⁷¹ The assumption made in the repressive attitude is that the arbitrator operates in a morally relative environment and has a special bias to apply the moral values of the community. To this end, the moral argument made here is that the arbitrator is bound to repress and suppress corruption in arbitration.

The second response toward corruption as suggested by Sayed (2004) is the *indifferent tendency*. Here the concern for the arbitrator is that the proceedings

⁷¹ Jeremy Bentham (1748–1832) *An introduction to the principles of Morals and Legislation* (Oxford Clarendon Press)

must maintain autonomy which is one of the pillar principles in arbitration. The argument is that they should exhibit disinterest in questioning the validity of the contract by any party which in any event is the reason why they are appointed to arbitrate. Actions involving the resort to corruption in pursuit of profit are not problematic since they seem to make a business decision with the public official more predictable regardless that they interfere with the quality of the product intended to benefit the public. The argument here is similar to what Nye (1967) posits that corruption should be scientifically studied to identify the cost and benefit of corruption. Some of the arguments made by Nye (1967) are that corruption aids reinjection the capital to the economy, the government gets the best available price since the bribe eats into the profit margins, fosters investment since cumbersome bureaucracies are eliminated and anti-development or unintelligent national policies are bypassed with ease. To this end, the arbitrator is not bound by any moral requirement and is not the moral police for the parties and should be indifferent to these allegations.

b) When to Raise Allegations of Corruption in Arbitration

There are several instances where the arbitral tribunal may be called upon to make a determination on corruption allegations. Firstly, a party may raise an allegation that there was corruption involved in securing a compromise for arbitration. Secondly, the arbitrator may be minded *suo moto* to consider the possibility of corruption and question the validity of the agreement. The third category is where there is a suggestion of corruption but does not go to the root of the contract and effectively doesn't affect the validity of the arbitral agreement. In all these and other scenarios the arbitrator will have to make a determination on these issues.

Several issues emerge from these suggested stages. This is what Sayed (2004) argues that these stages form the basis for several court decisions discussed below. First, the invocation of anti-corruption law emerges as an event of impossibility to perform the contract. Secondly, foreign laws can be used to defeat the agreement however these decisions make it clear that there has to be complementarity between different states or practical impossibility to perform the contract. In other words, corruption allegations alone would not suffice as

compelling reasons for an argument for the impossibility to perform the contract. Third, the principle of *lex loci contractus* (the law of the place where the contract is made) revives the issue of the morality of law and whether it has universal application. In international law, the *lex specialis* and *lex generalis* debate are yet to be resolved. This presents the dilemma for the arbitrator to determine the applicable law and relevant standard of proof where there are competing standards in different jurisdictions. This issue is compounded by the fact that anti-corruption though globally abhorred but this doesn't rise to the elevated to a *jus cogens* principle.

c) Standard of Proof of Corruption Allegations

The Court in United Kingdom was asked to enforce an award which had been found to be absent of evidence of corruption in the case of *Omnium de Traitement et de Valorisation SA versus Hilmarton Ltd*⁷² it was held that an arbitral award, made under a foreign proper and curial law, which had specifically found that there was no corrupt practice should be enforced in England even if English law would have arrived at a different result on the ground that the underlying contract breached public policy.⁷³ The Court went on to find that the standard of proving an allegation of corruption is not beyond a reasonable doubt.⁷⁴

Malik et al (2018) argue that the burden of proof should lie with the person asserting that the contract in question is tainted with bribery, as is the case with other forms of illegality. They also insist that there must certainly the standard of proof is higher than a mere preponderance of probabilities in regards to a sensitive issue like corruption. The standard of proof they argue that it should not be as high as "beyond reasonable doubt" but higher than the balance of probability for the natural reason that this the wrongdoers should not escape the grasps of the law, especially where there is sufficient evidence.

⁷² [1999] 2 All ER (Comm)

⁷³ Accordingly, a Swiss arbitral award which determined that there had been no attempt at bribery or corruption in Algeria but merely a breach of a statute aimed at protecting Algerian suppliers from foreign competition, and hence that the contract concerned was not unenforceable as contrary to Swiss public policy, would be enforced even though an English tribunal might have come to a different conclusion.

⁷⁴ ICC Case No. 5622 of 1988, in 19 Y.B, Comm. Arb., 105, 111 (ICC Int'l Ct. Arb.).

In the case of *Northrop Corp. V. Triad Intern. Marketing, S.A.*⁷⁵ the issue was Northrop a United States Company was involved in selling military equipment which was subjected to allegations of bribery of foreign officials to facilitate sales in Saudi Arabia in 1970. One of the issues for determination was that there was a mandatory law in Saudi Arabia decreeing that the foreign nationals which were a measure to uproot bribery in military procurement which was a shared sanction by the United States. The arbitral tribunal agreed that as a matter of public policy and the law the arbitral award and domestic law made it impractical to enforce the agreement. The lower court overturned the decision of the arbitral tribunal but on Appeal, the Court found that the lower court had erred in misreading the position taken by the arbitral tribunal.

d) Some other Decided Cases

There are several other decisions that can guide the arbitrator on how to deal with corruption allegations. In *Westacre Investments Inc v. Jugoinport-SDRP Holding Co Ltd*⁷⁶ an arbitral tribunal award was not overturned by the Appellate court when allegations of corruption had been made by the defendant. The arbitral tribunal had found that there was no evidence of bribery or fraud in procuring the contract.⁷⁷ What emerged from this case is that the principle of separability is insulated once the agreement is executed. This principle Sayed

⁷⁵ 842 F.2d 1154 (1988)58

⁷⁶ [1999] EWCA Civ 1401; [2000] QB 288 |

⁷⁷ Westacre served as a consultant to a Yugoslavian government agency to procure contracts for the sale of military equipment in Kuwait. The consultancy agreement, which was governed by Swiss law, provided for arbitration in Switzerland under the rules of the International Chamber of Commerce. A dispute arose and Westacre initiated arbitration. The defendants alleged that the agreement contemplated that the contracts in Kuwait would be obtained through bribes and that it was therefore void on public policy grounds. The tribunal dismissed this argument and made an award in favour of Westacre. Based on the tribunal's factual finding that there was no evidence of bribery or other illegality, the Swiss Federal Tribunal also declined to annul the award on public policy grounds. Westacre thereafter sought to enforce the award in England which turned out unsuccessfully since the tribunal found no evidence of fraud.

(Facts obtained from

http://newyorkconvention1958.org/index.php?lvl=notice_display&id=546&opac_view=6) (Accessed on 5th November 2019 at 15:30:34)

(2014) argues was assessed based on first the nature of the offensiveness of the alleged illegality which is an evaluation of the tolerance of the illegality as compared to the policy in favour of arbitral awards. This he argues is a subjective act since there is two competing public policy, on the one hand, there is the policy against corruption and on the other hand the policy on the international principle of separability in arbitration. The other suggestion made is that the Court evaluated the entirety of the arbitral award in considering whether to tinker with the decision of the arbitrator. Again, this is a subjective test on the quality of the arbitral award. This case is to be contrasted with a situation where the Arbitrator is called upon to determine a matter without any regard for corruption allegations.

In *ICC Award No. 1110 of 1963 by Gunnar Lagergren*⁷⁸, the arbitrator noted that arbitration involving gross violations of good morals and international public policy can have no countenance in any court either in Argentine or France, and in any event in any other civilised State, nor in any arbitral tribunal.⁷⁹ In this case, the arbitral tribunal did was persuaded by the repressive tendency to reject the application of arbitration proceeding to defeat public policy. The idea of public decency supports the repressive attitude anchored in the natural law theory. Sayed (2004) argues that what Judge Lagergren did was based on a presupposed general principle of law which states that immoral contracts are non-arbitrable which again another subjective test is. The rule that an arbitration agreement is null and void if it pertains to an immoral contract can be challenged at the arbitration stage where the immorality is left non-raised prior to a dispute.

5. Way forward

As Gaillard (2019) argues the combatting, corruption globally continues to intensify. Arbitrators play an increasingly important role in developing responses to cases raising corruption related allegations. There has been a balanced development of universal principles, or transnational rules, which are readily available to and are progressively used by arbitrators who adjudicate

⁷⁸ YCA 1996, at 47 et seq. (also published in: Arb.Int'l 1994, at 282 et seq.).

⁷⁹ "https://www.trans-lex.org/201110 Accessed on 16:40:33 on 5th November 2019

corruption and fraud in the transnational contracts. First, the literature reviewed has shown that there is difficulty in analyzing the evidence of corruption even when the burden and balance of proof are at stake. As seen in the literature above Arbitrators seem to be consistently accepting that corruption can be proven through a sufficient number of indicators and avoid the red herrings allegations that might be used to scuttle the arbitration process. Second, there are situations where the arbitrators and indeed courts may depart from the traditional rule that rubbishes the restoration of the gains attained under contracts that may be tainted by corruption.

Third, a number of cases have confirmed that concerns of corruption can be determined by reference to the rules of multinational public policy as opposed to the mandatory rules of the state. This is more so where local rules do not form part of the *lex contractus*. While these responses to corruption have not and need not achieve united appreciation in all legal systems, they have been accepted in a substantial number of cases to operate as general principles that can offer guidance to arbitrators dealing with corruption allegations.

Since World War II the use of arbitration has increased. One of the issues that arise is whether the state has the capacity to enter into arbitration agreements. The larger debate is whether superiority or hierarchy of international law as well as the interplay between municipal and international law. Mostly, national laws do not prohibit states from concluding arbitration agreements Muller, S., & Mus, W. (1993). The conclusion of an arbitration agreement is normally considered as a waiver of immunity from jurisdiction. The philosophical foundation of treaties is *pacta sunt servanda* (let agreements be kept). One of the primary concerns for any treaty or contract is the issue of capacity to contract. In the case of *Tuxaco Oil Company vs. Libya*⁸⁰, the issue was whether the agreement between the Tuxaco Oil Company and Libya had been internationalized by virtue of international law. While it has been argued that the state has a dual personality on matters touching on immunity, the theory applicable to corruption in the arbitration is restrictive immunity where once

⁸⁰ Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977), translated in 17 I.L.M. 1 (1978)

allegations of corruption are raised the state is under a duty to investigate Blankenstein, A. (1993).

It is clear from the literature that corruption calls for comprehensible and pragmatic responses since to some, corruption is always evil but to others, it is a preferred alternative used for gain even in arbitration proceedings. Anti-corruption efforts appear to be what prohibition is to drinking which appears to easy but often simply making things worse.⁸¹ The arbitral case reviewed above reveals a range of rules and mechanisms available to arbitrators who are called to adjudicate corruption allegations. Most of these rules have arguably reached the status of general principles or transnational rules and in my view soon to join the ranks of *jus cogens*. As the global fight against corruption will continue to intensify, arbitrators, whose role is to adjudicate disputes in the international sphere, are perfectly placed to uphold the values of the international community and to contribute to this fight by continuing to develop responses to the difficult issues that arise in cases raising corruption issues.

6. Conclusion

This paper aimed at studying literature surrounding the peaceful settlement of disputes under international law as envisaged in the United Nations Charter. The focus was on arbitration. Since arbitration is abroad subject, the issue under investigation was corruption in international commercial arbitration. It has emerged that the issue of corruption is an old matter that has dominated all societies. Arbitration processes cannot claim to be insulated from its influence. The paper identified the definitional difficulties that arise in attempting to define corruption and how this would be troublesome for an arbitrator. The nature of allegations that can be made in the arbitration is either that the agreement was made out of corruption or that the arbitrator is corrupt or that the dispute arose out of corrupt practice by one of the parties. This means that the arbitrator has to determine several aspects including whether he has jurisdiction to hear and determine that matter.

⁸¹ See Nye (1967) on Corruption and Political Development; the cost benefit analysis

The paper urged that the arbitrator should be bold and decline an invitation to participate in overseeing a corrupt laden arbitration. The standard and burden of proof have been displayed in this paper. Several international initiatives have been advanced to settle this menace of corruption in arbitration. From regional conventions to global treaties the global trend is to combat or fight corruption. This paper found Nye suggestion very curious that corruption should be studied from a cost benefit approach. However, majority of the literature suggests that corruption is disapproved by the overbearing majority.

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Arbitrating Technological Disruption: Examining the Role of Arbitration in the Settlement of Technology Disputes in Kenya

*By: Ibrahim Godofa**

Abstract

Technology disputes have some unique features underlying them which must be considered for the effective resolution of these disputes. These features include: Their technical nature which gives rise to the need of a person with the relevant technical background to resolve them. The innovation aspects that are often at the centre of these disputes which make it crucial to factor in their speedy resolution to enable new technologies to hit the market before they are obsolete. And finally, the huge and precarious investment decisions that underly them, the success of which is dependent on the subject matters of these disputes making into the market and achieving commercial viability. The latter can influence investment decisions in a country and ultimately have a mark on economic development.

It is clear that the resolution of these technology disputes is an important issue. It flows from this understanding that the mechanisms employed to resolve them should have the dynamism to take into consideration the special features underlying them. Arbitration seems to fit this description. In arbitration, parties have the autonomy to choose an arbitrator with technical expertise to be able to appreciate the issues that are up for determination in these disputes. The arbitral process is also designed to achieve a speedy resolution and allow the innovations to get to the market in a timely fashion. To put the icing on the cake, all these are done in a confidential environment that will come in handy in case the parties have concerns about their innovation secrets being made public at an early stage.

