

Alternative Dispute Resolution



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CONTENTS

The Art and Science of Virtual Proceedings: Shifting the Paradigm in Alternative Dispute Resolution Tribunals	<i>Jacqueline Waihenya</i>
Enhancing the Court Annexed Mediation Environment in Kenya	<i>Kariuki Muigua</i>
Bangalore Principles on Judicial Conduct: A Framework for Arbitrator Conduct?	<i>Lady Justice Monica K. Mugenyi</i>
ISDS Reforms: The Forum Menu	<i>Paul Ngotho</i>
Current Problems of the Investor-State Dispute Settlement Mechanism: Proposals for Future Reforms	<i>Wilfred A. Mutubwa Hector Charles Cynthia Mwihaki Nura Adan Guyo Lana Mohamed Tumu Kache Abdurrahman Mohamed</i>
An Uncertain Future: The Relationship Between Arbitral Tribunals and Courts in Kenya	<i>Kethi Kilonzo</i>
Enforcement of Multi-Tiered Dispute Resolution Clauses	<i>Hazron Maira</i>
Mega-Regional Trade Agreements: Analyzing their Impact on Treaty Policy and Law and their Modes of Dispute Resolution Mechanisms	<i>Peter Mwangi Muriithi</i>
An Overview of Negotiating Peace Agreements in East Africa	<i>Henry Murigi</i>
Effective Dispute Settlement as a Catalyst for Infrastructure Development in the Construction and Energy Industry	<i>Eng. Bwalya Lumbwe</i>
Constitutional Limits to Party Autonomy in Arbitration in Kenya	<i>Eric Thige Muchiri</i>
Claims, Conflicts and Disputes in Construction Industry- Where is the Engineer?	<i>Eng. Odhiambo Aluoch</i>
Practicability of Neutrality of Mediators: Demystifying the Interplay between Mediator Neutrality and Power Imbalances	<i>Julius Nyota Bernard Nthiga</i>
Towards Resolution of the Trophy Hunting Conflict	<i>Leslie Olonyi</i>



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Editor's Note

Welcome to the, *Alternative Dispute Resolution Journal Vol. 8 No. 2, 2020*, a publication of the Chartered Institute of Arbitrators – Kenya Branch (CIArb-K). The Journal is published in hard copy and also online at www.ciarbkenya.org. This Volume contains papers covering the whole spectrum of ADR mechanisms including arbitration, mediation, negotiation and construction adjudication.

The papers featured in the volume entail scholarly discussion on themes such as: Arbitrator Conduct; Enhancing the Court Annexed Mediation Environment in Kenya; Constitutional Limits to Party Autonomy in Arbitration; Effective Dispute Settlement in the Construction and Energy Industry; Virtual Proceedings in ADR; Relationship between Arbitral Tribunals and Courts in Kenya and Concerns facing the Investor-State Dispute Settlement Mechanism. ADR mechanisms are the preferred mode of dispute management due their unique advantages. However, concerns continue to emerge on how to fully reap from the benefits of ADR and promote access to justice.

The Journal offers useful insight on some of these concerns. The ongoing efforts to formulate policy and legal framework on ADR in Kenya are welcome since this will firmly entrench ADR within the legal environment in Kenya and enhance its practice.

The Journal also addresses some emerging issues in the practice of ADR such as Virtual Alternative Dispute Resolution Proceedings in light of the COVID-19 pandemic.

In order to ensure the highest quality of scholarly standards and credibility of information, the Journal is peer reviewed and refereed. The Editorial Team also welcomes feedback from our readers across the globe to enable us continually improve the publication.

CIArb (Kenya) is grateful to the Publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to continue producing such an important publication that has had a tremendous impact on scholars, ADR practitioners and general readers worldwide.

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

Alternative Dispute Resolution – Volume 8 Issue 2

Content	Author	Page
The Art and Science of Virtual Proceedings: Shifting the Paradigm in Alternative Dispute Resolution Tribunals	Jacqueline Waihenya	1
Enhancing the Court Annexed Mediation Environment in Kenya.	Kariuki Muigua	20
Bangalore Principles on Judicial Conduct: A Framework For Arbitrator Conduct?	Lady Justice Monica K. Mugenyi	41
ISDS Reforms: The Forum Menu	Paul Ngotho	54
Current Problems of the Investor-State Dispute Settlement Mechanism: Proposals for Future Reforms	W. A. Mutubwa Hector Charles, Cynthia Mwihaki, Nura Adan Guyo Lana Mohamed, Tunu Kache Abdurrahman Mohamed	86
An Uncertain Future: The Relationship Between Arbitral Tribunals and Courts in Kenya	Kethi Kilonzo	99
Enforcement of Multi-Tiered Dispute Resolution Clauses	Hazron Maira	110
Mega-Regional Trade Agreements: Analyzing their Impact on Treaty Policy and Law and their Modes of Dispute Resolution Mechanisms	Peter Mwangi Muriithi	131
An Overview of Negotiating Peace Agreements in East Africa	Henry Murigi	151
Effective Dispute Settlement as a Catalyst for Infrastructure Development in the Construction and Energy Industry	Eng. Bwalya Lumbwe	168
Constitutional Limits to Party Autonomy in Arbitration in Kenya	Eric Thige Muchiri	186
Claims, Conflicts and Disputes in Construction Industry- Where is the Engineer?	Eng. Odhiambo Aluoch	203
Practicability of Neutrality of Mediators: Demystifying the Interplay between Mediator Neutrality and Power Imbalances	Julius Nyota & Bernard Nthiga	228
Towards Resolution of the Trophy Hunting Conflict	Leslie Olonyi	242

The Art & Science of Virtual Proceedings: Shifting The Paradigm in Alternative Dispute Resolution Tribunals

*By: Jacqueline Waihenya**

This paper considers the paradigm shift necessitating virtual proceedings following the various institutional guidelines and laws that were instituted at the onset of COVID-19 pronounced and issued by the World Health Organization as well as the Kenyan Ministries of Health and Interior and Coordination of National Government all requiring social distancing and imposing stay at home policies. In some jurisdictions Kenya being one of them, the Courts were initially closed. The Judiciary later put in place upscaling of operations geared primarily towards the use of virtual proceedings in the delivery of judgments and the dispensation of urgent applications. Adapting to online and virtual proceedings within the Alternative Dispute Resolution (ADR) space has been more challenging to track due to the private nature of most proceedings. However, shared experiences by practitioners and participants in ADR can give an insight into their experiences comparative to the litigation sphere. The writer further chanced upon a Webinar conducted by ICSID entitled The Art and Science of Virtual Hearings which made some very useful contributions to the practical experience of conducting virtual proceedings from the perspectives of the Tribunal, the Counsel and their witnesses¹ which she is inclined to share.

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¹ International Centre for Settlement of International Disputes – Webinar: *The Art & Science of Virtual Hearing* (5 May 2020) ICSID Available at <https://www.youtube.com/watch?v=Xroz4e8Ctv0> Last accessed on 8 May 2020

1. Introduction

COVID-19 and the resultant social distancing guidelines, rules and regulations dealt a mighty blow against business as usual and triggered a new normal in a multitude of countries around the globe. In Kenya, an ad hoc National Council on Administration of Justice (NCAJ) committee appointed on March 15, 2020 comprising representatives from the Judiciary, Office of the Attorney General, Police, Office of the Director of Public Prosecutions (ODPP), Kenya Prisons Service, Law Society of Kenya (LSK), Probation and Aftercare Service (PACS) and Ethics and Anti-Corruption Commission (EACC) among others took a variety of steps to adjust normal court and allied operations promoting the adoption of online procedures in lieu.² Since then upscaling of Court proceedings has seen an increase in the use of virtual proceedings which has proven to be a monumental trigger to the manner in which our proceedings are being carried out creating a brand new paradigm.

In the past virtual proceedings have been more the exception and not the norm and have been used only where it has been impossible or impracticable for one or more participants to attend.³ In most cases this has entailed accommodating a disabled participant or one who had challenges making it to the hearing venue due to geographical location e.g. they were located in a different county or even jurisdiction and/or health challenges where they could not travel due to medical considerations. Typically, the methods adopted previously have ranged from admitting a sworn witness statement or facilitating one or more parties to join in using video conferencing. Understandably virtual proceedings have seen greater application in international arbitrations comparative to tribunal proceedings along the ADR Continuum. This paper will specifically

² National Council on the Administration of Justice – *Measures Implemented by the Justice Sector to Prevent the Spread of the CoronaVirus* (19th March 2020) NCAJ Available at <https://ncaj.go.ke/measures-implemented-by-the-justice-sector-to-prevent-the-spread-of-the-coronavirus/> Last accessed on 8 May 2020

³ Janet Walker C. Arb – *An Arbitrator’s Perspectives* (March 2020) Available at <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> Last accessed on 8 May 2020

focus on mediation and arbitration proceedings and where appropriate compare and contrast with litigation.

The new paradigm however requires us to consider online hearings and proceedings as the new normal with the virtual platform being used for and by every single participant in the proceedings including the tribunal, the counsel, parties and their witnesses. The paradigm shift has been abrupt and wholesale and it therefore requires us to rethink the old online versus in person proceedings and what the implications are both from the technical, procedural, substantive viewpoints not to mention the psychological and mental perspectives as well.

2. Virtual Proceedings

The court room has for a long time been considered to be the centre of complex system of information exchange and management because lawyers and judges deal with “data” making it highly probable that virtual technology was not only practicable but desirable.⁴ The data itself comprising such matters as case names, parties, counsel, legal briefs & other legal materials, pleadings, motions/applications and supporting documents, prescribed forms, administrative procedures and steps, court proceedings/records, electronic images, exhibits, diaries, scheduling of mentions, hearings and case management processes. This data except in certain cases has largely had to be made available to the public to cater for matters of public and/or media interest. Around the globe a prevalence to prefer court and arbitral proceedings to be held in person within the physical edifices of a court or conference room has however seen the depressed or slow adoption of virtual proceedings particularly within the litigation and domestic arbitration sphere.

⁴ Lederer, Fredric I., *"The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms"* (1999). Faculty Publications. 212 pg.803 Available on <https://scholarship.law.wm.edu/facpubs/212> Last accessed on 8 May 2020

2.1 Meaning of Virtual Proceedings

There is no consensus on the meaning of the term virtual proceedings within the context of arbitration, mediation and/or litigation. And in actual fact a variety of terms have emerged to describe hearings carried on virtually using a technology platform with the tribunal, counsel, parties and/or witnesses being physically in different locations. The term “Electronic Case Management” has been used by the Kenyan Judiciary⁵ whilst “Remote Hearing” has gained currency in the United Kingdom Civil Courts⁶. Within the ADR sphere the term adopted is Remote Dispute Resolution Hearings with remote dispute resolution being defined to include but not be limited to video and audio conferences, email and offline means such as documents-only proceedings.⁷ Other terms that have been used have included been eHearing⁸, Online proceedings, Video Conferencing etc and they have come to be used interchangeably to denote proceedings and/or hearings that are carried out virtually as opposed to the traditional in-person hearings/proceedings.

2.1.1 Online Dispute Resolution (ODR)

It is important to distinguish online dispute resolution (ODR) from virtual hearings as the dispute resolution processes are intended to address very separate and distinct areas⁹. United Nations Commission on International Trade

⁵ Practice Directions on Electronic Case Management 2020 – Kenya Gazette No.2357 of 4 March 2020

⁶ Civil Justice in England and Wales: Protocol Regarding Remote Hearings (26 March 2020) Available at https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf Last accessed on 8 May 2020. This is an amendment to the UK Civil Court Guidance on How to Conduct Civil Hearings Remote Hearings (Protocol Regarding Remote Hearings) published on 20 March 2020.

⁷ The Chartered Institute of Arbitrators has also issued a Guidance Note on Remote Dispute Resolution Hearings as well. Available at <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf> Last accessed on 9 May 2020.

⁸ eHearing is the term used by the Hong Kong Judiciary

⁹ Mireze Philippe – *Offline or Online? Virtual Hearings or ODR?* – (April 2020) Kluwer Arbitration Blog Available at <http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/> Last accessed on 10 May 2020

Law (UNCITRAL) finalized and adopted the Technical Notes on Online Dispute Resolution at its forty-ninth session in 2016¹⁰ and these are non-binding. ODR as articulated in the Technical Notes is geared towards dealing with low value sales or service cross border disputes in contracts concluded using electronic communication, that is to say, ecommerce. ODR per the Notes encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others) and the potential for hybrid processes comprising both online and offline elements.

2.2 Technology in Tribunals and Courts

Today international arbitration tribunals and to an increasing extent Courts or domestic arbitral tribunals are likely to contain different levels of technology. This may include a combination of options for example (1)Electronic filing (potentially with document display capability), (2)Foreign language translation (potentially simultaneous – with audio or visual and textual presentation), (3)Multimedia court records captured using stenographic real-time electronic transcripts accompanied by digital audio and video, (4)Information and evidence retrieval using imaged documents available from CD-ROM or other data storage and retrievable by a computer system, (5)Access to legal materials and case-specific information from video, DVD, or high-definition storage devices, (6)High-technology information and evidence display systems (often multimedia screen capability), (7)Teleconferencing and videoconferencing (which may include remote appearance, remote hearing or remote testimony), (8)Public access to court information via the World Wide Web or secure access to court documents and evidence via a network (intranets or internet).¹¹ Thus, in Kenya there are high chances that an arbitrator will be able to provide for at

¹⁰ United Nations Commission on International Trade Law - *Technical Notes on Online Dispute Resolution* (2016)(UNCITRAL) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf Last accessed on 9 May 2020

¹¹ Schofield, Damian - *Handbook of Research on Practices and Outcomes in Virtual Worlds and Environments – Chapter: Virtual Evidence in the Courtroom* (January 2011) Publisher: IGI Global, Editors: Harrison Yang, Stephen Yuen, pp.200-216

the very least a hybrid of electronic filing with hardcopies supplied as well as some form of teleconferencing or videoconferencing during various portions of the proceedings before them because of the prevailing infrastructure which provides fairly stable and reliable connectivity.

2.3 Arbitration, Technology and the Law

Though the Kenyan Arbitration Act does not specifically provide for virtual or online proceedings it does contemplate the use of technology within the arbitration process though the provisions it makes are limited to the creation of the arbitration agreement. The Act considers an agreement in writing to include an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement.¹² The Kenyan Arbitration Act further extends to the arbitral tribunal the commensurate powers as the High Court in the instance where an application for interim measures of protection are is made.¹³ The High Court has available to it the oxygen principle also known as the overriding objective principle when disposing of matters and which further requires such courts to handle all matters presented before it for the purpose of attaining the just determination proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and the use of suitable technology.¹⁴

One of the best and widely accepted articulations of the general principles of arbitration is that at Section 1 of the English Arbitration Act, 1996 to the effect that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;¹⁵ the parties should be free to agree how their disputes are resolved, subject only to such safeguards

¹² Sections 4(3) and 9 – Kenyan Arbitration Act, 1995

¹³ Section 18 – Kenyan Arbitration Act, 1995

¹⁴ Section 1B – Civil Procedure Act, Act No.3 of 1924 (Rev. 2012)

¹⁵ Section 1(a) – English Arbitration Act, 1996

as are necessary in the public interest;¹⁶ and the non-intervention of courts.¹⁷ The Kenyan equivalent can be gleaned from the arbitrator's duty to treat all the parties with equality and be given a fair and reasonable opportunity to present their case.¹⁸ The parties to arbitration are also under an obligation to do all things necessary for the proper and expeditious conduct of the arbitral proceedings¹⁹ and they are further free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.²⁰ It is therefore arguable that provided parties to an arbitral proceeding are amenable to the use of virtual proceedings at any or all of the stages of the process starting from the creation of the arbitration agreement, to the referral of an arbitral dispute, the hearing and determination of interim matters and even where a merit hearing may take place the inescapable conclusion is that the law reflects an inclination towards accepting arbitration via virtual proceedings in Kenya. Further, given the provisions of Section 1B(e) of the Civil Procedure Act matters within the ambit of the Mediation Practice Directions on Court Annexed Mediation²¹ the same conclusion may be arrived at regarding mediation.

2.4 Institutional recognition of Virtual Proceedings

A number of institutions have proceeded to issue guidance notes including but not limited to the Chartered Institute of Arbitrators (CI Arb), International Chamber of Commerce International Court of Arbitration (ICC) and the Seoul Protocol on Video Conference in International Arbitration. Whilst various institutions have ventured in this direction for the purposes of this paper we will consider those of the foregoing below:

2.4.1 The Chartered Institute of Arbitrators (CI Arb)

CI Arb published the *Guidance Note on Remote Dispute Resolution Hearings* in the wake of the COVID-19 restriction of movement implications. The Guidance

¹⁶ Section 1(b) – English Arbitration Act, 1996

¹⁷ Section 1(c) – English Arbitration Act, 1996

¹⁸ Section 19 – Kenyan Arbitration Act, 1995

¹⁹ Section 19A – Kenyan Arbitration Act, 1995

²⁰ Section 20(1) – Kenyan Arbitration Act, 1995

²¹ Gazette Notice No.7268 of 2018

Note seeks to reassure disputing parties that through the application of sensible checks parties were still in a position to use remote procedures for full resolution of their disputes even where parties to the dispute were unable to meet physically. The Guidance Note is stated to be intended for use in conjunction with and adjusted to any governmental and arbitral institutions' advice with reference to any dealings during the COVID-19 pandemic and moving forward into the future. The Guidance Note is applicable in respect of arbitration, mediation, adjudication, negotiation, expert determination, dispute boards, or any other type of alternative dispute resolution. The Guidance Note covers a number of issues and it is premised on the availability of minimum, reliable electrical supply and access to a stable and secure internet connection and takes cognizance of the fact that there are a number of commercial internet platforms that are available for video and/or conferencing. It covers diverse matters such as security, venue, platforms, interpreters, witnesses and experts, procedural documentation, confidentiality and privacy concerns. On the legal matters the Guidance Note considers the requirement for the express affirmative agreement of the parties to adopt a remote hearing approach ensuring complete compliance with various institutional, governmental and/or statutory provisions applicable in differing jurisdictions and exhorts the various ADR tribunals to achieve enforceable awards and it annexes a preliminary checklist to consider prior to conducting remote dispute resolution proceedings.²²

2.4.2 International Chamber of Commerce International Court of Arbitration

ICC has also issued *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*²³ to augment the existing ICC Arbitration Rules.²⁴ Virtual hearings contemplated by the Guidance Note are audioconference, videoconference, or other similar means of communication

²²CIArb Guidance Note on Remote Dispute Resolution Hearings Ibid Supra Note No.8

²³ *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* Available at

<https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> Last accessed on 9 May 2020

²⁴ICC Arbitration Rules (2012) [Rev.2017] Available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> Last accessed on May 2020

which can be activated if the parties agree or if the arbitral tribunal so determines. In such a case the tribunal and parties must take into account, openly discuss and plan for special features of proceeding in that manner. In the event a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances and also whether any resultant award will be enforceable. Cyber Protocols or implementing procedures highlighted by the ICC include the implication of time zones, logistics, real time transcription, use of interpreters, procedures for identifying all participants, taking evidence from fact witnesses and experts, use of demonstratives e.g. shared screens on virtual hearing platforms and the use of the electronic hearing bundle. The ICC Hearing Centre in Paris is able to provide technical support though parties are at liberty to use commercial third-party applications e.g. Microsoft Teams, Vidyocloud and Skype for Business which it has licensed or Zoom, BlueJeans and GoToMeeting which the institution had used successfully. A key consideration in the use of any platform was security and confidentiality.²⁵

2.4.3 The Seoul Protocol on Video Conference in International Arbitration

The Seoul Protocol on Video Conferencing in International Arbitration has its roots in the 7th Asia Pacific ADR Conference, held in Seoul, Korea on 5-6 November 2018 following discussions on the opportunities and challenges posed by videoconferencing. It was established to serve as a guide to best practice for planning, testing and conducting video conferences in international arbitration to facilitate the effective and fair use of technology in ADR proceedings as well as to mitigate challenges particularly as pertains to security. The Protocol is viewed as a practical guide as to what must be observed when hearing witnesses via video conference in international arbitration proceedings.²⁶ The Protocol considers preparatory arrangements to be made for video conferencing, technical requirements, witness examination,

²⁵ ICC Guidance Note Ibid Supra No.22

²⁶ Nino Sievi - *Video Conferencing in International Arbitration - Seoul Protocol as guide to best practice* (25 March 2020) Lex Futura Available at

Video conferencing venue, security, participants, documents and technical requirements as well as interpretation.²⁷

3. Practical Considerations

Courts and tribunals are still considered the last bastions of oral tradition and from the foregoing a sense that virtual proceedings guidance notes and practice directions are geared to respond to the challenges presently posed by the COVID-19 pandemic. Many forecasts point to a prolonged experience rather than a brief one and there is therefore great value in reassessing the possibility of adopting virtual proceedings not only within the immediate context but possibly moving forward into the future. The oral tradition champions have expressed the desire to retain the in-person merit hearings provided safety considerations allow it and this is well enshrined in existing legal instruments for example Article 10 of the *CI Arb Guidelines for Witness Conferencing in International Arbitration*²⁸ which provides as follows:-

“There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.

<https://www.lexfuturach/en/whats-keeping-us-busy/article/video-conferencing-in-international-arbitration-seoul-protocol-as-guide-to-best-practice/> Last accessed on 10 May 2020

²⁷ Korean Commercial Arbitration Board – *Seoul Protocol on Video Conferencing* (18 March 2020) KCAB - Available at

[https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf) Last accessed on 10 May 2020

²⁸ *CI Arb Guidelines for Witness Conferencing in International Arbitration* (April 2019) Available at <https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf> Last accessed on 10 May 2020

There is however a growing critical mass that views the unfortunate circumstances as an opportunity to embrace technology and adopt it to achieve and/or facilitate the fair and expeditious disposal of pending dispute resolution proceedings as a practical consideration. To achieve this any tribunal and/or counsel requires to critically assess the following key issues (1) Legal Concerns; (2) Cyber-protocols and logistics which are highlighted below:

3.1 Legal Concerns

This is the primary concern particularly for the tribunal and the and it entails a consideration of (1) existing and prevailing substantive and/or procedural legal requirements that require to be complied with; (2) the best evidence rule as it applies on a case by case basis; and (3) enforceability of any resultant award.

3.1.1 Thus per *Guidance Note on Remote Dispute Resolution Hearings* domestic laws and regulations that are applicable as well as government requirements on social distancing require to be heeded. For international arbitrations the substantive law and *lex arbitri* must also be taken into consideration as well especially as regards due process, external relationship with the courts and existing public policies as well as the law of the seat.²⁹ And thus for instance in *Tanzania National Roads Agency v Kundan Singh Construction Limited* Miscellaneous Civil Application No.171 of 2012 [2013] eKLR the Honourable Mr. Justice Muya stated as follows:-

"In our present case the final award was arrived at in breach of the express terms of the agreement between the parties which contains the arbitration clause that any dispute shall be referred to arbitration and shall be governed by the law of Tanzania. There is ample evidence from the Respondents replying affidavit and further affidavit that the decision of the majority as set out in the award was made contrary to the laws of Tanzania. Should the court condone that breach by recognizing and enforcing the award. I find there would be no justification legally or

²⁹ Alistair Henderson – *Lex Arbitri, Procedural Law & the Seat of Arbitration: Unravelling the Laws of the Arbitration* – Singapore Academy of Law Journal (2014) 26 SAclJ 886

morally to condone a breach of a contract Between two parties and it would contrary to the public policy of Kenya to allow a court to be used towards that end."

- 3.1.2 The best evidence rule is a common law principle that requires the original documents to be produced and where it exists then such document is the best evidence and ought to be presented to the tribunal. Virtual proceedings may require to adopt a system where parties present an agreed bundle of documents. The *CI Arb Guidance Note* provides for the list of documents and the electronic bundle to be provided whilst the *Seoul Protocol* provides for the agreed bundle of documents.
- 3.1.3 The enforceability of the award is a critical issue to be considered and at all times the tribunal requires to keep in mind the provisions of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* or as it is commonly referred to New York Convention as domesticated by the Kenyan Arbitration Act, 1995. The upshot of the above is that the usual provisions of undertaking a successful arbitral proceeding will apply with the primary change being the platform over which the Tribunal, Counsel, Parties and Witnesses communicate. It is therefore important that prior to agreeing to engage in a virtual proceeding they do so thoughtfully, considering and evaluating the practical and legal challenges and implications of virtual proceeding, and strategically implementing the virtual hearing procedures to ensure an effective and efficient arbitral process that results in an enforceable arbitral award.³⁰

³⁰ Winston & Strawn LLP - *Arbitration Proceedings in The Age of Virtual Hearing Rooms* (9 April 2020) - Available at <https://www.winston.com/en/thought-leadership/arbitration-proceedings-in-the-age-of-virtual-hearing-rooms.html> Last accessed on 10 May 2020

3.2 Cyber-protocols & Logistical Requirements

- 3.2.1 Cyber-protocols consider the technical and logistical requirements that require to be taken into account to support and ensure a successful virtual proceeding. The bare minimum is a neutral who is familiar with virtual platforms, their dynamics and the legal implication as well as availability of reliable electrical supply and access to a stable and secure internet connection for all participants.
- 3.2.2 Technical requirements are however varied with a number of institutions providing customized virtual hearing rooms and support for example ICC and CIArb. The current trend however is for institutions to accommodate third-party commercial internet based platforms provided the participants involved, especially the counsel and parties are familiar with them and that they expressly agree to their use.
- 3.2.3 Equipment required will also vary depending on the elected platforms as some of the institutional and/or arbitral chambers have sophisticated equipment. However, basic requirements for the tribunal and counsel include at least 2/3 laptops per person. The laptops should be equipped with internet connectivity, a web cam, microphone and speakers as well as a mobile phone with Whatsapp capability. These should enable the tribunal achieve reasonable standards of trial advocacy especially in document intensive proceedings such that one screen should have live notes and documents and the other audio visual capacity to view all the participants whilst making it straightforward to reference documents such as exhibits, legal authorities/pleadings, transcripts and/or correspondence. The Whatsapp is generally useful to facilitate ease of communicating between teams and or especially in the event of down times which is a practical reality in many cases.
- 3.2.4 Planning & Cooperation between the counsels for each of the parties is key to the success of a virtual hearing particularly with regard to the

inspection and discovery process. The Seoul Protocol provides thus at Article 4.3

The Parties may agree on utilizing a shared virtual document repository (i.e. document server) to be made available via computers at all Venues, provided that the Parties use best efforts to ensure the security of the documents (i.e. from unlawful interception or retention by third parties).

Article 8 of the ICC Note also provides for requesting that the parties establish an agreed chronology of facts, joint lists of issues in dispute or other similar jointly produced documents that help define and narrow the range of issues in dispute.

3.2.5 Identification of Participants, taking Evidence & Witness Credibility is another key area. In the first instance it is critical to identify the number of participants in the virtual proceeding as this will impact the platform to be used, the equipment and other logistical considerations. The Appendix to the ICC Note makes reference to (1) Agreeing the number and list of participants (arbitrators, parties, counsel, witnesses, experts, administrative secretaries, interpreters, stenographers, technicians, etc.); (2) Agreeing the number of participants per virtual room and whether a 360° view for all participating rooms is required or necessary; (3) Agreeing regarding virtual rooms that will permit the arbitrators, and each side in the case, to confer privately amongst themselves during the hearing; (4) Identifying all log-in locations and points of connection; (5) Agreeing that each individual present in each virtual room will be identified at the start of the videoconference; and (6) In light of the above, consulting and agreeing among parties and tribunal on the hearing date, duration and daily timetable taking into account the different time zones.

3.2.6 The implication and/or management of different timezones for the participants is an important logistical issue that keeps coming up in

international arbitrations and increasingly mediation proceedings featuring an international character. This is a matter that requires due consideration to ensure a fair and just virtual proceeding.

3.2.7 Trial Advocacy & Etiquette: Virtual proceedings will of necessity change the approach by counsel and the tribunal with the greater burden resting on counsel. Given the nature of the platform considerations may include the following:

- (1) Focused Advocacy, that is to say, greater preparation in regards to the selection of documents to be used, the ease of ability to reference documents in the agreed bundle;
- (2) Team Coordination particularly the means within which the members of one team are able to communicate with each other is also a key consideration for trial advocacy particularly where members of one team may have no option but to be in separate locations. There may be value in having separate breakout/chat rooms for the teams on the same platform for the virtual proceeding in question or on an entirely different platform.
- (3) Dress Code and Onscreen Appearance are an important issue. It entails determining what background is the best, how does one's face appear on the screen? It is advisable to avoid having a window behind you, your face should be centered in the frame and that you can be seen clearly. Further, though virtual proceedings are considered to be less formal it is important that one appears in usual business attire.
- (4) When preparing it is useful to have speaking notes that are structured and have numbered arguments. The language you employ should be clear simple English especially where interpreters are required and it is useful to ensure that you are being followed. This is remarkably easier as the audience are all

on a screen in front of you as opposed to the usual distance in in person hearings. Due to this Counsel should also limit theatrics before the tribunal because one is literally in the tribunals face.

- (5) Onscreen etiquette also demands that the participants all ensure that they are in a quiet place and the normal everyday noises should be avoided where possible. All speakers who are not currently speaking ought to remain on mute unless and until called upon to avoid unnecessary interruptions.

3.2.8 Costs - The initial capital expenditure to acquire the necessary equipment, hardware and software, as well as training for all the various platforms can be significant. However, where one considers the savings in travel costs virtual proceedings are poised to reduce costs in the long run.

4. Conclusion

From the foregoing it is clear that the increased adoption of virtual proceedings by arbitral tribunals, mediators and other neutrals as well as courtrooms around the world is one of the unintended consequences of the COVID-19 pandemic and the resultant social distancing and stay at home policies. It has created the new normal in the dispensation of justice.

Time will tell whether or not virtual proceedings will replace in person merit hearings and/or proceedings. Chances are that moving forward tribunals will increasingly adopt a hybrid approach. However, it cannot be gainsaid that virtual proceedings will undoubtedly be an important aspect of any proceedings in the near as well as the distant future and it therefore behooves governments and institutional bodies to provide appropriate frameworks on the one hand and on the other that tribunals require to adopt an approach that ensures that virtual proceedings in ADR meet the agreement of the parties, are just and fair and that any resultant awards, decisions and/or outcomes are enforceable.

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Enhancing The Court Annexed Mediation Environment in Kenya

By: *Kariuki Muigua**

Abstract

The paper explores the workings of court annexed mediation in Kenya. With the recent entry in force of the Singapore Mediation Convention, the place of mediation has been elevated. Consequently, some of the shortcomings previously associated with mediation such as recognition and enforcement of settlement agreements have now been catered for under the Convention. This has created a conducive environment for the growth of mediation. In Kenya, court annexed mediation was introduced by the judiciary in 2015 and has witnessed notable success. The paper argues that if court annexed mediation is well actualised, it can enhance access to justice in Kenya and enable the country reap the benefits of mediation as a form of Alternative Dispute Resolution (ADR). The paper highlights some of the successes of court annexed mediation. It also pinpoints some concerns and challenges facing court annexed mediation and suggests solutions aimed at enhancing the mediation environment in Kenya in line with the spirit of ADR embraced under the Constitution of Kenya, 2010.

1. Introduction

Mediation is a form of alternative dispute resolution where an acceptable, impartial and neutral third party, who has no authoritative decision-making power, assists disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.¹ It has also been defined as a voluntary, informal, consensual and strictly confidential and non-binding dispute resolution process in which a neutral third party helps parties reach a

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

negotiated solution.² Mediation flows from negotiation. It arises where parties to a dispute have attempted negotiations but have reached a deadlock.³ As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.⁴ This demonstrates the voluntariness of the mediation process since parties have to agree to the mediation process and the mediator.

Mediation is recognised as one of the international conflict management mechanisms by the Charter of the United Nations.⁵ The Constitution of Kenya, 2010, also recognises mediation as one of the guiding principles that is to be promoted by courts and tribunals.⁶ Mediation has several advantages which include, *inter alia*, cost-effectiveness, flexibility, confidentiality, ability to preserve relationships and promoting expeditious resolution of disputes.⁷ Mediation plays an important role in conflict management. The underlying idea behind mediation and other forms of ADR is to promote efficient, effective and expeditious management of disputes in order to provide a conducive environment for human growth and development.⁸

However, whereas mediation and other Alternative Dispute Resolution (ADR) mechanisms have been lauded due to the above advantages, there is still a school of thought that is completely against them. Critics of ADR mechanisms

² Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Glenwood Publishers, 2nd Ed., 2017

³ Ibid

⁴ Ibid

⁵ Article 33 of the Charter of the United Nations 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, resort to regional agencies or arrangements, or other peaceful means of their own choice'

⁶ Constitution of Kenya, 2010, Article 159 (2) 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

⁷ Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

⁸ Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015

have argued *inter alia* that; there is imbalance of power between the parties, there is absence of authority to consent (especially when dealing with aggrieved groups of people), that ADR presupposes the lack of a foundation for continuing judicial involvement and that Adjudication promotes justice rather than peace, which is a key goal in ADR.⁹ It has further been argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation.¹⁰ Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.¹¹

Such views reflect the shortcomings of mediation and other ADR mechanisms. These include: lack of checks and balances through public scrutiny to determine whether justice was done; surrender of legal rights due to insistence on fairness at the expense of justice; lack of precedents due to the confidential nature of mediation; unequal bargaining power and difficulty in enforcing mediation agreements.¹²

Several measures have been adopted nationally and globally in order to address the challenges related to mediation while promoting the spirit of ADR. In Kenya, Court Annexed Mediation was introduced in 2015 and is conducted under the umbrella of the judiciary. Further, to deal with the problem of enforceability of mediation agreements, the **Singapore Convention on International Settlement Agreements Resulting from Mediation** came into force in August 2019.¹³

⁹ Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984)

¹⁰ Ibid

¹¹ Ibid

¹² Clarke. G.R., & Davies. I.T., 'ADR-Argument for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' QLD. University of Technology Law Journal, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwjUqc7M88vnAhVHT8AKHXK5Bl8QFjARegQICRAB&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F343%2F335&usg=AOvVaw0ZDgE91blBjnzwXPAdtHFZ> (Accessed on 12/02/2020)

¹³ United Nations Convention on International Settlement Agreements Resulting from Mediation, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media->

The paper briefly analyses salient provisions of the Singapore Convention and how it will change the mediation landscape both nationally and globally. Further, it seeks to examine the workings of court annexed mediation in Kenya and suggest necessary interventions that will ensure that the country reaps full benefits from the programme while promoting the spirit of mediation and Alternative Dispute Resolution in general.

2. The Singapore Convention On International Settlement Agreements Resulting from Mediation

Drafting of the Singapore Convention was informed by a number of factors within the sphere of international trade. There was the recognition by states of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.¹⁴ Further, it was noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.¹⁵

Further, the trend has been that the outcome of a mediation is treated as a *contractual agreement enforced as such* and not as an award as in the case of arbitration (emphasis added).¹⁶ This created a problem in many states in that one party may pull out of such an agreement and seek court intervention as if

documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_en
g.pdf (Accessed on 14/02/2020)

¹⁴ Ibid, Preamble

¹⁵ Ibid, Preamble

¹⁶ Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf> (Accessed on 10/02/2020)

the mediation never took place. These factors necessitated the drafting of the Singapore Convention in a bid to address this challenge.¹⁷

The convention defines “mediation” as a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) *lacking the authority to impose a solution* upon the parties to the dispute (emphasis added).¹⁸ The convention sets out certain general principles to guide the practice of international mediation. Under the convention, each party shall enforce a settlement agreement in accordance with its *rules of procedure* and under the conditions laid down in the convention (emphasis added).¹⁹ It applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international.²⁰

The convention also lays down certain requirements for reliance on settlement agreements. It requires that a party relying on a settlement agreement under the Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator’s signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.²¹

It also highlights grounds upon which relief being sought in relation to enforcement of a settlement agreement may not be granted. These include where: a party to the settlement agreement was under some incapacity; the settlement agreement being relied upon is null and void, not binding or is not

¹⁷ Ibid

¹⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation, ‘Singapore Convention’ Article 2 (3)

¹⁹ Ibid, Article 3 (1)

²⁰ Ibid, Article 1 (1)

²¹ Ibid, Article 4(1).

final according to its terms or has been subsequently modified; obligations in the settlement agreement have not been performed or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement and there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.²² Grant of relief may also be refused by the Competent Authority on grounds of public policy and where the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.²³

The convention allows for reservations where a party to the Convention may declare that: it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; or it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.²⁴ The Singapore Convention can play an important role in enhancing the mediation environment in Kenya beyond court annexed mediation. With the numerous investment and commercial activities being undertaken in Kenya, commercial and trade disputes are unavoidable.²⁵ Efficient mechanisms for management of such disputes are essential in order to preserve commercial relationships and promote economic growth.²⁶ Mediation is one of the

²² Ibid, Article 5 (1)

²³ Ibid, Article 5 (2)

²⁴ Ibid, Article 8 (1)

²⁵ Muigua. K., 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' available at

<http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf> (Accessed on 14/02/2020)

²⁶ Ibid

mechanisms that have been used universally in management of such disputes.²⁷ However, the foregoing discussion has shown that mediation suffers from several shortcomings such as enforceability of settlement agreements. Adoption of the Singapore Convention will enhance the mediation environment in Kenya by providing a framework for enforcement of international settlement agreements.

3. Uncitral Model Law on Mediation

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.²⁸ The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international commercial mediation and international settlement agreements.²⁹ It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or judicial proceedings.³⁰ Further, it provides uniform rules on enforcement of settlement agreements and also addresses the

²⁷ Africa ADR –a new African Arbitration Institution”, available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> (Accessed on 14/02/2020)

²⁸ United Nations Commission on International on International Trade Law , “United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (Accessed on 10/02/2020)

²⁹ United Nations Commission on International Trade Law, “UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf (Accessed on 14/02/2020)

³⁰ Ibid, S 2

right of a party to invoke a settlement agreement in a procedure.³¹ It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.³² With the increasing commercial and investment activities being undertaken in the country some of which involve multinational corporations, there is need to enhance the international commercial mediation environment in the country. In addition to the Singapore Convention which mainly deals with enforcement of settlement agreements, Kenya can adopt the Model Law to cover procedural aspects of international commercial mediation such as appointment of mediators and conduct of mediation. Adoption of this framework will create an assurance on the enforcement of settlement agreements and will boost the practice of international commercial mediation in Kenya.

4. Mediation in The African Context

African communities have since time immemorial had their own mechanisms of resolving conflicts as they arose amongst them.³³ These mechanisms were designed to ensure that there was continued co-existence of the communities and that conflicts were fully addressed to prevent their re-emergence in future.³⁴ These mechanisms were designed along principles such as common humanity/communal living, reciprocity and respect.³⁵ The mechanisms employed by indigenous African Communities reflect the present day ADR mechanisms. These included negotiation and mediation where people would sit down informally and agree to resolve their differences on their own or in some instances, with the aid of institutions such as elders or riika (age-sets).³⁶

³¹ Ibid, S 3

³² Hioureas. C, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" Available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil> (Accessed on 10/02/2020)

³³ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit

³⁴ Ibid

³⁵ Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

³⁶ Ibid

Mediation is therefore not a novel concept in Kenya since it has been practiced for many centuries.

Thus, while promoting mediation and other ADR mechanisms, it is important that these mechanisms promote the values and cultures that have been embedded in African communities for ages. Conflict management in the African context was designed to promote peace, harmony, co-existence and maintain the social fabric that held communities together.³⁷ It has been argued that culture is an essential part of conflict and conflict resolution.³⁸ Cultures are embedded in every conflict since conflicts arise in human relationships. Further, cultures affect the way we name, blame, frame, and attempt to tame conflicts.³⁹ The mediation environment in Kenya therefore needs to reflect the culture of African communities.