This paper examines the role of arbitration in the settlement of technology disputes in Kenya and in doing so analyses evidence from Kenyan cases, draws on experiences from other jurisdictions and ultimately presents a case for future use in Kenya.

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1. Introduction

“Technology disputes require prompt resolution because the issues are usually complex, the rights and duties rarely free from doubt, and the technology fast changing in the race for constant innovation and improvement.”¹ This highlights the nature of technology disputes as well as the considerations that need to be taken in determining the mechanisms that can be best utilised to resolve them.

Technology disputes have some key features that are often unique to them as can be deduced from the above quotation. The first one is the technical complexity of their subject matter² which requires the person resolving them to have some expertise on them.³ The second one is the fast-paced innovation aspect that underly all technologies which means that what is new in technology today could easily be obsolete tomorrow.⁴ What this means is that if the dispute resolution process of technology disputes is not time conscious and mindful of this innovation aspect, then it could negatively impact new technologies making it into the market on time.⁵ The third and final feature of technical disputes that

¹ Thomas Klitgaard and William Mussman, ‘High Technology Disputes: The Minitrial as the Emerging Solution’ (1992) 8 *Santa Clara High Technology Law Journal* Available at: (Last Accessed on December 18, 2019)

² Gregg Paradise, ‘Arbitration of Patent Infringement Disputes: Encouraging the use of Arbitration through Evidence Rules Reform’ (1995) 64 *Fordham Law Review* Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3201&context=flr> (Last Accessed on December 18, 2019)

³ Anita Stork, ‘The use of arbitration in copyright disputes: IBM v FUJITSU’ (1988) 3(2) *High Technology Law Journal* Available at:

<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1071&context=btlj> (Last Accessed on December 18, 2019)

⁴ Pravin Anand, ‘Arbitration in the Context of Technology Transfer Agreements: The Case of India’ (1990) 7 *Journal of International Arbitration* Available at: <http://www.kluwerlawonline.com/abstract.php?id=JOIA1990020> (Last Accessed on December 18, 2019)

⁵ Steven Elleman, ‘Problems in patent litigation: mandatory mediation may provide settlements and solutions’ (1996) 12 *Ohio St. Journal on Dispute Resolution*

is under consideration in this paper is the financial implications of the resolution of these disputes.⁶ Mechanisms of resolution of technology disputes that do not take into consideration the financial and investment decisions that underly innovations will lead to financial loss for the parties involved in these start-ups.⁷ In the long term, this could also negatively impact investment into the country hence affecting economic development.⁸

Arbitration, as a means of dispute settlement, has favourable attributes that can be utilised to achieve effective settlement of technology disputes.⁹ Some of the features of arbitration that make it a viable option in the settlement of technology disputes include: An opportunity for parties to control the arbitral process e.g. through choosing an arbitrator who has a technology background, as well as an opportunity for parties to preserve valuable resources among themselves.¹⁰ It is further argued that the use of arbitration as opposed to litigation, for example, can play an important role in the settlement of

Available:

https://kb.osu.edu/bitstream/handle/1811/79780/1/OSJDR_V12N3_759.pdf (Last Accessed on December 18, 2019)

⁶ Christopher Lee, 'The development of arbitration in the resolution of internet domain name disputes' (2000) 7(1) *Richmond Journal of Law & Technology* Available at:

<http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1099&context=jolt> (Last Accessed on December 18, 2019)

⁷ Ibid

⁸ See arguments in *Republic v Communications Authority of Kenya ex-parte Geonet Communications Limited & 5 others* [2016] eKLR at Par 40 and 46 Available at: <http://kenyalaw.org/caselaw/cases/view/126330> (Last Accessed on December 18, 2019)

⁹ Scott Blackman and Rebecca McNeill, 'Alternative Dispute Resolution in Commercial Intellectual Property Disputes' (1997) 47 *American Law Review* Available at:

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1415&context=aulr> (Last Accessed on December 18, 2019)

¹⁰ Neal Neal and Cathy Rincon, 'ADR and Intellectual Property: A Prudent Option' (1995) 36 *IDEA* Available at:

https://ipmall.law.unh.edu/sites/default/files/hosted_resources/IDEA/16.Yeend96.pdf (Last Accessed on December 18, 2019)

technology disputes due to the dynamic nature of arbitration and its ability to adapt to the nature of the dispute before it.¹¹

It is important to note that, as technology continues to constantly evolve, technology disputes will also be arising just as rapidly.¹² Flexible, dynamic, and equally progressive mechanisms of dispute resolution need to be adapted to the resolution of these disputes.¹³ This paper seeks to examine whether the adoption of arbitration for the settlement of technology disputes in Kenya is in keeping with these requirements.

1.1 Definition of Key Terms

Some of the key terms that have been used in this paper can be defined as follows:

a) Arbitration – It is classified as one of the mechanisms under Alternative Dispute Resolution mechanisms which is private and consensual and where

¹¹ Casey Lide, 'ADR and cyberspace: the role of alternative dispute resolution in online commerce, intellectual property and defamation' (1996) 12 *Ohio Journal on Dispute Resolution* Available at:

https://kb.osu.edu/bitstream/handle/1811/79766/1/OSJDR_V12N1_193.pdf (Last Accessed on December 18, 2019)

¹² Karl Kilb, 'An Important Option in the Age of Information Technology' (1993) 4 *Fordham Intellectual Property, Media and Entertainment Law Journal* Available at:

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1082&context=iplj> (Last Accessed on December 18, 2019) See also: George Friedman, 'Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities' (1996) 19 *Hastings Communications and Entertainment Law Journal*

Available at:

https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1466&context=hastings_comm_ent_law_journal (Last Accessed on December 18, 2019)

¹³ Gary Benton and Rogers Richard, 'The Arbitration of International Technology Disputes Under the English Arbitration Act 1996' (1997) 13(4) *Arbitration International* Available at:

<https://academic.oup.com/arbitration/article-abstract/13/4/361/324836> (Last Accessed on December 18, 2019)

parties in a dispute agree to present their grievances to a third-party resolver for a settlement.¹⁴

b) Technology Disputes - These are disputes that arise out of technology companies' interaction and contract among themselves as well as with other businesses and individuals.¹⁵ Technology issues form the subject matter of these disputes.¹⁶

c) Technological Disruption - This is defined as the process of a new technology that is being introduced into a market to grow and eventually meet the needs of the mass market hence creating a disruption in how things used to operate in that space before.¹⁷ The definition of these terms also sheds some light on the context in which they are used in this paper.

1.2 Objectives of the Paper

This paper is aiming to examine the role that arbitration plays in the effective settlement of technology disputes in Kenya. The paper seeks to interrogate the current place of arbitration in the settlement of technology disputes in Kenya with a view to identifying opportunities for improvements and a case for future use of arbitration to resolve these disputes in Kenya.

¹⁴ Kariuki Muigua, 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises' (2014) Available at: <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (Last Accessed on December 18, 2019)

¹⁵ Raymond Bender, 'Arbitration - An Ideal Way to Resolve High-Tech Industry Disputes' (2010) 65(4) *Dispute Resolution Journal* Available at: <https://search.proquest.com/openview/190f11af13fd99fcb2fa914d321a1667/1?pq-origsite=gscholar&cbl=25210> (Last Accessed on December 18, 2019)

¹⁶ *Ibid*

¹⁷ Ashish Sood and Gerard J. Tellis, 'Demystifying disruption: A new model for understanding and predicting disruptive technologies' (2011) 30(2) *Marketing Science* Available at: <https://pdfs.semanticscholar.org/70aa/4cdc43639ba8b4b8c20ce2f2a80581a23269.pdf> (Last Accessed on December 18, 2019)

1.3 Scope and Limitations of the Paper

This paper will only be examining the role of arbitration in the settlement of technology disputes and as such will not extend to other Alternative Dispute Resolution mechanisms. The scope of the paper will further be limited to technology disputes and will not extend to legal technology.

2. Legal Framework in Kenya

2.1 Constitution of Kenya

The Constitution of Kenya 2010 makes several provisions touching both on aspects of technology as well as on dispute resolution. It provides for the right to information and to gain full advantage from services available to consumers in this sector.¹⁸ The constitution also provides for the right to an expeditious and efficient administrative action¹⁹ as well as the right to a fair trial.²⁰ It further provides for a right to have a matter to be heard and dispensed in a timely manner.²¹

2.2 Arbitration

The legal framework governing domestic and international arbitration in Kenya is the Arbitration Act.²² The Act provides for the inclusion of experts to be appointed as arbitrators in order to make determinations in arbitral proceedings.²³ This is an excellent provision that would resolve the concern of expertise on the side of the personnel that is tasked with the resolution of technology disputes.

¹⁸ Constitution of Kenya 2010, Article 46(1)(b)

¹⁹ Ibid Article 47

²⁰ Ibid Article 48

²¹ Ibid Article 50(2)(e)

²² Arbitration Act, no. 4 of 1995 Available at:

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewjlleY_b_mAhVD8BQKHdsLBSoQFjAAegQIAhAC&url=http%3A%2F%2Fkenya-law.org%2Fk1%2Ffileadmin%2Fpdfdownloads%2FRepealedStatutes%2FArbitration_Cap49_.doc&usg=AOvVaw0C0f59CEenydhkZDrTHmAv (Last Accessed on December 18, 2019)

²³ Ibid Section 27

2.3 Technology Disputes

There are several statutes that touch on different aspects of technology disputes in the Kenyan legal framework. With specific attention to the resolution of technology disputes, however, the following are some provisions that touch on the same: The Kenya Information and Communications Act provides for offences relating to telecommunication services²⁴ and goes ahead to empower the Communications Authority of Kenya to look into their resolution²⁵ through a tribunal.²⁶ It recommends that further action arising out of this to be resolved at the High Court of Kenya.²⁷

The Science, Technology and Innovation Act provides that any offences that arise under it should be prosecuted through the courts.²⁸ The Copyright Act refers to copyright disputes to a board established under the Act²⁹ while the Trade Marks Act refers to trademark disputes to the office of the registrar established under the Act.³⁰ The Computer Misuse and Cybercrimes Act provides for offences arising under the Act to be the courts.³¹

²⁴ Kenya Information and Communications Act, no. 2 of 1998, Sections 28-34 Available at: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%202%20of%201998> (Last Accessed on December 18, 2019)

²⁵ Ibid Section 84T

²⁶ Ibid Section 102A

²⁷ Ibid Section 102G

²⁸ Science, Technology and Innovation Act, no. 28 of 2013, Section 15 Available at: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2028%20of%202013> (Last Accessed on December 18, 2019)

²⁹ Copyright Act, no. 12 of 2001, Section 3 Available at:

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202001> (Last Accessed on December 18, 2019)

³⁰ Trade Marks Act, Cap 506, Section 44 Available at:

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20506> (Last Accessed on December 18, 2019)

³¹ Computer Misuse and Cybercrimes Act, no. 5 of 2018, Section 55

Available at:

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018> (Last Accessed on December 18, 2019)

3. Evidence from Kenyan Case Study

3.1 The Unique Features of Technology Disputes

As highlighted in previous sections of this paper, technology disputes have some features that are unique to them and that need to be taken into special consideration in order to achieve their effective resolution. Some of these unique features have been observed by the Kenyan courts in technology disputes that have been presented before them.

In the case of *Leonard Otieno v Airtel Kenya Limited*,³² the learned judge observed that the issues being argued before the court was a highly technical matter for the court and that the court would require relevant expertise to isolate the specific problems up for determination from the entire telecommunication technology issues being argued before it.³³ In the case of *Republic v Communications Authority of Kenya ex-parte Geonet Communications Limited*,³⁴ the learned judge also made similar observations on the complex nature of the subject matter in the case and conceding expertise to the regulators.³⁵

Another unique feature of technology disputes that have been observed by the courts is the issue of innovations underlying them and the resultant need to resolve them in a timely fashion. This was brought out in the *Geonet Case*,³⁶ (Supra) as well as in the case of *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others*.³⁷

3.2 Challenges with the Current Mechanisms of Resolution

In the *Leonard Otieno Case*, (Supra) the court questioned the efficacy of the dispute resolution mechanisms under the Kenya Information and

³² [2018] eKLR

³³ Ibid at Par 54

³⁴ [2016] eKLR

³⁵ Ibid at Par 131, 216

³⁶ Ibid at Par 95

³⁷ [2014] eKLR at Par 303

Communications Act in providing redress to the petitioners before it.³⁸ In the case of *Nation Media Group Limited & 6 others v Attorney General & 9 others*, the constitutionality of some of the provisions of the Kenya Information and Communications Act that govern technology disputes were questioned.³⁹ The independence of the regulatory body established by this Act was further questioned in this case.⁴⁰

These are some of the challenges facing the legal and institutional framework established under the Kenyan legal system with regards to the resolution of technology disputes. This paper will explore possible remedies to these concerns by examining the role adoption of arbitration could play to mitigate these challenges.

4.0 The Place of Arbitration

In the case of *Bernard Murage v Fineserve Africa Limited & 3 others*, the court observed that the Appeals Tribunal established under Section 102 of the Kenya Information and Communications Act is mandated to employ arbitration in the determination of matters arising under the Act.⁴¹ This is an instance in which arbitration is provided for in the settlement of technology disputes under the Kenyan legal system. Arbitration is otherwise not widely provided for in the settlement of this category of disputes.