5. Court Annexed Mediation in Kenya

Court-annexed mediation arises where parties in litigation engage in mediation outside the court process and then move the court to record a consent judgment.⁴⁰ It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).⁴¹

³⁷ Kariuki. F., African Traditional Justice Systems, available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> (Accessed on 14/02/2020)

³⁸ LeBaron.M., Culture and Conflict: Beyond Intractability, available at <http://sociologycultures.pbworks.com/w/file/fetch/101971144/Culture%20and%20Conflict%20print%20friendly%20%20Beyond%20Intractability.pdf>(Accessed on 14/02/2020)

³⁹ Ibid

⁴⁰ Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> (Accessed on 10/02/2020)

⁴¹ Ibid

In Kenya, Court Annexed Mediation is conducted under the umbrella of the court.⁴² The project commenced in 2015 through legislative and policy reforms to accommodate mediation in the formal court process.⁴³ These included amendment to the Civil Procedure Act to provide for reference of cases to mediation. Under the Act, the court may direct that any dispute presented before it be referred to mediation: on the request of the parties concerned; where it deems it appropriate to do so; or where the law so requires.⁴⁴ Where a dispute has been referred to mediation by the court, parties are required to select a mediator for that purpose whose name appears in the mediation register maintained by the Mediation Accreditation Committee.⁴⁵ Such mediation is conducted in accordance with the mediation rules. An agreement between the parties shall be recorded in writing and registered with the court which referred the dispute to mediation; such an agreement is enforceable as a judgment of the court.⁴⁶ No appeal lies against such an agreement.⁴⁷ The Act also establishes the Mediation Accreditation Committee whose functions include *inter alia* maintaining a register of qualified mediators and setting up appropriate training programmes for mediators.⁴⁸

The Civil Procedure Rules also allows the court to adopt and implement, on its own motion or at the request of the parties, *appropriate means of dispute resolution* such as mediation for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act (emphasis added).⁴⁹ Where a court mandated mediation adopted pursuant to the rule fails, the court is

⁴² The Judiciary, 'Court Annexed Mediation: A Solution for You' available at <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf> (Accessed on 10/02/2020)

⁴³ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' available at <https://www.judiciary.go.ke/resources/reports/> (Accessed on 10/02/2020)

⁴⁴ Civil Procedure Act, Cap 21, S 59B (1), Government Printer, Nairobi

⁴⁵ Ibid, S 59B (2)

⁴⁶ Ibid, S 59B (4)

⁴⁷ Ibid, S 59B (5)

⁴⁸ Ibid, S 59A (4)

⁴⁹ Civil Procedure Rules, Order 46, rule 20 (1)

mandated to forthwith set the matter down for hearing and determination in accordance with the Rules.⁵⁰

The Mediation (Pilot Project) Rules, 2015 were enacted to give effect to the amendments made to the Civil Procedure Act and provide a legal framework on Court Annexed Mediation in Kenya. The Rules provide that every civil action instituted in court after their commencement shall be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable may be referred to mediation.⁵¹ Where a case has been referred to mediation after screening, the mediation Deputy Registrar is required to notify the parties of the decision within seven (7) days.⁵² Seven days after receipt of such notification, parties are required to file a case summary in the prescribed form.⁵³ Such mediation is conducted by a person registered as a mediator by the Mediation Accreditation Committee who is selected by the parties from a list of three qualified mediators nominated by the mediation Deputy Registrar.⁵⁴ The rules further prescribe a time limit of sixty (60) days from the date of referral to mediation within which the proceedings should be concluded.⁵⁵

Since the inception of Court Annexed Mediation in 2015 via the pilot phase in the Commercial and Family Divisions of the High Court in Nairobi, the program has expanded to 12 other counties.⁵⁶ According to statistics from the judiciary, as at 30th June 2019, 3517 matters have been referred to mediation, 2593 concluded, with 1279 matters settled successfully representing a settlement rate of 50 per cent.⁵⁷ Further, Kshs. 7.2 billion that had been held in litigation has

⁵⁰ Ibid, Order 46, rule 20 (3)

⁵¹ Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4 (1), Government Printer, Nairobi

⁵² Ibid, Rule 5

⁵³ Ibid

⁵⁴ Ibid, Rule 6

⁵⁵ Ibid, Rule 7

⁵⁶ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁵⁷ Ibid

ended up being released through court annexed mediation.⁵⁸ The Mediation Accreditation Committee has also accredited 645 mediators in order to facilitate court annexed mediation.⁵⁹

Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.⁶⁰ This reflects the expeditious nature of mediation and the need to enhance its environment in Kenya. Court annexed mediation can be a game changer in the access to justice discourse in the country. By combining the attributes of mediation such as voluntariness, party autonomy and expeditious disposal of disputes with the powers of courts to enforce agreements, court annexed mediation can be an important asset in conflict management in the country. It is therefore imperative to ensure efficiency of the process to enable the country reap from its benefits.

6. Court Annexed Mediation in Kenya: Challenges

While court annexed mediation in Kenya is well underway, it faces several challenges that needs to be addressed in order to enhance its efficiency. Further, various concerns have been raised with regards to the working of court annexed mediation in Kenya. Addressing such challenges and concerns can enable the country achieve the ideal environment for court annexed mediation. Some of these challenges and concerns are discussed below.

a. Voluntariness and Autonomy

Voluntariness and party autonomy are essential characteristics of mediation. It is non-coercive in that parties have autonomy over the forum, the process, and the outcome.⁶¹ However, these aspects are to a large extent defeated in court annexed mediation. The voluntariness and the autonomy over the process and

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict Through Mediation' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf> (Accessed on 12/02/2020)

the outcome may be diminished since it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.⁶² To this extent, it has been argued that court annexed mediation does not fully capture the attributes of mediation such as: *voluntariness; autonomy over the forum; choice of the mediator; control over the process and the outcome* (emphasis added).⁶³ Court annexed mediation therefore raises concerns related to the aspects of mediation since the court order referring a matter to mediation interferes with an essential characteristic of mediation being its voluntary nature.

However, coercion into mediation does not deprive the process of its capacity to ensure parties reach a resolution to the dispute. In fact, it is arguable that court annexed mediation brings parties to the table since there are parties who would otherwise be unwilling to negotiate or mediate. It is however imperative to ensure that the voluntariness and autonomy of the process is guaranteed.

b. Non-Settlement of Matters Through Court Annexed Mediation

Nearly half of the matters that have been referred to court annexed mediation have ended up not being settled. According to the judiciary, in the financial year 2018/2019, 933 out of the 1879 matters processed through mediation were not settled.⁶⁴ This is attributed to various factors such as parties failing to reach an agreement, non-compliance of parties and termination of matters by the parties.⁶⁵ In some instances, such matters have ended up being referred back to courts for litigation thus defeating the entire purpose of court annexed mediation. This raises concerns as to the efficacy of court annexed mediation.

c. Costs of Mediation

While ADR mechanisms have generally been hailed as being cost effective, this characteristic may be defeated in court annexed mediation. In court annexed mediation, referral of a case to mediation may happen after parties have incurred costs such as legal fees through drafting pleadings and filing the

⁶² Muigua, K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit

⁶³ Ibid

⁶⁴ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁶⁵ Ibid

same.⁶⁶ Currently, there is no framework for recovery of costs where a case has been referred to mediation. Thus, parties may end up incurring further costs in the process. Further, where parties fail to reach a settlement agreement and such case reverts back to the court, the costs of the entire process ends up being higher than what parties had intended. There is need to ensure efficiency of court annexed mediation to enable parties benefit from the attributes of mediation.

d. Lack of Awareness of Court Annexed Mediation

Since its roll out in 2015 at Nairobi, court annexed mediation has expanded to 12 other counties in Kenya.⁶⁷ It can therefore be argued that more than half of the country is not aware of the process. Further, most court users are not aware or are yet to fully embrace mediation and other ADR mechanisms. This demonstrates the reason why a high number of matters are still being filed in courts necessitating screening and referral of some of them to mediation. There is need to create public awareness on the presence and operation of court annexed mediation and other ADR mechanisms to enable Kenyans embrace these mechanisms and reduce backlog in courts.

e. Lack of Efficient Negotiation Skills by the Parties

Mediation flows from negotiation since the mediator merely facilitates discussions between the disputing parties.⁶⁸ Negotiation skills are thus of utmost importance in the process. Statistics from the judiciary show that nearly half of the matters that have been referred to court annexed mediation have ended up not being settled.⁶⁹ This can be attributed to among other factors, the lack of efficient negotiation skills by the parties. There may be need to provide basic negotiation skills to parties before they set down for court annexed mediation.

⁶⁶ Muigua, K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit

⁶⁷ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁶⁸ Muigua, K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

⁶⁹ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

f. Capacity of Mediators

Court annexed mediation deals with various disputes including commercial matters. Some of the mediators may not have the necessary skills and expertise in such areas making them ill equipped to facilitate the process. There is need for capacity building through training programmes for mediators to ensure that they are well informed and able to efficiently discharge their duties.

7. Enhancing Access to Justice in Kenya Through Court Annexed Mediation: way Forward

a. Early Referral of Disputes to Mediation

The Mediation (Pilot Project) Rules, 2015 provide for a system of screening of civil actions and referral to mediation for those cases that are found suitable.⁷⁰ The judiciary through the Office of the Mediation Deputy Registrar should ensure that this process is done early enough to avoid instances where cases are referred to mediation after significant steps have already been taken by parties in the litigation process. This would enable parties minimise costs of the process while contributing to expeditious disposal of disputes.

b. Implementing the Ideals of the ADR Policy

The ADR policy is intended to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.⁷¹ The policy proposes a number of recommendations aimed at enhancing the practice of ADR in Kenya which include *inter alia* enactment of an Alternative Dispute Resolution Act and establishment of an ADR division of the High Court to be the focal point for linkage and coordination of the ADR sector.⁷² The policy recognises the importance of ADR mechanisms and their role in promoting access to justice.⁷³

⁷⁰ Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4, Government Printer, Nairobi

⁷¹ Alternative Dispute Resolution Policy (Zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 14/02/2020)

⁷² Ibid

⁷³ Ibid

Implementing the ideals of the policy will be mark an important milestone in enhancing the ADR environment in Kenya including mediation.

c. Maintaining of Quality Standards in Mediation

While mediation is generally understood to be an informal process, there is need to maintain quality standards in court annexed mediation. This relates to the fact that since the process is conducted under the auspices of the court, there may be *perception on the part of the parties that the court in some way exercises control over the process (emphasis added)*. Thus, if a mediator is incompetent or if the process falters, the reputation of the court and the entire judicial system stands to suffer.⁷⁴ The Civil Procedure Act establishes the Mediation Accreditation Committee whose functions include *inter alia* enforcing a code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.⁷⁵ The Committee needs to step up its mandate in order to promote quality of the practice of court annexed mediation in Kenya.

d. Enhanced Support for Court Annexed Mediation

While there has been notable success with court annexed mediation since its roll out in the country, there are notable challenges such as non-compliance by advocates and parties and resistance from legal practitioners.⁷⁶ The judiciary has proposed measures to curb these challenges such as streamlining and integration of court annexed mediation into the justice system.⁷⁷ It also plans to establish mediation rooms in courts under construction.⁷⁸ Sensitisation exercises should also be conducted targeting the public, advocates and other stakeholders. The challenge on non-compliance with directions of mediators needs to be addressed through measures such as summons, citation for contempt and injunctions which can only be enforced by courts. There should also be sustainable funding by the judiciary to support the process. The

⁷⁴ F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) *Arbitration* 53, (2006).

⁷⁵ Civil Procedure Act, Cap 21, S 59 A (4)

⁷⁶ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁷⁷ Ibid

⁷⁸ Ibid

programme also needs to be rolled out to the rest of the country in a progressive manner in order to enhance its impact.

e. Capacity Building

There is need to enhance capacity building through training new mediators and enhancing the efficiency of those already accredited by the Mediation Accreditation Committee. Under the Civil Procedure Act, the functions of the Committee include setting up appropriate training programmes for mediators.⁷⁹ The committee needs to further this function to enhance capacity building that will facilitate court annexed mediation. Mediators need also to learn some basic principles of law such as commercial law principles of 'liability' and 'quantum' in addition to understanding mediation. This will in turn enhance their capacity to facilitate the mediation process.

f. Embracing the Spirit of Mediation in Court Annexed Mediation

Court annexed mediation needs to reflect the true attributes of mediation which include voluntariness, privacy, confidentiality and party autonomy. Thus, the courts through the Mediation Deputy Registrar should not coerce parties into mediation. The process should be voluntary and where parties intend to litigate their dispute, they should not be forced to undertake court annexed mediation through mandatory screening of their cases. As a suggestion, the consent of parties should be sought before their matter is referred to mediation. Further, the mediator in charge of the proceedings should not impose his/her decision on the parties in the name of reaching a settlement and enhancing expeditious disposal of the parties. The mediator should merely facilitate the process and any decision or agreement should come from the parties themselves. Where parties fail to agree, the mediator should file a report to that effect rather than suggesting or imposing solutions to the parties. Through this, the true spirit of mediation can be reflected in court annexed mediation.

8. Conclusion

The importance of mediation continues to be realised across the globe. With the recent enactment of the Singapore Convention, the future of mediation looks

⁷⁹ Civil Procedure Act, Cap 21, S 59 A (4) (e)

bright. Kenya can borrow from the Model Law on Mediation to create a legal and institutional framework that supports mediation. However, it should be borne in mind that conflict management is culture specific. The best practices from the African culture can be distilled and incorporated into a mediation and ADR framework. In Kenya, entrenchment of mediation in the judicial system through court annexed mediation offers viable opportunities for the country to benefit from the positive aspects of the process. The programme has so far witnessed significant success and promises a brighter future for the country in its journey towards enhancing access to justice for all. However, more needs to be done to enhance the court annexed mediation environment in Kenya and ensure the country fully benefits from such a noble idea.

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Bangalore Principles on Judicial Conduct: A Framework for Arbitrator Conduct?

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A. Introduction

The balance of power in most governance structures is typically skewed in favour of the executive branch of government, as opposed to the judicial or legislative limbs. In June 1998, a Colloquium on Parliamentary Sovereignty and Judicial Independence in the Commonwealth held at Latimer House, Buckinghamshire, United Kingdom produced the *Latimer House Guidelines on Parliamentary and Judicial Independence*. These Guidelines were the precursor to the *Commonwealth (Latimer House) Principles* that were adopted in 2003 with a view to entrenching the exercise of responsibility and restraint by each arm of government in performance of its constitutional function so as to avoid encroaching on the legitimate constitutional mandate of the other branches.¹ Running concurrently with the foregoing governance initiatives was a global push to address the then creeping (in some cases, runaway) vice of corruption within the judicial branch of governments. On the one hand, Commonwealth judicial officers meeting under their umbrella group, the Commonwealth Magistrates and Judges Association (CMJA), had adopted the *Lammisol Conclusions on Combating Corruption within the Judiciary* in Lammisol, Cyprus in June 2002; and, on the other hand, in November 2002 the *Bangalore Principles of Judicial Conduct* were promulgated, a culmination of the Bangalore Draft Principles of Judicial Conduct as adopted by the Judicial Group on Strengthening Judicial Integrity and revised by a Round Table Meeting of Chief Justices from both Civil and Common Law backgrounds.²

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¹ Plan of Action for Africa on the Commonwealth (Latimer House) Principles on the Accountability of the Relationship between the Three Branches of Government, Commonwealth Secretariat, 2005.

² See Long Title and Explanatory Note, *The Bangalore Principles of Judicial Conduct*, p.1, pp. 9 – 11.

The *Bangalore Principles on Judicial Conduct*, 2002 ('the Bangalore Principles') were promulgated to perform the dual function of engendering the institutional independence of judiciaries across the world, as well as providing standards for the judicial conduct of individual judges. In terms of the latter function, the Principles address two (2) aspects of judicial ethics: first, the knowledge required of judges in performance of their judicial duties (Know-How) and, secondly, the conduct expected of judges in both their official and personal capacities. Sometimes referred to as '*Know-Be values*', the first five Principles encapsulate the ethical standards required of judges, captured under the Principles of Independence, Impartiality, Integrity, Propriety and Equality. On the other hand, the Principle of Competence and Diligence represents the technical '*Know-How*' expected of judges in performance of their judicial duties.³ The Bangalore Principles were formally included in the Compendium of UN Standards and Norms relating to the Administration of Justice in 2016, making them the global standard for judicial conduct.

B. Snapshot of the Bangalore Principles

The Bangalore Principles are drafted in such a manner as to include explanatory notes that clarify the gist of each Principle. It is from the explanatory notes, as well as a *Commentary on the Bangalore Principles of Judicial Conduct* by the United Nations Office on Drugs and Crime (UNODC) that the following summation of the Principles is derived.

1. Independence

The term 'Independence' under the Bangalore Principles essentially denotes the adjudication of disputes honestly and impartially, on the basis of the law and evidence on record, without external pressure, influence or interference (including from other judges).⁴ To avert external influence, judges are required to maintain personal conduct that is fairly withdrawn from their communities. The test of a judge's

³ Martin, Jorge Jimenez, *Guaranteeing an Independent and Efficient Judiciary through Training*, Judicial Integrity Views 2018 - 2019, Global Judicial Integrity Network (UNODC), p.35

⁴ See also **R vs. Beauregard**, Supreme Court of Canada (1987) LRC (Const) 180 at 188, per Chief Justice Dickson.

independence in this regard is similar to a related test applicable to the question of judicial bias or prejudice, to wit, whether such judge would be perceived as independent by a reasonable observer. Understandably so, given that the principles of Independence and Impartiality would appear to have some co-related and overlapping characteristics. Indeed, Article 14(1) of the International Covenant on Civil and Political Rights underscores the fundamental rule that **‘everyone shall be entitled to a fair hearing before a competent, independent and impartial tribunal established by law.’**

2. *Impartiality*

Impartiality under the Bangalore Principles denotes the absence of bias (actual or perceived) by a judge or tribunal. Bias in this context may be deduced from real or perceived conflict of interest flowing from a judge’s relationship with parties, advocates or third parties; the judge’s behavior on the bench, or his or her partisan associations & activities outside the court. The Principle of Impartiality thus provides an ethical standard that underscores the need for judges to conduct themselves in such a manner as would minimise the incidence of recusals on account of bias or prejudice. For instance, *ex parte* communication between judges and parties, their legal representatives or witnesses would be considered unacceptable judicial conduct in so far as it reflects the perception of bias. A judge should therefore ensure that such communication is promptly relayed to the opposite party to forestall any such perception.

This high standard of judicial conduct is intended to entrench the minimum tenets of a fair trial, that is, **‘a trial by an impartial and disinterested tribunal in accordance with regular procedures.’**⁵ In that regard, Civil Procedure Rules or Codes within the East African region do broadly provide for and demand due judicial compliance with the following basic procedural measures:

⁵ Black’s Law Dictionary, 8th Edition, p. 634

- i. Adequate notice to parties about the proceedings.
- ii. Ample time for parties to prepare their respective cases.
- iii. Opportunity to present evidence & arguments (*with interpretation if required*).
- iv. Legal representation.
- v. Delivery of a reasoned decision rendered without undue delay.
- vi. Parties informed of their right of appeal where applicable.

However, the foregoing standards and operational provisions notwithstanding, judges whose impartiality is compromised or in respect of whom there is a legitimate perception of partiality must disqualify themselves from the conduct of a case. Owing to the intrinsic nature of adjudication, parties' consent (or the lack thereof) is irrelevant to a judge's decision for recusal. This is because in most Common Law constitutional orders, courts exercise judicial power in trust for their communities. Thus, unlike arbitration, adjudication is a public process the impartiality of which is manifestly important to the observing public. It is pertinent to note, however, that a judge's personal values, philosophy, or beliefs about the law may not necessarily constitute bias. *Opinion*, which is acceptable, is to be distinguished from *Bias*, which is unacceptable. Knowledgeable judges would ordinarily have a scholarly opinion on a myriad of topics, as well as a personal philosophy or beliefs. They cannot be expected to degenerate into empty minds carrying mental blank sheets! Thus, it was observed by the United States (US) Supreme Court that '**proof that a judge's mind is a tabula rasa (blank slate) would be evidence of a lack of qualification, not lack of bias.**'⁶

3. Integrity

Integrity encompasses the totality of what is expected of a judge. The Principle of Integrity as espoused in the Bangalore Principles seeks to posit an ethical standard for a judge's personal conduct on and off the Bench, as well as the conduct of judges viz the image of the judiciary they serve in. Hence, not only should a judge's personal conduct be

⁶ Laird vs. Tatum, United States Supreme Court (1972) 409 US 824

literally above reproach, the judge's conduct should generally reaffirm public faith in the judiciary. Judges are therefore expected, at all times (not only in the discharge of official duties), to act honourably and in a manner befitting that judicial office; be free from fraud, deceit and falsehood; be good and virtuous in behaviour and character, and observe the most scrupulous respect for and fidelity to the law.

4. Propriety & the Appearance of Propriety

This Principle hinges largely on public perception of the totality of a judge's conduct. What matters most is not necessarily what a judge does or does not do but, rather, what the public thinks a judge has done, might do or is capable of doing. The test for impropriety is whether the judge's conduct compromises his/her ability to execute the judicial function with integrity, impartiality, independence and competence, *or* the conduct is likely to create, in the mind of a reasonable observer, the perception that the judge's ability to so carry out his/her judicial duties is impaired. Thus, on the one hand, judges are enjoined to avoid relationships or activities that could denote partiality or prejudice and, in the same vein, preserve the confidentiality and integrity of the judicial process. It is in that spirit that the Bangalore Principles impose a duty upon judges to interest themselves in and establish the financial interests of their family members to obviate questions of impropriety. Hence, for instance, serving judges should neither engage in legal practice nor preside over cases involving family members, or matters in which either they or members of their families have interests.

The definition of a judge's family in this context is quite broad thus placing a considerably onerous duty upon judges.⁷ It includes a judge's **'spouse, son, daughter, son-in-law, daughter-in-law and any other close relative or person who is a companion or employee of a judge and who lives in a judge's household.'** Given the diverse global cultural background in which this ethical standard is sought to be applied, it remains to be seen how enforceable this Principle is. What

⁷ See the Definition Section of the Bangalore Principles.

might be considered an acceptable request for information in one society could constitute a taboo of enormous proportions in another, not to mention an unacceptable infringement on personal space in yet another context. Further, the jury is still out as to the propriety of retired judges engaging in legal practice. Whereas some jurisdictions maintain a dignified silence on the subject, others have attempted to clarify the duty upon judges post-retirement. Retired judges of the Court of Justice of the European Union (CJEU) are bound by the same duty of integrity, dignity, loyalty and discretion as serving judges.⁸ Subject to the foregoing duty, they may nonetheless serve as **'as agent, counsel, adviser or expert or provide a legal opinion or serve as an arbitrator'**, and may participate in matters that were neither pending before them nor connected to cases they handled as judges in the Court and, after three (3) years post-retirement, may even appear before the CJEU itself as legal representatives of parties.⁹

5. Equality

This BP basically underscores the equality of all persons before the law. It prohibits discriminatory conduct by judges, parties and other court users on the basis of race, religion, sex, sexual orientation, gender, cultural diversities, etc. Judges are enjoined to treat all court users with courtesy and dignity, and similarly ensure the adherence of the same standards of decorum by all court users.

6. Competence & Diligence

As has been quite correctly opined, **'nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.'**¹⁰ In a nutshell, judges must possess an astute knowledge of their tools of trade. They should

⁸ Article 9(1) of the *Code of Conduct for Members and Former Members of the Court of Justice of the European Union*.

⁹ Article 9(2) and (3) of the same Code of Conduct.

¹⁰ Mason, Anthony, *The Australian Judiciary in the 1990s*, (1994), *The Sidney Papers*, p. 111 at 114.

know and apply the law, as well as keep abreast with new developments. No less is expected of them in terms of *competence*. With regard to *diligence*, it is the duty of judges to consider matters soberly, decide them impartially and act expeditiously so as to achieve a balanced application of the law and prevent the abuse of process. To that end, judges are expected to ensure prudent case management that negates unnecessary delays in the judicial process, and maintains order and decorum in court proceedings. They are also expected to deliver astute, reasoned judgments that conclusively resolve the dispute between the parties.

C. Arbitral Ethics: a Sine qua non?

An interrogation of the ethical principles and values that are inherent in the arbitral process is pertinent to a discussion as to whether there is, in fact, need for more comprehensive standards of arbitral ethics. The overall objective of arbitration is quite instructive in this regard. Section 1(a) of the English Arbitration Act designates that objective as **‘the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.’** That legal provision succinctly demarcates the values of fairness and impartiality as core tenets of arbitration. The objective of arbitration also embraces the expeditious and inexpensive components of arbitration as the backdrop against which the core values therein should ensue. The operative word for that purpose would be the term ‘unnecessary’, which presupposes that in some instances some degree of delay and expense are inevitable. Nonetheless, perhaps for purposes of forestalling the undeniable subjectivity that could arise, the English Arbitration Act goes ahead to explicitly propound the general duty of an arbitral tribunal. To that end, section 33(1)(a) and (b) underscores the vitality of fairness, impartiality and diligence in the arbitral process. It qualifies this emphasis on the foregoing attributes by correlating them, first, to the integrity of the arbitral process in so far as each party is given a reasonable opportunity to present their respective cases and, secondly, to the notion of arbitration as an inexpensive, expeditious, yet fair alternative dispute resolution mechanism. Finally, the same Arbitration Act does, in section 24(1)(a) and (b), quite categorically

designate lack of impartiality or incompetence on the part of an arbitrator as sufficient grounds for his/ her removal.

In like vein, the Arbitration Act of Kenya (as amended) does in section 13(3) designate an arbitrator's lack of impartiality or independence as grounds for a challenge to his/ her appointment. Interestingly, under the same provision, an arbitrator's mental incapacity to conduct arbitral proceedings (or justifiable doubts as to his/ her ability to do so) is also outlined as a ground for a challenge to an appointment. This brings to the fore the question as to whether an otherwise competent arbitrator might, nonetheless fall mentally short on account of other considerations such as his/ her personal temperament and predisposition. Further, section 19 of the same Act enjoins arbitral tribunals to treat each party with equality and extend a fair and reasonable opportunity to each of them to present their respective cases. Construed in its literal sense, section 19 would appear to explain the notion of equality by demonstrable fairness and reasonability in the conduct of the arbitral proceedings. However, it is proposed herein that an arbitrator that perhaps complies with the parties' preferred procedural rules might not necessarily be sufficiently averse to non-discrimination against any of them on account of their race, gender, religion, sexual orientation or other considerations.

Arbitration does pride itself in its being a party-driven, private and conclusive form of dispute resolution. However, whereas it is the prerogative of the parties to elect to submit to arbitration at their preferred terms, the integrity of the arbitral tribunal, process and award is such a *sine qua non* to the success of arbitration that the need for minimum ethical standards for all arbitrators cannot be over-emphasized. Indeed, the flexibility, timeliness and cost-effectiveness of arbitration would only deliver a fair and credible result where the integrity of the tribunal is unassailable. Integrity in this regard would encompass the tribunal's competence and diligence, which is an essential prerequisite to the finality of the award, as well as the timeliness and cost-effectiveness of the process in so far as it minimizes undue court intervention. In the same vein, a

tribunal's impartiality and propriety reinforces the acceptability and finality of the award, as does its independence from external influence, and the equal and fair treatment of all parties, witnesses, experts etc. Needless to state, one of the main attractions of arbitration over other forms of dispute resolution is the privacy that accrues to the process and award. The preservation of that privacy, particularly in commercial arbitrations involving business rivals and their trade secrets, is the ultimate test of the integrity of an arbitral tribunal. Undoubtedly, therefore, the law and practice of arbitration would be a tad incomplete without due provision for minimum ethical standards for arbitrators.

The *International Bar Association (IBA) Rules of Ethics for International Arbitration, 1987* ('the Rules') and the *IBA Guidelines on Conflict of Interest in International Arbitration, 2014* ('the Guidelines') do provide a regulatory framework for arbitral ethics. From the onset, in introductory remarks, the Rules state quite categorically that arbitrators should be '**impartial, independent, competent, diligent and discreet.**' The need to be discreet is particularly in tandem with the general view that arbitration is a private and confidential process. Rule 1 does then lay the foundation for the general thrust of the Rules. It enjoins arbitrators to embody the attribute of impartiality throughout the arbitration and conduct the arbitral proceedings with diligence and efficiency (competence) in order to deliver a result that is just and effective. Indeed, the question of bias is a common thread throughout the Rules, the elements thereof as outlined in Rule 3 poignantly reflecting the values of independence and propriety as espoused in the Bangalore Principles. It might have been quite plausible to posit that, aside from the general duty imposed on arbitrators in Rule 1 to be free from bias, the Rules appear to address the question of bias only in so far as it pertains to appointment of arbitrators. This appears to be the main thrust of Rules 3.3, 3.4, 4 and 5; Rule 7 restricting itself to the need for diligence in the conduct of the arbitral proceedings. However, the designation of Rule 1 as a 'Fundamental Rule' would appear to grant it pre-eminence in the Rules and, to that extent, places a non-derogatable duty upon arbitrators to avoid bias. On the other hand, the Guidelines encapsulate seven (7) General

Standards that seek to avert conflict of interest situations and thus entrench the impartiality and independence of arbitrators. Like the Bangalore Principles, they do also contain explanations that clarify the import of the Standards. They further categorise conflict of interest scenarios into lists of waivable and no-waivable situations that, though obviously not absolutely comprehensive, are nonetheless an invaluable guide to arbitrators on how to approach the issue of conflict of interest. The Guidelines' outreach is quite broad given that they do pertain to arbitrators with or without a legal background and are applicable to both commercial and investment arbitration.

Thus, it would appear that whereas the IBA Rules provide a general framework for arbitrator ethics, the IBA Guidelines provide a practical guide to how bias that manifests as conflict of interest can be negated. The question is whether the 2 instruments comprehensively address the myriad of ethical issues that do pertain to arbitration as a dispute resolution process. Do the Rules and Guidelines sufficiently address the issues that arise from the Principles of Integrity and Equality as defined in the Bangalore Principles in so far as they pertain to an arbitrator's general conduct, temperament, disposition and sense of judgment both at a personal level and in the conduct of arbitral proceedings? Within the ambit of section 13 of the Kenya Arbitration Act, might an otherwise competent arbitrator that is not necessarily biased or riddled with conflict of interest issues, but predisposed to a dishonest, discourteous, careless and thoughtless disposition impact on the acceptability of an award to parties? Similarly, considering the provisions of section 19 of the same Act, would an arbitrator that is not sufficiently grounded in the intricacies of minorities, sexualities, demographic, gender and other related equality issues conduct an arbitration that meets the threshold of procedural fairness that is encapsulated in that statutory provision? In any event, procedural fairness that takes into account the rules of natural justice (as seems to be the import of sections 19) is not necessarily synonymous with due cognizance of the intricate equality issues engrained in Principle 5 of the Bangalore Principles, which should accrue to a just and effective dispute resolution process.

Above all, where parties do not pose or address the foregoing questions in the underlying arbitration agreement, should they be ignored at a regulatory level?

D. Applicability of the Bangalore Principles to Arbitration

The regulation of judicial conduct arose from the need to hold judiciaries accountable without compromising institutional judicial independence or individual judges' autonomy in decision-making. This is captured succinctly in Kenya's *Judicial Service Code of Conduct and Ethics, 2013*, the purpose of which is '**to establish standards of ethical conduct of judicial officers (and) ... be construed so as not to impinge on the essential independence of judicial officers in the making of judicial decisions.**'¹¹ At institutional level, it was anticipated that the establishment of universally acceptable standards of ethical conduct for judges would provide judiciaries with a peer-reviewed framework for regulating judicial conduct. The jurists that participated in the promulgation of the Bangalore Principles also sought to promote adjudication as an effective, inexpensive and expeditious mode of dispute resolution. That is the essence of the notion of judicial economy. Conversely, at a personal level, it was hoped that universal standards would provide much needed guidance to individual judges in the execution of their judicial function, while concurrently establishing standards or values by which they could be held to account. Can a similar case be made for the arbitration fraternity? Considering the pivotal function of integrity in arbitration, the comparative informality and flexibility of the arbitral process would inevitably be susceptible to insurmountable integrity pitfalls that can neither be ignored nor accommodated. That notwithstanding, it is imperative that the intrinsic nature of adjudication be juxtaposed against the essence of arbitration to garner an appreciation of the limitations of a one-size fits all approach to the applicability of the Bangalore Principles to the latter process. While drawing from the wisdom underlying the Bangalore Principles is neither untenable nor entirely unfathomable, the constraints faced in their enforcement by judiciaries themselves, let alone their adaptability to arbitration cannot be summarily disregarded either.

¹¹ See Preamble to the Code of Conduct, para. 2.

It will suffice to note here that the unethical conduct that is sought to be addressed by the Bangalore Principles is to be distinguished from typical judicial misconduct, which is a disciplinary issue. The professional standards encapsulated in the Bangalore Principles simply represent best practice that judges should aspire to and should not be equated to conduct justifying disciplinary action unless a breach is of such magnitude as to justify such sanction.¹² Thus the enforcement of the Bangalore Principles is largely peer-driven. By contrast, the related ethical standards notwithstanding, arbitration is a private, contractual dispute resolution process that is shielded from the prying eyes of an intrusive public. How then would peer enforcement of ethical conduct be achieved? And what would be acceptable parameters within which arbitration peers that are otherwise strangers to the agreement between the parties and the arbitral tribunal inquire into the conduct of an arbitrator? This is compounded by the fact that judges terms of engagement are fundamentally different from those of arbitrators. Judges hold judicial power in trust for the people and are therefore accountable to the public; not so with arbitrators who are purely bound by their contractual terms. Consequently, given the notion of party autonomy or ‘freedom of contract’, on what premise would arbitrators appointed by and arguably agreeable to the parties be held to account? Would considerations of public interest suffice?

E. Conclusions and Way Forward

Arbitration is steadily taking root in various jurisdictions. As global communities increasingly grapple with the vice of corruption in both public and private space, it is inevitable that ethical issues will gain prominence in the practice of arbitration. It is arguable that the adoption of comprehensive ethical standards/ values would further enhance public confidence in arbitration as a viable alternative to adjudication. Arbitrators would be rightly viewed as neutral arbiters with unassailable personal integrity and

¹² Jayawickrama, Nihal, From Independence to Accountability – The Bangalore Principles of Judicial Conduct, Presentation made at conference of Chief Justices and Presidents of Supreme Courts and Constitutional Courts of Africa, 2018

thus the moral authority to engage in ADR. Furthermore, bringing unequivocal and comprehensive clarity to what is acceptable ethical conduct could provide much needed guidance to arbitration practitioners and users alike. Indeed, to the extent that court intervention plays a pivotal role in the arbitration process, the vitality of integrity to both processes cannot be overstated. Might it not then be prudent to consider holding both judges and arbitrators to similar or related ethical standards?

The legitimacy of the Bangalore Principles is derived from the fact that they were crafted by judges for judges. Many judiciaries world over have adapted them to their home-grown, national judicial codes of conduct. Similarly, arbitrators are best-placed to agree on enforceable ethical standards of practice. The IBA Rules and Guidelines are an absolutely invaluable contribution to arbitral ethics from the vantage point of legal practitioners. We do know, nonetheless, that arbitration is a cross-cutting, multi-disciplinary dispute resolution process. It is for arbitrators to determine whether or not the regulatory framework in place presently is sufficient for its purpose or it requires strengthening to aptly address the intrinsic dictates of arbitration.

‘Do I believe in Arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion.’¹³

Arbitrators should commit to offering the public an arbitration process that addresses the social dichotomies present within society; one that is as effective to the mighty as it is to the might-less; one the standards of which are drenched in unquestionable personal and procedural integrity.

¹³ Samuel Gompers, Labour Union Leader (1850 – 1924)

ISDS Reforms – The Forum Menu

Paul Ngotho*

Background

That the current Investor-State Dispute Settlement (ISDS) regimes are fundamentally flawed is old news, leaving for serious consideration only how and when the reforms would be addressed. The current ISDS emerged from the aftermath of the Second World War, when much of Africa and Asia had no voice while China, Japan, Singapore, South Korea, India and Brazil had not emerged as the major players in the international arena they are today. The mineral resources in much of less developed countries (LDCs) had not been discovered. Investors came from a handful of states, which enjoyed powerful positions as ex-colonial powers while many new, inexperienced host states were competing for the precious investment. Strong nationalism and rhetoric from host states did not yield much on the negotiating table, where investor states adopted a take-it-or-leave-it stance. One can see why the dispute clauses in some of the bilateral and multilateral investment treaties (BITs and MITs) were skewed in favour of the investors and why meaningful ISDS reforms must include BITs and MITs themselves.

States have been known to make knee-jerk reactions like terminating BITs, banning foreign arbitrators, lifting immunity against arbitrators or imposing criminal sanctions on arbitrators. Even regional patch-up operations are not a viable in the long term. If anything, they demonstrate the dilemmas and frustrations which states and other actors face in the current ISDS regimes. “Investor-State dispute settlement is unfortunately not dead”, lamented the

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Office of the United Nations High Commissioner for Human Rights in a news release¹ on 19 April 2016.

The reasons why users are dissatisfied with the current ISDS systems are well documented. However, the political-economic dynamics which have made ISDS reforms necessary and urgent have not been fully appreciated. Yet any solution must reflect those dynamics.

Firstly, and probably most significantly, is that the traditional dichotomy of the more developed countries (MDCs) producing the investors while the LDCs were the host states has changed, making the call for a fair system universal. There are increasing investments between MDCs themselves and between LCDs. In addition to the odd LCD national who invests heavily in an MDC, sovereign funds and private investors from Arabian states, which were formerly purely recipients on foreign investment, have invested in the US and Europe. All this leads to the same state contributing investment and acting as a host state at the same time but in different transactions. The interests of investor and host states have converged irreversibly.

Secondly, LCDs still need foreign investment to exploit their resources. Their level of desperation is apparent from the fact that some of them are still signing BITs which contain onerous terms. Their young and demanding populations coupled with ambitious development goals and the high cost of exploring and exploiting natural resources have put economic and political strains on LCDs. The universal recognition of peoples' rights over their natural resources does not seem to have strengthened LCDs' negotiation position much.

Thirdly, the collapse of USSR in 1980s robbed the world of a much-needed counterbalance in the world arena, leaving LCDs at the mercy of European and North American states and their attendant multi-lateral agencies. The investor nations used their strong financial position and historical ties with the host

¹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839&LangID=E> last accessed on 11th May 2020.

states to force political and economic reforms in LCDs, which had little option that to comply.

Fast forward to the 2000s. It has taken states decades to redefine themselves and to calibrate their relationships with others in the new era. UK's reluctant and drawn out joinder of European Union, the subsequent painfully chaotic Brexit and US President Trump's criticism of NATO financial arrangements should be viewed in this light. In the process, the world spins quite recklessly with even nuclear arms being treated like toys - at least one adult male in debatable, if not decidedly unsound, mind has the codes to all his country's atomic arsenal.

The dynamics on the supply side of the investment market equation also changed to LCDs' benefit. Cash-rich China, and to some extent Japan and the Arab states, were shopping aggressively for resources and investment opportunities. Suddenly, LCDs had options without explicit political strings.

Concerns have arisen over LCDs' over-dependence on China for investment and credit. There is also apprehension on how China, a relatively new lender, might enforce its rights in the event of default. The US and some of the European states are also now heavily economically dependent on China, but they are less vulnerable than the LCDs.

The convergence of MDCs' and LDCs' interests put both groups on the same side in agitating for ISDS reforms in order to achieve a system which is fair to all. It's amazing how fast simply putting the boot on the other foot changes the mindset. It has also led to dilemmas. For example, South Africa has terminated BITs in which it is host state and retained the ones in which it is the investor. This gives a hint of who between investors and states is benefiting more from the flawed ISDS system but also the awkwardness which some states face in the ISDS reforms.

Polanco R². advances the view that in order to address some of the criticisms leveled against ISDS, a large majority of states have taken a 'normative' strategy, negotiating or amending investment treaties with provisions that potentially give more control and greater involvement to the contracting parties, and notably the home state. This is particularly true of agreements concluded in the past fifteen years.