Experiences from other Jurisdictions

4.1 Sampled Jurisdictions

The jurisdictions that are sampled for comparison in this paper are the United States and Singapore. The US is selected for this comparison because it is

³⁸ *Leonard Otieno Case* (n32) at Par 27, 28

³⁹ [2016] eKLR at Par 1

⁴⁰ *Ibid* at Par 195

⁴¹ [2015] eKLR at Par 54

considered a developed nation⁴² with significant technological advancements.⁴³ In addition to this, the US is also regarded to have an elaborate legal regime as well as dispute resolution mechanisms.⁴⁴ This combination of technological advancement and developed legal regimes make the US an attractive jurisdiction to examine. The advancements in technology are expected to give rise to increased technology disputes and the advancement in legal regime is expected to provide innovative mechanisms for the resolution of these disputes. Singapore is selected because it is considered a developing country⁴⁵ but it nevertheless boasts impressive technological developments.⁴⁶ Additionally, technology law in Singapore is cutting edge often keeping pace with technological innovations to meet the needs of the changing times.⁴⁷ Singapore is an interesting jurisdiction to sample because of three things: One, as a technologically advanced nation it is expected that a lot of technology disputes would be arising in that jurisdiction. Two, with its progressive laws it is interesting to see the mechanisms that have been adopted to resolve technology disputes in this jurisdiction. Finally, as a developing country, it will also be very interesting to see how the practices and approaches adopted in this jurisdiction

⁴² See

https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf (Last Accessed on December 19, 2019)

⁴³ Joseph Tasker, 'The Information Technology Agreement: Building a Global Information Infrastructure While Avoiding Customs Classification Disputes: A Perspective for the Customs Practitioner' (2001) 26(3) *Brooklyn Journal of International Law* Available at:

<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1537&context=bjil> (Last Accessed on December 19, 2019)

⁴⁴ See <https://www.usnews.com/news/best-countries/slideshows/countries-with-well-developed-legal-frameworks-ranked-by-perception> (Last Accessed on December 19, 2019)

⁴⁵ See

https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf (Last Accessed on December 19, 2019)

⁴⁶ See <https://www.edb.gov.sg/en/news-and-events/insights/innovation/singapore-flexes-its-standing-as-asias-technology-capital.html> (Last Accessed on December 19, 2019)

⁴⁷ See <https://www.vantageasia.com/singapore-law-and-the-frontiers-of-technology/> (Last Accessed on December 19, 2019)

can be compared to the situation in Kenya, which is also considered a developing nation.

4.2 Resolution of Technology Disputes in Sampled Jurisdictions

In the US, Intellectual Property disputes, which are a type of technology disputes, are resolved through specialised courts that are dedicated only to these disputes both at the national as well as at the federal level.⁴⁸ In Singapore, there is a significant bias towards the use of arbitration in the resolution of technology disputes arising in that jurisdiction.⁴⁹

In the US, there is also the practice of mini-trial as a mechanism of resolving technology disputes due to some important advantages that this mechanism presents over other mechanisms like litigation.⁵⁰ At a lower level to the specialized IP courts, the US also has patent courts that presides over patents and plant variety protection disputes.⁵¹

The preference of resolving technology disputes through arbitration in Singapore has been attributed to the choice of technology companies selecting arbitration over judgments from domestic courts due to flexibility concerns among other reasons.⁵²

4.3 The use of Arbitration in Sampled Jurisdictions

The resolution of technology disputes through arbitration is most common in Singapore between the two sampled jurisdictions. The Singapore International

⁴⁸ Lawrence Sung, 'Strangers in a strange land: Specialized courts resolving patent disputes' (2008) *Business Law Today*, Page 27-29 Available at: http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1534&context=fac_pubs (Last Accessed on December 19, 2019)

⁴⁹ Kimberley Nobles, 'Emerging issues and trends in international arbitration' (2012) 43 *California Western International Law Journal* Available at: <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1025&context=cwilj> (Last Accessed on December 19, 2019)

⁵⁰ *Ibid Klitgaard and Mussman*, (n1)

⁵¹ *Ibid Sung*, (n48)

⁵² *Ibid Nobles*, (n49)

Arbitration Centre (SIAC) is a leading regional arbitral centre in Asia.⁵³ It is further strengthened by the enactment of new rules addressing issues of expedited procedures, speed, and efficiency among others.⁵⁴ Singapore's national laws are also apparently favourable to parties seeking resolution of technology disputes through arbitration.⁵⁵ This is because Singaporean law stands at 2% of the percentage of choice of law in international arbitration of technology disputes in that jurisdiction.⁵⁶ All these factors, together with its dynamic nature, have made arbitration a very attractive option for parties that are involved in technology disputes in Singapore.⁵⁷

In the US, arbitration of technology disputes has been considered for a while especially with regards to Intellectual Property disputes, specifically patent disputes.⁵⁸ Some of the reasons why arbitration is considered as a viable mechanism in the resolution of these disputes include; Prolonged proceedings in court that negatively affect time-sensitive patent disputes, the quick advancement of modern technology, business strategies and development of companies involved in the patent dispute, as well as the unpredictability of the court process among other considerations.⁵⁹ Another reason why arbitration is preferred is due to the danger under-informed nature of judges and juries especially with regards to new issues in technology which often lead to decisions that are unpredictable and often of low quality.⁶⁰

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ See <https://www.ft.com/content/3d9129f0-8e93-11e9-a1c1-51bf8f989972> (Last Accessed on December 19, 2019)

⁵⁸ Craig Metcalf, 'Resolution of Patent and Technology Disputes by Arbitration and Mediation: A View from the United States' (2008) 74 *Arbitration, Sweet & Maxwell* Available at:

https://www.kmclaw.com/media/site_files/1_metcalf-arbitration%20article.pdf (Last Accessed on December 19, 2019)

⁵⁹ Ibid

⁶⁰ Ibid

These generally, are some of the instances in which arbitration is chosen as the preferred mechanism in the settlement of technology disputes in the sampled jurisdictions. It is also important to take note of the fact that arbitration has been demonstrated to cater to the unique nature of technology disputes which are often not taken care of by the other mechanism of dispute settlement like litigation.

5.0 The Case for the use of Arbitration in Kenya

Having discussed the place of arbitration in the settlement of technology disputes in Kenya through the legal framework as well as case study, and having analysed experiences from other jurisdictions, this paper will now turn to the elephant in the room; the future of arbitration in the settlement of technology disputes in Kenya.

There have been discussions on the use of Alternative Dispute Resolution mechanisms to enhance access to justice in Kenya.⁶¹ Arbitration, as one of the Alternative Dispute Settlement mechanisms, is however facing some challenges that may hinder it from being a viable option in providing access to justice to an ordinary Kenyan.⁶² Some of these challenges include the increasingly high cost of arbitration as well as a lack of clear guidelines that have often negatively impacted support for arbitration.⁶³ There are valid concerns regarding the reality of access to justice through arbitration especially for those of weak economic positions in the country and the impact that this may eventually have on sustainable development.⁶⁴

⁶¹ Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (2018) Available at: <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-Justice-And-Alternative-Dispute-Resolution-Mechanisms-In-KENYA-23rd-SEPTEMBER-2018.pdf> (Last Accessed on December 19, 2019)

⁶² Ibid

⁶³ Ibid

⁶⁴ Kariuki Muigua and Francis Kariuki, 'ADR, access to justice and development in Kenya' (2014) 3 *Strathmore Annual Law Conference*

While the use of arbitration as a mechanism of dispute settlement is rising in Kenya and in other parts of the world as well,⁶⁵ parties to disputes before arbitration, especially foreign parties in international commercial arbitration still do not prefer the Kenyan jurisdiction for their arbitral proceedings.⁶⁶ While this preference of established arbitral institutions may still act as an impediment to the widespread use of arbitration in Kenya,⁶⁷ the continued economic liberalization and the opening up of markets are resulting in the growth of international trade and consequently a rise in the use of arbitration to resolve disputes arising in this space.⁶⁸

Other challenges that continue to face arbitration as a means of access to justice include; the low level of utilization of this mechanism in Kenya, lack of diversity in arbitration, proliferation of regional arbitral centres, territorial barriers, corruption, lack of sufficient experience, inadequate training and mentorship of arbitrators, issues of bias, the question of arbitrability, as well as challenges with

Available at: <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (Last Accessed on December 19, 2019)

⁶⁵ Anne Wanjiru Mwangi, 'A Critique of the Contribution of International Commercial Arbitration Toward the Realization of the Right of Access to Justice in Kenya' (2017) *University of Nairobi* Available at:

http://erepository.uonbi.ac.ke/bitstream/handle/11295/101379/Mwangi%2CA%20Wanjiru_A%20Critique%20of%20the%20Contribution%20of%20International%20Commercial%20Arbitration%20Toward%20the%20Realisation%20of%20the%20Right%20of%20Access%20to%20Justice%20in%20Kenya.pdf?sequence=1&isAllowed=y (Last Accessed on December 19, 2019)

⁶⁶ Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa' (2015) *Chartered Institute of Arbitrators*

Available at: <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfvrsn=0> (Last Accessed on December 19, 2019)

⁶⁷ *Ibid* Mwangi, (n65)

⁶⁸ James Ngotho Njung'e, 'Access to Justice in Kenya: A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya' (2018) 2(1) *Journal of CMSD* Available at:

<https://journalofcmsd.net/wp-content/uploads/2018/05/Challenges-Facing-Arbitration-As-A-Tool-Of-Access-To-Justice-In-Kenya.pdf> (Last Accessed on December 19, 2019)

implementations.⁶⁹ All these challenges have contributed to the resolution of disputes by other means other than arbitration.⁷⁰

Having set out the challenges that are facing arbitration as a mechanism of dispute settlement in Kenya, let us now turn our focus to the use of arbitration in the resolution of technology disputes. Arbitration has some dynamic features that can be adapted to address the unique features of underlying technology disputes. First, technology disputes have strong investment decisions lying beneath them and most of them are usually commercial start-ups with growth prospects and as such, they will not benefit from the uncertainties that come with other mechanisms of dispute resolution like litigation.⁷¹ As such, parties to technology disputes may want to engage in commercial disputes managements and this is where arbitration may come in.⁷²

Secondly, with regards to the technical nature of technology disputes, arbitration presents to the parties an opportunity to have some control over the knowledge background of the arbitrator. To put this into context, an arbitrator for the purposes of an arbitral process is famously described by Lord Justice

⁶⁹ Ibid

⁷⁰ Jacob K. Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1(6) *International Journal of Humanities and Social Science* Available at: http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf (Last Accessed on December 19, 2019)

⁷¹ Kariuki Muigua and Ngararu Maina, 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration' (2016) Available at: https://s3.amazonaws.com/academia.edu.documents/44254108/Opportunities_for_the_Nairobi_Centre_for_International_Arbitration.pdf?response-content-disposition=inline%3B%20filename%3DEffective_Management_of_Commercial_Disputes.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20191219%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20191219T081551Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=5bef809a44893edebca24572cfed8d6b534fdd50b96e269d49c14b34f4028307 (Last Accessed on December 19, 2019)

⁷² Ibid

Raymond as “a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them...”⁷³ This clear indication of party autonomy in the choice of arbitrator is a very welcome approach in the resolution of technology disputes. Under arbitration, parties can choose an arbitrator who has technical expertise over the subject matter of technology and who can also appreciate the innovation and time factors underlying these disputes as opposed to a judge with no background on or appreciation of these crucial considerations.

Due to these unique features of technology disputes, it can be argued that the effective resolution of technology disputes can best be achieved through the adoption of resolution mechanisms that are best adapted to address the unique considerations. From the foregoing, arbitration is clearly one such mechanism. Apart from addressing all these unique needs of technology disputes, the adoption of arbitration is also likely to boost business in the region and give parties the confidence that their interests are being well protected.⁷⁴ This will be a step forward for dispute resolution in the Kenyan legal system and also a win for the Kenyan economy and sustainable development.

6.0 Conclusion

Kariuki Muigua contends in his paper that:

“In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business Related, arbitration offers the best vehicle among the ADR Mechanisms to facilitate access to justice”⁷⁵

⁷³ Kariuki Muigua, ‘Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya’

Available at: <http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf> (Last Accessed on December 19, 2019)

⁷⁴ Ibid

⁷⁵ Kariuki Muigua, ‘Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms’ (2015) Available at:

Technology disputes fit this description both in the time essence as well as from the business perspective. Widening the practice of arbitration and extending it to the resolution of technology disputes will certainly present benefits in terms of both investor confidence as well as the growth of arbitral institutions and arbitration in the country.⁷⁶

Perhaps another very crucial aspect in technology disputes that are often overlooked when resolving them, and which arbitration can really step in to address is the issue of confidentiality of the technologies involved and adverse publicity effect that can arise out of resolving them through more public mechanisms like litigation.⁷⁷

The greatest advantage of arbitration will remain in its ability to combine strong enforceable decisions with a flexible nature that allows the parties to select favourable procedures that favour their businesses, choose an arbitrator with expertise in their area of dispute, have their disputes resolved with the required confidentiality, and have a speedy resolution for their disputes.⁷⁸ All these adequately address the unique considerations underlying technology disputes, which are crucial to achieving their effective resolution.