Amending a few of the 3,000-odd BITs and initiatives like introducing new national or regional BIT templates will not fully address the underlying ISDS problem, which is multi-faceted and global in nature. When two states each with its own BIT template negotiate a new BIT, one template will yield? The ISDS challenge is much broader and not amenable to localised patchwork at BIT, regional or continental levels in a globalised world.

This article gives the background to ISDS analyses and attempts to rank objectively the various forum options. It will restrict itself to adjudicative ISDS and not negotiation, mediation, conciliation, fact-finding, UN General Secretary's Good Office etc all of which are still very important because they prevent the escalation of disputes as well as facilitate early and amicable settlement, which should be given a change even though success cannot be guaranteed. Suffice to say that conciliation and mediation take up of BIT disputes has been slow especially after the existence of a dispute becomes public.

The Criticisms

Criticisms of the existing ISDS regimes have been classified into six themes as follows:

1. Excessive costs and recoverability of cost awards

2 The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection? Cambridge University Press, 2018. See comments at <https://www.wti.org/research/publications/1196/the-return-of-the-home-state-to-investor-state-disputes-bringing-back-diplomatic-protection/> last accessed 11th May 2020.

2. Excessive duration of proceedings
3. Lack of consistency and coherence in legal interpretation
4. Incorrectness of decisions
5. Lack of diversity among ISDS adjudicators
6. Lack of independence, impartiality & neutrality

Tafadzwa Pasipanodya³ adopts that list, which does not claim to be universal or exhaustive. The six and additional issues are discussed in a different order below.

Firstly, arbitrators in investment arbitrations are mainly party-appointed. Parties' right to determine how their dispute is resolved and to appoint the tribunal is one of the characteristic features of arbitration as opposed to courts. Yet it creates the potential of arbitrators favouring their benefactors in appreciation of the appointment and to ensure future appointments in this apparently lucrative field. In arbitration, such concerns are absent only when the parties either mutually and jointly appoint the whole tribunal or allow a third party with the appointment of the entire tribunal.

Secondly, double hatting, where the same familiar faces exchange roles between arbitrator and counsel in different arbitrations has been critiqued as incestuous and inherently unhealthy. It is inconceivable in national courts, where it should in fact be tolerated due to diversity of cases and issues they handle. However, investment arbitration is uniquely vulnerable to this practice because the issues and standards under consideration are the same in nearly all the cases. For example, a person who has interpreted what an investment is as an arbitrator in one case cannot, if he has an inkling of professional integrity in him, argue differently as counsel in a different case with similar or identical circumstances. A detailed discussion of double hatting is found in the *ESIL Reflection The Ethics and Empirics of Double Hatting*⁴, part of which states:

³ "Issues with the current ISDS System: From Diagnosis to the Desirability and Feasibility of Reform", a paper presented in the AAIL-AALCO Arusha Seminar, 2018
⁴ https://esil-sedi.eu/post_name-118/ last accessed on 11th May 2020.

“In his closing speech at the 2015 European Society of International Law conference, Philippe Sands took aim at some of the association’s members. The international legal profession, he maintained, bore some responsibility for the legitimacy crisis in international law. The crux of his concern was the ethics of appointments. To a reasonable observer, it might appear that international lawyers were prioritising their material and political interests over independence and impartiality.”

Sands named four specific practices. First, select lawyers and law firms were ‘capturing’ international investment arbitration and charging excessive fees. Second, International Court of Justice (ICJ) judges were acting as arbitrators – seemingly the ‘only’ international court to allow this practice. Third, some judges and arbitrators were too close to states, participating in the appointment processes of state counsel or leaking confidential information to governments. Fourth, he labeled as ‘deplorable’ another practice of double hatting in which individuals act simultaneously as arbitrators and legal counsel in international investment arbitration” (Emphases added.)

That lawyers are an integral part of this problem, as of many others in investment and international commercial arbitration. Hear the EU Commissioner Cecilia Malmstrom's statement on 5 May 2015: “(M)y assessment of the traditional ISDS system has been clear - it is not fit for purpose in the 21st Century. I want the rule of law, not the rule of lawyers.”⁵ (Emphases added.)

Sands is saying that the ISDS system is under siege from a cartel of international law firms, which employ arbitrators-cum-litigators to control the judicial outcomes and to protect both their fees and market. Those firms can be reasonably expected to resist meaningful reforms because they would be adversely affected. Effective reforms must either involve their cooperation or strategies to lessen their stranglehold of ISDS.

5 “Investments in TTIP and beyond -- toward an International Investment Court” at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303> last accessed on 11th May 2020.

Interestingly, the law firms are the major sponsors of most arbitration conferences, the main forum for discourse on all matters arbitral. They directly or otherwise control the agenda, content and tone through various means including key-note speeches as well as reserved moderator and choice speaker slots. As for the international arbitration journals, one just has to read the lists of editors. Little wonder that the reform agenda is still a marginal issue in international law discourses.

Thirdly, investors are increasingly challenging the legislative and regulatory roles of sovereign states by filing cases which are based on the actions taken by states in good faith to enhance or control public health, environment and national security. Thus Phillip Morris, even though it lost, tried to use ISDS to force Uruguay to change its laws on cigarette packaging and marketing claiming that they amounted to expropriation as they affected it adversely.

Fourthly, the finality of arbitral awards even when they have factual or legal errors is considered too rigid and unjust. Correction of errors as allowed by nearly, if not absolutely, all arbitration rules and national arbitration laws deals with typographical errors and rarely allows delving into the merits. Appeals or setting aside on merits are an exception to the rule.

Fifthly, confidentiality, which is understandable and perfectly acceptable when only private parties are concerned, is ill-suited where public interest and public funds are involved. The great strides which have been made to introduce transparency in ISDS recently do not seem to have addressed all the concerns fully. Ideally, a single individual citizen or community in a host state which is adversely affected by the actions of a foreign investor should be able to make an independent arbitration claim against the investor regardless of the state's action or inaction.

The sixth criticism is the perceived inconsistency and incoherence in the decisions of *ad hoc* and other arbitral tribunals. This problem, which is significant on its own, has multiple consequences like unstable and

unpredictable jurisprudence, which are bad for planning and business. These interrelated problems erode confidence in arbitration as an ISDS forum.

Funke Adekoya SAN⁶ has pointed to five arbitrations arising from the Argentina-US BIT. Argentina had removed stabilisation measures during economic crisis. Three tribunals determined that the action did not satisfy either the necessary defence under customary international law or the emergency clause under the BIT while two tribunals concluded that the action met the emergency defence under the BIT.

The inconsistency aside, two further comments are worth making at this juncture. First, those arbitrations were administered. That demonstrates that the delimitation of charges of inconsistencies to *ad hoc* arbitrations is unjustified. Indeed, the 6 criticisms against ISDS regime have always been raised against *ad hoc* arbitration in favourable contrast with institutional arbitrations. The complaint about inconsistency and incoherence is in fact common in both administered and *ad hoc* arbitrations. It has been levelled even against ICSID, which runs administered arbitrations and has one of the most developed system of precedents and in-house “appeals” or annulment procedures. Second, and more significant, similar criticisms have been levelled against ICJ, the “international court” *per excellence*, which has tenured judges. That bursts the myth that the establishment of an international investment court can cure the inconsistency problem.

Seventhly, that high arbitral awards against LCDs compete or threaten development and recurrent budgets. This is a controversial issue. On one hand, it could be that the relatively high quantum in awards is justified. A party's ability to pay is not, itself, one of the usual issues for determination in any arbitration. That the gross revenues or even profits of some multinational corporations exceed the combined GDP of several LCDs is also not a consideration in the determination of liability or quantum. On the other, some

⁶ The Practical Considerations of Having a World Investment Court. Paper presented in the AAIL-AALCO ISDS Conference, Arusha 19-21st November 2018

of the methods used in quantifying damages, especially when projects abort before any significant money is actually invested, are suspect and require thorough and sober interrogation within and without the ISDS fora.

The quantum awarded in the arbitration between *Process and Industrial Development Ltd and Nigeria* has drawn much attention and is currently the subject of litigation in both the US and UK. Interest alone at 7 % p.a. or USD 1.2m daily was about USD 2.3 billion during the first five years, raising the total sum due to about USD 9 billion in 2018 and probably USD 10 billion in 2020. Such figures raise emotions and political pressure in LDCs and tend to divert discourse from the real issues like critical evaluation of the damage quantification methods.

Eighthly, states are exposed to frivolous claims which must be defended at colossal costs in a system under which they are not assured to recover their expenses even if they win. The cost of investment arbitrations is high in relative terms and competes with the LDCs governments' ability to provide basic services and stifles their development agenda. MDCs might also find the cost high in absolute terms but they are probably mollified by the fact that much of the money, being legal fees for international law firms, remains in their economies.

International arbitrators are, unmistakably, created in large European and American law firms' senior partners' image in terms of age, race, gender, nationality, profession and the law schools attended. This should not be surprising, given that arbitrators are appointed not by parties but by their counsel, who are more comfortable with their own types. Thus, the law firms have contributed immensely not only to the lack of diversity and exorbitant costs but also to the other problems facing ISDS. Much ink, air miles, conference time, research and lobbying have gone into the diversity and inclusion debate in the last ten years. However, diversity, while most desirable, cannot cure the more fundamental underlying problems in ISDS. Users will not stop complaining about incongruence of awards if the panels became more or truly diverse.

It is necessary to distinguish complaints against ISDS from those against foreign investors. States have a duty to carry out due diligence on potential investors and traders to establish if they have been paying taxes or been blacklisted in their home states or elsewhere. This might involve lifting the veil to see the names behind the investment companies and to establish who their local spanner boys are. In the *World Duty Free*⁷ case, a little initiative would have established that the company was under receivership when it signed the initial contract. Due diligence on *Cortec*⁸ would have raised unmistakable red flags.

Calvo Doctrine and Hull Formula

For completeness, discussion on ISDS in historical, current or future contexts must pay homage to Calvo and Hull. Apparently, some of the issues haunting ISDS today were considered century ago and left unresolved. If that is so, then one cannot help wondering if there is any chance that they will be resolved now, soon or ever.

The clamour to modify investment regimes and ISDS is merely the reincarnation of the Calvo Doctrine⁹, named after Carlos Calvo (1824-1906). Clavo was an Argentinian diplomat and legal scholar. The doctrine evolved in mid-1800s, when Argentina was heavily indebted and under the threat of military intervention from the investor states. The timing of the current debate is hardly surprising, given that some LCDs are heavily indebted and others admittedly over-indebted.

The Calvo Doctrine was essentially restated by the Drago Doctrine, which was propagated by the Argentine foreign minister Luis Drago in 1902. At the time

⁷https://www.trans-lex.org/241400/_/world-duty-free-co-ltd-v-the-republic-ofkenya-icsid-case-no-arb-00-7/ last accessed on 11th May 2020.

⁸ <https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf> last accessed on 11th May 2020.

⁹ The doctrine was advanced by Carlos Calvo, in his *International Law of Europe and America in Theory and Practice* (1868) source

<https://www.britannica.com/topic/Calvo-Doctrine> last accessed on 11th May 2020.

Venezuela was indebted to Great Britain, Germany, and Italy, which threatened armed intervention to collect. Drago advised the United States government that “public debt cannot occasion armed intervention nor even the actual occupation of the territory of (Latin) American nations.”

The Calvo Doctrine advocates the regulation of the jurisdiction of governments over aliens and the scope of their protection by their home states. It maintains that aliens should not enjoy more rights or more amenable standards than the nationals of the states where they invest and that uniform standards should apply for all nations, regardless of the size or economic strength. It also maintains that foreigners who held property in Latin American states and who had claims against the governments of such states should apply to the courts within such nations for redress instead of seeking diplomatic intervention. Furthermore, nations were not entitled to use armed force to collect debts owed them by other nations. Some aspects of the Doctrine were incorporated into BITs.

The Hull Formula is named after Cordell Hull (1871– 1955). It recognises minimum standards in international law which apply and which superseded national standards. It advocates prompt, adequate and effective compensation for investors after expropriation. Not much needs to be said about the Hull Formula except that much of it has prevailed in the long run and found their way into national laws, BITs and customary international law. For example, the international minimum standard is integral in customary international law. It basically says that there is a minimum standard of treatment which applies to foreign investors regardless of any lower standard might apply to nationals when it comes to payment for expropriations.

The Reform Menu

The ISDS reform options which render themselves for serious consideration are four: national investment courts, new multilateral courts, a reformed ICSID and a new/reformed international arbitral institution. Before discussing each of them, some hope has been put on new or additional codes of conduct for arbitrators. While such cannot possibly do any harm, their contribution to the

solution is very limited because the international judges and arbitrators against whom the complaints are raised are all ostensibly reputable lawyers and members of prestigious bar associations, each of which has a code and disciplinary measures. Indeed, a good number of them are members of multiple bars - typically a colourful assortment of European and American bars sometimes spiced up with something Latino, Arabic or Asian.

National Investment Courts

Every state would like its investment disputes determined by its own national courts. Such courts have, and will always, play a major role in investor-dispute resolution especially in the support of *ad hoc* arbitrations and the enforcement of non-ICSID awards. A recent intervention by Kenyan High Court¹⁰ stopped the enforcement of an award from an *ad hoc* arbitration in an investor dispute which had, apparently, previously been dismissed by an ICSID tribunal. The investor has appealed. The role national courts play in commercial, and to a lesser extent in investment, arbitrations, is still significant. What is under discussion is whether such courts should decide the merits of investment disputes.

Special national courts are promoted by governments, which are typically respondents in many national arbitrations, some international arbitrations and in nearly all investment disputes. Listen to the sales pitch, in New York, from the The Netherlands Commercial Court:

“The NCC is a newly established commercial court focused on resolving complex international commercial disputes. Located in the centre of European business, Amsterdam, the NCC is conducting its proceedings in English, allowing foreign-speaking attorneys to participate in the case without a translator. Joining the team of already existing international commercial courts in Singapore, Dubai, Qatar and London, the NCC incorporates a number of invaluable advantages. In addition, the NCC aims to make each proceeding more efficient and less extensive, and therefore, shorter and less expensive than

¹⁰ <http://kenyalaw.org/caselaw/cases/view/159886/> last accessed on 11th May 2020.

in other international commercial courts. Launched only in January 2019, the NCC is already becoming an attractive alternative to cross-border litigation and arbitration."¹¹

The China International Commercial Court is, quite understandably, a function of the Belt and Road Initiative (BRI):

*“...the formal inauguration on 29 June 2018 of a new Chinese court specifically focused on resolving BRI disputes (the **Court**) is another step...as a forum for resolving BRI disputes. BRI projects are generally financed wholly or largely by Chinese funders, and constructed by Chinese contractors using largely Chinese workforces, so these entities might try to negotiate for dispute resolution in China.*

However, whether non-Chinese parties will be willing to submit to the jurisdiction of the Court remains to be seen...doubts will linger over its independence and impartiality (whether fairly or unfairly). The obvious lack of neutrality, just in terms of location, will always be a big factor making other dispute resolution jurisdictions attractive. And then there is the problem of enforcement, in which arbitration reigns supreme...It is also possible that, in wholly Chinese-funded projects, submission to the jurisdiction of the Court may be a condition of funding.”¹²

According to Tanzania's Constitutional and Legal Affairs minister Augustine Mahiga, the country plans to enact a law that will facilitate the settling of disputes with investors in the country in order to increase transparency and cut unnecessary costs¹³. The move is consistent with Tanzania's approach to

¹¹<https://nyiac.org/events/nyiac-talks-an-introduction-to-the-netherlands-commercial-court/> last accessed on 11th May 2020

¹² <https://www.ciarb.org/resources/features/china-international-commercial-court/> last accessed on 11th May 2020.

¹³ https://www.iarbafrica.com/en/news-list/17-news/956-new-law-on-settling-investment-disputes-in-the-offing?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-

investment arbitrations generally as reflected in the country's recent public statements and legislation¹⁴.

At this rate, investors will soon be invited to a full beauty parade of copied and pasted versions of special national investment courts. Will the investors bite? Will the stone which Hull so vehemently rejected become, finally, the ultimate quoin stone of ISDS? Sam Luttrell¹⁵ thinks not: “From the international business person's perspective, the most significant risk is that judges in other states may be biased against foreign parties. Humphrey O'Sullivan puts it more graphically 'there is little use in going to law with the devil if the court while the court is held in hell'”. That was in 1831. Little has changed the last 189 years. Foreign investors' morbid fear of national courts in hosts states is not baseless. It is not like foreign investors do not know the door to the local court! They have been there every day for traffic, pick-pocket, employment and physical planning matters¹⁶ etc.

“Special” national courts to handle investment disputes are quite easy to set up and relatively inexpensive to run as funding would also be assured. They would also have full-time judges of national repute. But that is all in their favour. The criticisms against national courts generally are weighty, leading to their reject by investors as unfit for purpose. Thus the carrot lies in courts' newness and specialty, which states would make believe guarantee fairness to the foreign investors.

However, the current spate of states quickly retreating into cocoons called special national courts is a zero-sum game once every state has such a court. It could also lead to a quagmire.

Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019 last accessed on 11th May 2020.

14 Reference is made to Public Private Partnership Amendment (Amendment) Act. No.9 of 2018 and Natural Resources and Natural Wealth Management Act of Tanzania.

15 *Bias in International Commercial Arbitration*, Kluwer Law International

16 <https://www.capitalfm.co.ke/news/2019/04/court-orders-kiambu-to-process-tatu-city-building-approvals/> as an example. Last accessed on 11th May 2020.

It would be unfair to suggest that all national judges or that all national courts are biased against foreigners in general or foreign investors in particular. However, their independence is, in the eyes of foreign investors, a hit-and-miss affair at best or suspect at the very least. The investors might not to take the risk of a forum in which the selection, remuneration, retirement and removal of each adjudicator are all dependent on the opponent. Even lesser matters like the exposure of a judge to transfer from the special court to a less glamorous one could be influenced by states directly or indirectly.

In addition, patriotism is an important consideration in investment and international arbitration. The current ISDS systems generally require that no member of the tribunal shares nationality with either party. Even ICJ allows a party to appoint an ad hoc judge to balance the situation whenever one party shares nationality with one of the permanent judges.

States could deal with the nationality bias issue quite easily by reserving the presidency, some or most of the seats in the special courts to non-citizens. They would then administratively ensure that no member of the bench in a particular case shares nationality with the investor in each case. However, they are most unlikely to take that approach due to national sentiments and probably fear of losing control of the courts.

Investors would also love a court they could control. Since they are not able to do that legitimately, the best they could negotiate for is for disputes to be heard in courts in their home states, a prospect which host states would not normally accept.

The other major drawback to special national courts is the venue. Being national courts, they are likely to routinely hear cases in the host state in spite of powers to sit elsewhere. Host states could easily frustrate foreign investors and their witnesses through arrests for genuine or trumped up charges timed to frustrate the investor's case in court. Non-judicial harassment includes trailing, phone tapping, stage-managed muggings and food poisoning. Foreigners might suddenly start receiving undue attention from pickpockets and street urchins.

Counsel might require licences from the host state's attorney general while the investor's foreign expert witnesses might require work permits as opposed to visitor's visas all of which are controlled by governments. Governments are known to play hard ball as any private party in arbitration and are never short of tricks.

Few judiciaries, even in the MDCs, can withstand sustained pressure from their governments. Not to mention that some jurisdictions have particularly pro-government judges. Foreign investors are not about to take the risk.

The other drawback is that judgements of national courts are not as widely enforceable in other states as foreign arbitral awards are under the New York Convention. The problem of sovereign immunity would dodge the special courts throughout.

A special national court might achieve a reasonable level of consistency and coherence. However, for certain, the jurisprudence across several jurisdictions on the same issues is likely to be much more chaotic than what ISDS is currently accused of.

Multilateral/International Investment Arbitration Court(s)

According to Schwarzenberger in the Manual of International Law:

“the only difference between arbitration and judicial settlement lies in the method of selecting the members... While, in arbitration proceedings, this is done by agreement between the parties, judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept”

The perfect international investment court would be made up of tenured judges, who would work to high ethical standards and be truly impartial and independent. It would also be free from political manipulation by states and

would have trial and probably appeal chambers. Its decisions would be binding and enforceable worldwide.

Parties are, quite unexpectedly, disinterested in arbitration under regional courts, whose judges are tenured and nominees of the member states. The courts are free of charge to the users. They are, however, prone to regional political dynamics and to crippling under-funding. Investors have given many of them a wide berth. The East African Court of Justice and COMESA court are, apparently quite unpopular ISDS destinations. Each had in November 2018 handled only three investment disputes even though they had been in existence for decades.

The ICJ and the International Criminal Court (ICC¹⁷) are probably the best examples of truly international courts. They are permanent and have tenured judges, who have impressive credentials. Yet ICJ is facing the same criticisms as the ISDS - inconsistency, time, costs, domination by MDCs especially the permanent members of the UN Security Council.

S. Gozie Ogbodo has, for example, criticised the ICJ as follows:

“nomination of ad hoc judges by parties under Article 31 of the ICJ Statute corrupts the integrity of the Court by allowing a party before it to nominate an ad hoc judge if none of the ICJ judges is a nationality of the party. In other words, every party before the ICJ is entitled to either a judge of the same nationality on the Court or an ad hoc judge. On the face of it, this practice may be geared towards ensuring fairness and democracy in the operation of the Court. However, a critical examination of this practice - as well as the outcome - portrays an abuse of the judicial process at the highest level. The records indicate that ad hoc judges typically vote for their country of nationality, irrespective of the majority decision of the Court. Guaranteeing a contentious party the right to a representative

¹⁷ Not to be mistaken for the International Chamber of Commerce, which has a reputable arbitral institution.

judge does not augur well for the Court's image of impartiality. The impression created by this practice is that a party can only be guaranteed a fair and impartial justice before the Court if, and only if, the party is represented by one of the judges – either one of the elected judges or an ad hoc judge. Moreover, the mere fact that a party before the court must have a representative judge does not only negate the impartial appearance of the Court but speaks volumes about its ability to dispense States-blind justice to the parties before it. This practice contravenes the claim that a member of the Court is not a delegate of the government of her/his own country. Since an ad hoc judge is an appointee of a state party before the Court, the likelihood of future appointment will definitely sway the judge to be sympathetic to the state party which typically is his home state.”¹⁸

The discovery that a large number of ICJ judges were carrying out private arbitrations in complete violation of the absolute prohibition under Article 16.1¹⁹ of the ICJ Statute bursts the myth that tenured judges would necessarily work to higher ethical standards than private arbitrators. As noted by Sands elsewhere in this article, the ICJ judges are in fact quite close to states and not because of nationality but because states are actual or potential clients in private arbitrations.

ICC, the criminal court not the arbitral institution by the same initials, has been accused of unduly targeting African states. That allegation requires objective analysis against the worldwide geographical occurrence of the violations which ICC is mandated to handle. Such an analysis is beyond the scope of this paper but a few observations would be in order.

¹⁸ An Overview of the Challenges Facing the International Court of Justice in the 21st Century at <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1159&context=annsurvey> last accessed on 11th May 2020.

¹⁹ “No member of the Court may not exercise any political or administrative function, or engage in any other occupation of a professional nature” (Emphasis added.)

At one stage, the African Union requested that the U.N. Security Council defer the cases against Kenya’s president Uhuru Kenyatta and his deputy, William Ruto, for one year to allow them to deal with the aftermath of an attack by Al Qaeda-linked Somali militants. But the 15-member Security Council was split - seven members, including Russia and China, voted in favor, and eight abstained, including France, the United States and Britain. Resolutions need nine votes and no vetoes to pass. Britain, France, the United States, China and Russia hold veto powers.²⁰

ICC itself admitted “political interference” as the reason for terminating the Kenyan cases. It did not say where the interference came from. The US embassy and various European missions in Nairobi had, over the years, issued statements which make them suspect. The US was a rather queer participant because it was not then or at any stage bound by the Rome Statute. Therefore, it was playing Unoka, *who* Chinua Achebe refers to in *Things Fall Apart* as, “the outsider who wept louder than the bereaved”.

Moreno Ocampo²¹, the ICC Prosecutor who carried out the investigations and partly prosecuted the Kenyan cases, came highly recommended, having gained his fame in high-profile cases in Argentina. This former Transparency International board member had earned coveted honours - being on lists like “Brave Thinkers” and “100 Top Global Thinkers” but his 9-year tenure at the ICC was, in this author's view, an unmitigated disaster. The Court itself criticised his shameless attempt to rely on material which he refused to disclose to the accused in the Thomas Lubanga. He then deliberately or otherwise botched the Kenyan cases by shoddy investigations.

In addition, ICC has faced some rather pedestrian challenges. Sample this:

²⁰<https://www.reuters.com/article/us-kenya-icc-un/africa-fails-to-get-kenya-icc-trials-deferred-at-united-nations-idUSBRE9AE0S420131115> last accessed 11th May 2020.

²¹<https://getnicklaw.com/our-team/luis-moreno-ocampo/> last accessed on 11th May 2020.

“Unqualified judges, in some cases with no expertise on international law and in one case no legal qualifications, have been appointed to key positions because of highly politicised voting systems and a lack of transparency...To elect a person to the ICC who doesn't even have a law degree for example, is a most unfortunate precedent to have set.”²² (Emphasis added.)

How did the premier international civil and criminal courts both end up being managed like the judiciary of a banana republic? Few national courts in the world today are that depraved even in police states and military dictatorships. *How did the ICJ and ICC get here?* The answer is contained above and underlined, for ease of reference.

There is little motivation to create a new “world investment” court today. States, particularly LCDs, are not enthusiastic to sign a new treaty to create such a court given their experiences with ICC, ICJ and ICSID.

The proposed European Union and US Transatlantic Trade and Investment Partnership (TTIP) proposal is worth commenting on. According to Stephen M. Schwebel, an international arbitrator and former ICJ President,

“The EU now proposes to replace investor-State arbitration by an Investment Court System, a Tribunal of the First Instance composed of 15 judges appointed jointly by the EU and the US, of which five would be EU nationals, five US nationals and five nationals of third countries. Three judges would be randomly assigned to each case; the disputing parties would not choose the particular judges...the Commission’s objective is to replace all investment dispute settlement mechanisms with a permanent International Investment Court and an Appeals Tribunal.”²³

²² <https://www.google.com/amp/s/amp.theguardian.com/law/2010/sep/08/law-international-court-justice-legal> last accessed on 11th May 2020.

²³ <http://isdsblog.com/2016/05/30/former-icj-president-criticizes-ec-investment-court-proposal/> last accessed on 11th May 2020.

The appointment of the judges of the court of first instance is like that of the Iran-US Claims Tribunal, which has 9 members of whom the 3 are Iranian, 3 US nationals and 3 from other states. Under TTIP, the investors would have no role to play either in the initial recruitment of the judges or the subsequent appointment of the panel to hear a specific case. Even the states would not have that option, but they do not need it since they will have played the greater role in the appointment of the entire court!

Furthermore, the fact that a panel of 3 would be chosen at random means that there is a possibility of two or all three members of any panel coming either from EU or from US appointees thus undermining confidence in the system. According to Schwebel in the paper quoted above:

“the fundamental objection to the EU Commission’s proposal to replace investor/state arbitration with an investment court is that it would replace the current system, which on any objective analysis works reasonably well, with a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing”

The possibility of states populating the court with pro-state arbitrators to the detriment of the investors coupled with the fact that the more powerful states carry more weight in the appointment of the judges mean that the appointment of judges might be an exercise of horse trading.

Judge Schwebel²⁴, is critical of the EU's TTIP, and suggests that the current ISDS is fairer because “(T)he costs of investor/state arbitration are borne by the parties, but under the EU’s approach they would apparently be borne by States alone.” That might or might not be correct or unique to TTIP as the establishment and maintenance costs of ICSID as well as the regional or special national courts are funded by states. The same would apply to an international

24 The Proposals of the European Commission for Investment Protection and an Investment Court System on 17th May 2016. Available at <http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf> last accessed 11th May 2020.

investment arbitration court, just as happens now with ICJ and ICC. The representation and witness costs as well as disbursements would be borne by parties themselves and awarded to the prevailing party in the end even though this practice is not universal. In fact, award of costs to the prevailing party might be more assured under some special national courts depending on the legal tradition and the applicable municipal law of the subject state. Therefore, minimal weight should be given to Schwebel's views above.

The Permanent Court of Arbitration (PCA) is not a court but an arbitral institution, which primarily applies the UNCITRAL arbitration rules. Since inception of PCA, it had as at November 2018 been asked to appoint arbitrators in 725 cases, of which 170 were ISDS matters. That year it administered 170 disputes and had 3-inter-state, 95 investor-state and 50 contract-based arbitrations pending.

Regional courts fall under the above broad heading. Sibling rivalry, mistrust, interests and politics undermine such courts. A case study would be in order here to demonstrate the hard choices which states have to make. Tanzania, Uganda and the joint venture oil companies²⁵, after months of negotiations, agreed that any disputes arising from contracts on the 24-inch (61 cm) wide 1,445 km export pipeline from Ugandan oilfields to the Tanzanian port of Tanga would be arbitrated “in London”²⁶, which probably means LCIA.

They would be paying three times - they fund the idle capacity at EACJ and Southern African Development Community (SADC) and would then have to pay for arbitrations in London. Yet the states are bound to later complain about cost should arbitration become necessary.

25 Total E&P, Tullow Oil Uganda and China National Offshore Oil Company

26 [https://www.iarbafrica.com/en/news-list/17-news/952-london-to-arbitrate-ea-oil-pipeline-](https://www.iarbafrica.com/en/news-list/17-news/952-london-to-arbitrate-ea-oil-pipeline-projectrows?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019)

[projectrows?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019](https://www.iarbafrica.com/en/news-list/17-news/952-london-to-arbitrate-ea-oil-pipeline-projectrows?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019) last accessed on 11th May 2020.

Tanzania had initially said it would host the arbitration, but the other partners preferred a neutral country. Both Uganda and Tanzania are members of the East African Community and so the EACJ, which has mandate to arbitrate such disputes and is in Tanzania, would have been the most logical choice. Both Tanzania and Uganda have, like other member states, donated judges to the court. The judges have, in addition to experience, been trained as professional arbitrators – at public expense, of course.

Other options were available nearby at Kigali International Arbitration Centre in Rwanda and Nairobi Centre for International Arbitration in Kenya. No visas would be required for East African witnesses or counsel. Both centres have lists of international arbitrators drawn from practitioners all over the world and allow parties to come with arbitrators of their own choice.

Rwanda is not involved in the pipeline at all and so it will be considered first. It has had problems with Uganda the last couple of years leading to closure of the border²⁷ in 2019. Case closed. Kenya is still unhappy with Uganda's decision to do the pipeline deal with Tanzania instead of Kenya. Indeed, Kenya's president was slighted in a summit of regional presidents as he had not been informed of Uganda's final choice in good time. May be Uganda and Tanzania could not trust Kenya as a forum for their dispute. They certainly considered that their best interests would be secured by arbitrating in London.

Africa's choice of foreign arbitration centres and arbitrators is traditionally blamed on “poor advice” and ignorance with respect to the available options. Such arguments are not only self-serving but incorrect. At least in the case of the Uganda-Tanzania pipeline example above, the states made conscious and informed decisions after considering the various options and interests.

Ascribing ignorance to states, which are legally advised essentially by their

²⁷ <https://www.bbc.com/news/world-africa-47495476> last accessed on 11th May 2020.

respective learned attorneys general is unfair, patronising and simplistic. This author cannot accept that the states will be considered knowledgeable only when they make certain choices. He is inclined to give the devil his due: African states' consistent choice of foreign arbitration centres is deliberate and thoroughly informed. That is not to say that the behavior is rational or unchangeable.

The OHADA model, which involves, first and foremost, uniform arbitration laws and then creation of a regional court replacing all national courts with respect to certain disputes, requires a lot of political goodwill. It has a lot of potential for Africa especially following the formation of the Africa Arbitration Association under the auspices of the African Union. However, the fact that majority of the member states are capital receiving states will be a major challenge, which might not be resolved by the inclusion of non-Africans in the panel of arbitrators. It is doubtful that African Union would restrain itself from interfering with AFAA the way it attempted to intervene with block boycott of the ICC following the Kenyan cases as discussed above.

A Reformed ICSID

The ICSID Convention, which entered into force in 1966, was meant to establish institutional and legal framework for foreign investment dispute settlement by providing an independent, depoliticised forum for arbitration, conciliation and fact-finding. While signing the ICSID Convention in April 2019, Djibouti's Minister of Economy & Finance in Charge of Industry, Commerce & Tourism, Ilyas Moussa Dawaleh said, "(J)oining ICSID is part of a series of actions that the government of Djibouti has undertaken to transform the business and investment environment in Djibouti, create employment opportunities for youth and women, and to boost economic growth in the country."²⁸ The signing brings to 163 the number of states which have signed the convention, which has

28https://www.iarbafrica.com/en/news-list/17-news/950-djibouti-signs-icsid-convention-to-encourage-investment?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly last accessed on 11th May 2020.

been ratified by 154 states.

Given the criticisms which have been leveled against ISDS generally and ICSID in particular, the fact that any state signed the Convention in 2019 is an indication that states still have a substantial residual level of confidence in ICSID and/or that they are desperate to attract foreign investment. Djibouti's unique circumstances have been discussed elsewhere²⁹.

During ICSID's relatively long history, from 1966 to 2006, no state which was bound by the ICSID Convention denounced the treaty. For forty years there were no exits, only entries. To-date, only 3 states which have been bound by the ICSID have denounced the Convention, i.e. Bolivia from 3rd November 2007, Ecuador from 7th January 2010 and Venezuela from 25th July 2012 – the last exit was 7 years ago. That compares favourably with 13, the number of states which have become bound by the Convention since 2007 – Canada, Mexico, Sao and Principe, Kosovo, Iraq, Haiti, Cabo Verde, Montenegro, Nauru, Qatar, San Marino, South Sudan and Serbia. The entries are more than 4 times the exits. The ratio is more impressive when one considers states like Djibouti which have since 2007 indicated their intentions, even though they are not yet bound by the ICSID Convention³⁰. In comparison, the New York Convention, which is older than the ICSID Convention by eight years and has more significant impact on states, had as at 20th April 2019 159 contracting states, which are bound by that treaty³¹.

Judge Schwebel opines that ICSID, having successfully administered a very large number of cases, is now facing criticism mounted against it and investor/state arbitration more broadly by “uninformed or misinformed critics have made so much uninformed and misinformed noise”. That comment calls

29 <http://arbitrationblog.kluwerarbitration.com/2019/05/30/djibouti-signs-the-icsid-convention-the-big-question-is-why/> last accessed on 11th May 2020.

30 <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> last accessed on 11th May 2020.

31 <http://www.newyorkconvention.org/countries> last accessed on 11th May 2020.

for verification of the credentials of some of the ISDS critics cited above.

Gus van Harten is a law professor at Osgoode Hall Law School in Toronto, Canada, and specialises in investment arbitration. He has “studied the field closely since foreign investor lawsuits against countries began to explode in the late 1990s... (and) received a PhD in the subject from the London School of Economics and Political Science in the mid-2000s.”³²

What about Philippe Sands³³? After completing his postgraduate studies at Cambridge, he spent a year as a visiting scholar at Harvard Law School. He was appointed Queen's Counsel in 2003. He is a British and French lawyer at Matric Chamber and Professor of Laws and Director of the Centre on International Courts and Tribunals at the University of London. A specialist in international law, he appears as counsel and advocate before many international courts and tribunals, including the ICJ, International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights and the International Criminal Court. He also serves on the panel of arbitrators at the ICSID and the Court of Arbitration for Sport. He is the author of sixteen books on international law. His book *East West Street: On the Origins of Genocide and Crimes against Humanity* (2016) has been awarded numerous prizes.

Schwebel has also described the ISDS criticisms as being “more colorful than they are cogent” and addressed three of the criticisms against ICSID in a simple and factual manner. Firstly, on the claim that tribunals are biased toward investors, he draws from Susan Franck’s research, which concluded that, of 144 publicly available awards as of January 2012, states won 87 cases (about 60%) when arbitrators resolved a dispute arising under a treaty, while investors won 57 (40%) and that, even when investors were awarded damages, they won significantly less than the average amount claim of USD 343m, and that about a quarter of investment claims were dismissed at the jurisdictional stage. His

32 <https://gusvanharten.wordpress.com> last accessed on 11th May 2020.

33 <https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/Philippe-Sands-QC-2.pdf> last accessed 11th May 2020.

conclusion is that the findings hardly suggest bias against states.

At face value, that research shows, that the arbitration tribunals are unbiased. Yet it could be that, for example, states could win 75, 80 or 90% of the time given more independent tribunals. Conversely, a state success rate of only 20 or 30% would not necessarily mean that the tribunals were either biased against investors. Such statistics do not prove anything either way and are unhelpful in the assessment of tribunals' independence and impartiality. The relatively high dismissal rate on jurisdiction and low success rate on merits in spite of the best legal and expert advice which investors can buy speaks more about the quality of some of the cases which are mounted against states than about the independence and impartiality of the arbitral tribunals.

On the alleged asymmetry which gives investors' freedom to bring claims against states, while states cannot bring claims against investors, Judge Schwebel's response is that states can, and have, brought counterclaims against investors under ICSID and UNCITRAL. Fair enough.

Regarding the often-conflicting arbitral awards, he readily admits the charge and says that such cannot be unexpected in the decentralized, horizontal nature of the ISDS system. He adds that conflicting interpretations of similar provisions in BITs often arise because tribunals are responding to differences in the facts of each case and that even in the relatively centralized, hierarchical judicial systems of a state, conflicts among courts are common, aptly demonstrated by the inconsistencies between state and federal jurisprudence in the US.

As for the noise makers, this author is proud to be one of them and solemnly pledges to pitch his voice several decibels higher to keep alive the debate on the small matter of the ICJ judges admitted willful violation of an express statutory provision. Even if institutional failures in ICJ and the UN stop the matter from being addressed, he wants his solitary noise to be on record. He would rather be ignorant (i.e. "uninformed and misinformed "as Schwebel would say) since that could be cured more easily than arrogance.

According to Edmund Northcott and Acacia Hosking³⁴, the changes in the works at ICSID are limited to electronic filing, disclosures of third party funding, requirement of parties consent for publication of awards, security for costs, bifurcation, requirement for parties to challenge the arbitrator within 20 days of the basis of challenge arising instead of “promptly”, new time lines for selection of arbitrators and for publication of awards etc. Those changes would enhance ICSID's operations. However, they would have minimal impact on costs and duration of proceedings and no effect whatsoever on the remaining for criticisms, i.e. inconsistent and “incorrect “decisions”, incoherence and the real or perceived lack of diversity, independence, impartiality and integrity.

Amendment of the Convention itself would be quite cumbersome, if not impossible. Article 65 stipulates that any contracting state may propose amendment of this Convention by sending a proposed amendment to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered. The proposal would then be transmitted to all the members of the Administrative Council, which, according to Article 66, shall decide by a majority of two-thirds of its members. The proposal shall then be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depository of this Convention of a notification to contracting states that “all Contracting States have ratified, accepted or approved the amendment”.

Thus, any amendment must be ratified by all the Contracting states to be effective. Getting all the contracting states to ratify an amendment would probably take decades. Therefore, reforming ICSID through mandatory or optional arbitration rules is a more practical solution. Will ICSID make the necessary reforms or perpetuate the *status quo* by running with the hares and hunting with the hounds through cosmetic changes?

³⁴10 *Things you need to know about the new draft ICSID Rules* <https://www.kwm.com/en/be/knowledge/insights/10-things-you-need-to-know-about-the-new-draft-icsid-rules-20181119> last accessed on 11th May 2020.

International Arbitral Institutions

The challenges and practical difficulties with each of the above options opens a unique opportunity for innovative and reputable arbitral institutions in international commercial arbitration to diversify to investment arbitration through rules which address the various criticisms. While a proven track record would be advantageous, the opportunity is open to new institutions also. There may even be room for like-minded institutions to jointly developing the rules but administering the arbitrations independently.