The use of arbitration to resolve technology disputes should be promoted by both the government and the various stakeholders since it has the potential not

http://erepository.uonbi.ac.ke/bitstream/handle/11295/88542/Muigua_Empowering%20the%20Kenyan%20people%20through%20alternative%20dispute%20resolution%20mechanisms.pdf?sequence=1 (Last Accessed December 20, 2019)

⁷⁶ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (2015) Available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.975.3764&rep=rep1&type=pdf> (Last Accessed on December 20, 2019)

⁷⁷ Kariuki Muigua, 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1(1) *Alternative Dispute Resolution* Available at: <http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf> (Last Accessed on February 8, 2020)

⁷⁸ Ibid

only to improve dispute resolution under the Kenyan legal system but also attract businesses as well as foreign direct investments to the country thereby influencing economic growth.⁷⁹

⁷⁹ Ibid

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Examination of Conciliation as an Alternative Dispute Resolution Mechanism

By: **Jemimah Keli***

Abstract

This paper examines the application and effectiveness of conciliation as an alternative dispute resolution method. The article is inspired by the reported case backlog of 13778 cases as at 30th June 2019 against 15733 case backlog in the previous financial year of 2017/2018 at the Employment and Labour Relations Court and the need to increase access to justice in labour and employment disputes. Justice delayed is justice denied is a recognized legal principle under the Kenyan Constitution and under the International law. There is an indication of minimal utilization of conciliation by parties in labour and employment disputes as a first attempt towards dispute resolution, The parties appear to prefer the clogged court system despite the existence of a cost effective and comprehensive legal framework for conciliation of such disputes under the Labour Relations Act of 2007. The author hopes to ignite discussion on the topic towards increased referral of labour and employment disputes to conciliation as the first step in dispute resolution and hopefully increase the rate of resolution of such disputes.

Key words

Conciliation. Conciliator, parties, trade disputes, justice

1. Introduction

There exist various modes of Alternative Dispute Resolution (ADR) mechanisms globally. Alternative Dispute Resolution refers to all methods of dispute resolution outside court. The most common Alternative Dispute Resolution methods include reconciliation; negotiation; arbitration; mediation; adjudication and conciliation. The Constitution of Kenya recognizes the application of traditional justice mechanisms besides other modes of dispute resolution outside court as long as the traditional methods do not infringe on the constitutional bill of rights and are not repugnant to justice and morality.¹

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This article focusses on conciliation as a method of dispute resolution in labour and employment disputes in Kenya and examines the application of conciliation as an alternative dispute resolution method. The Ireland Law Reform Commission in its 2010 report provides that,

*“when provision for conciliation is made in legislative form, it should be defined as an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement”.*²

The 2002 UNCITRAL Model Law on International Commercial Conciliation defines conciliation as: —

... a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (—the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute”.

The broad nature of definition by the model law does not distinguish conciliation from mediation. However, a distinction can be found between the two dispute resolution mechanisms in Section 4 of the Model Law, which states that “The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.” The conciliator may break an impasse by suggesting solutions to the parties for them to consider. The mediator does not have such powers. Conciliation is thus a formal process.

“Conciliation is a more formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage that should no

¹ See Article 159(2)(C) and (3) of the Constitution of Kenya, 2010

² Ireland Law Reform Commission. Alternative Dispute Resolution: Mediation and Conciliation. 2010. Available at <https://ww.lawreform.ie> (Accessed on 7th January 2020).

*amicable solution be reached, the conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute”.*³

The Chartered Institute of Arbitrators - Ireland branch on its website defines conciliation, “as a process similar to mediation whereby the conciliator seeks to facilitate a settlement between the parties”.⁴ In Ireland conciliation is rarely availed of except in respect of construction industry disputes. Under the industry defined procedures for conciliation, the conciliator is obliged to issue a recommendation for the resolution of the dispute if the parties fail to reach a settlement.

The conciliator under Ireland jurisdiction will attempt to facilitate a settlement between the parties. If this cannot be achieved, he will publish a recommendation setting out the basis on which he believes the dispute should be resolved.

Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for figuring out the best solution for the parties. The conciliator, not the parties, often develop and propose the terms of the settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. Attorneys are more active in mediation in generating and developing

³ Bunni, N.G., *The FIDIC Forms of Contract*. Wiley-Blackwell, 3rd ed., 2008) ebook at 445 Available at <https://www.ebooks.com> ISBN: 9781405172394 (Accessed 8th January 2020)

⁴ Available at <https://www.ciarb.ie/>. (Accessed on 7th January 2020)

innovative solutions for settlement. In conciliation, they generally offer advice and guidance to clients about proposals made by conciliators.⁵

2. Conciliation Legal Framework

2.1 Domestic Legal Framework for conciliation

The Constitution of Kenya under Article 159(2) (c) recognizes the application of alternative methods of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Conciliation is an alternative method of dispute resolution mainly for labour disputes. It is rarely used to resolve other disputes.

The Labour Relations Act, 2007, provides for conciliation to resolve trade disputes. The Act defines a “trade dispute” to mean a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organization and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.

Section 62 of the Act provides for the procedure of reporting a trade dispute by an employee to the Minister. The Act defines the Minister to mean the minister for the time being responsible for labour matters. The conciliation procedure is elaborate as reproduced hereunder:-

“62 (1) A trade dispute may be reported to the Minister in the prescribed form and manner – (a) by or on behalf of a trade union, employer or employers’ organisation that is a party to the dispute; and (b) by the authorized representative of an employer, employers’ organisation or trade union on whose behalf the trade dispute is reported.

⁵Sgububini,A.,et al., “Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective” August 2004. Available at <https://www.mediate.com> (Accessed 7th January 2020)

(2) A person reporting a trade dispute shall – (a) serve a copy by hand or registered post on each party to the dispute and any other person having a direct interest in the dispute; and (b) satisfy the Minister that a copy has been served on each party to the dispute by hand or by registered post.

(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within – (a) ninety days of the dismissal; or (b) any longer period that the Minister, on good cause, permits.

(4) If the issue in dispute concerns the redundancy of one or more employees, a trade union may report a trade dispute to the Minister at any stage after the employer has given notice of its intention to terminate the employment of any employee on grounds of redundancy.

(5) The reporting of a trade dispute by a trade union under subsection (4) does not prevent an employer from declaring employees redundant on the expiry of notice of intention to declare the employees redundant”.

Section of the Labour Relations Act provides for the conciliation process as follows:-

“65 (1) Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute unless –

(a) the conciliation procedures in an applicable collective agreement binding on the parties to the dispute have not been exhausted; or

(b) a law or collective agreement binding upon the parties prohibits negotiation on the issue in dispute.

(2) The Minister may require any party to a trade dispute to supply further information for the purpose of deciding whether to appoint a conciliator.

(3) If the Minister refuses to appoint a conciliator as specified in subsection (1), the Minister shall supply the parties to the dispute with written reasons for that decision.

(4) Where a party is aggrieved by a Minister’s decision under this section, that party may refer the matter to the Industrial Court under a certificate of urgency.

(5) The Minister may consult the Board on any trade dispute, which has been reported for conciliation."

The Labour Relations Act under section 66 provides for persons who may be appointed as conciliators as being a public officer, any other person drawn from a panel of conciliators appointed by the Minister after consulting the Board; or a conciliator from the Conciliation and Mediation Commission. The Conciliation and Mediation Commission has never been put in place hence the third option does not apply.

The Act defines the Conciliator's powers in resolving the dispute. The conciliator or conciliator committee appointed under section 66 shall attempt to resolve the dispute within 30 days or such other period as may be extended by the parties to the dispute. In exercise of the power under the Act the Conciliator may (a) mediate between the parties; (b) conduct a fact-finding exercise; and (c) make recommendations or proposals to the parties for settling the dispute.

For the purposes of resolving any trade dispute, the conciliator or conciliation committee may – (a) summon any person to attend a conciliation; (b) summon any person who is in possession or control of any information, book, document or object relevant to resolving the trade dispute to appear at the conciliation; or (c) question any person present at a conciliation.

The Minister shall pay the prescribed witness fee to any person who appears before a conciliator or conciliation committee in response to a summons issued under sub-section (3).

No person shall without good cause fail to – (a) comply with a summons issued under subsection (3); (b) produce any book, document or item specified in a summons issued under subsection (3); or (c) answer any relevant question asked by a conciliator or conciliation commission under subsection (3).⁶

The Act provides that if a trade dispute is settled in conciliation the terms of the agreement shall be recorded in writing and signed by the parties and the conciliator.

⁶ Section 67 Labour Relations Act, 2007

*A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.*⁷

*A trade dispute is deemed to be unresolved after conciliation if the – (a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or (b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires without parties reaching agreement.*⁸

The above demonstrates a comprehensive conciliation process framework for the resolution of trade disputes. The process is time bound and financed by the State. Parties ought to take advantage of the more cost effective and expeditious conciliation process in comparison with the court process. The Conciliator has court powers including to summon witnesses and call for records making it a formal process in comparison with mediation. It should be noted that the conciliation process has been held by the courts not to be mandatory and a party may opt to move the court directly.⁹

2.2. International Labour Organization (ILO) instruments

The Republic of Kenya has ratified 50 conventions under the ILO out of which only 37 are in force. The ILO conventions are categorized into three groups namely; fundamental, governance and technical. Under the fundamental category, there are 8 conventions and the Republic of Kenya has ratified 7 of them leaving out the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).¹⁰ Among the fundamental conventions ratified is the International Labour Organization (ILO) instrument of 1949, Right to Organize and Collective Bargaining which contains provisions relating to labour dispute settlement machinery.¹¹ The main principles set out in these instruments are that:

⁷ Section 68 Labour Relations Act, 2007

⁸ Section 69 Labour Relations Act, 2007

⁹ Court of Appeal Civil Appeal No. 100 of 2013 *Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* (2018) eKLR <https://www.kenyalaw.org> Accessed on 8th January 2020

¹⁰ Available at <https://www.ilo.org> (Accessed on 7th January 2020)

¹¹ Labour legislation guidelines by ILO. Available at <https://www.ilo.org/> (Accessed 8th January 2020)

- Bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining;¹²
- Procedures for the settlement of labour disputes should assist the parties to find a solution to the dispute themselves;¹³
- disputes in the public service should be settled through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration;¹⁴

ILO Conventions and Recommendations leave ample room for member States to design their own dispute settlement systems, in accordance with the following general principles:¹⁵

Governments should make available voluntary conciliation machinery, which is free of charge and expeditious, to assist in the prevention and settlement of industrial disputes;¹⁶

- The parties to disputes should be encouraged to abstain from strikes and lockouts while conciliation or arbitration is in progress;¹⁷
- Agreements reached during or as a result of conciliation proceedings should be drawn up in writing and accorded the same status as agreements concluded in the usual manner;¹⁸

In practice, the principal methods of dispute settlement, used in many countries, as suggested by the relevant ILO instruments, are:-

- Conciliation/mediation (which may or may not be differentiated); In Kenya, the Labour Relations Act gives power to the conciliator in a conciliation process to attempt mediation as one of the mechanisms towards resolving the dispute.¹⁹
- Arbitration; and
- Adjudication.

¹² Convention No. 154, Article 5, paragraph 2(e));

¹³ Collective Bargaining Recommendation, 1981 (No. 163), Paragraph 8

¹⁴ Convention No. 151, Article 8

¹⁵ Ibid 8

¹⁶ Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), Paragraphs 1 and 3

¹⁷ Recommendation No. 92, Paragraphs 4 and 6

¹⁸ Recommendation No. 92, Paragraph 5

¹⁹ Ibid 4

All of these methods are commonly established on a statutory basis and involve independent and impartial third parties to assist in the resolution of disputes. Conciliation/mediation and arbitration procedures are sometimes also established under the terms of collective agreements.²⁰

ILO thus recognizes several methods of trade dispute resolution so long as they conform with the above principles and have independent and impartial/ neutral third parties assisting to resolve the dispute.

2.3 The UNCITRAL Model Law on International Commercial Conciliation, 2002

The model law by the United Nations General Assembly applies to international conciliation. The model law provides that a conciliation is international if: (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or (b) The State in which the parties have their places of business is different from either: (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or (ii) The State with which the subject matter of the dispute is most closely connected. Under article 5, if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate; (b) if a party does not have a place of business, reference is to be made to the party's habitual residence. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

Article 7 states that the parties are free to agree to exclude the applicability of this Law.²¹ The model law is flexible and parties may adopt other rules on the procedure. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy

²⁰ibid

²¹ Articles 2-7 available at <https://www.uncitral.org> (Accessed on 8th January 2020)

settlement of the dispute. In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.²² The model law can also be adopted with modification by states to Apply in Domestic Disputes.

3. Application of Conciliation

3.1 Conciliation as a Mandatory Process

Conciliation is used almost preventively, as soon as a dispute or misunderstanding surfaces: a conciliator pushes to stop a substantial conflict from developing. For example under the Labour Relations Act of 2007²³ conciliation is usually the first attempt to solve the dispute between trade unions and employers and between unionisable employees and employers. Section 62 of the Act provides that; “a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within Ninety Days of the dismissal”.

The said section requires the Minister upon referral to appoint a conciliator within 21 days and if he does not, to give parties written reasons for not doing so, whereupon the aggrieved party may proceed to the industrial court. This provision is meant to ensure timely and expeditious disposal of trade disputes. The Court of Appeal has interpreted the referral for the appointment of conciliator by the Minister not to be mandatory. In *Court of Appeal Civil Appeal No. 100 of 2013 Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union (2018) eKLR*, the appeal arose from dismissal of a preliminary objection by the trial court. The preliminary objection was on the ground that the suit was invalid for the reason that the Claimant did not exhaust the alternative dispute resolution mechanism set out under Part VIII of the Labour Relations Act, 2007.