There are several categories of arbitral institutions: government-sponsored, professional associations, independent international bodies and completely privately owned institutions. Each category has its strength and weaknesses, which define its suitability for this role. CIArb, for instance, specialises in arbitrator training, standards, appointments and *ad hoc* arbitrations. It seems averse to administered arbitration, which is much more popular in ISDS.

The International Bar Association has developed various guidelines for application in domestic and international arbitrations. Since arbitrator integrity is a major complaint, then ISDS reforms must embrace the CIArb and IBA expertise in that area.

Empirical Evaluation of ISDS Options

This section comes with a health warning. The arguments made above are not dependent on this section. Therefore, the paper remains valid if the analysis in this section turns out to be incorrect.

The following table is an attempt to introduce a level of objectivity into the debate. It is work in progress and reflects the author's interim thoughts as at 31st December 2019. Even the weights (0-5 and 0-10) and scores are provisional. It could even be that he has left out some of the issues which should be scored. This paper is complete even without this section.

Matrix of ISDS Options

	Special Nat. Courts	Int'l Investment Court	Rfmd Arbitral Institutions	Reformed ICSID
Absence of bias (0-10)	4	7	7	9
Advantage* of parties' choice of tribunal (0-10)	0	0	10	10
Costs of proceedings (0-10)	10	5	0	5
Absence of inconsistency, incoherence and incorrect decisions (0-10)	10	8	6	8
Taking too long (0-5)	4	5	3	3
Lack of diversity (0-5)	0	3	5	5
Confidentiality (0-5)	0	2	5	0
Total Scores	28	30	36	40
Ranking	4	3	2	1

* The right of parties to take part in the appointment of the tribunal is here taken as an advantage, but that it can also be considered a disadvantage is acknowledged.

A reformed ICSID emerges as the most viable option but, should it not rise to the occasion, while then the next contender is reformed arbitral institutions. The relatively low score of an international investment court is unexpected. The above approach might give the wrong impression that the choice is between one or two options versus all the others. In reality, all of the options will be attempted simultaneously, competing for space and disputes until one or two fora takes clear dominance probably twenty years down the line.

Obviously, an analysis of the situation a completely different matrix, weights and assumptions would give different scores. However, the author believes that the ranking is likely to remain the same considering the arguments found elsewhere in this paper.

Timelines

The ideal time for ISDS reforms was 20 years ago. The next ideal time was yesterday. The third is today. Obviously, how soon they will take place depends much of the option or options which are chosen. Some regional and special national courts are up and *walking* already, while creation of more is a copy and paste affair, which can be done in a hurry. The other options are inherently slow due to the numbers of players involved.

The Chartered Institute of Arbitrators (CI Arb) held a panel discussion³⁵ in London on 13th February 2019 under the telling theme, “Evolution, Not Revolution: CI Arb’s Work on Investor State Dispute Settlement (ISDS) Reform at UNCITRAL Working Group III”. It recognised the need for reforms to improve the consistency, clarity and predictability. The participants cautioned that reforms should be carried out an incremental way. They advocated evolution, which, at least in the strictly scientific sense, has no agenda, time frame or pre-determined outcome.

Evolution has evidently failed to recognise, let alone address, these complaints for decades.

It has its place and has in fact been going on silently all the while. One just has to consider the changes in arbitration jurisprudence, BIT content, confidentiality in investment arbitrations, the so- called Americanisation of arbitration and the gender diversity to appreciate the role which evolution has played.

³⁵ <https://www.ciarb.org/news/evolution-not-revolution-ciarb-sets-out-its-approach-to-the-question-of-isds-reform/> last accessed on 11th May 2020.

However, the pace in ISDS reforms must be determined by the issues which are currently at stake. The demonstrated paucity in ethics among some arbitrators and lack of confidence in the entire ISDS system cannot be left to evolutionary forces. You can't cross a river in installments.

Continued resistance to reforms could lead to the next stage: many states' refusal to take part in ISDS or to honour awards. That would put ISDS, states, investors, arbitral institutions and arbitrators in a most awkward position and pressurise the various players to cooperate in accelerating the ISDS reforms. African states' threat, whether justified or not, to quit the Rome Statute *en mass* shows that the clamour for ISDS regimes could turn nasty if not addressed in a timely, fair and orderly manner.

Epilogue

To put things in perspective: would a national judiciary, faced with such flaws, survive? If not, then ISDS must not be allowed to survive in its current state. A legal, political, economic or even mechanical system which is inherently flawed is costly to maintain in the short run and must be replaced sooner than later.

Finally, the pro- and anti- arbitration pendulum moves all the time, but the metal ball never stops or spins out of control. Despite all the criticism, many parties, even when they have other domestic and international options, still prefer arbitration to litigation. Internationally, the practical choices are fewer: they are between arbitration and arbitration.

Current Problems of the Investor-State Dispute Settlement Mechanism: Proposals for Future Reforms

By: W A Mutubwa, Hector Charles, Cynthia Mwihaki, Nura Adan Guyo, Lana Mohamed, Tunu Kache & Abdurrahman Mohamed

1. Introduction

Traditionally, investor-state arbitration (ISA) has been perceived as a system to solve international investment disputes that entails numerous advantages. These include; the depolarization of the dispute - a “small” investor could bring a claim against a powerful state, being heard in a neutral forum with a previously established framework of procedural rules, the neutrality and independence of a qualified arbitrators knowing about the claim, a cheaper, flexible and expeditious way of settling an investment dispute, the perception for investors of a greater control and security over the process than litigating before the local courts as well as major chances that the award would be enforceable against the host state.¹ In other words, investor-state arbitration was perceived with a sense of legitimacy within the previously existing dispute settlement landscape.

However, the day to day of international investment arbitration has shown several disadvantages of the system that are generating the mistrust of the parties, bringing a sense of uncertainty and inefficiency towards the system. Investment arbitration has several unique features such as: the long-term

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¹ For examples of advantages of Arbitration over litigation see, <https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation>. Accessed on 13th June 2020.

relationship that normally exist between an investor and a host state, the international law and international treaties will determine the applicable law to an investment dispute or the investor will be challenging -in a long and costly process- acts or measures taken by a sovereign state.²

As a result, the following disadvantages of the current practice of international investment arbitration have been perceived: confidentiality of the awards and lack of transparency, huge costs of the process, the expertise of the arbitrators, their independency and impartiality, the lack of a right balance between investors' rights and host state legitimate policy changes, time delay until an arbitral award is rendered and the fact that the award is binding without the possibility of appeal.³

The legitimacy crisis faced by investment arbitration is endangering the ultimate ability of investor-state arbitration to achieve its goals.⁴ Put it in another way, an investment arbitration mechanism without the necessary external legitimation might not be an efficient and effective method to solve an investment dispute between a foreign investor and a host state. In fact, there is also a perception that ISA institutions -ICSID and UNCITRAL for instance- are "*in a state of paralysis and unable to move beyond the status quo*".⁵

2. Current Problems

2.1 Confidentiality and lack of transparency

Confidentiality and transparency have always been linked. In fact, while the former has historically been considered as a reason to choose the arbitration, the

²UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*.

³Marboe, I

(2018)https://www.researchgate.net/publication/325138087_Damages_in_Investor-State_Arbitration_Current_Issues_and_Challenges/citation/download

⁴Shany Y. *Assessing the Effectiveness of International Courts: A Goal-based Approach* (Oxford University Press, 2014).

⁵Trakman E. *Investor State Arbitration or Local Courts*: (Journal of World Trade 46, no. 1, Kluwer Law International BV, the Netherlands, 2012) pg. 120.

lack of transparency during the whole process as well as in the awards, is nowadays one of the major ISA concerns.⁶

Confidentiality seems justifiable in commercial arbitration where private interest and parties were involved. However, in investment arbitration public interest of the host countries are also on the table, so the acceptability and credibility of arbitral awards are elements of major importance.⁷ That is why the lack of transparency and the confidentiality of the awards avoid the development of a coherent and consistent legal doctrine which may increase the efficiency of the tribunal's performance, as well as the quality of its reasoning in the award.⁸ Indeed, if similar cases would be treated alike, the perception of fairness will be promoted enhancing the legitimacy of the system. In addition, a major transparency would decrease the uncertainty faced by both investors and host states by the time to make a decision regarding their investment or the governmental policy respectively.

Consequently, there are those who demand greater transparency *"in knowledge about the existence of arbitral proceedings, a significant number of which take place in secret, openness of hearings and transparency of documentation as well as greater accountability of arbitrators for their decisions"*⁹ and assert that *"without a sense of how the law will be applied -and access to the awards making those determinations- there can be little justified reliance"*.¹⁰

A further concern is that within ICSID arbitration proceedings parties request private hearings and the resulting arbitration awards are normally not

⁶ Michael Nolan (2015) "Challenges to The Credibility of the Investor-State Arbitration System" *American Law Business Review* at p.429.

⁷ Yannaca C. *Transparency and Third Party Participation in Investor-state Dispute Settlement Procedures* (Chapter 1) on *International Investment Law: A Changing Landscape* (OECD 2005) 26-27

⁸ Franck S. *Challenges Facing Investment Disputes*.pg 188.

⁹ Muchlinski P. *The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement*. pg. 8.

¹⁰ Franck S. *Challenges Facing Investment Disputes*.

published unless the disputing parties give their consent, including the involvement of countervailing public interests.¹¹

This “closed doors” focusing of ISA on issues involving public interest, has generated pressure from the public and interest groups that claim for the end of that practice and the publication of the awards.¹² At the end, an investment arbitral awards may have significant outcomes -for instance, in the national budget of a state or on its future performance or investment decisions-, so the public interest in international investment disputes outcomes is totally justified and understandable. This is the explanation of the major transparency requirement, despite the consideration of the publication on the protection of confidential information related to the private business of an investor or to governmental information.¹³

2.2 Costs

Arbitration has generally thought to be a less expensive way to solve disputes than litigating in court. Contrary to those expectations, there are a lot of costs linked to investment arbitration that have proved otherwise.

From one hand, we have the economic costs; in the case that it is concluded that the host state violated any of the treaty provisions, damages ranges from tens of thousands to billions of dollars.¹⁴ There are also costs of the own process, which entails the payment of legal fees, arbitrators’ fees, the costs of experts and/or witnesses if needed and the administration fee of the arbitration center knowing about the dispute.¹⁵ Moreover, this cost is becoming even higher due to the complexity of the investment disputes.¹⁶

¹¹ Trakman E. *Investor State Arbitration or Local Courts*. pg. 101-103

¹² Ibid.

¹³ Ibid.

¹⁴ See note 3 above.

¹⁵ Muchlinski P. *The COMESA Common Investment Area*.Pg 6.

¹⁶ Sauvart P. *The International Investment Law and Policy Regime* Pg. 12.

The social and financial implications for the host country of paying large monetary awards could have disastrous consequences for the country and might lead to hard negotiations regarding debt financing and/or reconstruction.¹⁷

The economic costs can be even greater if we take into account the possibility of the so called “multiple proceeding”, where investors seek relief claiming against its host state in different arbitration proceedings. In addition, this might lead to the existence of parallel proceeding and the eventual possibility of conflicting awards.¹⁸

From the other hand, the arbitration costs involve more than economic ones, such as reputational -the host country’s reputation can be at stake due to the challenge of its regulation policies¹⁹ or time costs -because the proceeding might take several years, affecting both investors and governments.²⁰

These kinds of costs, as said before, affect both foreign investors and host states. The former ones, especially when they are small and medium-sized enterprises, may not have enough resources to litigate due to the time and high legal fees costs.

The later ones, remarkably when they are developing or poor countries which lack the experience to defend themselves properly, might not have enough financial resources to hire an adequate counsel. All this may lead to settlements even when one of the parties potentially could prevail.²¹

¹⁷ Muchlinski P. *The COMESA Common Investment Area*. Pg. 6

¹⁸ Yannaca K. *Improving the System of Investor-State Dispute Settlement* (OECD Working Papers on International Investment, 2006/01, OECD Publishing) 17-18.

¹⁹ Karl P. *The International Investment Law and Policy Regime*.pg 12.

²⁰ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*.pg 4

²¹ Ibid.

2.3 Expertise

Yet another argument against the current arbitral dispute settlement mechanism is the expertise of the arbitrators.²² In the arbitration system, parties are the ones choosing the arbitrators, who tend to be experts in commercial law field but have less or no expertise in the field of public international law. This can lead not to paying the due attention to the eventual public consequences of the award. Thus, one of the criticisms is that investment arbitrators do not take into regard a wide state's policies such as labour, health, environmental, national security or the regulation and protection of the national market. On the contrary, they focus their main attention in interpreting International Investment Agreements (IIA) provisions literally -using the plain word meaning-, with disregard of a major element, which is the public interest in the state's policy.²³

Nonetheless, and given the kind of issues that investment arbitrators have to deal with for instance, deciding about the fairness of an expropriation or nationalization, they should not only be experts in investment and international law, but also be in possession of good judgment skills.²⁴

In the end, the easiest and most effective way to enhance the efficacy and consistency of the international investment law is to assure that people with proved knowledge and expertise in the field are the members of the tribunal.²⁵

2.4 Impartiality and independency

There are also concerns regarding the impartiality and independency of ISA arbitrators. In respect to their independence, there is a perception that they might not be neutral in their adjudications, giving rise to a number of doubts on

²² See note 6 above.

²³ Trakman E. *Investor State Arbitration or Local Courts*. pg. 102.

²⁴ Ibid.

²⁵ Appleton B. *The Song is Over: Why it's Time to Stop Talking About an International Investment Arbitration Appellate Body*, in *Alternatives to Investor-State Arbitration in a Multipolar World* (ASIL Proceedings, 2013) 26.

the parties regarding the integrity and real fairness of the arbitration process.²⁶ As a matter of example, there are not few cases in which the same arbitrator has served as arbitrator and as a counsel of a corporation in two different cases involving the same company, or where the arbitrator has purposely delayed the process to favor one of the parties.²⁷

It seems clear that in those cases the existence of potential conflict of interest is hardly deniable, and that is why there are those who stood up for the creation of a “code of ethics for arbitrators” that could serve to avoid those undesired cases of conflicts of interest.²⁸ For the same reason, there are those who demanded the establishment of stricter rules to regulate the “appointment and eligibility” of international investment arbitrators.²⁹ In the end, independence is thought to be an indicator of procedural fairness and proper decision-making process, which reinforces the legitimacy of the system.³⁰

Regarding the independency of arbitrators, it is generally thought that since international investment cases involve huge amounts of money, they as well attract political interests that might lead to partiality.³¹ The process of appointment of arbitrators generates mistrust in this regard. The selection processes of the arbitrators. It should be remembered that two of the arbitral members are appointed by the parties to a dispute while the third, is appointed by the two arbitrators, which makes difficult to vouch for their independence and impartiality; and the possible interference of political bodies in their duty.³²

²⁶ See note 6 above.

²⁷ Franck S. *Challenges Facing Investment Disputes*.pg 187.

²⁸ Karl P. *The International Investment Law and Policy Regime*.pg 8-9.

²⁹ Muchlinski P. *The COMESA Common Investment Area*.pg 8.

³⁰ Shany Y. *Assessing the Effectiveness of International Courts: A Goal-based Approach* (Oxford University Press, 2014) 65.

³¹ Horn N. *Arbitration and the Protection of Foreign Investment*.pg 28.

³² Mackenzie, Ruth and Sands, Philippe. *International Courts and Tribunals and the Independence of the International Judge* (Harvard International Law Journal, Volume 44, Number 1, winter 2003) 272.

In fact, it is not uncommon finding an arbitrator that has acted as a counsel for the conflicting parties -either for investors or for states- in other cases.³³

Some measures have been proposed in order to ensure that there are no extraneous factors influencing arbitrators' decision-making process. Some of those measures are as follows: the creation of standing panels of arbitrators in order to avoid doubts in regard to their selection process, widening the interpretation faculties of the parties with respect to treaty provisions when they have to decide about an ongoing investment dispute or/and regulate specifically under which parameters or criteria host states will have the right to make policy changes in the public and general interest, even if it entails a damage or imposes some limits to international foreign investors' investments.³⁴

2.5 Right Balance between investors' rights and host states' legitimate policy changes

In the international investment sphere, it is not clear whether investment treaties exist to provide protection to investors' investments or to encourage the public welfare through the attraction of foreign investment.³⁵

While commentators do not agree on the ultimate reason, most of them agree about the fact that arbitral tribunals have not been extremely successful by the time to find a right balance between the investors' interests and the public interests of the host states.³⁶ As a consequence, Investor-State Dispute Settlement (ISDS) mechanism is generating the well-known "chilling effect" on governments, meaning that they are refraining from taking numerous regulatory measures for the benefit of the general interest because of the potential threat of a claim before an international arbitral tribunal.³⁷ That is why

³³ Gaukrodger D and Gordon K. *Investor-State Dispute Settlement*.pg 44 and 94.

³⁴ Karl P. *The International Investment Law and Policy Regime* pg. 9.

³⁵ Anthea R. *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System* (The American Journal of International Law, Vol. 107:45, 2013) 51

³⁶ European Parliament, *Investor-State Dispute Settlement (ISDS) Provisions*.pg 73.

³⁷ European Parliament, *Investor-State Dispute Settlement (ISDS) Provisions* pg. 74.

International Investment Agreements (IIA) are providing clauses that allow host states wide regulation capability in issues connected to sustainable development objectives such as the preservation of natural resources or the protection of humans' and animals' life and health.³⁸

Moreover, the actual system is thought to generate a breach of the existing links between investors and host states, which is exactly the opposite of what both parties are looking for. While states are looking to attract and promote foreign direct investment (FDI) as a way to encourage their country's economic development, investors seek good returns on their international investment that may require more probably, numerous years of uninterrupted operations.³⁹

In short, ISDS mechanism should provide an adequate balance between investors' and host states' rights and obligations. It should provide investors with the necessary substantive and procedural rights to overcome their concerns about local courts, but it should also make possible for host state the adoption of legitimate policy decision on the benefit of public interest.⁴⁰

2.6 Time

Another major concern is that arbitration was originally designed to be an expedited method to solve a dispute and lately has proven to be otherwise.⁴¹ The average time to reach a final award and its execution has risen significantly. Parties use different cunning resources to that extent, ranging from recourse to provisional measures to the initiation of an annulment procedure. So far, the average duration for a case to be finally settled by a final award varies from three to four years, without making any difference from litigating before the

³⁸ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*.pg 112.

³⁹ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*. pg. 19.

⁴⁰ Muchlinski P. *The COMESA Common Investment Area*. pg. 11.

⁴¹ Particularly when litigation lawyers transplant their litigation discovery processes into the arbitral process. See note 3 above.

national courts of the host state.⁴² There are also those who establish the average of ages even in a higher threshold, ranging between seven and nine years.⁴³

2.7 Arbitral awards are binding without the existence of an appeal body

Without the possibility to appeal a binding final award, there are only two ways of challenging an arbitral award available to the parties.⁴⁴ The first and main one is the procedure to review the final arbitral award. Its main goal is to set aside the award in the case that new facts have emerged after the award was rendered and are of such nature that the final award could have been to the contrary.⁴⁵

The second one is the annulment procedure, which is an option available only in a few cases where errors in the process or the due omission of reasoning occur.⁴⁶ In these cases, if the arbitral tribunal declares the nullity of the award, the original decision will be declared invalid. However, there does not exist the possibility of modifying the arbitration award on the merits.⁴⁷ That is to say, in the case that there is an error in the application of law by the arbitral tribunal, that error could not be remedied.⁴⁸

An appeal mechanism is the only way to achieve the modification of an award based on the same facts that were known by the arbitral tribunal. In addition, an appellate body cannot only change the first tribunal decision but also require that tribunal to amend its own mistakes.⁴⁹ The fact that the resulting arbitral award is binding without the possibility of appeal has commonly been seen as

⁴²UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*. pg. 18

⁴³ Lvesque C. *Encouraging Greater Use of Alternative Dispute Resolution in Investor-State Dispute Settlement: Opportunities and Challenges*.

⁴⁴ Yannaca K. *Improving the System of Investor-State Dispute Settlement*. Pg. 4-7.

⁴⁵ Article 34 of the UNCITRAL Model Arbitration Law

https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf. Accessed on 13th June 2020.

⁴⁶ E. g Article 52 Of the ICSID Convention.

⁴⁷ Trakman E. *Investor State Arbitration or Local Court*. pg. 101.

⁴⁸ Rachel. *Recent Trends in Investor-State Dispute Settlement* pg. 131.

⁴⁹ Yannaca K. *Improving the System of Investor-State Dispute Settlement*. Pg. 6-8.

a positive aspect of the arbitration mechanism over the traditional judicial settlement but its creation is becoming these days an element of growing importance.⁵⁰

Unreasoned and inconsistent awards can create confusion on both sides. First, they may make it difficult for the parties to understand the scope and the extent of investor's protection under a treaty as well as the circumstances that need to concur so the host state is found liable under an IIA. Secondly, they could be questioned by the parties because the awards might be perceived as unfair and lacking the required reasoning, especially as far as cost-related measures and costs shifts is concerned and thirdly, parties may not be able to negotiate effectively because they lack the necessary criteria, rules or precedent system to make an accurate cost-benefits calculus.⁵¹

3. Conclusion

Investment arbitration comprises of substantial public interests e.g. environmental standards and protections, public health regulation, labour standards or nuclear power related measures. The current state of affairs, unfortunately encourages inconsistent, contradictory, less well reasoned and mistaken decisions are therefore difficultly justifiable.

⁵⁰ European Parliament, Investor-State Dispute Settlement (ISDS) Provision pg. 64.

⁵¹ Franck & Susan. *Challenges Facing Investment Disputes*.pg 190.

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Current Problems of the Investor-State Dispute Settlement Mechanism: Proposals for Future Reforms: (2020) 8(2) *Alternative Dispute Resolution*
W A Mutubwa, Hector Charles, Cynthia Mwihaki,
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An Uncertain Future: The Relationship Between Arbitral Tribunals and Courts in Kenya

*By: Kethi D. Kilonzo**

Abstract

Section 10 of the Arbitration Act limits the intervention of the courts in matters governed by the Act. Often, this does not stop parties, who agreed to arbitrate their disputes, from seeking the intervention of the courts when they are dissatisfied with the results of the arbitral process. Protracted legal battles over the setting aside, recognition and enforcement of arbitral awards are an anathema to one of the key principles of arbitration – speedy resolution of commercial disputes. With courts expanding, through judicial interpretation, the parameters within which a party can move to the Court of Appeal, and ultimately to the Supreme Court, from a decision of the High Court under Section 35 of the Arbitration Act, the limits of Section 10 are likely to be stretched into territories that may render arbitral practice in Kenya unpredictable as well as unattractive. The case for law reform has been made, and it is necessary, to redefine the relationship between arbitral tribunals and the courts, to protect the arbitral process from judicial overreach and parties in arbitral proceedings from glaring unfairness.

1. Limited court intervention in arbitral matters is the fruit of party autonomy

A party is the best custodian and protector of its own rights. It is also the best determiner of the choice of forum to access justice. By agreeing to private resolution of disputes, a party also agrees to limit its access to the courts. Such a party cannot turn around to claim its contractual choice of an alternative dispute resolution forum was a fetter to its access to justice.¹ A party that chooses arbitration does not have a right to a “correct” decision from the arbitral

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¹ Tumaini Transport Services Limited vs Tata Chemicals Magadi Limited, (2017) eKLR.

tribunal that can be vindicated by the courts.² A party only has a right to a decision that is within the ambit of its consent to have any dispute arbitrated and that is arrived at following a fair process. When a party agrees to arbitration, it buys the right to get the wrong answer.³

The courts have a fourfold role in the arbitral process: to provide judicial assistance to the arbitral tribunals and the parties in the course of a reference, to prevent a party who has agreed to arbitrate from pursuing his claim by litigation, to exercise powers of review of arbitral awards in defined conditions and to provide the necessary machinery for the enforcement of arbitral awards.⁴ In Kenya, the limits of the court's intervention in the arbitral process are set out in the Arbitration Act. For instance: a party can move the High Court for interim measures of protection pending or during an arbitration;⁵ the High Court can on the application of a party, stay court proceedings and refer the matter to arbitration if the parties, in their agreement, opted for arbitration;⁶ and, it can give recognition and enforcement to arbitral awards.⁷ Parliament's primary constitutional mandate is the making of laws. Those laws set the ultimate directions of all activities in a state and the actions of all persons. The function of the court is to test ordinary legislation against the Constitution and to interpret and apply it where there is no conflict.⁸

² AKN and another vs ALC and other appeals, (2015) SGCA 18.

³ Ibid.

⁴ Roy Goode, "Arbitration – Should Courts Get Involved", *Judicial Studies Institute Journal*, 2002.

⁵ Section 7 of the Arbitration Act.

⁶ Section 6 of the Arbitration Act.

⁷ Section 36 of the Arbitration Act.

⁸ Law Society of Kenya vs The Attorney General and the Central Organization of Trade Unions, Supreme Court of Kenya, Petition No. 4 of 2019.

2. Who will define “unfairness” in arbitral proceedings - the Superior Courts or Parliament?

In *Nyutu Agrovet Limited vs Airtel Networks Limited*⁹, faced with the questions whether Sections 10 and 35 of the Arbitration Act¹⁰ were unconstitutional, the Supreme Court moved cautiously, admirably resisting the temptation to stretch its judicial powers into the legislative realm. Recognizing the boundaries of its jurisdiction, as well as the need for limited appellate reviews in exceptional circumstances from decisions of the High Court given under Section 35 of the Arbitration Act, the Supreme Court advised Parliament to cautiously craft and legislate the grounds upon which a party can move, with leave, to the Court of Appeal from a decision of the High Court. This decision was timely, coming at time when there was increased frustration and confusion from the conflicting decisions by the Court of Appeal on a party’s right to appeal if dissatisfied with the decision of the High Court under Section 35 of the Arbitration Act.

In 2006, in *Kenya Shell Limited vs Kobil Petroleum Limited*¹¹, the Appellant filed an application for leave to appeal to the Court of Appeal from a decision of the High Court rejecting its application to set aside an arbitral award under Section 35 of the Arbitration Act. The Court of Appeal decided that Section 35 of the Arbitration Act did not take away the jurisdiction of the Court of Appeal to grant a party leave to appeal from a decision given by the High Court.

In 2010, in *Safaricom Limited vs Ocean View Beach Hotel Limited*¹², the Applicant applied to the Court of Appeal for interim relief under Section 7 of the Arbitration Act¹³ and Rule 5 (2) (b) of the Court of Appeal Rules. The dispute between the parties arose from an Agreement that had an arbitration clause.

⁹ (2019) eKLR.

¹⁰ Section 10 of the Arbitration Act provides that courts should not intervene in matters governed by the Act except where provided.

Section 35 of the Arbitration Act provides the grounds upon which an application to set aside an arbitral award may be made to the High Court.

¹¹ Civil Appeal No. 57 of 2006.

¹² Civil Application No. Nai 327 of 2009.

¹³ Section 7 (1) of the Arbitration Act gives a right to a party to an arbitration agreement to request for interim measures of protection from the High Court before or during arbitral proceedings.

The High Court had dismissed a similar application made by the Applicant. At the time the matter was pending before the High Court and the Court of Appeal, the dispute had not been referred to arbitration. The Court of Appeal decided that there was no right of appeal from a decision of the High Court made under Section 7 of the Arbitration Act. Nonetheless, even in the absence of a statutory mechanism available to the Applicant for appellate review, the Court of Appeal decided that the extraordinary circumstances of the matter dictated intervention. The Court of Appeal, as the final court¹⁴, had residual or inherent jurisdiction to intervene as there was a miscarriage of justice. The jurisdiction to exercise this power was not derived from statute or rule of law but from the very nature of the Court of Appeal as a superior court of law. Such a power was intrinsic in a superior court; it was its very lifeblood and essence. The High Court had exceeded its jurisdiction, and usurped the jurisdiction reserved for the arbitrator, and the Court of Appeal had to step in to correct this injustice as the final court.

In 2012, in *Nyutu Agrovet Limited vs Airtel Networks Limited*¹⁵, five justices of the Court of Appeal would differ with the decision of *Kenya Shell Limited vs Kobil Petroleum Limited*¹⁶, setting the backdrop of a fiercely argued appeal at the Supreme Court. The Court of Appeal struck out the Appellant's appeal from a decision of the High Court given under Section 35 of the Arbitration Act. The decision of the court was unanimous with the Justices of Appeal laying out their reasons in separate opinions.

Justice of Appeal Mr. Mwera stated that once a decision is made by the High Court under Section 35 of the Arbitration Act it was final and must be respected because the parties voluntarily chose it to be final. Justice of Appeal Mrs. Karanja stated that a right of appeal must be conferred by statute. There was no

¹⁴ In the years that the decisions in *Kenya Shell Ltd vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006* and *Safaricom Limited vs Ocean View Beach Hotel Limited, Civil Application No. Nai 327 of 2009*, were delivered, the Court of Appeal was the final court under the Repealed Constitution. The 2010 Constitution had not been promulgated and the Supreme Court had not been established.

¹⁵ Civil Appeal (Application) No. 61 of 2012.

¹⁶ *Ibid.*

right of appeal under Section 35 of the Arbitration Act and such a right could not be inferred simply because it had not been expressly denied. The Appellant could not call the oxygen principles¹⁷ to its aid. The oxygen principles were not meant to replace the rules of procedure but to complement existing rules where they were deficient or otherwise insufficient. The oxygen principles could not confer a right of appeal where none existed.

Justice of Appeal Mr. M’Inoti stated that Section 35 of the Arbitration Act provides a closed catalogue of circumstances that justify intervention by the courts in an arbitral award, leaving no room for intervention on grounds other than those stipulated.

Justice of Appeal Mr. Musinga stated that arbitration was constitutionally recognized as one of the methods of resolving disputes where parties choose that route. Sections 10 and 35 of the Arbitration Act were therefore not unconstitutional. They were not a fetter to access to justice. They embed, in the Arbitration Act, the internationally recognized principle of finality in arbitration. Article 164 (3) of the Constitution did not accord a party to arbitral proceedings the right to appeal from a decision of the High Court given under Section 35 of the Arbitration Act.¹⁸

The Supreme Court agreed with the interpretation of the Court of Appeal that Article 164 (3) of the Constitution does not confer the right of appeal from the High Court to the Court of Appeal to any litigant.¹⁹ There was no automatic right of appeal under Article 164 (3) of the Constitution from a decision of the High Court made under Section 35 of the Arbitration Act. Jurisdiction was not synonymous with a right of appeal: Article 164 (3) defined the extent of the powers of the Court of Appeal but did not grant a litigant unfettered access to the Court of Appeal. A party who desired for its appeal to be heard at the Court of Appeal, had a duty to demonstrate under what law that right to be heard was

¹⁷ Sections 3A and 3B of the Appellate Jurisdiction Act.

¹⁸ Article 164 (3) of the Constitution provides that the Court of Appeal has jurisdiction to hear appeals from the High Court and any other court or Tribunal as prescribed by an Act of Parliament.

¹⁹ *Nyutu Agrovet Limited vs Airtel Networks Limited*, (2019) eKLR.

conferred. The party could not simply point to Article 164 (3) as the foundation for that right.

The Supreme Court endorsed the Court of Appeal's restrictive approach to the interpretation of the Arbitration Act. Statutory limitations on appeals were not an infringement to the right to access justice. Sections 10 and 35 of the Arbitration Act were not unconstitutional and did not contravene Articles 40²⁰, 48²¹, 50²² and 164 (3) of the Constitution. The Supreme Court adopted the prescription by Justice of Appeal Mr. M'Inoti, that Section 10 of the Arbitration Act was enacted to ensure predictability and certainty of arbitral proceedings by specifically providing instances where a court can intervene. Parties who agreed to arbitration required certainty on the instances when the jurisdiction of the court could be invoked. Section 10 was meant to ensure that a party would not invoke the jurisdiction of the court unless the Arbitration Act specifically provided for such intervention.

Though agreeing with the observation of Justice of Appeal Mrs. Karanja that Section 35 of the Arbitration Act did not answer the question whether an appeal lies to the Court of Appeal from the decision of the High Court, the Supreme Court drew different conclusions on the consequence of this silence. There was no right to appeal; this, of itself, did not mean that the courts could not intervene. The Supreme Court decided to strike a very delicate balance between the principle of finality in arbitration by bringing court-based litigation to an end at the High Court, and the injustice of a High Court's unfairness that could not be corrected through appellate review.

Despite taking a different road from that of the Court of Appeal in *Safaricom Limited vs Ocean View Beach Hotel Limited*²³, the Supreme Court arrived at the same destination. It opined that Parliament, *a fortiori*, in a situation where an

²⁰ Article 40 of the Constitution protects the fundamental right to property, which includes the right to legal action.

²¹ Article 48 of the Constitution protects the fundamental right to access justice.

²² Article 50 of the Constitution protects the fundamental right to a fair hearing in civil, criminal and other disputes.

²³ Civil Application No. Nai 327 of 2009.

appeal was possible, could not have intended that the unfair process of a lower court be immune from appellate review. Since there was no express bar to appeals under Section 35 of the Arbitration Act, an unfair determination by the High Court should not be immune from appellate review. In exceptional circumstances, the court ought to have residual jurisdiction to inquire into such unfairness. Circumscribed appeals may therefore be allowed to address procedural failures and obvious injustices should not be left to subsist because of the “no court intervention principle”.

The Supreme Court prescribed only one ground that met the test of exceptional circumstances. It decided that the High Court had no power under Section 35 of the Arbitration Act to set aside an arbitral award on constitutional grounds raised before it for the first time. The Supreme Court rested its majority opinion by stating that *“an appeal may lie from the High Court to the Court of Appeal on a determination under Section 35 where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in Section 35 and thereby made a decision so grave, so manifestly wrong, and which closed the doors of justice to either of the parties. This circumscribed and narrow jurisdiction should be so sparingly exercised so that only in the clearest cases should the Court of Appeal assume jurisdiction”*. The Supreme Court left it to Parliament to legislate on the other exceptions to Section 35 of the Arbitration Act. It firmly resisted the invitation to create a fresh catalogue of exceptions under which a dissatisfied party could move to the Court of Appeal from a decision of the High Court under Section 35 of the Arbitration Act.

3. Arbitral practice has constitutional licence and does not impede access to justice

The Supreme Court’s approach in *Nyutu Agrovet Limited vs Airtel Networks Limited*²⁴ cannot be faulted. Legislation’s proper place is Parliament. The decision is also in tandem with the approach the Supreme Court has taken in similar disputes, where parties have challenged the alternative dispute resolution mechanisms provided in statutes. The Supreme Court has consistently rejected the argument that alternative dispute resolution

²⁴ (2019) eKLR.

mechanisms dilute the right to access to justice in ordinary courts. Instead, the Supreme Court has embraced Parliament's endeavour to declutter the courts by providing specialized quasi-judicial dispute resolution mechanisms.

In *Modern Holdings (EA) Limited vs Kenya Ports Authority*²⁵, the Petitioner challenged the constitutionality of Section 62 of the Kenya Ports Authority Act that requires disputes arising from the discharge of the statutory duties of the Kenya Ports Authority to be negotiated, and if no agreement was reached, to be referred to arbitration. The Supreme Court rejected the challenge, stating that Section 62 of the Kenya Ports Authority Act is not an ouster clause. An ouster clause was one that took away the jurisdiction of a competent court of law, and denied a litigant any judicial assistance in the relevant matter, and at the same time denied the courts any scope for intervention²⁶. Section 62 of the Kenya Ports Authority Act did not deny a party the right to litigate his claim before a court of law thus rendering his claim non-justiciable. It provided a legal recourse through negotiation or arbitration. It therefore provided an alternative dispute resolution mechanism. Section 62 of the Kenya Ports Authority Act, and other similar statutory provisions²⁷ that offer alternative dispute resolutions mechanisms, are not aberrations. These alternative dispute resolution forums have been entrenched in Kenya's legal system and their jurisdiction given constitutional imprimatur.²⁸

In *Law Society of Kenya vs The Attorney General and Central Organization of Trade Unions*²⁹, the Supreme Court stated that Parliament understands and appreciates the needs of the people. The laws it enacts are directed to problems which are made manifest by the experience of elected representatives. The Supreme Court rejected the argument by the Law Society of Kenya that Section

²⁵ (2020) eKLR.

²⁶ *Judges and Magistrates Vetting Board and 2 Others vs Center for Human Rights Democracy and 11 others*, (2014) eKLR.

²⁷ Section 83 (1) of the Kenya Railways Corporation Act, Section 33 of the Kenya Airports Authority Act, Section 29 of the Kenya Roads Act and Section 32 of the Inter-Governmental Relations Act.

²⁸ *Modern Holdings (EA) Limited vs Kenya Ports Authority*, (2020) eKLR.

²⁹ Petition No. 4 of 2019.

16 of the Work Injury Benefit Acts limited access by employees to court and was therefore unconstitutional.³⁰

The Chartered Institute of Arbitrators (Kenya Chapter) was joined as an Interested Party in the battle between *Nyutu Agrovet Limited and Airtel Networks Limited* before the Supreme Court.³¹ In its written submissions, the Chartered Institute of Arbitrators took the following position:

- (a) Section 35 of the Arbitration Act was silent on whether or not there was a right of appeal from the High Court to the Court of Appeal;
- (b) In the absence of any specific provision in domestic arbitration prohibiting access to the Court of Appeal from the decisions made under Section 35 of the Arbitration Act, such decisions were appealable;
- (c) An interpretation that favored insulating High Court decisions under Section 35 of the Arbitration Act from appeals would pose the risk of the law being seen as protecting judgments of the High Court rather than arbitral awards;
- (d) Alleged breach of the Constitution was increasingly being adopted as an additional ground of setting aside awards under Section 35 of the Arbitration Act. Therefore, awards were being disturbed on grounds that were not envisaged by Parliament, the parties and arbitral tribunals, thereby making the High Court the first instance court dealing with constitutional arguments advanced at the setting aside stage;
- (e) It would not be in the interest of protecting the sanctity and finality of arbitral awards if the doors for appeals were shut in cases where arbitral awards were set aside by the High Court interpreting and applying constitutional provisions; and
- (f) The application of constitutional principles by the High Court to set aside arbitral awards would ultimately undermine the practice and benefit of arbitration.

³⁰ Under Section 16 of the Work Injury Benefits Act, claims by employees for liability and damages from occupational accidents or diseases are filed with and determined by the Director of Occupational Safety and Health Services.

³¹ (2019) eKLR.

The Chartered Institute of Arbitrators (Kenya Chapter) proposed that the Supreme Court provide for leave to appeal from the High Court to the Court of Appeal under Section 35 of the Arbitration in the following circumstances: where there was unfairness or misconduct in the decision-making process in order to protect the integrity of the process; in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice; where the subject matter was very important as a result of the ensuing economic value; or, where the subject matter was very important as a result of the legal principle at issue. Ultimately, the Supreme Court adopted a narrower approach. It refused to re-write Section 35 of the Arbitration Act and directed this challenge to Parliament. The Supreme Court also remitted the dispute between *Nyutu Agrovet Limited and Airtel Networks Limited*³² to the Court of Appeal to determine whether it fell under the narrow, circumscribed and exceptional circumstances that merit an appeal from the High Court.

4. If left to the courts to delimit, widened court interventions will bode ill for arbitral practice

Uncertainty looms for arbitration practice in Kenya. Now that the Supreme Court has opened the door for appeals to the Court of Appeal from decisions of the High Court, who will draw the boundary lines suggested by the Supreme Court to ensure only the most meriting of cases reach the Court of Appeal? Will the Court of Appeal resist invitations by disputants to expand its juridical powers under Section 35 of the Arbitration Act? Will the Court of Appeal admit challenges to decisions of the High Court given under Section 37 of the Arbitration Act?³³ Will the battle between *Nyutu Agrovet Limited and Airtel Networks Limited*, and similar matters before the Court of Appeal, return to the Supreme Court? Will arbitral awards that are subjected to protracted legal battles through the 3-tier-hierarchy of Kenya's Superior Courts become the new norm? This uncertainty bodes ill for arbitral practice in Kenya, and its place as a center for alternative dispute resolution. Parliament, as hinted by the Supreme Court in *Nyutu Agrovet Ltd vs Airtel Networks Limited*³⁴, is the ideal place to settle

³² Ibid.

³³ Section 37 of the Arbitration Act sets out the grounds under which the High Court may refuse to recognize or enforce an arbitral award.

³⁴ (2019) eKLR.

this uncertainty. Left to the corridors of justice, finality and certainty will be long coming.

Enforcements of Multi-Tiered Dispute Resolution Clauses

By: **Hazron Maira** *

Abstract

Multi-tiered dispute resolution clauses are a common provision in commercial contracts. This is mostly due to the desire by the parties to have their disputes resolved expeditiously and by cost effective procedures, while at the same time giving some leeway, in the event a dispute is not resolved, for final resolution by arbitration or court proceeding. However, it is not uncommon to find a party to such a clause failing to refer a dispute to the first tier and instead referring it to other procedures or to the courts. The response by the other party is usually to apply for the court to order a stay of the proceedings while the parties comply with the provisions of a dispute resolution agreement.

This paper examines enforcements of multi-tiered dispute resolution agreements. It reviews the legal principles that guide courts dealing with applications for a stay of proceedings while the parties comply with a provision in a dispute resolution clause. A review how those principles are applied to both negotiation and mediation follows. On negotiation, a review of the principles that govern the mechanism from Kenyan and two other common law jurisdictions establishes that a multi-tiered dispute resolution clause providing for parties to first attempt to resolve a dispute by negotiating in good faith is not necessarily enforceable in all three jurisdictions.

1. Introduction

It is common practice for parties in a commercial relationship to have an alternative dispute resolution (ADR) clause in their contract or in some cases, as a separate agreement. Depending on their needs, contracting parties could provide in the ADR clause for disputes to be resolved by themselves using an agreed procedure or by one presided by an independent third party appointed in accordance with a defined process. An ADR procedure can be

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determinative, which include arbitration clauses, binding expert valuations and third party certifications where the parties agree that certain issues would be finally and conclusively be resolved by a third party, or non-determinative, which include negotiation, mediation, expert appraisal and non-binding rulings from a mediator.¹

During the sunset years of the twentieth century, a trend emerged in the commercial world whereas contracting parties started incorporating in their contracts dispute resolution clauses that required them, in the event of a dispute, to first attempt to resolve it through a first tier procedure failing which, it was escalated to the second tier procedure (which in most cases was arbitration) or court proceedings.² This led to the emergence of multi-tiered dispute resolution clauses.³ The benefits of having such a clause can be summarised as; first, all disputes are initially referred to the first-tier procedure and only disputes that are not resolved can be escalated to the second tier procedure or to the courts. This filtration process allows minor and simple disputes to be resolved fast and by cost effective procedures rather than have them referred for arbitration or for litigation.⁴ Second, in construction contracts where multi-tiered dispute resolution clauses are common,⁵ disagreements and disputes are inevitable especially in large and complex projects. By having multi-tiered dispute resolution clauses that require early referrals of conflicts and disputes to informal tiers that are part of the project, issues that can potentially lead to

¹ *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303

² One of the earliest commercial sector to incorporate multi-tiered dispute resolution clauses in contracts was construction; see for example the dispute resolution clauses in the 1986 contract in the *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 and the 1996 Supplement of the FIDIC Red Book Standard Form.

³ IBA Litigation Committee (2015), Multi-Tiered Dispute Resolution Clauses. Available at:

https://www.ibanet.org/LPD/Dispute_Resolution_Section/Litigation/multitieredisputeresolution.aspx. [Accessed on 09 October 2019]; - "Multi-tiered dispute resolution clauses call for contracting parties to engage in negotiation, mediation, or some other form or combination of alternative dispute resolution prior to commencing litigation or arbitration."

⁴ Doug Jones, *Dealing with Multi-Tiered Dispute Resolution Process*, (2009) 75 *Arbitration* 2,188

⁵ Mostly due to contractual provisions e.g. in FIDIC suite of contracts or statutory requirements e.g. in England and Wales Construction Act 1996

hostilities between parties and disruptions to the project are dealt with at early stages. This can lead to completion of project on time and within budget as well as preserve ongoing business relationships.⁶

Parties in a commercial relationship who agree to have their disputes resolved by ADR procedures must show good reasons for departing from the terms of the agreement.⁷ One of the “good reason” for departing from the provisions of a dispute resolution agreement is for a party to show that the entire clause or part of it is not enforceable under the law because it is not in the form described in *Scott v Avery*⁸; i.e. the clause must operate to make completion of the first tier procedure a condition precedent to commencement of the second tier procedure or court proceedings.⁹

Enforcements of ADR agreements is done not by ordering the parties to comply with the provisions in the dispute resolution, but by forbidding them from using other procedures from which they have agreed to abstain from until the end of the dispute resolution process.¹⁰ Therefore, when a party claims a first tier dispute resolution provision in a clause is not enforceable under the law or disregards it and seeks resolution of a dispute either by other procedures or court proceedings, the other party is entitled to respond by seeking enforcement of the ADR agreement from the court by means of an order staying the other procedure or court proceedings. The public interest in the enforcement of an agreed ADR agreement was considered in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*¹¹ and the court said;

“Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to

⁶ Hazron Maira, *The Evolution, Role and Effects of Dispute Boards in Construction Contracts*, (2018) 6(1) *Alternative Dispute Resolution*, at p. 222/3

⁷ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 353

⁸ (1856), 5 H.L. Cas. 811

⁹ Completion of first tier does not necessarily mean resolution of the dispute but can be achieved by invoking terms of the agreement; for example, failure to resolve a dispute within the stipulated time limits

¹⁰ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, at para 43

¹¹ EWHC 2104 (Comm), at para 64

enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration."

In the discussion that follows, this paper first reviews the legal principles that guide courts dealing with applications for enforcement of ADR clauses. A review of how those principles are applied to negotiations and mediation follows. With respect to negotiations, the paper reviews the principles governing the procedure in Kenya, England and Wales as well as Australia and establishes that the mechanism is not enforceable in all three jurisdictions.

2. Legal principles

The legal principles that guide courts dealing with applications for enforcements of ADR agreements by ordering a stay of proceedings are in the Constitution of Kenya, 2010 and common law.

2.1 *The Constitution of Kenya, 2010*

Article 159 (2) (c) provides that in exercising judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to clause (3)¹². In *Geoffrey M. Asanyo & 3 others v Attorney General*,¹³ The Supreme Court said that a concise reading of the judicial principles in Article 159(2) of the Constitution would show the provisions are non-derogable and have to be adhered to by all courts and tribunals exercising judicial power/authority. Where there is a *prima-facie* case of derogation, it behoves the Court to intervene so as to safeguard the Constitution within its jurisdiction.¹⁴ Referring to Article 159 (2) (c), the Court agreed with the following statement in the *Council of County Governors v Lake Basin Development Authority & 6 others* Petition No. 280 of 2017; [2017];

¹² Clause (3) states that traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.

¹³ [2018] eKLR

¹⁴ *Ibid*, at para 61

“... alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.”¹⁵

The decision in *Southern Shield Holdings Limited v Tandala Investment Company Limited*¹⁶ confirms that an ADR mechanism need not be listed under article 159 (2) (C) for it to be promoted by Courts and Tribunals in exercising judicial authority. In that case, a multi-tiered dispute resolution clause provided in parts that *“any dispute, controversy, or claim arising out of relating to this agreement or a termination hereof....., whether in its interpretation, application or implementation shall be resolved by way of consultations held in good faith between the parties.”* Subsequent clauses provided for escalation to mediation and arbitration if a dispute, controversy or claim is not resolved.

Following a dispute, the claimants, *Southern Shield Holdings* filed a suit in court and the defendants, *Tandala Investment* filed an application pursuant to Section 6 of the Arbitration Act, 1995 for the court to stay proceedings pending reference of all matters in respect of which the suit was brought to the ADR mechanisms set out in the agreement between the parties. In court, the Plaintiff argued that Article 159 of the Constitution of Kenya 2010, was inapplicable in the case on the grounds that there had always been and remains to, that there was no dispute or claim between itself and the defendants to be referred to Alternative Dispute Resolution, pointing out the commencement of the suit was valid and had never been inconsistent with Article 159 of the Constitution of Kenya 2010. Having reviewed parties’ submissions and the authorities, the court was satisfied there was a dispute, or claim or controversy that required to be referred to the ADR in terms of the clause in the agreement, hence the invalidity of the commencement of the suit. The court also found Article 159 (2) (c) of the Constitution of Kenya 2010 was applicable to the case, and a stay of proceedings was granted.

¹⁵ *Ibid*, at para 90

¹⁶ [2018] eKLR

2.2 Common law

Under common law, the doctrine of certainty in commercial contracts plays a key role in courts' decisions on whether to stay proceedings while the parties comply with a provision in a dispute resolution agreement.

"Certainty is a desideratum and a very important one, particularly in commercial contracts"¹⁷ for the simple reason that contracting parties are entitled to know where they stand and act accordingly in the event of an occurrence of any event that affect their respective rights.¹⁸ Therefore, the parties' rights and obligations must be agreed and defined with sufficient certainty to enable any agreement to be effective in law.¹⁹ If parties fail to identify with sufficient certainty what was agreed in the contract, it then becomes impossible to hold that they had the same intention; in other words the consensus *ad idem* would be a matter of mere conjecture.²⁰

A court construing a clause strive to give effect to what parties have agreed and is often reluctant to hold that an agreement is void for uncertainty, but has to be satisfied the parties have an agreement which was intended to be legally binding. As Lord Wright said in *G Scammell & Nephew Ltd v. HC ad JG Ouston*;²¹

"The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect of that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted."

¹⁷ *Golden Strait Corporation v. Nippon Yusen Kubishka Kaisha* [2007] UKHL 12, per Lord Scott of Foscote

¹⁸ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana ("The Scaptrade")* [1983] QB 529, 540

¹⁹ *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 at para 35

²⁰ *G Scammell & Nephew Ltd v. HC ad JG Ouston* [1941] AC 251, 255

²¹ [1941] AC 251 at 268

It is indisputable that a dispute resolution clause forming part of a substantive contract is a separate contract in its own rights. Consequently, the doctrine of certainty equally apply to dispute resolution clauses.²² In *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors*,²³ the court after reviewing authorities formulated the criteria for enforceability of ADR clauses and held that in the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the dispute resolution clause “prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.”²⁴ In the context of a negative stipulation or injunction preventing a reference to a second tier procedure or court proceedings until a given event like negotiation or mediation, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.²⁵ In attempting to define the minimum ingredients necessary for an ADR clause to be given legal effect, it is not an issue of just ticking but each case must be considered on its own terms,²⁶ and courts should not transpose a decision on a contractual provision in one case to another.²⁷

A useful guidance on how a court strive to give effects to parties’ dispute resolution agreement that was intended to be binding but later one party claims the clause or part of it is not sufficiently certain is to be found in *Associated British*

²² See *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC) at para 42; “Dispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises.”

²³ [2012] EWHC 3198 (Ch)

²⁴ *Ibid*, at para 60

²⁵ *ibid*, at para 61

²⁶ *Sulamerica v Enesa* (*supra* fn. 19), at para 35

²⁷ *Openwork Ltd v Forte* [2018] EWCA Civ 783, at para 24

*Ports v Tata Steel UK Ltd*²⁸ where a dispute resolution clause provided in part as follows; "It is hereby agreed between the parties that in the event of any major physical or financial change in circumstances affecting the operation of either party may serve notice on the other requiring the terms of this Licence to be re-negotiated with effect from the date on which such notice shall be served. The parties shall immediately seek to agree amended terms reflecting such change in circumstances and if agreement is not reached within a period of six months from the date of the notice the matter shall be referred to an Arbitrator"

Associated British Ports sought a declaratory relief in court as to the proper construction of the arbitration clause, and two of the issues to be determined were; first, whether the arbitration clause was void for uncertainty because the triggering event "any major physical or financial change in circumstances" was too uncertain to create a binding obligation to refer a dispute to arbitration. Second, there were no or insufficient objective criteria to guide an arbitrator in deciding how to amend the Licence terms if a matter is referred to him so that the term is too uncertain because it is akin to an agreement to agree.

Having reviewed the authorities, the Judge concluded that the case fell in the category of cases where the court is particularly reluctant to find that a clause is void for uncertainty. It was not difficult to see the commercial sense behind including a clause of this kind because the parties were in a relationship of mutual interdependence. The contract was long term and the clause was intended to enable them carry out the first major reassessment of the relationship.²⁹

On the first issue, the court held that provided one can posit some changes which would definitely fall within the scope of the phrase "major physical or financial change in circumstances" and some changes which clearly falls outside it, then the phrase is sufficiently certain to be enforceable even though it may be difficult in the abstract to draw the precise divide between changes falling on either side of the line.³⁰ On the second issue, it was held that the clause was not

²⁸ [2017] EWHC 694 (Ch)

²⁹ *Ibid*, at para 34

³⁰ *Ibid*, at para 43

as open ended as asserted and the arbitrator is not faced with setting new terms in a vacuum. First, the arbitrator would have the existing terms of the Licence and although the arbitration takes place against the background of the major change, still the existing terms show what the parties considered to be a fair and reasonable bargain in the circumstances that prevailed at the time the Licence was entered into. Second, the limit on the arbitrator's task will be set by the nature and effect of the major physical or financial change in circumstances that has triggered the arbitration. The revision of the Licence that the arbitrator must fashion has to reflect the effect of the change of the operation of the parties' facilities. Thirdly, the arbitrator would be working within the parameters set by the submissions of the parties.³¹ Therefore, the clause created a binding obligation to refer a dispute to arbitration and the trigger was not too uncertain. A stay of further proceedings was granted.

In rare circumstances or as a last resort, a court may find an ADR clause is void for uncertainty if; first, it is legally or practically impossible to give to the parties' agreement (or part of it) any sensible content, second, where there are a variety of meanings fairly attributable to it and it is impossible to say which of them was intended, and third, where the terms of the contract require further agreement between the parties in order to implement them.³²

3. Negotiation

Negotiation as a procedure for resolution of disputes involves discussions between the disputing parties with the aim of settling their dispute(s) without involvement of a third party. The principles governing the procedure may be based on either the written or unwritten law. If the legal principles are governed by statutes, the role of courts enforcing the ADR provisions is to "stick to the precise words and not supplement or re-interpret what is written."³³ But, if the legal principles are governed by unwritten law as is the case in most common law jurisdictions, the status of a clause purporting to create a legal obligation for

³¹ *Ibid*, at paras 57 - 60

³² *Durham Tees Valley Airport Ltd v Bmibaby Ltd & Anor* [2010] EWCA Civ 485, at para 88; *UYCF Ltd v Forrester & Anor* [2000] EWCA Civ 317, at paras 9-10

³³ Lord Mance, Should the law be certain? The Oxford Shrieval lecture given in the University Church of St Mary The Virgin, Oxford on 11th October 2011. Available at https://www.supremecourt.uk/docs/speech_111011.pdf. [Accessed on 02 April 2020]

disputing parties to first negotiate a dispute in good faith before escalating it to the next tier or court proceedings, and whether such a clause is legally binding depends on a State's courts finding that the provision is sufficiently certain. As will be seen below, the findings by courts in one jurisdiction that such a clause is sufficiently certain may not be persuasive for courts in another jurisdiction to arrive at a similar finding for a clause with almost similar wording.

Although negotiation as an ADR mechanism is not listed in Article 159 (2) (c) of the Constitution of Kenya 2010, the decision in *Southern Shield v Tandala Investment*³⁴ confirms it is one of the mechanisms to be promoted by courts and tribunals exercising judicial authority, and a multi-tiered dispute resolution agreement providing for parties to first negotiate a dispute in good faith is enforceable, if defined with sufficient certainty because a "Court of law cannot re-write a contract between the parties."³⁵

In England and Wales, the current principles governing negotiations were first formulated by the Court of Appeal in *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*.³⁶ where the court held that an agreement to negotiate, like an agreement to agree, is not enforceable. The court reasoned that "a contract to enter into a contract (when there is a fundamental term yet to be agreed) is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be."

The principle in *Courtney v Tolaini* was approved by the House of Lords in *Walford v Miles*³⁷ where the main issue before the court was whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract. Lord Ackner, with whom the other law Lords agreed, delivered the lead judgment speech and dismissed the appeal on two grounds; First, he held that an agreement to negotiate, like an agreement to agree, is

³⁴ *supra* fn.16

³⁵ *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* [2001] eKLR; *DI Koisagat Tea Estate Ltd v Eritrea Orthodox Tewhdo Church Ltd* [2015] eKLR

³⁶ [1975] 1 WLR 297

³⁷ [1992] 2 AC 128

unenforceable because it lacks the necessary certainty, and the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Second, “a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies., while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.”

Having been pronounced by the highest court in the land, the principles in *Walford v Miles* are binding unless overruled. It's also instructive to note that in both that case and *Courtney v Tolaini*, there was no concluded contract, and in *Walford v Miles*, there was no express agreement to negotiate in good faith. In a few instances, these deficiencies have been used by lower courts to distinguish binding effects in *Walford v Miles* and clauses with express obligation to negotiate.³⁸ That notwithstanding, the principles in *Walford v Miles* reflect the current settled state of English law on negotiations.³⁹

The principles enunciated in *Walford v Miles* and *Courtney v Tolaini* have been applied in cases involving resolution of disputes on ADR clauses. In *Cable & Wireless Plc v IBM United Kingdom Ltd.*⁴⁰, one of the issues before the court was an application for a stay of proceedings pending the dispute being referred to

³⁸ See *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, paras 115 – 121 (though not in the context of an ADR clause and the statements were *obiter*), and decision in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) where the court distinguished *Walford v Miles* (like *Courtney & Fairbairn Ltd. v Tolaini Brothers* which it approved) and said it was not a case of a dispute resolution clause within a binding contract obliging the parties to seek to settle a dispute under that contract within a time limited period, and therefore held that “a requirement to engage in time limited negotiations” was a condition precedent to commencement of arbitration.

³⁹ See for example a recent court pronouncement in *Chaggar v Chaggar & Anor* [2018] EWHC 1203 (QB), at para 190: - “...neither an agreement to negotiate in good faith nor an "agreement to agree" creates an enforceable contract: *Walford v Miles* [1992] 2 AC 128 per Lord Ackner at 138B-H”

⁴⁰ [2002] EWHC 2059 (Comm)

ADR. The application was founded on a multi-tiered dispute resolution clause in the contract that provided in part that; “*The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations...*”

Having cited *Courtney v Tolaini*, the Judge said there was an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement. He said this was because a court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision and therefore, if in the present case the words of clause had simply provided that the parties should “*attempt in good faith to resolve the dispute or claim*”, that would not have been enforceable.

The principles on negotiations developed by English courts have not been persuasive enough to Australian courts and a Judge from New South Wales once described the status of law governing an ADR clause requiring parties to negotiate in good faith as “*unsettled*”.⁴¹ However, the decision of New South Wales Court of Appeal in *United Group Rail Services Limited v Rail Corporation*⁴² show the direction of travel in that area of the law is towards a settled status. That case concerned the content and operation of a multi-tiered dispute resolution clause in engineering contracts for the designing and building of new rolling stock. The clause provided in part that if a dispute or difference arose, the parties were to “*meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference;*” failing which the matter at issue would be referred for arbitration. *United Group* asserted the provision was uncertain and therefore void and unenforceable and *Rail Corporation* disagreed.

Having reviewed both the English and Australian authorities including *Walford v Miles*, the court made observations of some essential propositions founded on accepted authority and principle including; first, an agreement to agree is incomplete, lacking essential terms; and that is not a question of uncertainty or vagueness, but the absence of essential terms, and second, good faith is not a

⁴¹ *Aiton Australia v Transfield* (*supra* fn. 10) at para 103

⁴² [2009] NSWCA 177

concept foreign to the common law, the law merchant or businessmen and women.⁴³

With regard to the principle in *Courtney v Tolaini* case, the court said the reasoning equated an agreement to negotiate with an agreement to agree, and it does not follow that an agreement to undertake negotiations in good faith fails for the same reason. An agreement to agree to another agreement may be incomplete if it lacks essential terms of the future bargain; and an agreement to negotiate, if viewed as an agreement to behave in a particular way may be uncertain but is not incomplete.⁴⁴

The court was neither persuaded by the views of Lord Ackner in *Walford v Miles* case and said that an obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. Referring to what Lord Ackner said that a party is entitled not to continue with, or withdraw from negotiations at any time and for any reason, the court said that would assume there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into. The restraint was a requirement to meet and engage in genuine and good faith negotiations, and that expression has, in the context of the contract, legal content.⁴⁵

The court also held that an “honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such.”⁴⁶ The objective yardstick by which to measure the good faith or otherwise of a negotiating party’s stance is honest and genuine negotiation, within the framework of fidelity to the bargain and the posited controversy.⁴⁷

⁴³ *Ibid*, paras 56 - 58

⁴⁴ *Ibid*, at para 64

⁴⁵ *Ibid*, at para 65

⁴⁶ *Ibid*, at para 73

⁴⁷ *Ibid*, at para 77

Recognising the important public policy in promoting efficient dispute resolution, especially commercial dispute resolution, the court said it requires that, where possible, real and enforceable content be given to clauses such as the one before the court to encourage approaches by, and attitudes of, parties conducive to the resolution of disputes without expensive litigation, arbitral or curial.⁴⁸ Therefore, the clause was not uncertain and was enforceable.

4. Mediation

There are many definitions of mediation and while it is generally accepted that the purpose of the process is to assist people in reaching a voluntary resolution of a dispute, in its simplest form, it can be said that mediation is negotiation facilitated by a third-party.⁴⁹ A clause providing for resolution of a dispute by mediation must therefore include the administrative processes for selecting a mediator and how to pay that person defined.⁵⁰

In the Australian case of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,⁵¹ the test for enforcement of a mediation clause was framed in the following terms;

"An agreement to conciliate or mediate is not to be likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement."

The other essential terms of an ADR clause purporting to create a binding obligation for parties to refer a dispute for mediation include setting out in detail the mediation process to be followed or incorporation of rules by reference to a

⁴⁸ *Ibid*, at para 80

⁴⁹ The Irish Law Reform Commission (2010), *Alternative Dispute Resolution: Mediation and Conciliation*, at p. 20. Available at: https://www.lawreform.ie/_fileupload/reports/r98adr.pdf. [visited on 12 September 2019]

⁵⁰ *Aiton Australia v Transfield* (*supra* fn. 10) at para 69)

⁵¹ (1992) 28 NSWLR 194, 209 (cited in *Aiton Australia v Transfield* (*supra* fn. 10) at para 45)

specific mediation provider. In the English case of *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*,⁵² a contract had a mediation clause that provided in part that; “If any dispute or difference of whatsoever nature arises, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation.” The other parts of the clause covered rights of the parties in respect of the Dispute, termination of the procedure, steps to take if dispute not resolved, how to invoke the arbitration process and the sharing of costs.

One of the issues before the court was whether the clause gave rise to any binding obligation to mediate and if compliance with its terms was an essential precondition to arbitration. The first instance Judge held the clause did not give rise to any binding obligation. He had referred to and followed authorities in each of which the court had expressed the view that an agreement to enter into a prescribed procedure for mediation is capable of giving rise to a binding obligation, provided that matters essential to the process do not remain to be agreed. Regarding the instant case, the Judge held that the clause did not meet those requirements, because it contained no unequivocal undertaking to enter into a mediation, no clear provisions for the appointment of a mediator and no clearly defined mediation process. Essential matters therefore remained for agreement between the parties. Accordingly, the clause did not give rise to a legal obligation of any kind, and in the absence of a binding obligation there could be no effective precondition to arbitration.⁵³

The Court of Appeal agreed with the High Court Judge’s decision and said the clause did not set out any defined mediation process, nor does it refer to the procedure of a specific mediation provider. The most that might be said is that it imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an *ad hoc* mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process.⁵⁴ In conclusion,

⁵² [2012] EWCA Civ 638,

⁵³ *Ibid*, at para 33

⁵⁴ *Ibid*, at para 36

the court said that if mediation is not defined with sufficient certainty, the conditions cannot constitute a legally effective precondition to arbitration.⁵⁵

Where the parties have incorporated mediation rules by reference to a specific mediation provider, the courts give effects to the parties' agreement by referring to the published mediation provider's procedures and terms upon which the parties may proceed. In *Cable & Wireless Plc v IBM United Kingdom Ltd.*⁵⁶, a multi-tiered dispute resolution clause provided in part that "...the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution.⁵⁷ However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings." Following a dispute, *Cable & Wireless* (C & W) declined to refer it to ADR and IBM sought enforcement of the clause by seeking an order staying court proceedings.

In court, it was submitted on behalf of *IBM* that the court should give effect to the parties' agreement by ordering a stay of the proceedings while the parties comply with the ADR provision in the clause. *C & W* claimed that since the last sentence of the clause expressly contemplates the issue of proceedings where an ADR procedure is being followed, it could not have been the mutual intention that the reference to ADR should have binding effect, for the facility to commence proceedings was inconsistent with the enforceability of the duty to submit the dispute to ADR procedure. The Judge disagreed with *C & W* and held that the clause had prescribed the means by which parties should attempt to resolve the dispute, namely "through an (ADR) procedure as recommended to the parties by (CEDR)". The engagement can therefore be analysed as requiring not merely an attempt in good faith to achieve resolution of a dispute but also the participation of the parties in a procedure to be recommended by CEDR. By resorting to CEDR and participating in its recommended procedure, these are engagements of sufficient certainty for a court to ascertain whether they have

⁵⁵ *Ibid*, at para 37

⁵⁶ *supra* fn. nr 40

⁵⁷ The Centre for Dispute Resolution (CEDR) is a London based International Dispute Resolution Centre dealing with commercial mediation and conflict management services. See details at <https://www.cedr.com/> . (visited on 13 September 2019)

been complied with. Thus, if one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR's model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in the ADR clause. *IBM* was thus at least prima facie, entitled to the enforcement of the ADR agreement.

5. Conclusion

The provisions of Article 159 (2) (c) of the Constitution of Kenya 2010 are non-derogable and a court is entitled to grant a stay of proceedings against a party who is in breach of an agreement to refer a dispute to an ADR mechanism. Where parties have provided for a multi-tiered dispute resolution clause, a binding obligation to refer a dispute to a tier arises if the provision is defined with sufficient certainty. If parties have entered into what they believe is a binding dispute resolution clause, difficulties of interpretations would not render such a clause (or any provision in it) void for uncertainty and a court of law would strive to give effects to the intention of the parties, unless the provision is meaningless or unintelligible.

Although negotiation is not listed in Article 159 (2) (c) of the Constitution of Kenya 2010, it nevertheless falls under the mechanisms to be promoted by courts and tribunals in exercising judicial authority. In most common law jurisdictions, determination of whether a multi-tiered dispute resolution clause providing for parties to undertake negotiation in good faith is enforceable depends on the courts finding the provision to be sufficiently certain. In England and Wales, courts have found such a clause not enforceable because; (1) an agreement to negotiate, like an agreement to agree, is not enforceable because it lacks the necessary certainty (2) it is not possible to estimate the damages because it is not possible to tell whether the negotiations would be successful or would fall through, and if successful, what the terms would be, and (3) a duty to negotiate in good faith is unworkable because while negotiations are in existence, either party is entitled to withdraw at any time and for any reason without giving a reason. In Australia, a dispute resolution clause providing for parties to meet and undertake genuine and good faith negotiations has been found to be sufficiently certain and enforceable. The objective yardstick by

which to measure the good faith or otherwise of a negotiating party's stance is honest and genuine negotiation, within the framework of fidelity to the bargain and the posited controversy. An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into, and it requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such.

Sufficient certainty in a dispute resolution clause requiring parties to have a dispute resolved by mediation is achieved by the parties setting out a defined mediation process, making unequivocal undertaking to enter into a mediation and in clear terms provide for the appointment and payment of a mediator. In the alternative, parties may refer to the procedure of a specific mediation provider with documented procedures and terms upon which they may proceed.

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Mega-Regional Trade Agreements: Analyzing their Impact on Treaty Policy and Law and their Modes of Dispute Resolution Mechanisms.

*By: Peter Mwangi Muriithi **

Abstract

In the international arena, there is an emergence of a new type of trade agreements namely Mega-regional trade agreements. These mega-regional trade agreements are increasing in number and their unique characteristics have made them quite visible in any international trade agreement discourse. Their ability to challenge the status quo and displace the existing multilateral treaties on trade have made them relevant. An example is their adverse effect on the Agreement establishing the World Trade Organization a multilateral treaty on trades.

This discourse will seek to analyze, the impact of mega-regional trade agreements on treaty policy and law and the various modes of dispute resolution mechanisms that they have adopted.

Succinctly, the paper shall; give a brief introduction, analyze the impact of mega-regional trade agreements for treaty policy and law, analyze modes of dispute resolution mechanisms adopted by mega-regional trade agreements and lastly give a conclusion.

1. Introduction

Mega regional agreements are by definition treaties. Article 2 of the Vienna Convention on the Law of treaties¹ defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

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¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <<https://www.refworld.org/docid/3ae6b3a10.html>> accessed on 20/05/20

The term '*mega-regionals trade agreements*' describes a trend in international trade law to negotiate free trade agreements ('FTAs'; Free Trade Areas) among countries encompassing a considerable share of world trade. Unlike regional trade agreements, they span across sub-regions.²

Mega-regional trade agreements (MRTA's) are deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI).³ Beyond simply increasing trade links, the deals aim to improve regulatory compatibility and provide a rules-based framework for ironing out differences in investment and business climates.⁴The major economies have shifted trade-negotiating emphasis towards MRTA's

The most significant examples of MRTA's currently are; the Trans-Pacific Partnership (TPP) agreement among Australia, Canada, Japan, Mexico, the United States, and seven other countries; the Transatlantic Trade and Investment Partnership (TTIP) agreement between the United States of America (USA) and the European Union (EU); and the Regional Comprehensive Economic Partnership (RCEP) agreement between Australia, China, India, Japan, Korea, New Zealand and ten countries of the Association of Southeast Asian Nations (ASEAN). These MRTA's raises a host of short-term and long-term questions in regards to their effect on treaty law and policy.⁵

Among these MRTA's, the most significant currently are the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) between the USA and the European Union (EU), both promoted by the USA.⁶

² Christian Riffel, *Mega regionals*, <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2177>> accessed on 20/05/20

³ <<https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>> lastly accessed on 21st July 2019

⁴ Ibid No.3

⁵ Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO (Part of Discussion Paper Series on Global and Regional Governance September 2016)*

⁶ <<https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>>

These two MRTA's would affect at least a quarter of world trade in goods and services (TPP: 26.3%; TTIP: 43.6%) of global foreign direct investment.⁷

In particular, TPP and TTIP are classic examples of mega-regional Agreements that seek to introduce innovative content that reflects twenty-first-century trade and economic exchanges such that commitments are undertaken on "traditional and new areas of trade" are likely to have far-reaching implications on global trade regulation and public policy.⁸

MRTA's are imperative in the achievement of trade liberalisation.⁹ Among all the agreements actively negotiated by WTO members, MRTA's have taken centre stage. These are agreements with deep integration partnerships among countries.¹⁰ Over the last few years, the number of MRTA's has augmented to such an extent of causing awareness globally.¹¹

accessed on 20/05/20

⁷ <<https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>>

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⁸Badri G. Narayanan and Sangeeta Khorana, Mega-regional trade Agreements: Costly distractions for developing countries.

⁹Dani Rodrik, What are the aims of the Mega-Regional Trade Deals?

<<https://www.weforum.org/agenda/2015/06/what-are-the-aims-of-the-mega-regional-trade-deals/>>

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¹⁰ Anabel Gonzalez, Mega-regional Trade Agreements Game-Changers or Costly Distractions for The World Trading System?

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjA0YXysazhAhXj6OAKHbkMDm4QFjAAegQIABAC&url=http%3A%2F%2Fwww3.weforum.org%2Fdocs%2FGAC%2F2014%2FWEF_GAC_Trade_FDI_MegaRegionalTradeAgreements_Report_2014.pdf&usg=AOvVaw2sFw8umIfUEDR50GSgW4w> accessed on 20/05/20

¹¹ Mavel S and M. Mathieu, Emergence of Mega-Regional Trade Agreements and the Imperative for African Economies to Strategically Enhance Trade-Related South-South Cooperation. A paper selected for presentation at the 19th Annual Conference on Global Economic Analysis, Washington D.C., 15-17 June 2016.

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The slow progress in the WTO negotiation rounds, more specifically the Doha rounds has been a catalyst to the increased number of MRTA's.¹² Currently, due to the stalled multilateral negotiations, MRTA's provide an optimal alternative for states to pursue trade liberalisation in the specific fields of interest and to establish rules to deal with the emerging issues.¹³

The number of limited membership makes this expedient thus, making it difficult to have a stalemate since all members have almost the same interests to protect. To put this into context, *Simon Mevel* in his scholarly article posited:¹⁴

"Due to the slow progress in various WTO multilateral agreements and conferences, more specifically, the Doha rounds, states resorted to other avenues to ensure that their commercial interests are met. This gave rise to a proliferation of regional trade agreements."

However, it was noted during the Nairobi Ministerial Declaration from the Tenth Ministerial Conference of the WTO held on the 15-18 December, in Nairobi, Kenya, that, "...the need to ensure that regional trade agreements remain complementary to, not a substitute for, the multilateral trading system."¹⁵

¹² Brock. R. Williams, "Bilateral and Regional Trade Agreements: Issues for Congress." (May 17, 2018) article can be found at <<https://fas.org/sgp/crs/row/R45198.pdf>> accessed on 20/05/20

¹³ Ibid No. 11

¹⁴ Simon Mevel, Trade and Sustainable Development News and Analysis on Africa, "Mega-Regional Trade Agreements: Threat or Opportunity for the Future of Africa Trade" (Vol 5, issue 3 April 2016).

¹⁵ Ibid No.14 Paragraph 28.

2. Analyzing the impact of mega-regional trade agreements on treaty policy and law.

Since the early 2000s, regional trade agreements (RTAs) allowed under WTO rules have flourished.¹⁶ Interestingly, this development has taken place in the context of minimal progress in multilateral trade negotiations, thereby suggesting strong interest from many countries to consider regional markets as an important avenue for expanding trade.¹⁷

The emergence of mega-regional trade agreements (MRTAs), which gather not just neighbouring countries and account for large shares of world GDP and population, attests to this trend.¹⁸ This trend, however, (of growth Mega regional trade agreements) has affected treaty law and policy.

Below are some of the effects associated with mega-regional trade agreements on treaty law and policy:

- a) Existence of mega-regional trade agreements is a threat to the multilateral system.

These new MRTAs have costs and benefits. However, MRTAs pose a potential new threat to the multilateral system. In essence, they may render multilateral trade agreements ineffective. For example, they pose a threat or may render multilateral trade treaties like the *Agreement establishing World Trade Organization* otiose.¹⁹

However, there are direct steps that can be undertaken to minimize such concerns. First, the return to plurilateral and critical mass agreements is a way to bring some of the MRTAs new rules and issues into the system. Second, reforms to the WTO's dispute settlement procedures is needed to

¹⁶ Simon Mevel, *Trade and Sustainable Development News and Analysis on Africa, "Mega-Regional Trade Agreements: Threat or Opportunity for the Future of Africa Trade"* (Vol 5, issue 3 April 2016).

¹⁷ *Ibid* No.16

¹⁸ *Ibid* No.16

¹⁹ Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO* (Part of Discussion Paper Series on Global and Regional Governance September 2016)

further strengthen and sustain what is perhaps its most prominent function. Importantly, the United States, the EU, and the other countries should support the relevance of the multilateral system despite the allure and trappings of the mega-regional agreements.²⁰

- b) Mega regional trade agreements can result in overlapping trade agreements. This means that the obligations for parties under these MRTAs overlap with those of other treaties especially multilateral trade agreements. The emergence of MRTAs is likely to complicate the trading environment, as some countries may be covered by overlapping obligations under RTAs.²¹ For example, the TPP overlaps with the North American Free Trade Agreement (NAFTA), which involves the US, Mexico, and Canada.

TPP also overlaps with the Japan-Mexico RTA. Once overlapping RTAs enter into force, firms and/or organizations are faced with multiple RTA schemes when trading with the member countries.²² For example, if the TPP enters into force (even among 11 countries), exporters in Japan will be able to choose tariff schemes from among the TPP, the Japan-Mexico RTA, and most favoured nation (MFN) schemes (i.e. non-use of a preferential scheme) when trading with Mexico.

Hence, one can say that the emergence of mega-regional trade agreements is likely to complicate the trading environment, as the 'noodle bowl' of overlapping trade agreements will continue to get bigger.²³

²⁰ Ibid No.19

²¹ Kazunobu Hayakawa, Shujiro Urata, Taiyo Yoshimi, Designing mega-regional trade agreements, accessed on 20/05/20

²² Kazunobu Hayakawa, Shujiro Urata, Taiyo Yoshimi, Designing mega-regional trade agreements, accessed on 20/05/20

²³ Ibid No.22

Sopranzetti S.²⁴ points out that the existence of overlapping trade agreements increases the costs of negotiation of treaties. Maur²⁵, on the other hand, argues mega-regional trade agreements have contributed to new impediments to trade, which require more sophisticated trade facilitation measures because border formalities become more complex, especially when it comes to discriminating between preferential and non-preferential trade.

Hence, one can state that the impact of mega-regional trade agreements on treaty law and policy is that they increase overlapping of treaty obligations as provided by various treaties and which subsequently increases the cost of negotiations of treaties.

- c) Mega regional trade agreements (MRTA's) have eroded the basic principles in international trade as enshrined in the WTO system such as the principle of the most favoured nation.²⁶ The most favoured nation principle is a bedrock principle of the WTO that ought to be protected.

The most favoured nation principle requires a country to provide any concessions, privileges, or immunities granted to one nation in a trade agreement to all other World Trade Organization member countries. Although its name implies favouritism toward another nation, it denotes the equal treatment of all countries.²⁷

²⁴ Sopranzetti S. (2017). Overlapping free trade agreements and international trade: A network approach. *World Econ.* 2017; 00:1-18.< <https://doi.org/10.1111/twec.12599>> accessed on 20/05/20

²⁵ Maur.J.C (2008), *Regionalism and Trade Facilitation: A primer*. World Bank Development Research Group.

²⁶ Magdalena Słok-Wódkowska, "From most-favoured to least favoured nations - how RTAs influenced the WTO MFN-based trade?" (University of Warsaw, Ph.D thesis, Law).

²⁷<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed on 20/05/20

However, ostensibly most regional and MRTA's derogate from this principle. Magdalena²⁸ observes that "with the recent growth of importance of RTA, especially with so-called mega-regionals such as Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), there is a clear shift in the significance of the old WTO most favoured nation."

The most favoured nation principle is the main pillar of international trade from which stems economic benefits. Thus, if this main principle loses value as a consequence of the formation of MRTA's many countries will be placed in a disadvantaged position especially the least developed countries (LDC's).

- d) Mega regional trade agreements (MRTA's) have the effect of rendering WTO system otiose. Perhaps an important principle to hold sacrosanct when it comes to international relations is that encapsulated in the Vienna Convention on the law of treaties, Article 26. This is the principle of *pacta sunt servanda*.²⁹ Succinctly, this principle provides that; the treaties ratified by states binds the states and they should perform the obligations thereunder in good faith. The fallback employed by many states is usually that of sovereignty.

Although it is conceded that the WTO itself recognizes the need of states to conclude regional agreements, this should not be used to *render the WTO system otiose* but should rather be complementary to the WTO system. The derogation from the already existing WTO provisions essentially renders the system nugatory.