It was contended that the Employment and Labour Relations Court (ELRC) lacks jurisdiction to hear and determine the suit. In this case, the referral had

²² Article 6, Ibid

²³ Laws of Kenya(2018 edition) Available at <http://www.kenyalaw.org> (Accessed 20th January 2020)

been done but the Minister did not appoint a conciliator nor give written reasons. The trial court had found that Section 62 did not oust its jurisdiction and proceeded to determine the claim. The Court of Appeal, Waki JJA presiding, in upholding the decision of the trial court held,

“We agree with the trial court that section 62 (1) is permissive and allows all trade disputes to be reported to the Minister by the parties listed thereunder in the manner prescribed. There is no compulsion for the referral, and it was certainly not the intention of Parliament to confine parties into a straight jacket, place them at the mercy of the Minister, or oust the jurisdiction of the court. At best, it was tailored to enhance good industrial relations between an employer and an employee and to achieve improved industrial relations between the employer and the trade union representing the employee, as partners in social dialogue.”

Whereas conciliation is a faster and cheaper mechanism to resolve disputes on employment, the court’s view is that the referral is not mandatory. Consequently, many of the claims have been filed in court with the consequence of clogging the courts which suffer huge case backlog. According to the financial year 2018/2018 State of Judiciary report as of 30th June 2019, 13778 cases were pending in the ELRC down from 15733 cases that were recorded at the end of the financial year 2017/18 indicating a 12 percent decline. In the reporting period, a total of 2672 new cases were filed in all the ELRC court stations. The 2019-2020 report further indicates that out of the 13778 cases pending in the ELRC 84% are backlog.²⁴ The report does not give statistics on matters which were referred to the conciliation process in the period an indication that the Judiciary has not paid attention to the process which can help alleviate the case burden. It is time the Judiciary worked closely with the ministry responsible for labour matters to enhance the utilization of the conciliation process. The backlog statistics justify a call for mandatory conciliation of all trade disputes at first instance. The parties may then refer trade disputes to court in event of lack of agreement at conciliation.

²⁴ State of Judiciary and Administration of Justice Annual Report 2019-2020 Page 50-52
<https://www.judiciary.go.ke/> (Accessed on 26th January, 2020)

In the year 2019, the Judiciary introduced the court-mandated mediation to the ELRC.²⁵ The impact on the caseload will be reported at the end of the financial year. Conciliation prior to court saves parties costs of litigation if they reach an agreement and also serves to decongest court diary. The author makes a strong case for conciliation to be a mandatory process prior to filing all types of disputes in the ELRC save for constitutional petitions.

3.2 Compliance with the procedure in conciliation

The courts have held that agreement following conciliation is binding on the parties as long as the prescribed procedure or legal framework is complied with. In the Indian case of *Haresh Dayaram Thakur v State of Maharashtra and Ors*²⁶, the Supreme court considered an appeal from the High Court challenging a conciliation settlement agreement. The appellant filed an objection against a report of the conciliator setting out grounds of objection to the settlement among them the failure by the conciliator to comply with the procedural rules. The High Court summarily rejected the objection referring to a previous Order of the Court where the parties had agreed to be bound by the Conciliation agreement. The Supreme court in overturning the High Court Order held:

“ the learned Judge in passing the impugned order failed to notice the apparent illegalities committed by the conciliator in drawing up the so-called settlement agreement, keeping it secret from the parties and sending it to the court without obtaining the parties’ signatures.”

The Supreme Court proceeding to state: *“the position is well settled that if a statute prescribes a procedure for doing a thing a thing has to be done according to that procedure”*. Accordingly, the appeal was allowed and the settlement agreement by the conciliator set aside.

The ELRC has upheld the above position in dealing with agreements from the conciliation process under the Labour Relations Act. In *Kenya Shoe & Workers*

²⁵ The author is an accredited mediator for the court and has facilitated some employment disputes since the introduction

²⁶ Supreme Court of India Case No. 3247 of 2000, Appeal (Civil) dated 5th May 2000. Available at <https://indiankanoon.org/> (Accessed on 20th January 2020)

Union v Modern Soap Factory Ltd [2017] eKLR Justice Makau rejected an objection to the suit as being premature by acknowledging that the prescribed process had been followed by the conciliator who had filed a report that the parties had not reached an agreement.²⁷

The conciliation process has been held to be permissive in the case discussed previously of *Court of Appeal Civil Appeal No. 100 of 2013 Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* (2018) E Parties to trade disputes may file cases directly to the court.

3.3. Application of conciliation together with other ADR mechanisms

Conciliation may be combined with arbitration whereby conciliation is the first option in resolving the dispute failing which the matter proceeds to arbitration. Arbitration is confrontational and unsuitable where the parties want to maintain relationships. Asian business people, for example, prefer conciliation to arbitration for the reason that arbitration is confrontational. Burton argues that the Asian community prefers face saving, mutually agreeable compromises to awards proclaiming one party's rights. Consequently, Asian parties may resist contract clauses that send disputes straight to arbitration. They thus prefer to combine arbitration with conciliation for those cultural reasons. Burton argues that business people prefer to process business disputes in a business manner. In conciliation proceedings, the parties participate and retain control. They can resolve a dispute while preserving an ongoing relationship and enjoy flexibility without regard for formal procedures.²⁸

Conciliation is not, however, a completely satisfactory solution since its success within Asian domestic settings is partly hinged on cultural norms that support compromise, conciliation and may thus fail in international transactions where such norms may be absent. The solution lies in the combination of conciliation

²⁷ ELRC Mombasa Cause No. 247 of 2017 available at <https://www.kenyalaw.org> Accessed on 8th January, 2020

²⁸ Burton, S.J., "Combining Conciliation with Arbitration of International Commercial Disputes", *Hastings International and Comparative Law Review*, 1995, Vol. 18 Article 2. Available at

[https:// repository.uchastings.edu](https://repository.uchastings.edu) (Accessed on 7th January 2020)

with the arbitration, especially where Asian parties are involved. Arbitration being the alternative if conciliation fails. A practical advantage of combining conciliation with arbitration is that arbitration imposes a final and binding resolution to a dispute while conciliation on its own may drag indefinitely for lack of process rules.

The Labour Relations Act provides for the application of mediation during the conciliation process towards reaching an acceptable settlement of the dispute. Mediation skills help the parties in reaching a win-win situation in which the conciliation makes the process formal. Thus the process benefits from the advantages of mediation.

The parties may in their contract agree to conciliate if in event of a dispute negotiations fail. In the contract, parties may provide for the appointment of one or more persons to serve as conciliators or they may authorize an institution to appoint a conciliator for them. In international transactions, a pair of conciliators, one chosen by each party, may help bridge a cultural gap unless the single conciliator is familiar with the cultures of both parties.

4. Conclusion

Conciliation is a viable dispute dissolution mechanism with the main advantage of the parties being in control while at the same time the third party being able to give suggestions on the possible solutions to the dispute. Whereas it may apply to all types of disputes in Kenya, it is mainly applied to resolve trade disputes and in other countries like Ireland predominantly applied in construction disputes. In Kenya, the Labour Relations Act of 2007 provides for an elaborative legal framework for conciliation of disputes but the process is not mandatory prior to litigation in court. Conciliation is recognized by ILO as a viable method of dispute resolution in the 1949 Convention on the right to organize and collective bargaining. Recommendations under the Convention give guidance on how state parties can legislate laws on the conciliation of labour and employment disputes.

There is a need to train a pool of conciliators and sensitize the employers and employees on the process. Conciliators must be able to appreciate labour and

employment law principles and have mediation skills. The process must be monitored by the Judiciary in partnership with the ministry concerned with labor affairs to ensure efficacy and efficiency.

The ELRC has a backlog of 13778 cases up to the year 2015 with the majority of the parties avoiding the conciliation process under the law. The parties are therefore unlikely to get justice in the immediate future. The conciliation framework under the law if enforced as the first instance of justice can greatly improve access to justice in trade disputes. Considering the case backlog in the ELRC there is a justification to introduce mandatory conciliation in all trade disputes and only in cases where parties do not reach an agreement should the case be allowed in court. An exception can be made for constitutional petitions to the court. The ELRC retains supervisory jurisdiction over the conciliation process to ensure justice is done as was seen in the Indian case of *Haresh Dayaram Thakur v State of Maharashtra and Ors.*²⁹

The legal principle that justice delayed is justice denied will be upheld in trade disputes if there exist other alternative methods to resolve disputes conciliation being the preferred method.

²⁹ ibid

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Arbitration in Settling Intellectual Property Disputes in Kenya

By: *Doreen Kibia**

Abstract

The current legislative frameworks regulating intellectual property disputes are well advanced at the international, regional and national levels and have a significant influence on whether disputes are settled in an efficient and effective manner. The main challenges facing these mechanisms are political interference, lack of resources and public ignorance. The challenges faced by these mechanisms have negative ripple effects on right holders whose intellectual property rights have been infringed upon as the mechanisms lack the capacity to determine matters in a just, expeditious, proportionate and affordable way.

To create legislative and institutional mechanisms that settle intellectual property disputes in an efficient and effective way, Kenya should reform the current laws to provide for the use of alternative dispute resolution mechanisms as the first step in settling intellectual property disputes in Kenya. The best alternative dispute resolution mechanism to settle intellectual property disputes is arbitration.¹ Intellectual property rights are perceived to have the same status as other personal rights and as such are arbitrable in nature unless a statute provides the contrary.² The use of arbitration to settle intellectual property disputes has a number of advantages among them confidentiality and flexibility.³ These advantages complement the characteristic of intellectual property disputes.

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¹ Thomas D Halket, David L Evans and Theodore J Folkman, *Arbitration of Intellectual Property Disputes in the United States* (JurisNet, LLC 2019) 6

² *ibid.*

³ *ibid* 165 & 169.

1.0 Introduction

One of the values of many companies doing business in Kenya is found in their intellectual property (IP) as most successful companies rely on intellectual property for much of their asset value. The value and importance of IP to these companies are undisputable and as the commercial value of IP has grown, so has the need to protect intellectual property rights (IPR) and establish effective ways of settling IP disputes.⁴

Property is that which belongs to one as a bundle of rights that are unrestricted and exclusive and are guaranteed and protected by the government. It is an exclusive right because the owner (right bearer) has the right to dispose of a thing, to use it and to exclude everyone else from interfering with it.⁵ One may lawfully exercise this right over particular things without any control or diminution unless the laws of the state provide the contrary.

The Constitution of Kenya, 2010 defines property as any vested or contingent right to, or interest in or arising from land, goods or intellectual property among others.⁶ Sihanya defines IP as a term used to refer to the recognition, protection, and promotion of the work or product of the mind.⁷ IP is divided into copyright and related rights; and industrial property (which includes patents, trade secrets (TS), trademarks (TM), utility models (UM), unfair competition (UC), geographical indication (GI), plant breeder's rights (PBR) and industrial designs (ID)).⁸ Kenya has ratified various international treaties on IP among them the Trade-Related Aspects of Intellectual Property Rights (TRIPs) which is to date the most comprehensive multilateral agreement on IP and forms the basis of

⁴ *ibid* 6.

⁵ Henry Campbell Black, *Black's Law Dictionary* (4th edn, St. Paul Minn. West Publishing Co. 1968) 1382.

⁶ The Constitution of Kenya, 2010 Article 260.

⁷ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya 2016) 1.

⁸ Donald S Chisum, *Understanding Intellectual Property Law* (3rd edn, Carolina Academic Press, LLC 2015) 1–2.

modern IPR in all countries, including Kenya.⁹ Article 2(6) of the Constitution of Kenya, 2010 states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. As such, the TRIPs agreement forms part of Kenyan Law.

In the same spirit of the protection and promotion of IPR, article 40 of the Constitution of Kenya, 2010 mandates the state to protect property with article 40 (5) being specific to the protection of IP. In so doing, Parliament has enacted a number of legislations that deal with the different forms of IP. Among the legislations enacted are: The Industrial Property Act, 2001; The Copyrights Act, 2001; The Trademark Act, (Cap.506 of the Laws of Kenya); The Seeds and Plant Varieties Act, Cap. 326 of the Laws of Kenya, 1991; and The Anti-counterfeiting Act No. 13 of 2008.

Despite there being laws that protect IPR, infringement does occur. Infringement of IPR is the violation of a protected IPR, it includes the violation of rights protected by a patent, copyright or trademark among the other forms of IP.¹⁰ The value of many companies in Kenya as earlier stated is increasingly being found in their IP and in addition to this, the growth of incubation hubs in Kenya over recent years has been on a rise. In spite of this increase, the protection of these inventors has been a challenge as the enforcement of the laws protecting IPR in Kenya is weak thus exposing the inventors to exploitation and outright theft of their ideas.¹¹ IPR enables the right holder to litigate people who have infringed on their rights and seek remedies or any other legal recourse when a dispute involving IPR occurs.

⁹ Moni Wekesa and Ben Sihanya, *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung 2009) 6.

¹⁰ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya 2016) 226.

¹¹ The U.S. Chamber of Commerce's Global Innovation Policy Centre, 'Inspiring Tomorrow IP Rights and Economic Activities' (February 2019) 21. Available at https://www.theglobalipcenter.com/wp-content/uploads/2019/02/023593_GIPC_IP_Index_2019_Full_03.pdf (Accessed 22 January 2020.)