²⁸ Magdalena Słok-Wódkowska, "From most-favoured to least favoured nations – how RTAs influenced the WTO MFN-based trade?" (University of Warsaw, Ph.D thesis, Law).

²⁹ Article 26 of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, available at:

< <https://www.refworld.org/docid/3ae6b3a10.html> > accessed on 20/05/20

- e) Mega regional trade agreements although, at heart do have the objective of liberalization of trade central, which is almost in tandem as the objectives pursued by the WTO agreements, they concomitantly have adverse effects. The negative impact posed by MRTA's on developing countries and the least developed countries is a manifestation of these adverse effects.

This is precisely because the developing countries and the least developed countries most significantly rely on the principles established by multilateral treaties,³⁰ to address inequalities that they face in world market trade. For example, the most favoured nation principle, which requires equal treatment of all countries.³¹

The MRTA's erode such principles that precisely seek to protect the developing countries and the least developed countries. In the end, the liberalization intended by MRTA's end up causing various adverse effects. The developing countries and the least developed countries then have no option but to enter into regional trade agreements to address these adverse effects. For example; The Agreement Establishing the African Continental Free Trade Agreement (AfCFTA) a regional trade agreement seeking liberalization of trade in Africa.³²

- f) Mega regional trade agreements lead to the proliferation of regional trade agreements and the creation of policies in other regions as a response to their existence. In the context of the emergence of mega-regional trade agreements such as TTIP, TPP, and RCEP, has necessitated the creation of various regional trade agreements. Various regions have entered into regional trade agreements. For example, the Africa region has established a

³⁰ For example; Agreement establishing the World Trade Organization a multilateral treaty.

³¹ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed on 20/05/20

³² The Agreement Establishing the African Continental Free Trade Agreement (AfCFTA) entered into force on 30/05/2019 and among other things seeks to promote economic growth in Africa through liberalization of trade.

trade agreement namely; African Continental Free Trade Agreement (AfCFTA). The agreement establishing the African Continental Free Trade Agreement (AfCFTA) entered into force on 30th May 2019, which consist of African Countries including Kenya.³³

This agreement is not only intended to help African economies to mitigate trade losses caused by the formation of major trade blocs, but also enhance trade policy coherence within the continent.³⁴

This is an ambitious and inclusive continental-wide trade policy to reform and align multiple existing trade regimes across Africa while addressing the issue of overlapping memberships among the African Regional Economic Communities (RECs).³⁵

At a time when African countries are engaged in reciprocal albeit asymmetrical trade deals with external partners, such as the Economic Partnership Agreements (EPAs) with the European Union, the CFTA should ensure that any African country does not disadvantage its continental counterparts over external partners in terms of market access.³⁶

2. Modes of dispute resolution mechanisms adopted mega-regional trade agreements

A glimpse at the dispute resolution mechanisms adopted by mega-regional trade agreements illustrates that they highly adopt alternative dispute

³³<<https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>>accessed on 20/05/20

³⁴Simon Mevel, Trade and Sustainable Development News and Analysis on Africa, *"Mega-Regional Trade Agreements: Threat or Opportunity for the Future of Africa Trade"* (Vol 5, issue 3 April 2016).

³⁵ Ibid No.34

³⁶ Simon Mevel, Trade and Sustainable Development News and Analysis on Africa, *"Mega-Regional Trade Agreements: Threat or Opportunity for the Future of Africa Trade"* (Vol 5, issue 3 April 2016).

resolution mechanisms.³⁷ These can be termed as 'gentler arts of reconciliation and accommodation'³⁸

In essence, mega-regional trade agreements advocate for alternative dispute resolution mechanisms and are complemented by other modes of dispute resolution mechanisms like panels. Below is a succinct analysis of dispute settlement mechanisms under the three main mega-regional agreements:

a) The Trans-Pacific Partnership (TPP) Agreement

The Trans-Pacific Partnership (TPP) agreement negotiating parties included; Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. The Trans-Pacific Partnership (TPP) agreement was signed by its 12 members in February 2016. Through the TPP, the participating countries sought to liberalize trade and investment and establish new rules and disciplines in the region beyond what existed in the World Trade Organization.³⁹

The Preamble of the agreement succinctly captures the purpose of the agreement as; a comprehensive regional agreement that promotes economic integration to liberalize trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth.⁴⁰

Chapter 28 of the Trans-Pacific Partnership (TPP) agreement, provides for dispute settlement. The Dispute Settlement chapter governs disputes between

³⁷ Analyzing the salient provision on dispute resolution in mega-regional trade agreements like the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) show that they adopt alternative dispute resolution mechanisms.

³⁸ Derek C. Bok, A flawed system of law practice and training (<http://heinonline.org>), page 583 accessed on 20/05/20

³⁹ Ian F. Fergusson, The Trans Pacific Partnership (TPP): In Brief

⁴⁰ Trans-Pacific Partnership (TPP) Agreement

governments. It is unrelated to the Investor-State dispute settlement (ISDS) mechanism, which applies exclusively to commitments in the investment chapter and relates to disputes between private parties and governments.⁴¹

The dispute settlement mechanisms generally apply across the TPP Agreement, including to obligations under the Labor and Environment chapters (chapter 19 and 20 respectively), as well as newer disciplines related to cross-border data flows and state-owned enterprises.

The Dispute Settlement chapter guarantees the right of the public in each TPP country to follow proceedings, by ensuring that submissions made in a dispute will be made publicly available, hearings will be open to the public, and final decisions by panels will be made publicly available. Further, non-governmental entities will have the right to request making written submissions to panels during disputes.⁴²

i) Use of alternative dispute resolution mechanisms

Chapter 28 of TPP commits the TPP Parties to make every attempt to resolve disputes *through cooperation and consultation and encourages the use of alternative dispute resolution mechanisms* where the Parties believe that it would be helpful to resolve a dispute.

The chapter encourages the use of arbitration and other alternative dispute resolution, especially for private commercial disputes. Under the Dispute Settlement chapter, the first formal step is to hold consultations between the relevant Parties, with a view to early resolution of the issue.⁴³

ii) Dispute settlement panel

If consultations between parties fail, the dispute can proceed with a party requesting the establishment a dispute settlement panel tasked with determining whether a Party has failed to comply with its obligations under the

⁴¹< <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Dispute-Settlement.pdf> >accessed on 20/05/20

⁴² Ibid No.41

⁴³ Chapter 28 TPP

Agreement. Specified timeframes are set to ensure an efficient system. A panel may be requested within 60 days after the date of receipt of a request for consultations or 30 days after the date of receipt of a request for perishable goods.⁴⁴

Panels are composed of three objective international trade and subject matter experts. Timeframes for selection of arbitrators are established, including procedures to ensure that the panel can be composed even if a party fails to appoint an arbitrator within a set period.⁴⁵

Clear rules of procedure to guide the functioning of panels and, in particular, ensure the transparency aspects noted above. Besides, panelists are subject to a code of conduct agreed to by TPP Parties to ensure the integrity of the dispute settlement mechanism.⁴⁶

Panels are required to present an initial report to the disputing Parties within 150 days after the last panelist is appointed or 120 days in cases of urgency. That report will be confidential to allow the disputing parties to a dispute review and submit any written comments to the panel. The panel then issues its final report within 30 days of the presentation of the initial report.⁴⁷ The disputing Parties will then be required to release the final report publicly within 15 days thereafter, subject to the protection of any confidential information.⁴⁸

Implementation of the Final Report by the dispute settlement panel

To maximize compliance with the obligations agreed to, the Dispute Settlement chapter allows for the use of trade retaliation (suspension of benefits or payment

⁴⁴ < <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Dispute-Settlement.pdf> >accessed on 20/05/20

⁴⁵ Ibid No. 44

⁴⁶ < <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Dispute-Settlement.pdf> >accessed on 20/05/20

⁴⁷ Chapter 28 TPP

⁴⁸ Chapter 28 TPP

of a monetary assessment) if a party that has been found not to have abided by its obligations fails to fix the problem identified by the panel.⁴⁹

However, before that may happen, a party that is found to be in violation can negotiate or arbitrate a reasonable period in which to fix the problem. While the Parties recognize the importance of prompt compliance with panel determinations, nothing in the Agreement can require parties to change a law or regulation.⁵⁰

Limitation

It is imperative however to note that no TPP Party can provide for a private right of action under its domestic law against any other TPP Party for failure to carry out the obligations in the TPP Agreement.

b) Transatlantic Trade and Investment Partnership (TTIP) Agreement

The Transatlantic Trade and Investment Partnership (TTIP) is a comprehensive trade deal between the European Union (EU) and the United States to promote trade and economic growth.⁵¹ TTIP aims to enhance market access through the elimination of barriers to trade and investment in goods, services, and agriculture between the European Union (EU) and the United States.⁵²

The Transatlantic Trade and Investment Partnership (TTIP) is still under negotiation hence the agreement has not yet set out a dispute settlement system. However, in the negotiation both the United States and European Union propose that; the TTIP dispute settlement system would be based on the WTO's

⁴⁹ < <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Dispute-Settlement.pdf> >accessed on 20/05/20

⁵⁰ < <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Dispute-Settlement.pdf> >accessed on 20/05/20

⁵¹<<https://www.investopedia.com/terms/t/transatlantic-trade-and-investment-partnership-ttip.asp>>
accessed on 20/05/20

⁵² Vivian C. Jones and Shayerah Ilias Akhtar, Transatlantic Trade and Investment Partnership (TTIP) Negotiations

successful dispute settlement system and would feature important innovations, such as⁵³:

- i) Enabling the EU and US to decide in advance which arbitrators are eligible to sit on panels, rather than choosing them on a case-by-case basis; this would increase mutual trust in the arbitrators and their rulings;
- ii) Ensuring even greater transparency by holding hearings in public; allowing interested parties, such as non-governmental organizations, to give their views in writing;
- iii) Publishing all views submitted to the panel of arbitrators.

An analysis of dispute settlement System under WTO an established multilateral system

The WTO's dispute settlement system is an established system of resolving disputes between member states.⁵⁴ The emerging mega-regional agreements borrow heavily from WTO's dispute settlement system. Its vital characteristics like having procedures for mediation, conciliation, good offices, arbitration, consultation and panel procedures make it an ideal dispute settlement system.⁵⁵ The WTO's dispute settlement system has as its foundation the rules, procedures and practices developed under the General Agreement on Tariffs and Trade (GATT) 1947.⁵⁶ However, it improves upon the previous system in several ways, including by being more accessible. This is shown by the increased participation of developing countries.⁵⁷

The dispute settlement system follows specific and detailed timetables for completing the examination of a case. This first takes place by a group of three

⁵³Directorate-General for Trade of the European Commission; The Transatlantic Trade and Investment Partnership (TTIP) Towards an EU-US trade deal.

⁵⁴<<https://www.everycrsreport.com/reports/RS20088.html>>accessed on 20/05/20

⁵⁵Dispute Settlement Understanding (DSU) which is Annex II of Agreement establishing the World Trade Organization (WTO)

⁵⁶<https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf> accessed on 20/05/20

⁵⁷ WTO, Resolving disputes among WTO members.

panelists who are specially selected for the case. Their findings are published in a report which may be appealed by the members concerned. Appeals are considered by the WTO's Appellate Body, which consists of seven members elected for a four-year term.⁵⁸

The rules and procedures of the WTO's dispute settlement system are set out in the Dispute the "Understanding on Rules and Procedures Governing the Settlement of Disputes" or Dispute Settlement Understanding (DSU) which is Annex II of Agreement establishing the World Trade Organisation (WTO), which is administered by the Dispute Settlement Body (DSB), consisting of representatives of all WTO members. When lodging a complaint, WTO members are required to specify which WTO agreements are allegedly being violated. (Consider Annex I to IV of WTO agreement)

The "Understanding on Rules and Procedures Governing the Settlement of Disputes" or Dispute Settlement Understanding (DSU) agreement provides the common rules and procedures for the settlement of disputes related to the WTO Agreements. It aims to strengthen dispute settlement procedures by prohibiting unilateral measures, establishing dispute settlement panels whose reports are automatically adopted, setting time frames for dispute settlement, establishing the Appellate Body, etc.⁵⁹

The WTO dispute settlement mechanism also contains provisions for special or extra procedures under agreements such as Articles XXII and XXIII of GATS (General Agreement on Trade in Services) as well as the procedures and rules of the Appellate Body. The mechanism covers the procedures for mediation, conciliation, good offices and arbitration, and the core part of those procedures includes "consultation" and "panel procedures" and a series of other procedures relevant to them.

⁵⁸ WTO, Resolving disputes among WTO members.

⁵⁹ Overview of WTO agreements Chapter two

4. Conclusion

Mega regional trade agreements are likely to cause a ripple internationally that will be felt tremendously. This is not just for the efficacious value they hold especially in the liberalisation of trade, *but also inversely in the erosion of the multilateral system.*

The multilateral system involves a vast number of members with divergent ideas and interests, thus, compromise is usually vital. However, this is very unlikely when it comes to Mega regional trade agreements, not to discard as being impossible, as members usually are pushed to join based on the pursuance of various interests.

MRTA's are gainful for countries especially for the greater appeal they possess when it comes to the availability of a market-ready to assimilate the products from different member states. MRTA's effectively create an optimal atmosphere for the conduct of trade. This essentially creates dynamism in the market as innovation is bolstered, more especially due to the permeation of products in the market forcing producers from other countries to take an initiative to produce better products, thus, enhancing healthy competition. It would not thus be wrong to say that Mega regional trade agreements are the epitome of liberalisation.

However, while they do possess very fundamental aspects central to trade, Mega regional trade agreements should ensure that the WTO system is the guiding platform. Mega regional trade agreements should not derogate the WTO system but rather ensure that the policies within such regions are integrated in such a manner to complement and ensure the progression of the multilateral system under the WTO.

Article 30 of the Vienna Convention on the Law of treaties 1969 which provides for the application of successive treaties relating to the same subject matter ought not to be derogated from by members of various Mega regional trade agreements.

Mega-Regional Trade Agreements: Analyzing their Impact on Treaty Policy and Law and their Modes of Dispute Resolution Mechanisms.:
Peter Mwangi Muriithi

(2020) 8(2) Alternative Dispute Resolution

Mega regional trade agreements, highly adopt alternative dispute resolution mechanisms as the preferred modes of dispute resolution mechanisms. Further panel procedures are a prevalent mode of dispute resolution adopted by mega-regional agreements.

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Mega-Regional Trade Agreements: Analyzing their Impact on Treaty Policy and Law and their Modes of Dispute Resolution Mechanisms.:
Peter Mwangi Muriithi

(2020) 8(2) *Alternative Dispute Resolution*

Kazunobu Hayakawa, Shujiro Urata, Taiyo Yoshimi, Designing mega-regional trade agreements

Ian F. Fergusson, The Trans Pacific Partnership (TPP): In Brief

Magdalena Słok-Wódkowska, "From most-favoured to least favoured nations – how RTAs influenced the WTO MFN-based trade?"

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United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331,
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Vivian C. Jones and Shayerah Ilias Akhtar, Transatlantic Trade and Investment Partnership (TTIP) Negotiations

An Overview of Negotiating Peace Agreements in East Africa

By: *Henry K. Murigi**

Abstract

Negotiations are in the list of alternative dispute resolution approaches and produce negotiated agreements when used in the context of conflict. Negotiated agreements are constructed through diverse processes. They, however, face both structural challenges arising from the nature of negotiations processes and cultural challenges meaning they are context specific. In this paper, we seek to highlight both challenges. States in East Africa have undergone varied types of conflicts ranging from resource related, political, and ethnic among others. Each of the East African States in the region has recently experienced conflict but has successfully negotiated their way out albeit with serious challenges. The paper seeks to analyze the process, approaches, theories, actors and outcomes of negotiations as a model of conflict resolution. This paper will consider the attempts that have been made to use negotiation in conflict resolution in Kenya, Burundi, Uganda, Rwanda and Tanzania.

1. Introduction

Negotiation has been traditionally defined as a discussion between two or more parties aimed at resolving incompatible goals. It is one of the approaches to dealing with conflict Dean G. Pruitt & Peter J. Carnevale (1997). International negotiation defined widely may include a process by which states and other actors in the international arena exchange proposals in an attempt to agree about a point of conflict and manage their future relationship Bercovitch & Jackson, 1997: 25-26. It is a continuous set of related activities involving actors, decisions and situations. A highly flexible form of joint, voluntary, non-binding decision making, negotiation encompasses a wide spectrum of behavior that ranges from formal discussions in a multilateral forum such as the UN, to informal conversations at an embassy cocktail party. It need not even involve verbalized communications. Instead, it might be tacit, as in a series of moves and counter-moves. Furthermore, depending on the wishes of the disputants, it can be conducted formally or informally, in secret or in the open, by heads of

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state or by low-level officials, with closed or open-ended agendas, under firm deadlines or less firm deadlines, and using hard bargaining or problem-solving strategies.

2. Conflict Resolution through Negotiations

To begin with we consider the structural aspects of negotiations and the challenges reposed in the structure of negotiations as a conflict resolution approach. The preference for the negotiation option in the settlement of violent international disputes is one that has taken place against a backdrop marked by a growing preference for international negotiation as the principal means for dealing with international disputes on a wide range of issues. This is partly due to a stronger understanding of the processes of interest based negotiations, a method of structuring negotiations toward a 'win-win' solution in which both parties reach a satisfactory agreement on issues critical to each (Cohen et al. 1991).

Some scholars have located one of the main challenges to negotiation processes to be rooted in communication Curle, A. (1996). The challenges on international negotiation agreements in conflict settings can be classified into major approaches those that stress the importance of communications on one hand and dialogue as trust-building activities that help change the perceptions of warring parties on the other hand. These two concepts assist in promoting cooperative solutions and those that view the negotiation process as a risk management process directed at changing the preferences of the parties and their strategic ability to commit to negotiated agreements. The main idea of negotiations is compromise which is most often hard to achieve with ease. These challenges are well demonstrated in the following East African cases.

2.1 Ripeness of Conflict

One of the main challenges of negotiated agreements in East Africa is the misreading of the ripeness of the moment for an agreement. It is only when a conflict is ripe for settlement that negotiations can flourish. This does not mean that warring parties, third party interveners or other peace making actors do nothing until a conflict ripe for negotiation, resolution or settlement. That is why many conflict resolution attempts are made, but only a few succeed. The idea is

that the parties must have been greatly affected by the conflict for them to realize that they cannot achieve their aims by continued fighting, and that it is costly to continue fighting. It can be argued that one of the challenges to negotiated agreement is that the stalemate did not hurt enough, but again there is no clear evidence as to how long a stalemate has to last or how much it has to hurt before it triggers successful negotiations (Cairns, 1997). It is therefore important to distinguish, between ripeness for negotiations to start and ripeness for negotiations to succeed. The two are mutually exclusive and play a great role in the success of the agreement. Correct reading of ripeness is one of the main challenges to negotiations.

3. Understanding Negotiation

Here, we discuss in brief the stages and dynamics of negotiations and how they feed into the conceptual challenges of the negotiation process. We also consider that sometimes the parties may or may not choose negotiation as a conflict resolution model to their own disadvantage in spite of the opportunities it offers for a negotiated settlement. Lastly, we consider the arguments by critics about negotiated agreements.

3.1 Stages and Dynamics of Negotiation - Rwanda

It is critical to understand the stages and dynamics of any process as when this is not correctly understood it may pose a great challenge to the effectiveness of its output. In negotiation one of the main output is a negotiated agreement which as product is as good as the process producing it. Although it can be argued that a process may be flawed but produce an excellent agreement since it is in the spirit of the negotiating teams to reach an agreement, the process is just as important.

To begin with, the stages of negotiations as suggested by Druckman, et al (1999) are classified into four categories. In understanding the Rwanda case, this paper seeks to demonstrate that these stages were not adequately utilized. First, the actual negotiation process begins by *nonstick sounding* which includes establishing rapport for the warring groups. This may take the format of entertaining and establishing trust from variation of the cultures. One of the challenges is that sometimes negotiations do not include key stakeholders and

also there are issues dealing with power play between the antagonists. In Rwanda the negotiated response to the genocide was aimed to ensure that the entire country was behind the need to resolve the conflict.

Second, the parties then exchange their background information and express their needs and preferences. At this stage, the parties explain their initial positions and the differences become apparent. The genocide in Rwanda was a serious challenge that shocked the conscience of the world. Some have however argued that the approach taken by the President Kagame's regime was a pacification of the problem and it remains ticking time bomb for a far worse crisis. This might be a stretched argument that when properly scrutinized could reveal absence of proper factual basis. To this end, although the Gacaca courts were a product of the negotiations, they may not have gone to the root of the information needed for a permanent peace in Rwanda. Third, parties seek to convince the other using persuasive strategies with a view that parties modify their position for accommodation of other parties. The tactics used to persuade may include direct/honest acts, bluffing, threats, and misrepresentations with a view to gaining concessions at the end. Lastly, agreement is reached by a conclusion and accord is reached. This is the culmination of the process leading to the agreement the ultimate handshake turned into a formal written document.

There are several aspects that are at play during the negotiations that require the teams to put themselves in the other party's shoes. This requires that parties understand the other parties perspectives. Negotiators may use hard, soft and principled approaches to attempting to resolve conflicts. Roy Lweicki et al (1997) argue that in making a choice on negotiation strategy one must consider the outcome that is crucial to their course. In Rwanda it was considered that the substantive outcome was to ensure that they deal with the entire conflict toward a resolution. It was also realized that there was need for justice to be achieved for the victims which was balanced with the fact that the parties would ensure societal engagement. Roy Lweicki et al (1997) suggest that relational outcomes seek to restore the relationship between the warring parties.

Since it was impossible to avoid the relational reality in Rwanda post genocide, maintaining the relational and substantive outcomes was, as a strategy, worked in the context of lack of a better alternative to a negotiated settlement (BATNA). One of the challenges for negotiation is that the worst alternative to a negotiated settlement (WATNA) is always appealing to some of the parties. Competitive approaches in negotiation may work where there is a substantial goal as the bottom line but not when it is a relational outcome. These antecedent factors that influenced the context of the negotiation including the nature of dispute which comprises of intensity, complexity and issues related to the dispute Richard Jackson (2000). Also the nature of parties and their relationship influences the context within which the relationship of parties was at play in Rwanda.

4. Challenge of Conceptualization in Kenya

Many scholars have come up with different typologies of conflict. Mwangi (2005) argues that there are simple and complex conflicts. Simple conflicts are as a result of difference of opinion while complex conflicts entail numerous deaths, large scale displacements of people, mass famine, failing economic, political, and social institutions. Mwangi adds that there are short-lived conflicts like the case Kenya's 2007 post-election violence. There have been numerous challenges in Kenya leading to overt conflict right from independence. This history underscores the dynamics of conflicts in Kenya since most of the issues surrounding the conflicts have not been ultimately resolved. Put differently, the root causes of the conflicts in Kenya have never been addressed. This paper does not seek to explore that concept and all previous conflict situations. It seeks to analyze recent events that have led to conflict and how negotiations have been utilized albeit covertly.

4.1 Choice of Negotiation over Others - Kenya (Handshake)

Power strategies are critical and Roy Lweicki et al (1997) suggest that to limit power games, tactics such as persuasion as opposed to threats, exchange as opposed to competition, legitimacy as opposed to opportunism, friendliness, praise and reinforcement of commitments, consultation, and inspirational appeals should be adopted. After President Uhuru Kenyatta won the 2017 election, the leading contender the former Prime Minister Hon Raila Odinga and

he met behind closed doors and negotiated on what is now celebrated countrywide and referred to as the handshake. The handshake of 9th March, 2018 received mixed reactions since it caught most Kenyans by surprise. The output of the negotiation was an agreement in form of the initiative dubbed Building Bridges Initiative (BBI) consisting of prominent Kenyans appointed by the President and Raila Odinga. This was a clear case of a strategic maneuver, power games and dynamics that require investigation and study not merely because of the importance it has but to enhance the debate on negotiated agreements.

Power dynamics ought to be correctly anticipated as it might well be that the persons who purport to represent a community, state or group may not have the power to do so and as such real power is in the hands of another (other) party (parties) who may not be present in the negotiation. In the handshake, the President had legitimate power and Raila Odinga had, sworn himself as the people's president, and a threatened economic boycott (whether a bluff or not is another issue) was in the offing. There were allegations arrest and charges for various supporters for committing treason. This was an opportunity for uniting the country which was the President's agenda.

Several factors inform the choice of negotiation over other approaches to conflict resolution. First, the interests in the negotiation inform this decision a great deal. To get to a place of mutual interest in a negotiation is somewhat elusive but it might be a determinant to the negotiation process choice. In the Kenyan case, it can be argued that the mutual interest was stability of the country. No other forum had potential to frame this ideal. The Supreme Court had done its part, the legislators had also done their part, and there was a dilemma on the way forward for the Country.

Second, norms especially social norms have a huge impact on the choice. Norms shape the arguments and outcomes of negotiations. Under this issue, there is need to ensure that norms are applied fairly to encourage efforts that would achieve equal outcomes. The legal framework for resolving any dispute on the presidential election provided for in the law in particular the Supreme Court has the exclusive jurisdiction to resolve this disputes.

Third, the relationships which may have a positive or negative impact on the negotiation process. This may include the nature and origin of the relationship. The President and Raila Odinga have a shared history and common identity as children of founding fathers of the Republic.

Fourth, the group dynamics and networks are critical in the choice. This boils down to communication channels and power plays within the group. This is where the challenges begin to emerge over the decision to negotiate privately. The decision making process within the group may delay or expedite the choice of negotiation. In the case of the handshake, the president did not negotiate in his capacity as party leader of Jubilee party but as the President of the Republic. This was one of the major advantages for him but a big disadvantage to the Jubilee party. This disadvantage has led to the perceived split within the ranks of the political divide.

4.2 Resource based Negotiations - Tanzania

Most of the conflicts in Tanzania are about resources such as water arising from pastoralist related activities. They sometimes present themselves as ethnic related conflicts according to Kuney (1994). He argues that in Tanzania, compared to other countries, the magnitude of the conflict is relatively small. He argues that one of the most prominent conflict takes a tribal perspective and is between the Masaai and WaArusha. However, at the center of the dispute or conflict is the issue of land ownership, land economics and commercial use of land as a factor of production. Recently, there were reports that the conflict between the Masaai community in Kenya and Tanzania had conflict over grazing land. This conflict can escalate to unmanageable levels if not correctly diagnosed and managed through negotiations.

It is therefore easy to generalize the conflict and not really understand the root cause as argued by Doucey (2011). All human beings have basic needs. Part of these needs are physical, like the need for food, water or shelter, but essential needs go beyond these few elements because they cover the psychological sphere. "Needs" theorists, John Burton (1990), argues that needs are universal and nonnegotiable and, therefore, in the context of conflict should be primarily addressed as a basis for negotiating peace settlements.

4.3 Uganda Migingo Row

Uganda on the other hand, has had a history of violent conflicts especially prior to the regime of President Museveni. After he ascended into power there has largely been structural violence which relates to his Machiavenean style of staying in power. However, this paper shall consider the Migingo row which was settled by a negotiated agreement between Kenya and Uganda. Shaka (2013) argues that there was a rumbling unease on Migingo Island after Kenyan policemen were sent to the Island to assess and examine the complaints of unfriendly conduct of the Uganda Police against Kenyans in 2013. In response, Uganda deployed military force to the island leading to apparent conflict. This appeared to be another setting that would present a cross border conflict since some of the Kenyan fishermen were being treated unfairly and arrested by the Ugandan government (Shaka 2013).

Wekesa (2010) questioned why Migingo row had not been resolved and continued to surround the relations between Kenya and Uganda. It had been argued that the Kenyan side had taken a diplomatic posture (soft power) as a negotiation antique by considering the row as a non-issue. The Ugandans on the other hand deployed their military at will (hard power) since they considered their sovereignty to be under siege. This was especially so when Kenya deployed administration police to the Island and Uganda reacted by sending them away. At the 10th ordinary summit of the East Africa Heads of State meeting, a negotiated agreement by way of a resolution was passed to the effect that the Uganda and Kenya Government resolve the Migingo row leading to formation of a task force. In the agreement, the boundary survey was formed and the framework agreed to be guided by the provisions of the British order in Council of 1926, the Kenyan Constitution 1963, and the Ugandan Constitution 1995.

Baligidde (2012) argues that it is critical to examine how a country like Uganda could survive as a state among super powers. To understand Uganda for example he suggests that the Foreign Affairs Minister was a brother-in-law to the President and is part of the inner circle with the potential of influencing decisions. Baligidde further contends that Uganda's foreign policy utilized in the negotiations was influenced by a minority and not the view of the populace.

He posits that for a decision maker to be successful in the desire to retain power there must be a balance in foreign policy and maximization of the local/national support of the regime.

5. Actors in Conflict Resolution

The critical issues to interrogate when analyzing the role of actors include: interests, goals, positions, capabilities, potential and relationships. (Ghali, 1993) argues that interests are the underlying motivations of the actors while goals are the strategies that actors use to pursue their interests. He adds that positions are the solutions presented by actors on a given context, irrespective of the interests and goals of others while capacities are the actors' potential to affect the context, positively or negatively. Potential can be defined in terms of resources, access, social networks and constituencies while relationships are the interactions between actors at various levels, and their perception of these interactions (Ghali, 1993).

Bloomfield and Moulton (1997) suggests that some approaches distinguish actors according to the level at which they operate such as grassroots, middle level, and top level. In any case, it is important to consider the relationships between actors at various levels and how they affect the conflict dynamics. They argue that particular attention should be paid to spoilers, specific groups with an interest in the maintenance of the negative status quo. If not properly dealt with, they may become an obstacle to the conflict resolution process. It is therefore important that actors are assessed in relation to their capacity, legitimacy, the likelihood of their engagement, and the possible roles they can adopt before being allowed on board.

For Burundi we consider the challenges to negotiations by the East African Community (regional body) as an actor as well as the local traditional mechanisms called the *bashingatahe*. The East African Community (EAC) is regional intergovernmental organization comprised of six (6) States in the Africa Greats Lake region in Eastern Africa. The organization was founded in 1967. However, there was a momentary collapse of the organization in 1977, and pursuant to renewed and continuous efforts of the Presidents of Kenya, Uganda and Tanzania, it was revived in 2000. Burundi and Rwanda later joined the

federation after it became apparent that there was need to foster regional cooperation.

According to Daniel P. Sullivan (2005), Burundi has been ravaged by a history violent outbreaks, often consisting of Hutu rebel attacks followed reaction of the Tutsi military forces (1965, 1972, 1988, and 1993). Such outbreak took place in the 1972 genocide, an important and reference point for Burundians in which between 2,000 and 200,000 Hutu were killed, while other Hutu's fled the country. Another outbreak of violence took place in 1988, fuelled largely by rumours showing tendencies of a 'new 1972', which led to the killing of several hundred Tutsi by Hutu in response the killing of as many as 20,000 Hutu by the Tutsi.

Daniel P. Sullivan (2005) argues that the failure of a power-sharing (negotiated agreement) attempt at peace in Burundi led to the killing of hundreds of thousands of Burundians and created room for the tensions that led to the genocide in Rwanda where 800,000 people lost their lives. Schraml (2014) argues that the mainstream (constructivist) theorizing about ethnicity should be expanded in order to take essentialist aspects that are present in the notions of "potential ethnics" into account. By focusing on the notions of "potential ethnics", that is, in this case Burundians, one avoids the oversimplification that still persists in the debate about essentialist and constructivist approaches to ethnicity. In that work he demonstrates that between September 2007 and May 2008 Burundians did not conceive of ethnic categories as either constructivist or essentialist, but that constructivist and essentialist notions exist next to each other and are strongly intertwined in the different lines of reasoning. Attempts to view Burundi as a classic case for ethnicity is one of the reasons why the negotiations agreements have not worked in Burundi.

There has been a great push by scholars to have African solutions to African problems. Okello, S. (2016), argues that there should be approaches that adopts African Solutions for Peace and Security (AfSol), try Africa first, and do it yourself ideas. This is applicable to the EAC as well. Munene (2015) argues that without external interference each EAC's state has tried to become viable and acceptable to its people and have concentrated on peace, meaning law and order

at the expense of maintaining generic peace. The efforts by the community have thus failed to address the issues in Burundi which remains under crisis even today.

5.1 The *Bashingantahe* Analysed

Any intervention that is not approached from bottom up will ultimately fail in Burundi. One such institution is the traditional dispute resolutions that adopted negotiations as a means of dispute resolution. The monarchical the institution of *bashingantahe* which was similar to the *Gacaca* in Rwanda. *Bashingantahe* was formal traditional way of resolving community disputes under the monarchy in Burundi. There have been several attempts at negotiations with a view to revive the institutions in pursuit of the fulfilment of the Arusha Accord. In considering this institution, it has been argued by Vandeginst S. (2008) that the current preferred means of seeking a lasting solution to conflict is regional and international mediation, and Burundi has had recourse to such an approach. However, the wrongs committed in a particular country are best dealt with by those who are familiar with their root causes and the parties involved those, in other words, who have suffered directly and have issued pleas for help to political leaders who are not always able to provide answers to the challenges at hand which would be reached by way of an agreement. He argues that political transitions contained in negotiated agreements can sometimes appear like a no man's land where all kinds of evil practices go on behind the scenes, with crimes and a prevailing culture of impunity only serving to increase the number of victims. This, in turn, is why macro-political efforts should always be accompanied by initiatives that operate close to the people, on a human scale that enables the resolution of conflicts at the grass-roots level.

Vandeginst S. (2008) further argues that in Burundi transitional justice including negotiated agreements can serve as a complementary element to existing judicial structures that have either broken down or been rendered ineffective by the conflict and the painful experiences of many. As a traditional institution for managing conflict the institution of *Bashingantahe* can act as a safeguard guaranteeing community harmony and reconciliation. One of the major challenges that remains unaddressed mainly involves a tendency to trivialize the institution and the development of sound collaboration between the

authorities and the *Bashingantahe*. Other difficulties such as the incorporation of young people into the institution, and the investiture of women in their individual capacities, independently of their husbands, as well as the role they can play in the present context of a country recovering from crisis have not been included in the negotiated agreement. These are significant challenges, but they should be tackled sensitively, without unduly disrupting an already fragile Burundian society. Vandeginst S. (2008) agreeably suggests that culture does not change overnight. Mindful of this, once it is back on its feet the institution of *Bashingantahe* can play its full social and political regulatory role in the maintenance of peace and social cohesion and as a moral and cultural reference point. Additionally, it can play a significant role in the process of reconciliation in a society which has torn itself apart in the course of recent years, but is today committed to the path of reconciliation and reconstruction.

6. Way Forward

This paper has highlighted several challenges and the attempts that have been made to overcome them with some being problematic while others simple in arriving at a negotiated agreement. There appears to be an emerging consensus on some of the approaches that parties and negotiators must be aware of when engaging each other to ensure that there is a win-win negotiated agreement. This approaches apply to both structural and cultural challenges and calls for alertness to the needs of each other. These two ideas call for a cooperative view to the negotiation process as a conflict resolution process directed at changing the predilections of the parties and their calculated aptitude to commit to negotiated agreements. Here are some of the proposed approaches and way forward, though not exhaustive or exclusive, should be adopted by East African States in arriving at negotiated agreements to future disagreements. First, both parties should ensure that they have done a background into their opponent before embarking on the negotiations. This calls for deep research which is critical to understanding the root cause of the dispute or conflict as well the idiosyncrasies of the other party. This may require seeking professional assistance from those well equipped with the technical knowhow to give advice on the best approach to negotiations. The results from the research would ultimately become a good basis for engaging in negotiations.

Second, every process is often times as good as the players involved. Setting acceptable ground rules is critical to the negotiation. In so doing parties are able to ensure that trust is attained to the extent that the negotiations become meaningful. Third, identifying and establishing extra-mural mutual trust is critical. This occurs when parties meet with an attempt to diffuse the tension raised from the issues that have generated negative energy, produced heated exchanges and escalated the dispute to unmanageable levels. This calls for ensuring that the atmosphere in which the negotiations are taking place is seen to benefit both parties including getting a neutral grounds where the discussions would happen as well as setting the right atmosphere for resolution of a dispute. Ordinarily this is the negotiators duty but when parties are in control of the process it would be important to have this as a cardinal rule for setting up a face-face meeting. Fourth, the most important approach is one that ensures that cultural differences are acknowledged, appreciated and respected. It would be full hardy to insist on being right due to a single perspective to an issue. Understanding cultural differences does not mean that one is converted to the other sides view point, instead it means one has a richer perspective to the issue at hand. This calls for active listening and genuine desire to understating the other side's view point which often helps in understanding the conflict/dispute and the other party better. As stated earlier this are a few suggested way forward as approaches that might aid defeating the challenges highlighted in this paper. They are not exhaustive or conclusive.

7. Conclusion

In Kenya, there have been several negotiated agreements but the most prominent was the national accord settling the violent conflict post-election violence in 2007/8. Recently there was the handshake agreement. Burundi, on the other hand, has undergone a series of agreements due to the violent conflicts that have rocked the country since independence. Rwanda, on the other hand, recovered from the genocide and the peace agreement settled the post conflict reconstruction. Tanzania and Uganda have also had negotiated agreements and for purposes of this paper, the focus has been on Masai for Tanzania and Misingo for Uganda. However, there have been several challenges to the effectiveness of the negotiations that will be the subject of the study. This paper has highlighted the concept of negotiation as a conflict resolution mechanism

and the challenges facing the agreements reached in the countries. It is not that the challenges are unsurmountable, it is that they require a deeper understanding of the importance of negotiations. The paper has also highlighted some ways to approach negotiations with a view to overcome the challenges identified.

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Effective Dispute Settlement as a Catalyst for Infrastructure Development in the Construction and Energy Industry¹

*By: Eng. Bwalya Lumbwe**

1. Introduction

The construction industry covers a wide range of different types of projects, from offices, factories and warehouses, shopping malls, hotels and homes to major infrastructure projects that involve more complex civil engineering works such as the construction of harbours, railroads, mines, highways and bridges,² including tunnels. Added to this list are airports, rural roads, dams, waterways, irrigation, water supply and sewerage works and digital, Information and Communication Technology (ICT) networks³. Other construction projects involve specialist engineering works such as shipbuilding; bespoke plant and machinery such as turbines, generators and aircraft engines⁴. The works that support energy projects such as upstream oil and gas projects or renewables like wind, wave, solar and nuclear plants⁵ are in reality a subset of the construction industry and can be referred to as part of the energy industry. Included in the energy category is the harnessing of water to produce electricity through hydro-power plants and the attendant power distribution infrastructure.

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¹ The paper is based on a masterclass that the author taught at the Lagos Court of Arbitration on the 17th September 2019

² Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Introduction 1-3

³ Internet, phone, mobile payment services included

⁴ (n2)

⁵ Ibid

Infrastructure, by one conventional definition, is the basic systems and services, such as transport and power supplies that a country or organization uses in order to work effectively.⁶ The construction industry, therefore, is an enabler of infrastructure development including energy infrastructure.

Category-wise, infrastructure can be grouped as follows:

- a. Resource-based infrastructure- e.g. water, irrigation, power and energy supply
- b. Physical infrastructure-e.g. roads, transport, rails, airport, seaports, harbours, ICT, sewerage / wastewater
- c. Institutional or other infrastructure-e.g. schools, hospitals, universities, colleges, offices, security structures, housing and residential developments.⁷

Infrastructure delivery is by the state through public procurement processes⁸ or the private sector, though typically the state takes the lead in most countries for both resource-based and physical infrastructure.⁹ However, concession¹⁰ based

⁶ Cambridge online dictionary

<<https://dictionary.cambridge.org/dictionary/english/infrastructure>>accessed 30/02/2019

⁷ Skyways, *Expanding Africa's Agriculture Infrastructure Needs* (Urs Honegger, Airlink, Magazine by Panorama Media Corp [Pty] Ltd, Feb 2020) 50-51

⁸ Public procurement is a process in which governments through entities under their control ('procurement entities') acquire goods, works and services to accomplish many of their public duties. See Geo Quinot, Sue Arrowsmith (eds), *Public Procurement Regulations in Africa* (Cambridge University Press 2013) Introduction starting at page 1

⁹ This is true for Africa. See the Infrastructure Consortium for Africa, *Infrastructure Financing Trends in Africa* (2018)

¹⁰ Defined as 'instruments for the construction, financing and management of infrastructure and services of public interest'. Refer to Philip Dunham and José Manuel García Represa, *Construction Arbitration and Concession Contracts*, in Stavros Brekoulakis and David Brynmor Thomas, (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Chapter 26

infrastructure development, including Private Public Partnerships (PPPs)¹¹ which is applicable across all the categories is increasingly common.¹²

In terms of economic contribution, the construction industry is a major contributor to economic growth worldwide. In the United Kingdom it has been estimated that every £1 investment in construction out-put generates £2.84 in total economic activity¹³. This statistic emphasizes the importance of the construction industry and by extension infrastructure development in a country's economic endeavors. Infrastructure works or projects by their nature tend to have large monetary values and as such should in general result in a proportionately large economic contribution. Infrastructure development lies at the nexus of economic growth, productive investment, job creation, and poverty reduction.¹⁴

¹¹ According to the World Bank, 'there is no one widely accepted definition of public-private partnerships (PPP).' However, 'the PPP Knowledge Lab defines a PPP as "a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance". 'PPPs typically do not include service contracts or turnkey construction contracts, which are categorized as public procurement projects, or the privatization of utilities where there is a limited ongoing role for the public sector'. See < <https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>> accessed 30/02/2019

¹² Philip Dunham and José Manuel García Represa, *Construction Arbitration and Concession* in Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Chapter 26, 309

¹³ Report by L.E.K. Consulting commissioned by the UK Contractors Group in partnership with the CBI published October 2009; Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) introduction 1-3

¹⁴ Infrastructure Finance

<<https://www.worldbank.org/en/topic/financialsector/brief/infrastructure-finance>> accessed 10/02/2020

2. Infrastructure Construction Industry and Disputes

According to Brekoulakis and Thomas,¹⁵ complex construction infrastructure projects are rarely completed without encountering risks that lead to changes to the time and cost required for their execution¹⁶ and to quality as well. In addition, this is true not only for the complex projects, but also for the non-complex projects for other reasons other than complexity of the project that also affect project time, cost and quality. These reasons may include non-payment or late settlement of amounts due to a contractor or poor supervision. The two authors further state that, the changes to quality, time and cost in turn give rise to disputes, 'the majority of which and possibly the vast majority are submitted to alternative dispute resolution('ADR')' and eventually to arbitration.¹⁷ In practice the ADR processes common in construction are tiered starting with adjudication or dispute board processes and then eventually arbitration.¹⁸

The nature of typical infrastructure works is such that they carry considerably more risk than any other typical commercial transaction, both in terms of the amount of risk allocated under them and the complexity of that risk. The typically long durations lead to risks such as unexpected ground and climate conditions, fluctuation in the price of materials and in the value of currency, political risks, for example, governmental interventions and legal risks such as amendments in law or failure to secure legal permits and licences.¹⁹

These risks are further amplified in the energy sector which includes the nuclear power sector with its own peculiarities and risks aside from those found on any

¹⁵ Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) introduction 1-

¹⁶ Known by the industry term as the triple constraints- time, cost and quality as they are in competition with each other in project or works delivery

¹⁷ (n15)

¹⁸ Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2, 2019) 35

¹⁹ Stavros Brekoulakis and David Brynmor Thomas, Editors, *Global Arbitration Review: The Guide to Construction Arbitration* (Law Business Research Ltd. 3rd edn,2019) Introduction 1-3

conventional project.²⁰ For example, in conventional power projects, owners and suppliers juggle the competing constraints of time, cost and quality, with priorities driven by the commercial objectives as reflected in the underlying construction contract.²¹

For a nuclear project, nuclear safety overseen by a local nuclear regulator is superimposed over these constraints. 'Quality is non-negotiable, limiting the parties' ability to compromise on time and cost. Every aspect of the project must comply with the relevant nuclear safety requirements, irrespective of how long or how costly it is to achieve compliance.'²² This overriding requirement generates risk streams, that often are an issue in any construction dispute in the nuclear sector.

Furthermore, disputes in the energy sector present a range of challenges for stakeholders in the industry, which can be particularly acute given their inherent complexity and the financial and frequently, political consequences of delay and disruption in production. Such complexity is often compounded by the highly regulated environment in which these projects are developed.²³

The international nature of infrastructure construction sometimes means that the state is a party to a contract with contractors, subcontractors and suppliers will often come from a number of different countries and nationalities. Since the state is sovereign within its own territory, there are often concerns that a contractor or investor in, for example, a concession or PPP or a turnkey project may not be able to obtain adequate relief against harm it suffers as there is a perceived risk that a state will favour its own interests and those of its nationals

²⁰ Jane Davies Evans, *Construction Arbitrations in the Nuclear Sector*, in Stavros Brekoulakis and David Brynmor Thomas, Eds, *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Chapter 24, 293

²¹ (n 20) 290

²² Ibid

²³ Scott Stiegler and James L. Loftis, *Energy Sector Construction Disputes*, in Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Chapter 25, 301

over those of foreign parties.²⁴ Relief and protection for such contractors and investors may be found in the form of investment treaties, entered into between states for the purpose of promoting and protecting foreign investment.²⁵

The sum total of the above is that infrastructure construction works have a reputation for disputes and conflicts resulting from the various risks and more so for energy projects than typical construction project such as offices, roads, railways etc.

The Global Construction Dispute Report 2019²⁶ (Arcadis Report) is produced annually and tracks construction disputes. The report covers North America, UK, Continental Europe and the Middle East only, however it is likely that most indicators and conclusions will be similar for Africa, Asia and South America, parts of the world not reported on. The report states that the global average dispute value in 2018, was US \$33m and the global average length of the dispute was 17 months.²⁷ In the Middle East these figures were US\$ 56.7m and 20 months respectively.

The International Chamber of Commerce²⁸ ('ICC'), ICC Dispute Resolution 2018 Statistics²⁹ reveals that 'In Construction/engineering and energy disputes generate the largest number of ICC cases and, as in previous years, account for

²⁴ Tony Dymond, Gavin Chesney and Laith Najjar, *Investment Treaty Arbitration in the Construction Sector* in Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Chapter 23, 273

²⁵ (n24)

²⁶ Though the report is dated 2019, it is based on 2018 data, see page 4

²⁷ The value of a dispute is the additional entitlement to that included in the contract, for the additional work or event which is being claimed. The length of a dispute is the period between when it becomes formalized under the contract and the time of settlement or the conclusion of the hearing.

²⁸ For details see < <https://iccwbo.org/about-us/who-we-are/>> accessed 21/05/2020

²⁹<http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web_icc_disputeresolution2018statistics.pdf?m=11.6.2019%2011:46:22&_cldee=YXJiaXRyYXRvcnphbWJpYUBnbWFpbC5jb20%3d&recipientid=contact550c78218455ea11a811000d3abaad31727ce89f5f9e483ea0fbcfbb319aacf8&esid=4326d233-f853-4ae2-883b-ec2e0972afd5> accessed 21/05/2020

approximately 40% of the 2018 new caseload. A new record has been set in 2018 with the number of construction and engineering cases now reaching 224 new cases (i.e. 27% of the caseload in 2018).²⁹

With regard to mediation, the ICC Dispute Resolution Bulletin, 2018, Issue 2, report states that 'energy disputes were the most frequent, accounting for almost a third of all cases, followed by disputes relating to telecommunication and construction. In 2017, the value of disputes ranged from US\$ 50,000 to just under US\$ 500 million, thus confirming the suitability of mediation for larger value disputes.'³⁰

Under the ICC Dispute Resolution 2018 Statistics,³¹ 'the disputes covered a wide range of business sectors. Construction and engineering disputes were the most frequent, accounting for almost 35% of cases, followed by disputes relating to energy and telecommunication. In 2018, the value of disputes ranged from US\$ 250,000 to US\$ 860 million, thus confirming the suitability of mediation for a wide range of disputes, including high-value disputes. The costs of proceedings in which mediators were appointed (covering ICC administrative expenses and the fees and expenses of the neutral) were US\$ 18,500 on average.'

As in other areas of the ICC dispute resolution, demand for experts from the construction sector was highest, followed by energy and telecommunications.³² The London Court of International Arbitration³³ (LCIA), 2018 Annual Casework Report which covers arbitration only, reports that the caseload for construction and infrastructure stood at 10%, while energy and resources were 19%.³⁴

³⁰ (n29)16

³¹ <http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web_icc_disputeresolution2018statistics.pdf?m=11.6.2019%2011:46:22&_cldee=YXJiaXRyYXRvcnphbWJpYUBnbWFpbC5jb20%3d&recipientid=contact550c78218455ea11a811000d3abaad31727ce89f5f9e483ea0fbcfbb319aacf8&esid=4326d233-f853-4ae2-883b-ec2e0972afd5> accessed 21/05/2020

³² *ICC Dispute Resolution Bulletin*, 2018, Issue 2, 65

³³ For details see <https://www.lcia.org/News/2018-annual-casework-report.aspx>

³⁴ LCIA 2018 Annual Casework Report 3

The differences between the two leading arbitral institutions may be in the parties preferred choice of institution and the definition placed on each industry sector.

With regard to disputes under investment treaties probably the most visible body dealing with such disputes is the International Centre for the Settlement of Investment Disputes ('ICSID') whose records show that disputes in the construction sector have continuously represented 7–8 per cent of the total number of international investment arbitration cases registered by that institution. As an example in 2018, 56 of ICSID pending cases out of a total of 706 were construction disputes.³⁵ On the other hand the United Nations Conference on Trade and Development (UNCTAD) statistics also indicate that the number and range of investment disputes in the construction sector is growing, with 69 pending cases in 2016 rising to 96 pending cases in 2018, and more new cases being registered in the construction sector than in any other sector.³⁶

Hence it is reasonable to conclude that infrastructure construction works generate a sizable chunk of disputes worldwide.

3. Causes of Disputes

According to the Arcadis Report the leading causes of construction disputes worldwide, are, in order of rank:

- a. parties failing to understand and/or comply with contractual obligations.
- b. errors and/or omissions in the contract document; and
- c. failure to properly administer the contract.³⁷

Reasons (a) and (c) are suggestive of professional training failure, while reason (b) may be caused by both training as well as result from the nature of the

³⁵<[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf)> accessed 5/01/2020

³⁶<<https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search>>Accessed 5/01/2020

³⁷ Arcadis Report 10

construction industry, as some things may be impossible to foresee or quantify e.g. ground conditions. Additional to this may be the political risks which may be inherent in changes in government which then changes existing policies or legislation which subsequently affects the nature and operation of the infrastructure works.³⁸

On the other hand, the International Arbitration Survey: Driving Efficiency in International Construction Disputes ('the Queen Mary Report')³⁹ asked Respondents to a survey to identify, from a list of 14 possible options, the factors which caused international construction disputes. Respondents were permitted to select one or more causes out of the 14. The three main causes of disputes, in the respondents' experience, were late performance (68%) followed by poor contract management (63 %), with poor contract drafting as a third cause at 61%.⁴⁰

With regard to poor performance in the Queen Mary Report, the reasons can be a result of all three of the Arcadis's report leading causes which are: parties failing to understand and/or comply with contractual obligations; errors and/or omissions in the contract document; and failure to properly administer the contract.

The poor contract management which is the second common cause of international construction disputes under the Queen Mary findings, though worded differently, is the same as the failure to properly administer the contract, the third cause under the Arcadis report. Poor contract drafting is the third most common cause under the Queen Mary Report but the second reason under the Arcadis Report termed as errors and/or omissions in the contract document.

³⁸ Stavros Brekoulakis and David Brynmor Thomas, (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (3rd edn, Law Business Research Ltd 2019) Introduction 2-3

³⁹ Produced by Pinsent Masons and Queen Mary University of London, November 2019

⁴⁰ Queen Mary Report 7

An additional reason for causes of disputes that is rarely mentioned is that the process of construction procurement involves a number of different specialists with widely different skillsets who contribute to the works at different times, quite often working for different organisations. This arrangement leads to problems that stand in the way of effective team building that is key in successful infrastructure project implementation.⁴¹

This situation can quite often lead to conflicts at different levels, because each participant has their own aims and objects. The traditional contract structures rarely encourages team building as an aim amongst the project team members. Confrontation with each other rather than harmony is quite often an expectation, though contracts are beginning to expressly provide for procedures to discuss and resolve emerging problems that crop up as the project proceeds.⁴² Another issue to note is that personalities play an important role in resolving or the creation of disputes.

In the distant past and in some industries even today, such as shipbuilding, the product that one purchases is designed by its producer or builder. Hence, the responsibility for the design lies with the fabricator or builder or constructor. This is the design and build method which has successfully been in use for a long time. In modern times, though, most infrastructure is provided by an employer designing the project or engaging a professional designer, which design is then constructed by a contractor. This separation of design from the construction has been the source of many problems⁴³ and encourages the emergence of disputes.

4. Effect of Disputes

Disputes add direct costs to works, however, there are other hidden costs such as damage to reputations and commercial relationships, time spent by executives and other personnel on the dispute and lost opportunities.⁴⁴

⁴¹ Will Hughes, Ronan Champion, John Murdoch, *Construction Contracts; Law and Management* (5th Edn, Routledge 2015) par 2.1

⁴² *Ibid*, par 2.1.5

⁴³ Murray and Langford 2003

⁴⁴ Cyril Chern, *Chern on Dispute Boards* (3rd edn, Informa Law 2015) 5

Additionally, disputes sometimes lead to delayed project completion or vice versa, meaning that the benefits of the infrastructure accrue much later to the public aside from the added indirect and direct costs which includes the expenditure resulting from legal costs originating out of contract disputes and which represents an enormous amount globally each year.⁴⁵

The direct cost of the disputes is an additional cost to the original or revised cost of projects. The impact of increased costs on a project, other than a direct increase in cost, may result in cost cutting measures such as adopting lower quality specifications and the reduction of the final output. The extra cost is money that could be deployed on another infrastructure project or other state social needs, while lower quality specification may mean more maintenance costs in the future and the reduction in output may mean a future completion of a project at a much higher cost.

In addition, as time and costs are very often critical in infrastructure projects the late delivery of a power station or road can disrupt the project financing used to fund it whether this is from the national treasury or from donor or private financing.⁴⁶

The World Bank states that infrastructure improves lives by connecting people to opportunity and that access to basic infrastructure services is critical for creating economic opportunities and bringing social services to the poor.⁴⁷ Examples are the provision of:

- Rural roads and safe transport for access to health and education facilities; and.

⁴⁵ Ibid

⁴⁶ Stavros Brekoulakis and David Brynmor Thomas (eds), *Global Arbitration Review: The Guide to Construction Arbitration* (Law Business Research Ltd. 3rd edn,2019) Introduction 2-3

⁴⁷Infrastructure<<https://www.worldbank.org/en/topic/infrastructure/overview>> accessed 10/02/2020

- The electrification of clinics, schools and households in rural areas to improve digital connectivity.⁴⁸

Therefore, delays to implementation and additional costs resulting from disputes negatively impact the delivery of social services and the economic well-being of the populace of states.

Prof. Peter Hansford, former Chief Construction Adviser for the UK Government, recently commented in the context of infrastructure megaprojects, that these are vital to economies across the world but all too frequently, they fail to satisfy their objectives in material respects, sometimes with very serious social and economic consequences.⁴⁹

5. Popular Methods of Dispute Resolution

The most popular methods for resolving disputes worldwide, in order of preference as reported in the Arcadis Report are:⁵⁰

- a. Party to Party negotiation
- b. Mediation
- c. Adjudication

The report reveals that parties engaging in formal, contract mandated dispute avoidance, mitigation and resolution techniques are much more successful at containing disputes. Among the methods in use are risk management, dispute review boards and Mediation.

⁴⁸ Ibid

⁴⁹ Study Probes Why Megaprojects underperform
<<https://www.newcivilengineer.com/latest/study-probes-why-megaprojects-underperform-14-02-2020/>> accessed 1/02/2020

⁵⁰ The Arcadis Report 11

It is no surprise that the ad-hoc and standing dispute board techniques are not in the top three list above. This may be because Africa and Asia regions, by far the biggest users of the technique,⁵¹ are not included in the Arcadis Report.⁵²

The dispute board technique may provide parties with an option to seek an opinion from the board on party differences. The opinion rendered serves as an incentive to settlement of the difference or the discontinuation of the matter. The board may also be actively involved in 'real time' dispute avoidance.⁵³

However, the Arcadis findings as to the most popular methods of dispute resolution is in contrast to the findings in the Queen Mary Report though it must be noted that the findings are limited to international projects or works only. The survey shows that arbitration is perceived as the best available process for resolving disputes arising in international construction projects with 71% of respondents identifying it as the dispute resolution processes most used to resolve international construction disputes in their experience. Respondents had the choice of selecting one or more other options.⁵⁴ This is followed by negotiation or the intervention of senior representatives at 34%, mediation-32%, dispute boards-22%, expert determination-17%, statutory adjudication -17% and standing dispute boards 14%. Investor-state arbitration was at 13%.⁵⁵ The Queen Mary Report does not state if the results were undertaken as part of tiered system of dispute resolution.

Going by the Arcadis Report, the most important activities that helped to avoid disputes were listed as:⁵⁶

⁵¹ Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library/> > accessed 10/09/2019

⁵² Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2, 2019) 35

⁵³ Ibid

⁵⁴ Queen Mary Report, Executive Summary 5

⁵⁵ Queen Mary Report, Executive Summary 8

⁵⁶ Arcadis Report 11

- a. Contract mandated early resolution forums such as mediation, dispute review boards and others;
- b. Owner/ contractor willingness to compromise; and
- c. Contractor transparency of cost data in support of claimed damages.

As unresolved claims are very likely to lead to disputes, Arcadis reports that the most effective claims avoidance technique employed were:⁵⁷

- a. Risk Management.
- b. Contract and specification reviews; and
- c. Constructability reviews.

6. Dispute Avoidance

What the above findings in the Arcadis Report strongly suggests, is that a combination of methods will contribute to the avoidance, reduction or the elimination of disputes such as the deployment of active claim avoidance techniques and the of use contract mandated dispute resolution forums. These techniques and methods are, therefore, an aid in the effective dispute settlement in the infrastructure construction projects.

Risk Management is well established in other industries like oil and gas, which aims to promote successful project delivery and claims avoidance through the identification, assessment and the finding of suitable responses to uncertainties.⁵⁸ The result is the maximization of dispute avoidance of disputes through the application of risk management.

For the year 2018, globally, Arcadis reports a drop in the average value of disputes in the construction and engineering industries, due to the deployment of early dispute avoidance techniques⁵⁹ which include Dispute Review Boards or Dispute Avoidance and Adjudication Boards.

⁵⁷Acardis Report 11

⁵⁸ Ibid 6

⁵⁹ Ibid 2

Therefore, the most effective dispute settlement technique is the total avoidance of disputes. However, this is an impossible vision given the nature of infrastructure construction. The next best option is to deploy techniques that reduce the number of disputes by actively working towards dispute prevention. This may be through such contractual techniques as early warning by either party, of matters that will increase the cost of the works, interfere with timing and impair the effectiveness and delivery of the contract combined with risk reduction meetings that can be called by either party.⁶⁰

When disputes do occur, it is essential to employ techniques that effectively resolve the dispute quickly, at low cost and amicably, noting that some methods may not necessarily be the quickest and most cost effective.

Disputes increase project costs and therefore reduce the benefits that accrue to the public in that the extra cost could be utilized for some other infrastructure development among other disruptive effects. Hence a reduction of projects costs and time to completion resulting from disputes will serve as catalyst to spur more investment in infrastructure.

It also seems logical, that effective dispute settlement should begin with the adoption of contracts that by their set up will avoid and/or reduce disputes and the adoption of contract conditions that encourage team building. What better effective dispute settlement can there be, than the avoidance and reduction of disputes.

7. The Role of Enforcement and the Court Systems

Any agreement or decision made by negotiation, agreement or decision of a neutral in construction adjudication, dispute board or arbitration or litigation must be capable of being enforced. Ideally all agreements and decisions should voluntarily be honored but that is not always so. Therefore, some form of

⁶⁰ As in the New Engineering Contract Term Service Contract cl16.2 which is also found in the other form like the construction version FIDIC in the 2017 forms have a not so detailed clause but should produce the same results if used properly-cl 3.8 in the Red Book.

mechanism needs to be in place particularly where international capital is being sought and because infrastructure development quite often attracts international players in the form of investors, design engineers and contractors and others who wish to be assured that there is an effective dispute settlement mechanism in their contracts and that enforcement, if need be, is not an issue.

Similar enforceability in mediation, adjudication and dispute boards will be welcome by most users. With regards to mediation, there are efforts towards this such as under the Singapore Mediation Convention signed by 46 states on the 7th August 2019.⁶¹ The fact that in the energy sector, ICC are of the firm view that mediation is well suited to this sector for all for larger sized energy projects, should encourage the more signatories to the convention and its eventual application.⁶²

Where decisions by neutrals are permitted to be 'appealed' or subjected to setting aside proceedings or enforcement etc. through a court system, it will be helpful if the courts fast track such procedures⁶³ as the time taken in the court systems will add to the cost of disputes. The creation of specialist courts to deal with issues originating out of disputes will go a long way to promoting the effectiveness of any dispute settlement methods agreed by the parties.⁶⁴

8. Dispute Resolution Applications

Dispute resolution is quite often tiered,⁶⁵ more so in infrastructure, in the sense that, a contract will have several levels of dispute resolution methods available. This, for example, will start with negotiations, followed by determination by a

⁶¹ Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2, 2019) 35

⁶² ICC *Dispute Resolution Bulletin*, 2018, Issue 2, 13

⁶³ The Kenya judiciary is working on fast tracking cases connected to arbitration. See speech by the Chief Justice of Kenya given as keynote at the East African International Arbitration Conference, 29th August 2019, Nairobi, Kenya

⁶⁴ e.g. The Technology and Construction Court of England and Wales

⁶⁵ Jane Jenkins, *International Construction Arbitration Law* (2nd edn, Wolters Kluwer 2014) para 3.02

person acting as a Project Manager,⁶⁶ then on to adjudication or a dispute board and finally arbitration as the final tier.⁶⁷

These intermediate methods are in many respects quite successful, in reducing referrals to arbitration, while settling disputes in very short time periods and at much lower costs. For example, in the UK since the inception of statutory construction adjudication,⁶⁸ well over 90% of decisions reached are accepted or form the basis for a negotiated settlement and, in either event do not lead to further proceedings.⁶⁹ There is no reason why the same success cannot be achieved on an international scale, though a means of international enforcement may be helpful.

Dispute boards are equally successful with a study in 2017 showing that of 512 Decisions, 480 or 94% were accepted by the parties, hence no further action was required with only 6% referred to arbitration, of which only 1.36% of the total were later overturned.⁷⁰

Dispute boards and other forms of ADR offer parties a chance to avoid expensive follow-on dispute resolution procedures like arbitration and litigation. Infrastructure development particularly, where funding is external by international agencies such as the World Bank and other development agencies come with the use of internationally accepted conditions of contract which incorporate tiered dispute settlement procedures.⁷¹

9. Conclusion

Effective dispute settlement can quite easily be a catalyst for infrastructure development, but this must start with the deployment of techniques that avoid disputes in the first place, the use of contracts that encourage team building

⁶⁶ Who under infrastructure project will be the Engineer or a person designated as such

⁶⁷ Ibid

⁶⁸ Under the *Housing Grants, Construction and Regeneration Act 1996*

⁶⁹ John Uff, *Construction Law* (11th edn, Sweet and Maxwell 2013) 67

⁷⁰ Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2, 2019) 35

⁷¹ Ibid

together with the training and enhancement of contract administration and interpretation training for those involved in contract execution and administration. This particularly so as contracts become more and more prescriptive.⁷²

Where disputes do occur the use of dispute settlement techniques, decisions should easily be enforced whether those decisions are interim like adjudication or dispute boards before final resolution in arbitration or litigation. The acceptance of interim decisions requires practitioners that are highly trained and skilled in contract administration and interpretation. Good watertight decisions are more likely to be acceptable by both the losing and the winning party.

Where enforcement and court systems are required to resolve issues resulting from dispute settlement there must be effective and quick mechanisms in place to achieve this. The result of this is that when states, project funders, investors and parties to infrastructure development know that countries have effective dispute avoidance and settlement techniques more money is likely to be available for infrastructure development. The 'investment' in effective dispute settlement techniques should therefore act as catalyst for infrastructure development.

⁷² FIDIC 2017 Suite or the NEC suite of contracts

Constitutional Limits to Party Autonomy in arbitration in Kenya

*By: Eric Thige Muchiri**

1. Introduction

Party autonomy is a fundamental feature of arbitration. The principle provides that parties are free to agree on the applicable law, and the procedure to be followed during their arbitration. However, the principle is not absolute. Statutes, public policy, and practices all delimit party autonomy in a way or the other.

This paper reviews the limits set by the Constitution of Kenya (Constitution) on party autonomy especially in light of the supremacy of the Constitution. Further, the horizontal applicability of constitutional rights, national principles and values, are also reviewed to establish their impact on the principle of party autonomy. The paper concludes with suggested recommendations to bring the principle of party autonomy in line with the Constitution.

2. Party autonomy

Party autonomy has been described as one of the “golden pillars” upon which arbitration is built. Abdulhay defines it as the “freedom of the parties to construct their contractual relationship in the way they see fit.”¹ Lew states that the very nature of arbitration requires consent of each party to an arbitration to happen.² He further states that there can be no arbitration between parties which have not agreed to arbitrate their disputes.³ It is this autonomy of the parties to agree on their dispute’s resolution which leads to an arbitration agreement; such an agreement is the primary source of jurisdiction of the arbitral tribunal.

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¹ Abdulhay, S., *Corruption in International Trade and Commercial Arbitration*, (London: United Kingdom: Kluwer Law International, 2004) 159.

² J Lew, *Comparative International Arbitration* (Kluwer Law International 2003) 129-153.

³ *Ibid.* This argument appears to lose effect in cases of court-annexed arbitrations in which courts order parties to submit to arbitrations. Also, in statutory arbitrations there is nothing much for the parties to agree as the applicable statute usually enjoins the parties to arbitrate rather than take the dispute to court.

Therefore, whatever terms the parties agree on, modify, vary or leave out ought to be upheld by the arbitrator.

The principle of party autonomy finds legislative foundation at Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006 (Model Law).⁴ The section provides:

Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

In Kenya, the Arbitration Act 1995 is the main Act that regulates arbitration practice in Kenya. Section 20 (1) of the Arbitration Act 1995 is almost similarly-worded to the aforementioned Article 19 (1). It states,

Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.⁵

Indeed, under the Arbitration Act 1995 parties are also free to agree on the appointment of arbitrators⁶; challenge procedure⁷; place of arbitration⁸; and the language to be used in the arbitration.⁹ The principle of party autonomy is further ring-fenced by section 10 of the Arbitration Act, 1995 that provides that no court is to intervene in matters governed by the Act, except as provided by the Act. The Court of Appeal in Kenya in the case of *Nyutu Agrovet Ltd Vs Airtel*

⁴ The United Nations Commission of International Trade Law (UNCITRAL) is subsidiary of the United Nations tasked with improving the legal framework for international trade and modernizing the law of international trade. The full text of the Model Law can be found at

<https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> as accessed on 5th November 2018.

⁵ See also section 1 (b) of the Arbitration Act 1996 (UK).

⁶ Section 12 (2) of the Arbitration Act, 1995, *Government Printer, Nairobi*.

⁷ *Ibid*, section 14 (1).

⁸ *Ibid*, section 21 (1).

⁹ *Ibid*, section 23 (1).

Networks Limited (2015) eKLR had this to say about party autonomy, and the safeguard that is the stated Section 10:

"The rationale behind the limited intervention of courts in arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through arbitration, intervention by the courts in the dispute is the exception rather than the rule."

The principle of party autonomy is not absolute. There are limitations to the principle which means that not all that parties agree to is enforceable. Also, such limitations mean that national courts can intervene in the dispute despite the parties' initial agreement. One of the fundamental limitations on party autonomy is found at Article 18 of the Model Law which provides that,

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

This provision enunciates the requirements for equal treatment and natural justice. Article 18 is non-derogable.¹⁰ Thus, for example if the parties were to agree that only the claimant would be heard, such an agreement would run afoul Article 18.¹¹

In Kenya, Article 18 of the Model Law finds its place at Section 19 of the Arbitration Act 1995. Section 19 reads,

The parties shall be treated with equality and each party shall subject to section 20 (which provides for party autonomy as seen above) be given a fair and reasonable opportunity to present his case.

¹⁰ Holtzmann and Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" (Kluwer Law International 1995) at 583.

¹¹ *Ibid.*

It would appear from a plain reading of Section 19, that equal treatment is the only principle that is fundamental and non-derogable. On the other hand, the principles of natural justice appear to be made subject to party autonomy as stipulated under Section 20. This view is fortified by other provisions in the Arbitration Act 1995 that allow for parties to diverge from the principles of natural justice. By way of illustration, parties can agree that an arbitral award shall not state the reasons upon which it is based.¹² Such an agreement appears to be contrary to the principle of natural justice that parties are entitled to know the reasons for a decision. Also, parties can agree that an expert witness shall not be cross-examined which appears to be at cross-heads with the requirement for cross-examination of witnesses.¹³

Nevertheless, parties ought to consider these requirements for equal treatment and natural justice as they are agreeing on their arbitration clause. Otherwise, it appears their exercise of party autonomy is likely to be disregarded.

Validity of the arbitration agreement itself is also another limitation to party autonomy. Such validity is gauged by the law governing the contract in which the arbitration agreement is embedded even though the arbitration clause can be severed from the main contract and be subjected to a different set of laws.¹⁴ An arbitration agreement being a contract requires an intention to create legal relations; an offer acceptance; competencies and legal capacities of the parties to contract; and exchange of consideration.¹⁵ Further, the Arbitration Act 1995 requires the arbitration agreement to be in writing.¹⁶

The doctrine of privity of contract also serves to limit party autonomy. The doctrine provides that a contract allocates rights and imposes obligations only to the parties to the contract leaving out third parties. Therefore, only the parties

¹² Section 32 (3) (a) of the Arbitration Act 1995.

¹³ *Ibid*, Section 27 (2).

¹⁴ Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure", (2007) 24 *Journal of International Arbitration*, Issue 3, at pages 327–339.

¹⁵ Invalidity of the arbitration agreement due to lack of any of such requirements would render the award subject to setting aside by the High Court under Section 35 (2) of the Arbitration Act 1995.

¹⁶ Section 4 of the Arbitration Act 1995.

to an arbitration agreement can rely on it to solve their disputes; third parties cannot. It is also to be seen that if an arbitration were to decide on the rights of third parties in their absence, it would be a fundamental breach of their right to be heard. Further, such third parties would not have consented (exercised their party autonomy) to the arbitration thereby robbing such proceedings of legitimacy.

Amendment of institutional rules can be another limitation to party autonomy. Pryles gives the example of parties who agree to arbitrate under the International Chamber of Commerce (ICC) Rules but go further to agree that the resultant award would not be subject to scrutiny by the ICC Court.¹⁷ He is of the view that scrutiny of the awards by the ICC Court is an essential feature of an ICC arbitration and it is likely that an arbitration agreement ousting such scrutiny would be inapplicable.

Further, public policy also limits party autonomy. Awards that run contrary to public policy are not recognizable or enforceable. The Model Law as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958) lists violation of public policy as one of the grounds for setting aside an arbitral award. What constitutes public policy varies from one country to the other. In Kenya, public policy has been stated to be a “broad concept incapable of precise definition”. The High Court in *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, held as follows regarding public policy,

“An award can be set aside...as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

Therefore, if the parties were to disregard the provisions of the Constitution while formulating their arbitration agreement, it is likely that that agreement as well as an arbitration award based on such agreement would be invalid for

¹⁷ Michael Pryles, *op. cit.* 3.

being contrary to public policy. It is to these limits set by the Constitution that the paper now turns.

3. The Constitution of Kenya

Kenya has a written constitution which was promulgated in August 2010. The Constitution repealed the previous constitution that with various amendments had been in place since 1963. The new Constitution introduced a fresh dispensation in Kenya including an expanded Bill of Rights; a new devolved governance structure; an enlarged judiciary with its independence anchored; and principles of governance and national values.

3.1 Supremacy of the Constitution

The Constitution is the supreme law of the land with all the other laws, organs, and practices subject to it. Article 2 (1) of the Constitution enunciates its supremacy as follows,

This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

Arbitration involves exercise of judicial authority. Under the Constitution, judicial authority is derived from the people and vests in, and is exercisable by, the courts and tribunals established by or under the Constitution.¹⁸ The fact that the people are seen as the source of judicial authority fortifies and ‘justifies’ the supremacy of the constitution.¹⁹ Further, it is a constitutional principle that while exercising judicial authority, courts and tribunals are to be guided by the principle that alternative forms of dispute resolution including arbitration shall be promoted.²⁰

Due to this supremacy, the Constitution binds arbitrators as they determine a dispute, and also the parties to an arbitration agreement. Then, it follows that

¹⁸ Article 159 (1) of the Constitution of Kenya, *Government Printer*, Nairobi, Kenya.

¹⁹ Kariuki Muigua, ‘Constitutional Supremacy over Arbitration in Kenya’ (2015) 3(2) *Alternative Dispute Resolution*
<http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya_03_dec.pdf> accessed 1 November 2018.

²⁰ Article 159 (2) (c) of the Constitution.

parties cannot exercise their party autonomy and derogate from the provisions of the Constitution.

3.2 Bill of Rights

Chapter 4 of the Constitution provides for the Bill of Rights that has elaborate provisions on political as well as economic and social rights. The rights and fundamental freedoms in the Bill of Rights are not granted by the State but rather inhere in each individual.²¹ The rights and freedoms apply not only against the State but also between private individuals. This is because the Constitution states that the Bill of Rights applies to all law and binds all State organs and all persons.²² This vertical and horizontal application of the provisions of the Constitution has been upheld by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others*, [2012] eKLR:

At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods.²³

Some rights and fundamental freedoms in the Bill of Rights impact on the principle of party autonomy.

²¹ Article 19 (3) (a) of the Constitution.

²² Article 20 (1) of the Constitution.

²³ At Paragraph 62. See also Kiarie Mwaura 'Horizontalty and the Bill of Rights: Defining Parameters of corporate complicity in human rights violations' in Wayne Visser and Nick Tolhurst (eds), *The World Guide to CSR: A Country-by-Country Analysis of Corporate Sustainability and Responsibility*, (Greenleaf Publishing 2010).

See also the decisions of the Court of Appeal in *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another* [2017] eKLR available at <<https://bit.ly/2SYgjhA>> and the High Court in *Rose Wangui Mambo and 2 Others vs Limuru Country Club and 17 others* [2014] eKLR available at <<https://bit.ly/2QrtHsR>> as accessed 3 November 2018.

3.2.1 Access to justice

Access to justice is one of the rights enshrined in the Constitution. Article 48 provides that the State should ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice. This constitutional right of access to justice encapsulates the principle of natural justice that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.²⁴ Thus, if an arbitral tribunal does not uphold the principles of natural justice any award therefrom is likely to be set aside.

However, as stated above the Arbitration Act 1995 allows parties to an arbitration agreement to agree on which principles of natural justice to guide their agreement. Some principles, such as the right to cross-examine expert witnesses can be discarded by agreement of the parties.

A further aspect of the right of access to justice appears when a court sets aside an arbitral award but gives no direction on how the underlying dispute is to be determined. The setting aside of an award does not necessarily resolve the merits of the dispute. For example, if an arbitral award is set aside for being contrary to public policy should the court refer the matter back to the arbitrator, down its tools, or take up the matter and make a decision thereof? A court is severely handicapped by the Arbitration Act 1995 from taking up a matter that was the preserve of an arbitrator. This is so due to the provisions on non-intervention by the court in arbitration matters, and deference to the principle of party autonomy.

A court that downs its tools - by setting aside an arbitral award without any directions on how the underlying dispute should be resolved - would appear to be unsupportive of the parties' rights of access to justice, and also the constitutional rights to a fair hearing.²⁵ In such a scenario, the following question arises: if the award by arbitral tribunal is bad in law, and the court agrees, to where should the disputants turn to so as to have their dispute resolved? The situation is made worse if the limitation period within which to restart the

²⁴ Per Lord Hewart in *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233). See also Kariuki Muigua, *op. cit.* at page 16.

²⁵ See section 3.2.2 below.

arbitration process (which is usually 6 years) is over. This was the situation that arose before the High Court in the case of *Cape Holdings Limited v Synergy Industrial Credit Limited* [2016] eKLR. The court found the arbitral award to be in violation of public policy but gave no directions as to how the underlying dispute should be resolved.²⁶ If the decision is not reversed on appeal, it would have effectively left the parties without a remedy for their underlying dispute.²⁷

The Arbitration Act 1995 provides a leeway for the court to refer the matter back to the arbitrator to resume proceedings or take any action that would eliminate the grounds for setting aside the arbitral award.²⁸ Still, this power is only exercisable where one of the parties has made such an application as setting aside proceedings are on-going. Once the court renders its decision, it becomes *functus officio* and it is doubtful whether it can refer the matter back to the arbitration tribunal for its further dealing. It is arguable but in order to uphold the constitutional rights of fair hearing and access to justice, it would appear to be the most practicable way to refer the matter back to the arbitrator despite the court being *functus officio*. This is just so as to have the underlying dispute resolved. This was the route taken by the High Court in *Evangelical Mission for Africa & another v Kimani Gachuhi & another* [2015] eKLR in which the Court set aside an arbitral award for being in violation of public policy and ordered the parties for a second time.²⁹

Limitation of liability clauses in contract have been found to be unconstitutional impediments to the right of access to justice. In *Laiser Communications Limited & 5 others v Safaricom Limited* [2016] eKLR a contract had a clause that limited the liability of the respondent whether arising from a tort, contract or otherwise to Kshs.100, 000.00. Laiser Communications Ltd filed a suit against the Safaricom

²⁶ The decision was set aside by the Supreme Court in *Synergy Industrial Credit Ltd vs. Cape Holdings Limited* Civil Appeal No. 81 of 2016 and referred back to the Court of Appeal for determination.

²⁷ Kamau Karori & Ken Melly "Attitude of Kenyan Courts Towards Arbitration" in E.Onyema (ed), *Rethinking the Role of African National Courts in Arbitration*, (Kluwer Law International B.V., 2018) available at <https://bit.ly/2NXk3AY> as accessed on 1st October 2018;

²⁸ Section 35(4) of the Arbitration Act 1995.

²⁹ The decision is also subject to an appeal to the Court of Appeal of Kenya.

Ltd claiming a sum of more than KShs.100, 000.00. Safaricom Ltd successfully managed to stay the suit at the High Court and refer the same to arbitration. Laiser Communications Ltd appealed. In allowing the appeal, the Court of Appeal among other reasons held that the limitation of liability clause was a serious impediment to the right to access justice as afforded to Laiser Communications Ltd. This was because they were claiming more money than was allowed in the contract, and as such Safaricom Ltd would have had an “undue influence and an unfair bargaining power”. Thus, the Court refused to refer the matter to arbitration as it would have led to an injustice.

The decision is questionable as to why the court did not leave the issues of limitation of liability, and right of access to justice to the determination of the arbitrator. Also, it is questionable whether in the same agreement a limitation of liability clause can invalidate an arbitration clause despite the law allowing for the latter to be severed from the main contract.³⁰

3.2.2 Right to a fair hearing

Article 50 (1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Supreme Court of Kenya has interpreted this to mean that every person has the constitutional “right to judicial resolution of [a] conflict”.³¹

The right to a fair hearing calls for independence and impartiality of the arbitral tribunal. Further it requires an individual to be “informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the

³⁰ Section 17(1) of the Arbitration Act 1995. See the decision of the Court of Appeal on the principle of separability in *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited* [2017] eKLR in which the court correctly held that an arbitration clause can be severed from the rest of the agreement.