Courts are the main avenues for settling disputes in Kenya and the overriding objective of the courts is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Courts have however been criticised on their performance in delivering justice. Complaints raised have been about their inability to deliver justice in a manner that is not only fair but is seen to be fair; delay involved in processing and conclusion of cases; and inaccessibility of justice due to the expenses involved in litigation of matters.¹² Kenya was ranked 41 out of the 47 countries in the 2019 study by the U.S Chamber International IP Index with this performance being attributed to the weak judicial system that has case backlogs. The study stated that the judicial system is slow in determining cases before it and inventors rely on the four specialised IP tribunals which are faster than regular courts.¹³

In exercising their judicial authority, courts and tribunals in Kenya are guided by the principles of dispute resolution among them arbitration.¹⁴ As such, arbitration constitutes an alternative to litigation and specialised tribunals for the resolution of IP disputes. Arbitration is a mechanism for settlement of disputes which usually takes place in private, pursuant to an agreement between two or more parties in which the parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable in law.¹⁵ As a mode of settling IP disputes, arbitration has various advantages among them being that the parties to the dispute are ensured of confidentiality of the proceedings, the expertise of the arbitrator as well as time and cost-effectiveness. In addition to this, parties in dispute who opt for the arbitration to be in a different country or who are from different countries will find it easier to enforce foreign arbitral awards as compared to court judgments.¹⁶

¹² Steve Ouma, *A Commentary on the Civil Procedure Act Cap 21* (2nd edn, LawAfrica Publishing (K) Ltd 2015) 30.

¹³ The U.S. Chamber of Commerce's Global Innovation Policy Centre, (n 11) 21.

¹⁴ The Constitution of Kenya, 2010 Article 159 (2) (c)

¹⁵ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (edn, Glenwood Publishers Limited 2012) 1.

¹⁶ Dário Moura Vicente, 'Arbitrability of Intellectual Property Disputes: A Comparative Survey' (2015) 31 *Arbitration International* 163, 152.

Traditionally, the arbitrability of IP disputes was questionable because IPR such as patents is granted by national authorities. It was argued that disputes arising from such rights should be settled by a public body within the national system. It is now acceptable that like other disputes relating to other private rights, IP disputes are also arbitrable.¹⁷ This is evident under the TRIPs Agreement, 1994 which provides that states which are party to the agreement recognize that IPR is private rights.

2.0 Arbitrability of Intellectual Property Disputes

The arbitrability of IP disputes is the question of whether or not the subject matter of an IP dispute may be settled through arbitration. Traditionally the arbitrability of IP disputes arose in regards to the arbitration of specific IP disputes. This is because certain IPR are granted by the national authorities and as such disputes arising from these rights should automatically be settled by a public body within the national system.

The majority of IP disputes arise from a contract and if the contract from which the IP dispute arises provides for an arbitration clause, then the parties in dispute should ordinarily be referred to arbitration.¹⁸ This has, however, not been the practice as contract disputes arising from rights in rem (entitlement to an IP right such as copyright or trademark) were considered non-arbitrable. It is now acceptable that disputes relating to IP rights just like other disputes relating to privately owned rights are arbitrable. Any right that a party can dispose of by way of settlement should be capable of being the subject of arbitration as arbitration is largely based on party agreement.¹⁹

A new school of thought has developed in countries like India that carry out a pro-arbitration stance (determining what makes a policy or practice arbitration-

¹⁷ WIPO, 'Why Arbitration in Intellectual Property?' Available at <https://www.wipo.int/amc/en/arbitration/why-is-arb.html> (Accessed 23 January 2020).

¹⁸ WIPO (n 17).

¹⁹ *ibid.*

friendly) and ensure that purely contractual disputes that would traditionally be rendered non-arbitrable are subjected to arbitration (rights test).²⁰

3.0 The Use of Arbitration in Settling Intellectual Property Disputes

The UN Charter sets out the ADR mechanisms that parties in a dispute may resort to one of which is arbitration among others such as negotiation, mediation, conciliation and judicial settlement.²¹ In Kenya, The Arbitration Act, 1995 gives a narrow definition of arbitration as to any arbitration whether or not administered by a permanent arbitral institution.²² Kariuki Muigua best defines arbitration as a process subject to statutory controls where formal disputes are determined by a private tribunal -often referred to as an arbitral tribunal- chosen by the parties or by an appointing institution such as the Chartered Institute of Arbitrators in Kenya.²³

Arbitration has become popular as a dispute settlement mechanism in IP disputes. As Dário Vicente notes, arbitration was mainly used for IP disputes for contracts of licencing or transmission of IPR.²⁴ Recent developments have seen IPR being considered as a valid subject matter for arbitration with various legal systems ensuring that arbitration is a mandatory mechanism for IP disputes as it ensures expeditious disposition of the disputes, unlike litigation. For example, the Portuguese Law no 62/2011 provides for regulating through mandatory arbitration the pharmaceutical patent disputes between patentees and generic medicine companies.

Some IP disputes are non-litigable because courts are reluctant to hear them and the same disputes may be efficiently settled through arbitration. Thomas Halket notes that various forms of IPR exist in almost all countries but tend to vary

²⁰ Rahul Donde, Lévy Kaufmann-Kohler and Sharad Bansal, 'Arbitrability of Intellectual Property Disputes: Setting the Scene?' (2016) Available at <https://lk-k.com/wp-content/uploads/2016/03/Rahul-Donde-Sharad-Bansal-Arbitrability-of-intellectual-property-disputes-Setting-the-scene.pdf>. (Accessed 22 January 2020).

²¹ United Nations, 'The Charter of the United Nations and the Statute of the International Court of Justice' article 33.

²² The Arbitration Act, No 4 of 1995 s 2.

²³ Muigua (n 15) 1.

²⁴ Vicente (n 16) 163.

from country to country.²⁵ The best example of IPR that is generally non-litigable is domain rights that exist under a regime that is largely part private as opposed to governmental in nature.²⁶ Some IPR such as patents and trademarks are created by national laws and will vary in different countries, unlike copyright which is uniform in most countries due to the Berne Convention which is a copyright treaty law applicable to the majority of countries. A dispute may arise regarding an IPR that does not exist as a right in a country (or a foreign IPR) and the courts may be unwilling or even unable to settle the dispute. This makes a case for the arbitrability of such IP disputes as an arbitral tribunal may have jurisdiction to settle such disputes.

3.1 The Arbitration Agreement

An Arbitration usually takes place pursuant to an agreement between two or more parties in which the parties agree to be bound by the decision to be given by the arbitrator according to law.²⁷ Therefore, for arbitration to evolve, there must exist an arbitration agreement between the parties who either execute a contract that has an arbitration clause or a stand-alone arbitration agreement.²⁸ A stand-alone arbitration agreement may be executed before the dispute arises or when parties in a dispute agree to submit an already existing dispute to arbitration where no agreement to arbitrate had previously been executed.

An arbitration agreement has been defined under section 2 of the Arbitration Act of Kenya, 1995 as an agreement by the parties to submit to arbitration *all or certain* disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It provides the legal basis for compelling an unwilling party to arbitrate. Halket avers that an arbitration agreement is important because it lays down the means of settling a possible dispute; it serves as a road map for the dispute resolution process; it gives the arbitrator powers, and sets the jurisdictional basis for resolution of the dispute and enforcement of the tribunal award.²⁹

²⁵ Halket, Evans and Folkman (n 1) 26.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid* 16.

²⁹ *ibid* 29 & 30.

It is therefore important to carefully draft an arbitration agreement to meet the parties' desires on how to settle a dispute. Generally, these agreements are contracts just like any other contract and must meet the basic requirements provided by the law of contract. The arbitration agreement must consist of an offer and an acceptance; must have a consideration; the parties must have the capacity to enter into the contract; the subject matter must be legal; and the agreement must be in writing. The invalidity of a contract does not invalidate the arbitration clause as provided for under section 17 (a) of the Arbitration Act. This brings about the *doctrine of separability*, which requires the arbitration clause to be treated as an agreement independent of the other terms of the contract. Justice Kimaru in the case of *Kenya Airport Parking Services Ltd & Another V Municipal Council of Mombasa* [2009] eKLR noted that:

"...the principle of separability of an arbitration agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or legality of the agreement itself..."

If an arbitration agreement is not properly drafted it poses problems to the arbitral proceeding. The following problems may arise from the drafting of an arbitration clause:

i. Multi-Step Procedure

One of the problems that may arise in the drafting of an arbitration clause for an IP transaction relates to the procedures that may be adopted before the arbitration begins such as negotiations or mediation. ADR offers multi-step resolutions and parties to a dispute may opt to first negotiate and where negotiations fail, mediate and if mediation fails, arbitrate. A clause providing for a multi-step procedure may provide for negotiation or mediation or both negotiation and mediation before arbitration as illustrated by Table 1.1 and 1.2 below:³⁰

³⁰ *ibid* 16.

Table 1.1 An arbitration clause providing for mandatory negotiation as a first step

The parties shall endeavour to settle amicably by negotiation all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination. Any such dispute which remains unsettled within thirty (30) days after either party requests in writing negotiation under this clause or within such other period as the parties may agree in writing, shall be finally settled under the... arbitration rules by ...arbitrator(s) appointed in accordance with the said Rules. The place of arbitration shall be (city, country). The language of the arbitration shall be ...

*Source Thomas D Halket, David L Evans and Theodore J Folkman, *Arbitration of Intellectual Property Disputes in The United States* (JurisNet, LLC 2018) 37

Table 1.2 A conflict management clause providing for both negotiation and mediation before arbitration.

All disputes arising out of or in connection with this agreement shall be settled in accordance with the procedures specified below, which shall be the sole and exclusive procedures for the resolution of any such dispute.

Negotiation

The parties shall endeavour to settle any dispute by negotiation between executives who have authority to settle the dispute and who are at a higher level of management than the persons with direct responsibility for administration or performance of this agreement.

Mediation

Any dispute not settled by negotiation in accordance with paragraph (a) within (30) days after either party requested in writing negotiation under paragraph (a) or within such other period as the parties may agree in writing, shall be settled by mediation under the mediation rules.

Arbitration

Any dispute not settled by mediation in accordance with paragraph (b) within [45] days after the appointment of the mediator or within such other period as the parties may agree in writing, shall be finally settled under the arbitration rules. by

*Source Thomas D Halket, David L Evans and Theodore J Folkman, *Arbitration of Intellectual Property Disputes in The United States* (JurisNet, LLC 2018) 37.

ii. Scope of Dispute to be referred to Arbitration

The general practice in arbitrations is that parties agree on the disputes to be referred to arbitration while drafting the arbitration clause. As discussed above, the clauses of importance need to be drafted carefully. However, IP transactions may have considered not present in a normal contract and which can affect the parties consideration of the specific matters they wish to refer to arbitration.³¹ Most arbitration clauses provide for *all disputes arising from the contract to be referred to arbitration*. The danger with such a provision is that it may be both over-inclusive and under-inclusive for an IP matter.

It may be over-inclusive where, for instance, there is an indemnification provision where a right holder indemnifies the other party of any claim against a third party. It may be under inclusive in an instance where the agreement allows for the licensee of an IP to use the IP within the grant of the license therefore a dispute arising as to the use of the said license may not be within the matters submitted to arbitration under the arbitration clause.³²

iii. Place or Seat of the Arbitration and the Location of the Hearing

The seat of the arbitration is of importance because its arbitral procedural laws govern the procedural aspects of the arbitration. For example, if the choice of the seat of arbitration is Kenya, it means that Kenyan arbitral law will govern the arbitral proceedings. The location of the hearings is the place where the arbitral tribunal will physically sit during the hearing. The location of the hearing does not affect the procedural aspect of the arbitration if the arbitration clause provides for the seat of arbitration. However, the location of the arbitration has the advantage of home court proceedings and a party that may be concerned about the application of adverse local law at the location of the hearing is advised to consider specifying a hearing location that is neutral to all parties to the dispute while drafting the arbitration clause.³³

³¹ *ibid* 16.

³² *ibid*.

³³ *ibid* 24.

4.0 Arbitration is an Alternative to Litigation

According to the Black's Law Dictionary, litigation is a contest in a court of justice for the purpose of enforcing a right.³⁴ Bello states that one of the greatest shortcomings of litigation is the delay in the dispensation of justice.³⁵ The opportunity to choose how a dispute would be settled is said to be the greatest advantage of arbitration over litigation.³⁶ This advantage is pegged on the practice of the parties driving the arbitration process by referring the dispute to arbitration and giving the arbitral tribunal powers.³⁷ On the other hand, litigation, though the main avenue for settling disputes, has been deemed not effective or efficient mainly because it is a time-consuming procedure. As discussed earlier, courts have been criticised on their performance in delivering justice. Below are the main differences between litigation and arbitration:

³⁴ Henry Campbell Black, *Black's Law Dictionary* (4th, ST Paul, MINN West Publishing Co 1968) 1082.

³⁵ Adesina Temitayo Bello, 'Arbitration as an Alternative to Litigation Malady : The Frontiers of How Arbitrators Saves Time' (2014) 62 Nigerian Chapter of Arabian Journal of Business and Management Review 1, 1.

³⁶ Stipanowich, Thomas, *Arbitration and Choice: Taking Charge of the 'New Litigation'* (April 2, 2009). DePaul Business & Commercial Law Journal, Vol. 7, 2009; Pepperdine University Legal Studies Research Paper No. 2009/16. Available at SSRN: <https://ssrn.com/abstract=1372291>. Accessed 23 January 2020

³⁷ Bello (n 35) 2.

Table 1.3 Differences between Litigation and Arbitration

	Litigation	Arbitration
1.	Open to the public as proceedings are held in open court.	Confidential as proceedings are held privately.
2.	Parties cannot choose Judges/ Magistrates.	Parties directly choose the arbitral tribunal.
3.	Not flexible as rules are set beforehand.	Flexible as it is a private and consensual matter where parties and the tribunal agree or set the rules to be followed.
4.	A formal setting with rules that are compulsory set in place.	Minimum emphasis on formality thus encouraging expeditious disposal of matters.

*Source: The Author

Table 1.4 The main characteristics of IP disputes and the results offered by domestic litigation and arbitration

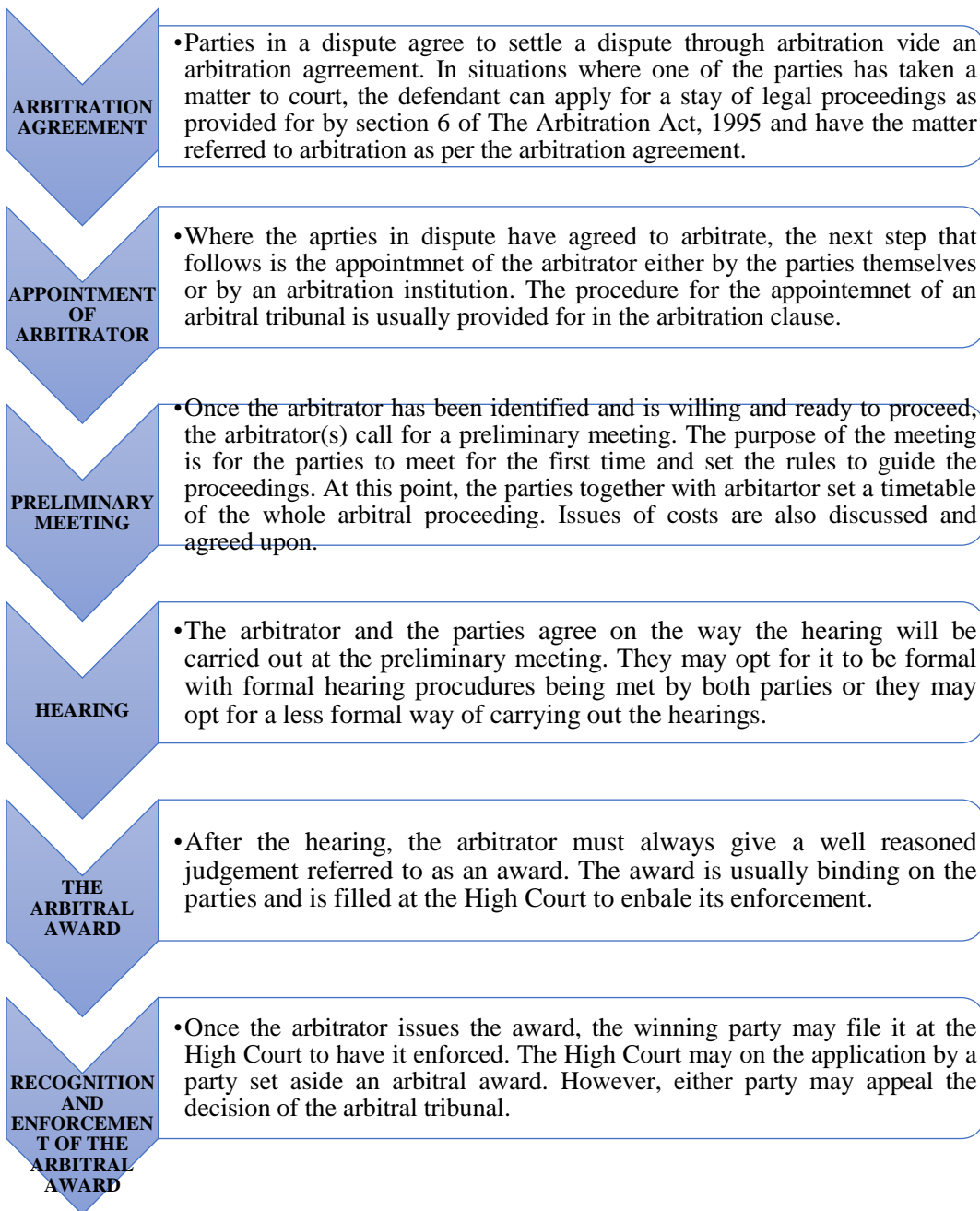
Characteristics	Litigation	Arbitration
1. International	Multiple Proceedings under different laws that increase the risk of conflicting results. Possibility of home court advantage for the party that litigates in its own country	A single proceeding under the law agreed upon by parties. Arbitral procedure and nationality of the arbitrator can be neutral, so is the language and institutional culture of parties.

2. Expertise	The judge/decision maker may not have relevant expertise to determine the matter.	Parties can select an arbitrator(s) with IP expertise.
3. Urgent	Procedures are often drawn-out delaying the process of the disputes. In certain jurisdictions, injunctive relief is available.	The arbitrator (s) and parties can agree to shorten the procedure to be used. The arbitration may include provisional measures and does not preclude seeking court-ordered injunction.
4. Require Finality	Possibility of appeal.	Limited appeal option.
5. Confidential	Public proceedings.	Proceedings and awards are confidential.

*Source WIPO Website on <https://www.wipo.int/amc/en/arbitration/why-is-arb.html>.

5.0 The Arbitration Process in Kenya

The flow chart below provides an overview of the standard Arbitration Process:



*Source: The Author

6.0 A Critique of the Use of Arbitration to Settle IP Disputes

Cook and Garcia argue that an arbitration agreement may be deemed invalid due to public interest and for this reason, some parties opt not to use arbitration as an alternative to litigation to solve IP disputes.³⁸ As mentioned above, the majority of IPR like patents and registered trademarks require government action for them to come into existence. The state may include criminal sanctions and punitive actions when legal issues arise that affect the public interest. The power of arbitral tribunals is limited to specific remedies that it can award and it has no powers to use punitive measures.

IPR is granted to the right holder through registration by the State and only the state and not an individual can reverse the rights granted.³⁹ As stated at the beginning of this paper, IPR is exclusive rights given by the state to individuals within their territory and possess a public nature. If the arbitral tribunal is mandated to establish the validity of an IPR, it cannot affect its registration in the national registration system but rather uses that information to decide on rights that should be protected.⁴⁰

7.0 Conclusion

The IPR are perceived to have the same status as other personal rights and as such are arbitrable in nature unless statute provides the contrary. The use of arbitration to settle IP disputes has several advantages as compared to litigation. These advantages are beneficial to IP disputes because they complement the characteristic of IP disputes. For instance, some IP disputes are international and in such disputes, arbitration is the most suitable mode of settling international disputes because the parties agree on the law to govern the proceeding other than litigation which would involve multiple proceedings under different laws.

³⁸ Trevor Cook and Alejandro I Garcia., *International Intellectual Property Arbitration*. (Kluwer Law International 2010) 23.

³⁹ M Suzuki, *Patent Infringement and Patent Invalidation. Introduction to Japanese IP Law*. (Nagoya University 2018) 66.

⁴⁰ *ibid* 68.

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The Arbitration Act, No 4 of 1995

The Constitution of Kenya 2010

Ramifications of the Decision of the Supreme Court in the case of; Nyutu Agrovet Limited (Petition No. 12 of 2016)

*By: Peter Mwangi Muriithi**

Abstract

The motivation behind this paper is to critique the ground breaking decision of the Supreme Court in the case of; Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR (hereinafter Petition No. 12 of 2016). This is with a view of highlighting the consequences of the Supreme Court decision on arbitration practice in general in Kenya.

In doing so the author shall: Offer an introduction which will constitute definition of some seminal terms and an elaboration of the basis of the paper, a succinct analysis of the nature and characteristics of arbitration, a background to Petition No. 12 of 2016¹, a case brief of Petition No. 12 of 2016, an analysis of the ramifications of the decision by the Supreme Court in Petition No. 12 of 2016. Lastly, the paper shall give a conclusion on the ramifications of the decision of the Supreme Court decision in Petition No. 12 of 2016.

1.0 Introduction

To commence this discussion, it is vital at this particular juncture to note that the mode of dispute resolution under discussion in this paper is arbitration. Arbitration as a mode of dispute resolution is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards. ² Succinctly, arbitration involves a final and binding

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¹ Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] Eklr

²Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences*, Vol. 1 No. 6; June 2011) page 221

decision rendered by a third party, producing an award that is enforceable in a court.³

This paper from the onset seeks to analyze the decision of the Supreme Court in *Petition No. 12 of 2016*, juxtaposing it with the nature and characteristics of arbitration, with the intention of establishing the ramifications of the Supreme Court decision in arbitration practice in Kenya. Succinctly, the paper questions the import of the Supreme Court decision in *Petition No. 12 of 2016* on arbitration practice in Kenya.

2.0 Understanding the nature and characteristics of arbitration

Arbitration is a private system of adjudication of disputes. Parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system.⁴ Arbitration is considered to have a number of attributes, which include confidentiality, the autonomy of parties, private and consensual process, flexibility and limitation of appeals.⁵ 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 in realizing justice in the best way achievable.⁶

Over time, arbitration has been lauded over litigation as a faster and easier method of settling legal disputes.⁷ Unlike with litigation, where the judges are

³Margaret L. Moses, *The principles and practice of International Commercial Arbitration*, page 1(Cambridge University Press)

⁴ Ibid No.3

⁵Kariuki Muigua, *Settling Disputes through Arbitration in Kenya (Glenwood Publishers Ltd) Page 3-6.*

⁶Kariuki Muigua, *Promoting International Commercial Arbitration in Africa* page 2(Published in CIArb Kenya , *Alternative Dispute Resolution Journal* Volume 5, Number 2 2017)

⁷U.N. Conference on Trade and Development, New York and Geneva, 2005, *Dispute Settlement : International Commercial Arbitration*, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38, Available at<http://unctad.org/en/Docs/edmmisc232add38_en.pdf> (accessed on 20th January 2020)

arbitrarily designated, arbitration allows parties to select their arbitrators, which means that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues.⁸ This attribute makes arbitration the preferred mechanism to resolve international disputes especially international commercial disputes where technical and complex matters may be the subject matter of the dispute.⁹

As Collier and Lowe correctly asserted,

*"...where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill-adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."*¹⁰

In arbitration, parties to a dispute have the autonomy to choose the arbitrators to arbitrate their dispute. This gives the parties an opportunity to choose arbitrators that are quick to grasp the complex issues at hand. In return, the arbitrators will also be quick to dispense with the dispute, thus saving the parties' time and, more importantly, money.¹¹ Another argument in favour of arbitration is that it gives parties control over the dispute resolution process by allowing them to determine by agreement, the forum, the applicable law, and the procedures to be adopted in arbitrating their dispute.¹²

[Hereinafter U.N. Conference on Trade and Dev. 5.1]

⁸Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251)

⁹ Ibid No.8

¹⁰John G. Collier & Vaughn Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 45-46 (1999).

¹¹Ibid No.7

¹² U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38, Available at

Arbitration is considered to be a means of settling disputes that is flexible. The flexibility lies in the fact that the parties can choose to by-pass certain procedural requirements associated with litigation that could potentially lengthen the settlement of the dispute. This flexibility also contributes to the faster and cheaper resolution of disputes.¹³

Arbitration further assures confidentiality.¹⁴ The confidential character of arbitration was captured by the English Court of Appeals in *Dolling-Baker v Merrett*, which stated that:

"...as between parties to an arbitration, although the proceedings are consensual may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use any other purpose any documents prepared for and used in the arbitration, or closed or produced in the course of the arbitration, or transcripts or notes of evidence in the arbitration or the award, and indeed not to disclose what evidence had been given by any witness in the arbitration, save with of the other party, or pursuant to an order or leave of the court. That qualification necessary, just as in the case of the implied obligation of secrecy between banker and customer..."¹⁵

Further, dispute resolution by way of arbitration is commended for leading binding determination of a dispute and an award that is not subject to any appeal mechanism. The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process.¹⁶

<http://unctad.org/en/Docs/edmmisc232add38_en.pdf> (accessed on 20th January 2020) [Hereinafter U.N. Conference on Trade and Dev. 5.1]

¹³Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 251

¹⁴U.N. Conference on Trade and Development, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, page 7-8 Available at

<http://unctad.org/en/Docs/edmmisc232add38_en.pdf> (accessed on 20th January 2020)

¹⁵ *Dolling-Baker v Merrett*, [1990] 1 W.L.R. 1205 A.C. at 1213 [Eng.]

¹⁶*Ibid* No. 23 page 8

Arbitration awards are also easier to enforce in foreign states than judicial judgment tends to be because of the transnational nature of the arbitration.¹⁷ These attributes make arbitration an attractive means of solving disputes internationally especially commercial disputes. With increased globalization, arbitration has become the most preferred mechanism for settling international commercial investment disputes.¹⁸ This being the case, analyzing the import of Supreme Court decision in Petition No. 12 of 2016 on arbitration practice is vital. This paper squarely falls within this scope.

3.0 Background and a brief summary of Petition No. 12 of 2016

Prior to Petition No. 12 of 2016¹⁹, the case of; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* was first filed in High Court as an appeal to an arbitration award in accordance with Section 35 of the *Arbitration Act 4 of 1995*. Briefly, the case concerned a distributorship agreement between the parties for the distribution of Airtel's telephony products. In accordance with an arbitration agreement, the parties referred the case for arbitration. An award was made in favour of *Nyutu Agrovet Limited*. Aggrieved, *Airtel Networks Kenya Limited* filed an application in the High Court to set aside the award on grounds that it dealt with matters outside the parties' agreement and the arbitrator's terms of reference. The application was allowed in the *High Court and the award was set aside*. Thereafter, *Nyutu Agrovet Limited* appealed to the Court of Appeal against the High Court's decision to set aside the award. This was in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR, *Civil Appeal (Application) No 61 of 2012*.

¹⁷Tsotang Tsietsi, *International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes* page 253

¹⁸Franck, S.D., "The Role of International Arbitrators," page 1. Available at <<https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>> (accessed on 15th January 2020)

¹⁹ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR

In a majority decision, the Court of Appeal found that there was no right to appeal to the Court of Appeal against the High Court's decision to set aside the award. The seminal question before the Court of Appeal was whether in the absence of an express provision of a right of appeal in an arbitration agreement a party to arbitral proceedings has a right of appeal to the Court of Appeal from a decision of the High Court given under section 35 of the Arbitration Act, 1995.

The Court of Appeal held that the right to appeal was expressly granted by law and not by implication. Further, a party had to show which law donated the right of appeal intended to be exercised. The Court of Appeal noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties.

The Court of Appeal also held that the principle on which arbitration was founded, namely that the parties agree on their own, to take disputes between or among them from the courts for determination by a body put forth by themselves and adding to all that as in the instant case, that the arbitrators' award had to be final. It could be taken that as long as the given award subsisted it was theirs. But in the event it was set aside as was the case, that decision of the High Court was final. The High Court's decision was final and must be considered and respected to be so because the parties voluntarily choose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that had been achieved. Despite the loss or gain either party might impute to, the setting aside remained where it fell. The courts, including the Court of Appeal, should respect the will and desire of the parties to arbitrate. The Court of Appeal in its Ruling found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

Nyutu Agrovet Limited aggrieved by the decision of *Court of Appeal Nyutu* made an application to the Court of Appeal to certify the case as being of general public importance and thereby to obtain leave to appeal to the Supreme Court.

Certification of leave to appeal to the Supreme Court was thereafter granted in terms of Article 163(4)f(b) of the Constitution. A Petition of appeal dated 15th July 2016 was thereafter filed seeking to overturn the decision of the Court of Appeal, Petition No. 12 of 2016.

Among other questions for determination in Petition No. 12 of 2016, the main question for determination by the Supreme Court as framed by the Court was; whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the Arbitration Act 1995 Act. Answering in the affirmative, the Supreme Court was of the view that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. Further, the Supreme Court noted that this circumscribed and narrow jurisdiction should be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

4.0 The ramifications of the decision by the Supreme Court in Petition No. 12 of 2016

Prima facie, the import of the Supreme Court decision is to widen the court appellate scope on arbitration matters in Kenya. In essence, the aspect finality of the decision by the High Court of either setting aside an arbitral award or affirming the award as was initially the case and as has been affirmed over time by various decisions of the courts in Kenya is no longer the position.

This was best captured by *Mwera JA*²⁰ who verbatim stated:

“... that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators’ award shall be final, it can be taken that as long as the

²⁰ Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61 of 2012.

given award subsists, it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own (sic). None of the parties can take steps to go on appeal against the setting aside the ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved."

That same view of the finality of High Court decisions is evident in other Court of Appeal decisions such as: *Anne Mumbi Hinga v Victoria Njoki Gathara Civil Appeal No. 8 of 2009*; [2009] eKLR, *Micro-House Technologies Limited v Co-operative College of Kenya Civil Appeal No. 228 of 2014*; [2017] eKLR and *Synergy Industrial Credit Ltd v Cape Holdings Ltd Civil Appeal (Appl.) No. 81 of 2016*.

The jurisprudence emanating from Kenyan Courts overtime on the finality of High Court decisions was guided by United States' Second Circuit of the Court of Appeal decision in the case of: *Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA)*,

*"By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favour of arbitration with all of its well-known advantages and drawbacks."*²¹

The decision by the Supreme Court in *Petition No. 12 of 2016*²², in essence, abrogated the principle of finality of High Court decisions, as had been the laid down and accepted overtime in Kenya.

However, it noteworthy that even before the Supreme Court decision in *Petition No. 12 of 2016*, the Court of Appeal had in some instances taken a different position and pronounced itself on non-finality of High Court decisions. For

²¹ 508 F2d. 969

²² *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] Eklr

example, in the case of: *Kenya Shell Limited v Kobil Petroleum Limited Civil Application No. 57 of 2006 (unreported)*, Omolo JA verbatim stated:

“...The provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section.”

Similarly, in the case of: *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited Civil Application No. Nai. 302 of 2015; [2017] eKLR*, the Court of Appeal rendered itself as follows:

“In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution.”

Despite the differing jurisprudence as expressed by the Court of Appeal, the accepted position overtime and what had been practised and adopted was the principle finality of High Court decisions. This, in essence, necessitated the Supreme Court intervention to offer clarity and the way forward vide *Petition No. 12 of 2016*.

However, in doing so there are various consequences on the arbitration practice in Kenya. Below is an analysis of the ramifications of the Supreme Court decision in *Petition No. 12 of 2016*.

A. Increased relevance of well-drafted arbitration agreement

An arbitration agreement is the basis of all arbitrations. Basically, an arbitration agreement is an agreement where the parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator

and that they will honour the decision (award) made by that person.²³ Defining arbitration agreement succinctly, it is an agreement between two or more parties in which they agree to refer disputes to arbitration for determination.²⁴ In essence, parties agree to submit present or future disputes to arbitration. This makes an arbitration agreement a written contract in which two or more parties agree to use arbitration, instead of courts, to decide all or certain disputes arising between.²⁵

Section 3 of the Arbitration Act No. 4 of 1995 defines an “*arbitration agreement*” as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

An arbitration agreement is a separate contract, procedural in nature²⁶ and ancillary to the main contract, which does not create substantive rights between the parties, but provides how disputes, which may arise, should be resolved.²⁷ It has also been described as an agreement, which creates collateral rights to the main contract.²⁸

It is notable that arbitration agreement may permit either one or both parties to refer a dispute to arbitration. An agreement to arbitrate can be made before or after the dispute has arisen.²⁹ (ad hoc or relate to future disputes). Typically,

²³ W. Turner, “ Arbitration Agreements”, 66(3) Arbitration 230 (2000)

²⁴ Andrew Tweeddale and Keren Tweeddale, Arbitration of Commercial Disputes page 97

²⁵ Kariuki Muigua, Settling Disputes Through Arbitration In Kenya (3rd Edn Glenwood Publishers Ltd, 2017) page 36

²⁶ The Tobler case (1933) 59

²⁷ Andrew Tweeddale and Keren Tweeddale, Arbitration of Commercial Disputes page 97

²⁸ Paul Wilson & Co. v Partenreederei [1983] AC 854, 917 Per Lord Diplock referring to Heyman v Darwins [1942] AC 356

²⁹ Susan Blake, Julie Browne, and Professor Stuart Sime, A practical approach to Alternative Dispute Resolution, 2nd edition page 399.

parties agree to arbitrate by executing an agreement or contract which has an arbitration clause or a stand or a standalone arbitration agreement.³⁰

In the light of the Supreme Court decision in *Petition No. 12 of 2016*, there will be a need for parties to have a well-drafted arbitration agreement. This will be the case, especially where parties seek to limit appeal on arbitration awards. Premised on the pronouncement of Supreme Court decision in *Petition No. 12 of 2016* it makes it vital for parties to tailor-make their arbitration agreements to meet their expectations of limited appeal on the arbitration award.

As a counter to the Supreme Court decision in *Petition No. 12 of 2016*, there will be an emphasis on well-drafted arbitration agreements to meet parties' expectations. This includes having arbitration agreements drafted in a comprehensive manner anticipating all eventualities and offering solutions, which lie outside judicial recourse. The aim of parties, who adopt arbitration to resolve their disputes, will be to have arbitration agreements that capture their needs and more importantly offers mutually acceptable arbitration awards. This, in essence, will seek to be a panacea to the widened court appellate scope on arbitration matters in Kenya.

B. An adverse effect of international commercial arbitration practice in Kenya

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 in realizing justice in the best way achievable.³¹

At international level disputes for example involving international trade, the discordant parties will be from different parts of the world, with correspondingly different world views, cultures and legal systems. Ideally,

³⁰Kariuki Muigua, *Settling Disputes Through Arbitration In Kenya* (3rdEdn Glenwood Publishers Ltd, 2017) page 35

³¹Kariuki Muigua, *Promoting International Commercial Arbitration in Africa* page 2(Published in *CIArb Kenya , Alternative Dispute Resolution Journal* Volume 5, Number 2 2017)

arbitration provides a flexible, mutually acceptable means of conflict resolution because the process is consensual: one party is not dragged unwillingly into court by another. The procedure is also considered to be understandable, flexible and informal, not overly burdened with the complex of legal rules and binding precedents. The arbitrators are often chosen by the parties and usually possess substantial commercial knowledge.³²

This being the case international commercial arbitration at all material time seeks to operate outside the national courts of a given country or at the very least limit national court intervention. The widened appellate scope on arbitration matters in Kenya will operate as a limitation to parties adopting Kenya as their forum of choice to arbitrate international commercial matters. In essence, there will be reduced referral of international commercial disputes for arbitration in arbitration institutions in Kenya. Parties adopt international commercial arbitration with a clear intention of having their disputes resolved outside the court of a given country. As *AM Gleen* rightly posited,

*“Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.”*³³

This was buttressed by *Chief Justice D.K Maraga*, in his dissenting opinion in *Petition No. 12 of 2016* who in no uncertain terms verbatim stated:

“... One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with the doctrine of res judicata that is deeply rooted in public international law. Section 32A captures this principle: Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it....” Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to

³²McLaughlin, Joseph T. “Arbitration and Developing Countries.” *The International Lawyer*, vol. 13, no. 2, 1979, Page 212 Available at <JSTOR, www.jstor.org/stable/40705956> (accessed on 20th January 2020)

³³ A. M Gleeson (Hon., AC, QC,), ‘Finality’ *Bar News*, 2013, page 41.

enable them to go on with their businesses.³⁴They require a final and enforceable outcome. That is why the Section goes on to limit recourse “against the award otherwise than in the manner provided by this Act.”

As such, the author argues that *Petition No. 12 of 2016* may operate as an inhibition to international disputants or parties seeking to arbitrate their commercial disputes in Kenya.

C. The need to amend the Arbitration Act 4 of 1995

In the light of the Supreme Court decision in *Petition No. 12 of 2016*, it will be vital to amend to the Arbitration Act 4 of 1995 to capture the decision of the Supreme Court and opinions as expressed thereunder. This will be necessary in order to codify in black and white some of the suggestions that the Supreme Court suggested.

Succinctly some of the main assertions by the Supreme Court in its wisdom in *Petition No. 12 of 2016* were:

- i) There should be a balance between the finality of arbitral awards and minimal court intervention. Agreeing with the interested party submissions, the Supreme Court in its decision opined that there should be a balance between the finality of arbitral awards and minimal court intervention.
- ii) The only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties.

³⁴Ivan Cisár, Slavomír Halla, ‘The finality of Arbitral Awards in the Public International Law’ *Conference Právni Rozpravy*, Grant Journal, 2012, page 1

- iii) The Court of Appeal narrow jurisdiction on arbitration matters should be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction. In this regard that Courts ought to draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice.
- iv) The High Court and the Court of Appeal particularly have that onerous task of enhancing the leave mechanism as suggested by the Interested Party as the ultimate answer to the process by which frivolous, time-wasting and opportunistic appeals may be nipped in the bud and hence bring arbitration proceedings to a swift end.

This author is of the view that there is a need to amend the Arbitration Act 4 of 1995 in order to capture unequivocally the main assertions by the Supreme Court in its decision. In paragraph 78 of the Supreme Court decision, the Court stated that it would expect the Legislature to act within its mandate to actualize its assertions. To this end, the author agrees with the Supreme Court assertion in paragraph 78 of its decision in *Petition No. 12 of 2016* that there is a need for legislative intervention. This will involve the amendment of the Arbitration Act 4 of 1995.

D. Increased appeals to Court of Appeal on decisions by High Court to set aside or affirm an arbitral award

The decision by the Supreme Court in *Petition No. 12 of 2016*, in essence, abrogated the principle of finality of High Court decisions, as had been the laid down and accepted overtime in Kenya. Preceding *Petition No. 12 of 2016*, the trite law was that High Court operated as the last result to a party aggrieved by the decision of the arbitrator.

However, in the light of the decision of the Supreme Court decision in *Petition No. 12 of 2016* and its interpretation of Section 35 of the Arbitration Act 4 of 1995, there will be a plethora of appeals on the decisions by the High Court of either affirming or setting aside arbitral awards. In essence, the decision by the Supreme Court decision in *Petition No. 12 of 2016* creates a leeway to parties to seek to recourse to Court of appeal where they are aggrieved by the High Court decision of either affirming or setting aside arbitral awards.

5.0 Conclusion

In light of the decision by the Supreme Court in *Petition No. 12 of 2016*, there is a need for legislative intervention as a means of realizing a balance between the finality of arbitral awards and minimal court intervention. This will involve having in place laws that guide and define in black and white arbitral matters that are subject to appeal to the Court of Appeal. This will, in essence, uphold the salient principle of limitation of appeal in arbitration matters while upholding the right to access justice by a party as provided by Articles 48 and 50 of the Constitution. Moreso, the legislative intervention will curtail the negative impact that the decision by the Supreme Court can have on the practice of arbitration and promotion of international commercial arbitration in Kenya.

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