³¹ *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR at paragraph 25.

benefit of a public hearing before a court or other independent and impartial body.”³²

A court that leaves the parties to an arbitration agreement without a remedy to their underlying conflict, or a way to resolve it, would appear to violate the parties’ constitutional rights to a fair hearing.³³ The principle of equal treatment of the parties to an arbitration as captured by Section 19 of the Arbitration Act 1995 also appears to be secured under the constitutional right to a fair hearing.³⁴ Any arbitration agreement that would stem the equal treatment of the parties to an arbitration would be liable to be set aside.³⁵

3.2.3 Right to privacy

Privacy and confidentiality of arbitration proceedings and materials generated therefrom is one of the features of arbitration. This right is not absolute and has been chipped at by the Constitution. Article 31 of the Constitution provides that every person has a right to privacy including among others the right to information relating to their family or private affairs not unnecessarily required or revealed; or the privacy of their communications infringed.

The impact of the Constitution on the right of privacy and arbitration played out in the High Court in the case of *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* [2014] eKLR, the High Court took the view that

³² Per the Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

³³ *Supra* note 26.

³⁴ Article 27 of the Constitution also provides for equality before the law, as well as equal protection and equal benefit of the law.

³⁵ Even though the right to equal treatment of the parties is not expressly mentioned in the judgment, this appears to have been the rationale of the Court of Appeal decision in *Laiser Communications Limited & 5 others v Safaricom Limited* [2016] eKLR. In the words of the court at the last paragraph of the decision, “[a]n arbitral clause that is oppressive or repugnant to justice is one that disadvantages one side. It is clear that the respondent herein would have the upper hand; it would amount to undue influence and an unfair bargaining power on the respondent’s part. The arbitration clauses would therefore lead to an injustice.” Nevertheless, this does not respond to the criticism as to failure to uphold the independence of the arbitration clause, and failure to sever it from the rest of the contract.

arbitrations should be open to the public just like litigations, especially where the dispute involves a public entity. In the court's view, such public hearing furthers the value of transparency as is required under Article 10 of the Constitution.³⁶ This view was rejected by another High Court in *Centurion Engineers & Builders Ltd. v Kenya Bureau of Standards [2014] eKLR* in which the court was categorical that "although arbitration hearings should be conducted in suitable rooms therefore, they certainly are not open to the public, are confidential to the parties and the Evidence Act (Cap 80, Laws of Kenya) does not apply."³⁷

Therefore, in as much as parties can agree to the people to allow into their arbitration there is jurisprudence that the Court can still allow the proceedings to be open to the public. This is especially so where one of the entities is a public entity which entities are bound by the constitutional principles of transparency and accountability. Further, there exists the constitutional right of access to information held by the State which may be the basis of an application to get copies of the awards in which the State is a party.

3.2.4 Right to fair administrative action

Article 47 (1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Fair Administrative Action Act 2015 was enacted to give effect to this constitutional right. At section 2, the Act defines administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act or decision of any person that affects the legal rights or interests of any person to whom such action relates. An arbitral tribunal falls into either category: it is a quasi-judicial tribunal, and its decision also affects the rights of the parties to whom the arbitration relates.

³⁶ *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others [2014] eKLR* at paragraphs 13 and 18.

³⁷ See also the decision of the High Court in *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited [2017] eKLR* in which the court decided that Article 50 (1) of the Constitution is not applicable to arbitral tribunals.

Thus, an arbitrator has to conduct the arbitration in an expeditious, efficient, lawful, reasonable and procedurally fair manner. The parties have to be treated equally. Further, unless the parties otherwise agree, an arbitral tribunal has to give reasons for its award. Deviation from this would lead to the award being set aside not only for being against the Arbitration Act 1995, the Constitution but also as against the Fair Administrative Action Act 2015.

3.2.5 National Values and Principles of Governance

Article 10 (1) of the Constitution provides for national values and principles of governance that bind all persons as they apply or interpret the Constitution or any law. Article 10 (2) lists the values and principles which include the rule of law; good governance; integrity; transparency and accountability. These values and principles bind all persons which includes arbitrators as well as the parties to an arbitration agreement.

The issue of transparency and accountability is a sticky issue especially in arbitration agreements involving the State or its departments.³⁸ As seen above, there is jurisprudence in favour of opening up arbitrations involving State entities to the general public; all this is in furtherance of transparency and accountability.³⁹

Non-transparency is 'viewed with suspicion' and may allow arbitrators to disregard the law and run on a frolic of their own; this is dangerous given the uphill task of appealing against an arbitrator's award.⁴⁰ Transparency and

³⁸ See generally Aloo Obura L., and Wesonga E. Kadima, 'What is there to hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in light of the Constitution of Kenya 2010' (2015) 3(2) *Alternative Dispute Resolution* at 2 <<http://www.ciarkkenya.org/assets/journal-volume-3-issue-2.pdf>> accessed on 5th November 2018.

³⁹ *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* [2014] eKLR.

⁴⁰ Lord Neuberger, 'Arbitration and the Rule of Law' (Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) at paragraph 23 <<https://www.supremecourt.uk/docs/speech-150320.pdf>> accessed 1 November 2018.

accountability satiate the public's interest in knowing how governance is being carried out and to hold their leaders accountable. Thus, deference is to be had to these values and principles while parties are drafting their arbitration agreement especially where one of the parties is a State entity.

4. Conclusion

The Constitution has expanded the Bill of Rights and re-asserts its supremacy over all the other laws, and binds all persons. It is applicable not only vertically as between the State and the persons but also horizontally as between private persons. Party autonomy allows parties to choose how their disputes shall be settled in arbitration. Such a choice is to be upheld by the courts. This holds the parties to their respective bargains achieved in exercise of their freedom to contract.

Any arbitration agreement, as well as an award, that goes against the Constitution is likely to be set aside for being against public policy. There is no clear definition of the term 'public policy' but unconstitutional agreements or awards are viewed as being against such policy. The extensive list of constitutional rights and fundamental freedoms, as well as the national values and principles of governance, have considerably reshaped the contours of party autonomy. Parties are not just to agree on the commercial aspects of their agreements without a keen look at the provisions of their arbitration clause. Also, arbitrators are not only to rely on the parties' arbitration agreement and terms of reference in making their decisions; they have to be alive to the provisions of the Constitution lest they conduct the arbitration in a manner which, or give an award which, violates the Constitution.

Lastly, the Arbitration Act 1995 needs to be reviewed to bring it into accord with the Constitution. The Act has not had a substantive review since 2010 following the promulgation of the Constitution. The issues of transparency and accountability in arbitrations involving public entities need to be resolved by the Act instead of relying on jurisprudence which is not uniform at the moment.

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Claims, Conflicts & Disputes in Construction Industry – Where is the Engineer?

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Abstract

Construction industry is a one commercial venture operating in a very complex environment and requires people of diverse knowledge and a wide range of expertise each with highly competing interest and must be properly managed in order to deliver project objectives. The management of the claims, conflicts and disputes are of great interest to every participant in the field of construction for no one will ever rejoice and celebrate a failed venture and wasted resources arising from self-interest. From the project inception to the project closure, team composition and the complexity of the environment in which the industry operates conflict are at times in evitable. Proper management of the same is a win-win for every party. Project management process and different parameters has been discussed and put into perspective in this paper. Areas of conflict and potential disputes with the respective bearers have also been put into context for the readers. In this paper the role of an engineer has been examined as an expert witness and as an advisor to the client in the management of disputes in the industry and the writer has concluded by giving his opinion on the best way disputes can be better handled by an engineer than a legal expert in the industry.

1.0 Introduction

Constraints in the implementation of a project appears when the project objectives are not achieved. Construction industry is a complex endeavor and operates in very competitive and diverse environmental conditions of which participants are also of different views, talents and levels of knowledge of the construction process. In this complex environment, participants from various professions, each has its own goals and each expects to make the most of its own benefits. In the industry, differences in perceptions among the participants of the projects make conflicts inevitable. If conflicts are not well managed, they could quickly turn into disputes which can hinder the successfully completion of the construction project. Thus, it is of importance especially to the engineer

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to be aware of the causes of disputes in order to complete the construction project in the desired time, budget and quality. There is confusion among construction professionals about the differences between conflict and dispute¹. Conflict and dispute are two distinct notations. Conflict exists wherever there is incompatibility of interest². Conflict can be managed, possibly to the extent of preventing a dispute resulting from the conflict. On the other hand, disputes are one of the main factors which prevent the successful completion of the construction project. Disputes are associated with distinct justiciable issues that require resolution.

Nowadays, the substantially increasing volume of claims are the result of the rising complexity of the projects, the price structure of the construction industry and the legal approach taken by a lot of owners and contractors². There are several researches that show the order of magnitude of the effects from construction claims on cost and time of the projects. In the past two decades, serious disputes concerning construction contracts have become increasingly common in construction projects. It is common practice for designers/ the engineers, contractors and owners to negotiate small and uncomplicated disputes, but larger and more complex ones frequently hinder the project through involvement with lengthy legal issues.

Typically, if the parties cannot reach a resolution themselves, expensive, time-consuming legal procedures begin, which severely affects all the participants. Disputes are a reality in every construction project. Without the means to address them, minor issues can fester and grow, with crippling consequences for project participants. The rising cost, delay and risk of litigation in construction disputes has prompted the construction industry to look for new and more efficient ways to resolve these disputes outside the courts. It has been found that when resolution occurs sooner rather than later and when this resolution is relatively confrontational, there is a much better chance that

¹ Acharya, N. K., Lee, Y. D., and Im, H. M. (2006). Conflicting factors in construction projects: Korean perspective. *Eng. Construct. Architect. Manage*, 13(6), 543–566.

² Fenn, P, Lowe, D., and Speck, C.(1997), Conflict and dispute in construction – Contract Management Economics, *Journal of Management in Engineering, ASCE*, 18 (1:20)

litigation can be avoided. Waiting until the end of a project to address a dispute inevitably makes it harder and more expensive to resolve. Parties involved in a construction dispute, or indeed any commercial dispute, generally prefer to retain control over the outcome and maintain a working business relationship.

1.1 Project management

Project management is defined as planning, organizing, directing, controlling of project resources, to achieve short-term goals that have been determined³. Objective of the project is composed of elements of cost, quality, and time expanded:

1. The cost of the project must be completed at a cost that does not exceed the budget.
2. Quality, product or output of the project must meet the required specifications and criteria.
3. The time, the project must be done in accordance with the period and the end date specified.

2.0 Conflict, Claim and Dispute

2.1 Conflict

It would look as if that the word 'conflict' is infrequently used in the construction industry. This is most probably due to the controversial nature of the word. The word 'conflict' and the idea of conflict is still central to many of the academic publications and critiques on disputes and the resolution of disputes. It is simply "a serious disagreement and agreement about something important" conflict is inevitable in any society and mostly that conflict can be viewed as either positive or negative.

2.2 Claim

Claim is defined as "a request for compensation for damages incurred by any party to a contract". During the execution of a project, several issues arise that

³ Suharto, I2001, *Project Management*, Erlangga, Jakarta.

cannot be resolved among project participants. Such issues typically involve contractor requesting for either time extension or reimbursement of an additional cost, or sometimes both. Such requests by the contractor are referred to as “claim”. If the owner accedes to the claim of contractor and grants him extension of time or reimbursement of additional cost, or both, the issue is sorted out. However, if the owner does not agree to the claim put out by contractor and there are differences in the interpretations, the issue takes the form of a dispute

2.3 Dispute

It is “any contract question or controversy that must be settled beyond the job site management”

2.3.1 Types of construction claims

Contractual Claim: Contractual claims are the claims that fall within the specific clauses of the contract. In well-accepted standard contracts, there are a lot of provisions which entitle both the contractors and the employers to claim for the appropriate compensation such as ground or geotechnical conditions, valuation, variations, late issue of information, adverse weather condition and delay in inspecting finished work.

Extra-contractual Claim: This type of claims has no specific grounds within contract but results from breach of contract that may be expressed or implied, i.e. the extra work incurred as a result of defective material supplied by the client.

Ex-Gratia Claim: Ex-gratia claims are the claims that there is no ground existing in the contract or the law, but the contractor believes that he has the rights on the moral grounds, e.g. additional costs incurred as a result of rapidly increased prices.

Extension of Time Claim: Each construction contract clearly stipulates the date (or period) for the contractor to complete work. The purpose of specifying a date of completion is to facilitate claims for damages by the Employer for any delays

created by the contractor in performing their work. The date for completing the project will be specified, either in the tender documents, or otherwise agreed to by the contractor, before the contract is awarded. In the case of no specific date for completion being mentioned in the contract, the law implies that the contractor must complete work within a reasonable time.

2.3.2 Disputes in construction industry

Given the uncertainties involved in a construction project and the magnitude of funds involved, it is only natural to have disagreement between parties, but these need to be resolved. While most of such day-to-day differences are resolved in an amicable manner, without having to resort to a more formal mechanism, the parties at times agree to disagree and seek redress through independent intervention. Although, in principle, the discussion falls under the preview of construction law, effort has been made to discuss some of the aspects related to disputes and dispute resolution with as little legalese as possible. Technically, a dispute implies assertion of a claim by one party and repudiation thereof by another.

2.3.3 Project implementation organization

Organization is indispensable for the smooth implementation of the project at the planning and implementation of the project⁴. Organization is a facility that allows people to work together effectively to achieve a purpose that is more clear and focused. In the implementation of a project there are elements of implementation and each has the duty and authority in accordance with his position. Organizational structures in a project explain the relationship of duty, responsibilities and authority of individuals and groups. In the implementation of the project, there are several elements in the project, namely owner, consultants and contractors. Working relations elements of the project parties are as follows:⁵

⁴ Dipohusodo. (1995), *Project Management*, Kanasius, Yogyakarta.

⁵ Leung, M., Ng, S. T., and Cheung, S. O. (2002). Improving satisfaction through conflict stimulation and resolution in value management in construction projects. *J. Manage. Eng.*2(68).

1. The owner and the consultant is a contractual relationship in the form of an agreement.
2. The owner and the contractor is a contractual relationship in the form of an agreement.
3. The working relationship between the consultant and contractor is functional relationships in performing their duties and responsibilities of each has been stated in the implementation of the document.

2.3.4 Causes of Conflicts and Disputes

As much as conflicts are always viewed as negative some positive thoughts can be deduced from the conflicts:

- i) Conflict can provide information and new ideas that ultimately improve the quality of decision-making.
- ii) Conflict can force the parties involved to think and reconsider alternative views to their problems.
- iii) Conflict can lead to problems that had been buried become the open and enable the leadership or the management assist in finding the best solution for the project.
- iv) Conflict can teach existence mutual understanding and respect for other opinions.

Conflicts can be interpreted as a disagreement between two or more members of organizations or groups within the organization that arise because they have to use scarce resources jointly, or carry out activities together, or have the status, goals, values, and perceptions is different.⁶ Leung et al (2005) partially verified the positive impacts of conflict on construction projects by respectively using case study and questionnaire survey to testify the relationship between distinctive conflict types and participants' satisfaction⁷. They found that a suitable level of conflict—especially task conflict—can indeed improve

⁶ Ranupandoyo, H, and Husnan, S.(1994), *Manajemen Personalia*, BPEE, Yogyakarta.

⁷ Leung, M., Liu, A. M. M., and Ng, S. T. (2005). Is there a relationship between construction conflicts and participants' satisfaction? *Eng. Construct. Architect. Manage.*, 12(2), 149-167.

participants' satisfaction up to a certain point at which diminishing begins. Conflict impacts appear to diverge when observing different indicators (i.e., objective or subjective) of organization effectiveness, however, it is thus concluded that participants' satisfaction (a subjective criterion) cannot be directly generalized to describe objective performance criteria such as cost, schedule, and project quality.⁸⁹

2.3.5 Factors of conflict in construction projects

Since disputes are inevitable in the construction industry, it is important to be aware of the causes of disputes in order to complete the construction project in the desired time, budget and quality.

Construction project divergent interest, on one hand the contractor's attention is in the completion of the project in accordance with specified schedule and attempt to make financial gain, while on the other hand the owner needs excellent facilities at economical prices. The purpose of each party seems contradictory in achieving their goals, such circumstances could lead to conflict. The causes of the conflict can be caused by owner, consultants, contractors, contracts and specifications, human resources, and project conditions.¹⁰

The complexity of the work, limited time, the amount of resources used, and many things that affect the process of the construction.⁹ If these constraints are not addressed immediately then it can result in losses and will lead to conflict. Factors of conflicts at the implementation stage occurs when stated in the contract and are not implemented in the field. Factors that cause conflicts in construction projects based on previous research can be summarized as follows:

⁸ Jehn, K. A., and Bendersky, C. (2003). Intragroup conflict in organizations: A contingency perspective on the conflict-outcome relationship. *Res. Organ. Behav.*, 25, 187-242.

⁹ Maloney, W. F. (1990). Framework for analysis of performance. *J. Constr. Eng. Manage.* 3(399), 399-415.

¹⁰ Susila, H. (2012). Causes of Conflict in the Implementation of Project Construction, *Journal of Engineering and Architecture, Faculty of Engineering, University of Surakarta Tunas Development*, 11(15).

Category of dispute	Causes of dispute
Owner	Failure of respond to issues in a timely manner. Lack of communication among the team members. The mechanism is not clear in providing information. Poor management, control and coordination. Variations initiated by the owner. Change of scope. Late giving of possession to the site. Unrealistic expectations. Payment delays
Consultant	Failure to determine responsibility in accordance with the contract and adequate risk allocation Cost estimation error Delayed in providing information Design quality, errors and specifications Incomplete pictures, details and specifications. Calculation of incorrect work progress Lack of experience in the consultants. Poor contractor management, supervision, and coordination skills. Failure of plan and implementation of change of work. Lack of understanding of the existing agreement in the contract.
Contracts, Specifications and other environmental factors.	Employment contracts and complete lack of construction documents. The lack of clarity of document the distribution of workflow. There is a confusion of terms in the contract documents.

	The big difference in understanding of contracts in foreign languages within the same contract. Site and weather conditions. Unforeseen changes. Legal and economic factors. Fragmented structure of the sector. Adversarial / controversial culture. Lack of communication. Lack of team spirit.
Contractor	Delays in work progress Time extensions Financial failure of the contractor Technical inadequacy of the contractor Tendering Quality of works

2.3.6 Conflict management

Conflict management involves addressing or solving the problem of conflicts ¹¹. This usually takes several methods and approaches:

1. Withdrawal/Avoidance, techniques for resolving conflict in a way to delay or avoid situations of potential conflict would occur. Avoid or delay the settlement of the conflict in order to do a better preparation, or expect to be completed by others.
2. Smooth/ Accommodative. conflicts are resolved with an emphasis to the area of the level of agreement.
3. Compromise/Reconciliation, techniques for resolving of conflict by seeking solutions that provide a level of satisfaction to all parties to temporarily or partially resolve the conflict. This approach is also called the "give and take".

¹¹ Ock, J. H. and Han, S. H.(2003). Lesson Learned Forms Rigid Conflict Resolution in an Organization: Construction Conflict Case Study, *Journal of Management in Engineering*, April 2003.

4. Forced/Directive approach. Techniques for resolving conflict based on the dominance of one party without regard to the other party. Usually based on the authority and power that the parties resolve the conflict. Also known as the win-lose approach.
5. Collaborative/Problem Solving techniques used for resolving conflict by combining multiple the views and from several different perspectives. Requires behavior of co-operative and open dialogue to get a consensus or a shared commitment.¹²

Regard to the conflict as a problem to be solved rather than a war to be won, in order to achieve satisfaction along with maintaining relationships and interests. The constitution of Kenya article 159(2), states that *...In exercising judicial authority the courts and the tribunal shall be guided by the following principles: c) alternative forms of dispute resolutions including reconciliation, mediation arbitration and traditional dispute resolution mechanism shall be promoted subject to clause 3.*¹³ Standard form of contracts Fidic clause 20 has elaborate dispute resolution mechanism.

The success of projects

The success of a project is measure based on the following parameters¹¹.

1. Aspect of costs

- a. In accordance with the contract documents and agreements;
- b. The project owner agrees and make payment until the work is completed;
- c. No progress billing owed; and
- d. Obtain the positive benefits, including benefits for the company.

2. Aspect of quality

- a. In accordance with the technical specifications of the contract documents and agreements;
- b. The project owner agreed and accept the project unconditionally;
- c. No penalty or complain about the quality of work of the project;

¹² Project Management Institute (2013). A guide to Project Management Body of knowledge (PMBOK-Guide)

¹³ The Constitution of Kenya 2010

- d. Occupational health and safety implemented properly;
- e. All parties related to the implementation are satisfied; and
- f. Getting a certificate of completion.

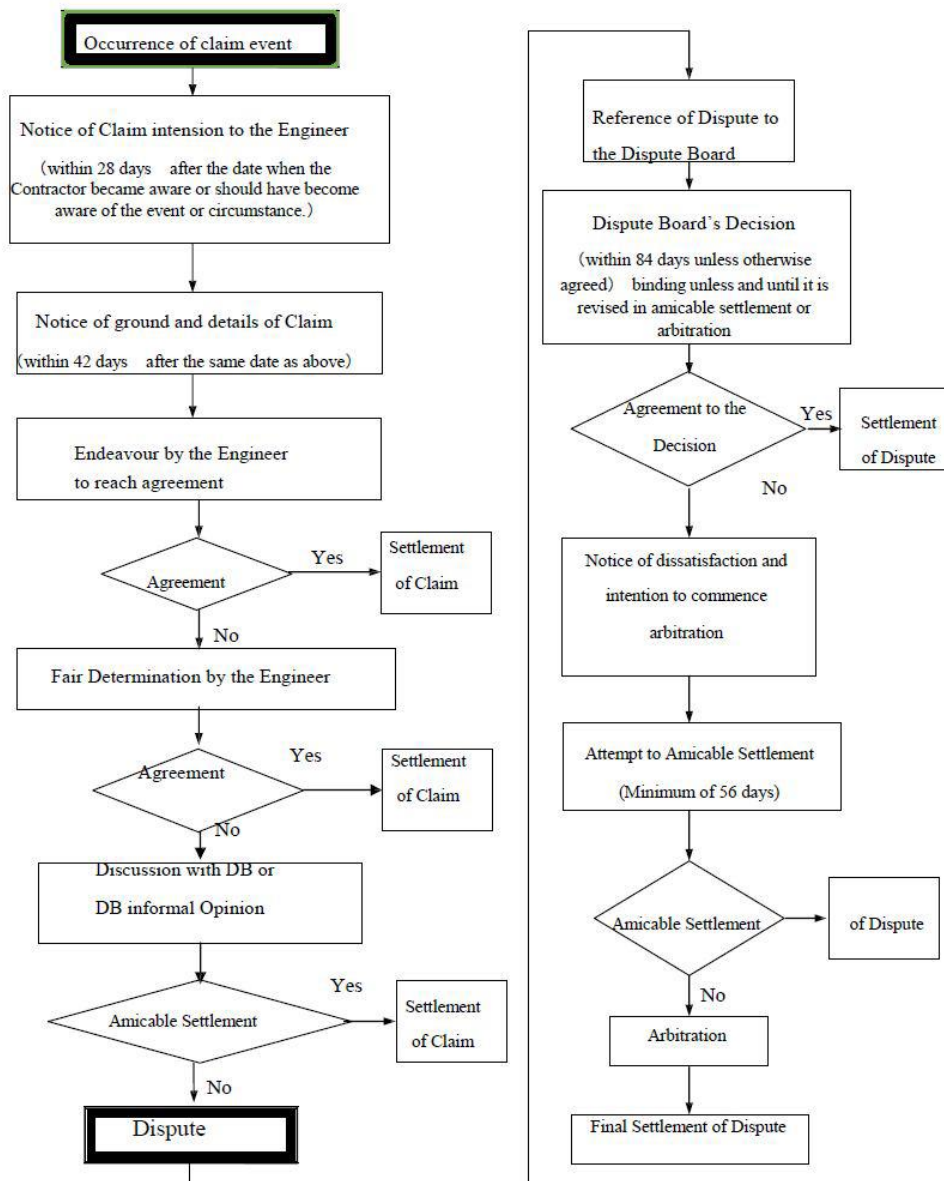
3. Aspect of time

- a. Project completed on time, or according to the work schedule in the contract documents;
- b. The project owner agreed and accepts the completion of part or all of the works;
- c. No complaints about the implementation progress related to completion of the work.

2.4 Methods of Dispute settlement in construction industry

Human conflicts are inevitable. Disputes are equally inevitable. It is difficult to imagine a human society without conflict of interests. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and resources are spared for constructive pursuits. For resolution of disputes there is a legal system in every human society. Every injured person is supposed to go to courts for his redress. All the legal systems are trying to attain the legal ideal and whatever there is a wrong there must be a remedy so that nobody shall have to take law into his own hands. Courts have become over crowded with litigants where the litigants have to face so much loss of time and money that at long last when a relief is obtained; it may not be worth the cost.

Methods of Dispute Resolution



Procedure of claim and dispute settlement according to FIDIC.

1) **Dispute Resolution Board (DRB/DAB):** As is well known, the procedure for the settlement of disputes in Clause 20 of the FIDIC the New Red Book provides

that disputes must be submitted initially to the Engineer for decision before they may be referred to arbitration.¹⁴ The limitations of this procedure are also well known. As the Engineer is hired and paid by, and administers the contract on behalf of, the Employer, he is not independent of the parties and cannot reasonably be expected to be always impartial in the settlement of disputes as discussed above. The significance of the new procedure for resolving disputes before arbitration which FIDIC proposes is that it provides for a decision maker who is completely independent of the parties and who should be able always to act impartially. Under this new alternative, instead of having disputes submitted to the Engineer for settlement before arbitration, they would be submitted to the Board. Where this alternative procedure is adopted, the Engineer would no longer have any involvement in deciding disputes under Clause 20. If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the dispute shall initially be referred in writing to the Dispute Adjudication Board or Dispute Review Board (the "Board") for its decision. Such reference shall state that it is made under this Sub-Clause. Unless the member or members of the Board have been previously mutually agreed upon by the parties and named in the Contract, the parties shall, within 28 days of the Commencement date, jointly ensure the appointment of the Board. The Board shall comprise suitably qualified persons as members, the number of members being either one or three as stated in the Appendix to Tender.

2) Arbitration: Arbitration is perhaps the most commonly used mechanism for settlement of technical disputes in a construction project. It is a quasi-judicial process to the extent that legal protocol is largely observed, and it is important that the arbitrator, who basically acts as a judge, understands legal procedures. In Kenya, the Arbitration Act, 1995 as amended, provides the legal framework for the arbitration process. In principle, collection and interpretation of

¹⁴ FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999

evidence, examination and cross-examination of witnesses, etc., are some examples of essentially legal matters, which an arbitrator needs to have a sound understanding of. However, a basic belief in principles of natural justice and a practical approach are a hallmark of a successful arbitrator. He should be able to guide and provide a direction to the proceedings, which could be quite tough, especially when the parties to the dispute are represented by professional lawyers. In fact, the law has now added a new dimension to the arbitration process by empowering the arbitrators to conciliate and help the parties in arriving at a fair compromise or an equitable settlement of the case before him. As far as the number of arbitrators is concerned, much like the judicial system, technical disputes can also be resolved by single arbitrators, or a panel of several arbitrators, and though the parties are free to determine the number of arbitrators, it should be ensured that the number is odd, so that a situation of a “tie” in an award is preempted.

3) Other Alternate Dispute Resolution Methods: Arbitration does provide a better way for settlement of the disputes compared to the litigation, however, there are other alternate dispute resolution methods like mediation, conciliation, negotiations, etc used in the construction industry. These methods of resolution of dispute are by basically mutual agreement and no judgment is passed. If the parties are not satisfied, then they can go in for Arbitration or litigation as the case may be. As already mentioned no understanding between the parties can be so perfect so as to avoid disputes. However, with the changing scenario the parties involved have realized that it is in their best interests to settle the claims in the earlier stage itself. This is one of the major reasons for increasing popularity of the ADR methods. They have opened up a new avenue for economic and fast settlement of disputes outside the judicial system. The ADR methods include:

a) Negotiation: Negotiation is the process by which one or more parties come to a mutually beneficial agreement. This is a quick, economic and efficient method as the parties settle the claim by direct communication. It is a sort of approach in which each party tells the other one, what it can give to the other party and what it expects in return. All negotiators share one common goal

of having both parties coming out better than what they started. This requires a great deal of mutual trust, confidence and belief that problems can be sorted out through mutual discussions and meetings.

b) Conciliation: Conciliation is a process of persuading parties to reach agreement, and is plainly not arbitration; nor is the chairman of conciliation boards an arbitrator.

c) Adjudication: Like arbitration, adjudication is a process of resolving disputes between parties by the decision of a neutral third party but is intended to provide a quick determination which will bind the parties only until the dispute is finally determined by legal proceedings, by arbitration or agreement.

d) Mediation: Mediation is a method of seeking passive help of a third party to resolving the dispute. Essentially, the parties sit down for negotiation. However, they do so in presence of a mediator. The mediator tries to give the discussion a meaningful and positive turn. He however intervenes only when necessary. The role of the mediator is basically to clarify the issues involved. He has to do the following things:

- i) Clarify the issues which are to be discussed.
- ii) Keep the subsequent discussion and negotiation on track.
- iii) Helping the parties to come to a decision such that the parties are in a win-win situation as far as possible.
- iv) Cool down the tempers which are bound to go up in the course of the discussion.

Even though the process seems quiet informal on the surface it is a very effective method, the process has proved itself in settling various disputes and time and again proved itself efficient method of dispute resolution and claim settlement.

e) Expert determination: Expert determination is a process by which an issue or dispute is referred to a third party jointly appointed by the parties for determination under the contract. The expert investigates and reports on the relevant facts and matters within his/her expertise. It is particularly appropriate

for a discrete matter of technical nature or short points of law. An expert is not an arbitrator. He does not enjoy immunity from suit in the way that such immunity is enjoyed by arbitrators and judges. The determination of an expert is a final and binding decision. The grounds for a challenge of an expert's decision are very limited. In this kind of dispute resolution involving technical issues, the person who decides the dispute ideally should be an engineer or an expert. Unless of course the dispute is of a legal nature, in which case a lawyer or judge may be more appropriate.

3.0 The Engineer in Dispute

Having looked at how the construction industry and project management is structured, the parties in the industry and their competing interest we will now have a look at the engineers' role at a closer range.

Since its establishment, FIDIC compiled and published the first edition to the third edition of Red Book in 1957, 1969 and 1977. In terms of the design of dispute resolution mechanism, the role of engineer was highly focused, that is, the disputing party should first submit the dispute to the engineer, who will make a decision within a certain period of time after receiving the submission this as explained in the above flow chart. If either party is not satisfied with the award or the engineer fails to give the award or his verdict within the prescribed period, either party to the contract may start the arbitration procedure to resolve the dispute according to the arbitration agreement articles in the contract. At this stage, the settlement of disputes in FIDIC is relatively simple and monotonous, and the choice of contract parties to resolve dispute is restricted. A source of continuing criticism of its Red Book emerged concerning the duality in the traditional role of the engineer as the employer's agent and as an independent third party holding the balance fairly between the employer and the contractor. The role of the engineer under the new Red Book is critically examined in the light of relevant case law, expert commentaries and feedback from two multidisciplinary workshops with international participation. The examination identified three major changes: (1) a duty to act impartially has been replaced by a duty to make fair determination of certain matters; (2) it is open to parties to allow greater control of the engineer by the employer by stating in the appropriate part of the contract powers the engineer must not

exercise without the employer's approval; (3) there is provision for a Dispute Adjudication Board (DAB) to which disputes may be referred. Although the duality has not been eliminated completely, the contract is structured in such away its flexible enough to support those who wish to contract on the basis of the engineer acting solely as the agent of the employer or in contractor.

3.1 Engineers' involvement in the contractual process

In this section will give the understanding and perspective that an engineer would consider as an advisor and as an expert witness in the construction industry. The section will be concluded with the role of an engineer in construction dispute avoidance and dispute resolution process. The role of the engineer can be examined in two stages, namely pre-contract award and post-contract award.¹⁵

Pre-contract. During the pre-contract stage, the client's engineers will prepare statements of requirements or functional specifications. These requirements or specifications become part of the bid document which goes to the bidders. The contractor's engineers will then review and put together a technical proposal with a method statement as part of the bid submission. Any qualifications should be made clear in the submission. Sometimes bidders submit alternative methods that are claimed to be better, quicker and cheaper to build at times termed as counter offer.

After the tender is submitted, the client's engineers will study the bid submission. Usually, technical submissions and commercial or financial submissions are assessed separately. Technical proposals will be assessed to see the compliance with the technical requirements, the suitability of the method statements and the viability of the delivery programme. Track records for delivering similar work will also be considered. Meetings will be held to clarify

¹⁵ *The deficiency of dispute settlement mechanism seen in Chinese construction field from FIDIC.* Available from: https://www.researchgate.net/publication/329652640_The_deficiency_of_dispute_settlement_mechanism_seen_in_Chinese_construction_field_from_FIDIC [accessed Dec 31 2019].

any uncertainties in the submissions. Assuming the proposal is also commercially acceptable, a decision is made to go ahead with the contract. This decision leads to contract award which must be well advised by the engineer

As is often the case, minutes of these technical clarification meetings are referred to in the contract and form part of the contract documents. In writing these minutes, any agreement on acceptance or rejection of any qualifications must be clearly stated. One pitfall that can occur is that it may be the intentions of the parties to include only certain specific points raised at a meeting to be contractually bound. By including the entire set of the minutes, undesirable items are inevitably included into the contract as well. Instead of referring to the entire set of meeting minutes, it is advisable to write special provisions in the contract to reflect any agreement on specific points which has been agreed up on.

Post-contract. When the contract is awarded, there will be the usual process of having a 'kick-off or site handover' meeting to set out any procedural requirements, such as establishing the lines of communication, revisiting the programme and clarifying any documentation submission requirements. Then it will be a matter of monitoring the process and performing the work. There will be many opportunities for interaction between the engineers of both parties as well as other members of the team such as the commercial personnel, procurement manager and his/her expeditors. Even though there is a contract in place, any discussion could be interpreted as an ad hoc agreement on specific points, altering the rights that are defined in the original contracts. Furthermore, statements made by the client's engineers can be interpreted as instructions, which may trigger a variation. Care needs to be taken in these instances.

3.2 The Engineer - Expert Witness

Being an Expert witness or an Engineer acting as an expert witness is not a profession in itself. It is a dual role where a practicing professional acts as an expert in court of law, arbitration or any other form of ADR. Very often engineers are asked to give evidence in court or at an arbitration hearing as an expert. There is a lot of ground that could be covered on this topic which this

writing may not exhaust and it is important for an engineer to understand his or her duties as an expert witness. In essence, the need for expert witnesses is the result of tribunals requiring assistance. The tribunals need assistance to make a decision on a particular issue or issues, which requires specialist knowledge beyond the knowledge of the tribunal.

The Civil Procedure Rule (CPR) defines an expert witness as an expert who has been instructed to give or prepare evidence for the purpose of court proceedings. The CPR definition draws a distinction between experts who are instructed with a view to actually giving evidence, be it in court or by means of a written report, and those who are simply instructed to advise a party or a potential party to proceedings.¹⁶

- a. Expert evidence should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- b. An expert should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.
- c. An expert witness should never assume the role of the advocate.
- d. An expert witness should state the facts upon which his opinion is based; he should not omit to consider material facts which could detract from his concluded opinion.
- e. An expert must make it clear when a particular question falls outside his expertise.
- f. If the opinion of experts is not properly researched because it is considered that insufficient data are available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the whole truth and nothing but the truth without qualification, that qualification should be stated in the report.
- g. If after the exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any

¹⁶ Laws of Kenya, Civil Procedure Rule 2010

other reason, such change of view should be communicated (through the party's representatives) to the other side without delay and, when appropriate, to the court.

- h. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as exchange of reports.

3.3 The Engineer - Expert Advisor

Engineers are usually appointed to give an initial opinion on a claim and to determine:

- The factual evidence, evaluation of all the documentation, evidences and the type of case that may be pursued with such kind of evidence available.
- The technical issues strengths and weaknesses of the client's case.
- The basis of technical arguments which may be included in a claim submission.
- Any measures to mitigate loss, if weaknesses are present in the client's claim,
- Promote settlement, if possible, prior to any arbitration or litigation process.
- The advice must be balanced and independent as the Expert Advisor may be required to act as an Expert Witness.

3.4 The Engineer in Dispute Avoidance

The best way to resolve disputes is always to avoid their occurrence in the first place. A number of suggestions have been presented in this paper for consideration by practitioners.

(a) Clear and concise drafting of specifications/scope of work. The importance of having a written contract in place has been illustrated in previous cases.¹⁷

¹⁷ M. Osama Jannadia, Sadi Assaf, A. A. Bubshait, Allam Naji, "Contractual Methods for Dispute Avoidance and Resolution (DAR)," *International Journal of Project Management*, 18 (2000), pp. 41-49

Everything is reduced to a contract document in writing. There is no substitution for the clear and concise drafting of the contract document. At the very least, the contract document should maintain consistency. It is not uncommon to find that the design review cycle specified in the technical part differs from that defined in the main body of the contractual terms. This creates contradiction and ambiguity, which can be avoided by careful and concise contract drafting. It is quite common for parties to enter into a risk and reward contractual arrangement; however, the conditions for achieving rewards must be clearly defined. For example, the exact meaning of weight savings could breed dispute. The contract needs to make it clear how the weight is measured, what is included in the measurement and whether the weight means dry or wet and what are the units of measurements.

(b) Effective construction project management plan. When a contract is awarded, a project team including the engineer has to be assembled in a very short timescale. Personnel from various backgrounds are brought together. A plan based on the company's previous experience needs to be in place to manage the project.

(c) Adhere to project procedure. There is little point in having a project management plan if procedures are not followed. The plan should contain the means to ensure compliance. A well-structured procedure is particularly important in large-scale projects in which team members are drawn from multidiscipline and backgrounds, and members may also be changed during the course of the project.

(d) Be familiar with the contract documentation. The engineer must ensure that the rights and obligations of all parties concerned are defined in the contract. As project progresses, the contract becomes the single source of reference from which parties can work out their liabilities and benefits. Knowing the contractual responsibilities will avoid unnecessary arguments and promote the smooth running of a project.

(e) Understand the implications of the day-to-day communication. A project inevitably requires communication between various team members from different companies, contractors and subcontractors. A statement made to a supplier may be interpreted as changes that have cost and time implications. Engineers must be kept alert when making statements as representative of a party.

(f) Keep good contemporaneous records and engineering reports. When things go wrong, individuals will put forward their own version of events to suit their arguments. Mere allegations without substantiation carry no weight in any subsequent resolution of disputes. File notes, diaries, internal memoranda or email messages that were created at the time are suitable evidence in support of individuals' claims and counterclaims.

4.0 Conclusion

The strategy of conflict resolution on the project is by respond to problems in a timely manner, creating good communication among project teams, creating a clear mechanism, creating management and good supervision. The conflicts are resolved in an appropriate manner to minimize contagion to the efforts of the achievement of the project target. The current dominant theory is the interactionism view that believes that conflict can be constructive in organizations under certain circumstances.¹⁸

Engineers are, and indeed should be, involved in every stage of a construction project of whichever nature. They have every opportunity to assist in dispute avoidance and dispute resolution process by way of being more aware of the contractual relationship between various parties and the project procedure. To achieve that, there should not be any need for any major further education or training for the engineers. If a dispute does, however, occur, engineers have a vital role to play in the dispute resolution process. They can be factual witnesses to set out the chain of events that happened, expert witnesses to assist the court

¹⁸ Robbins, S. P., and Judge, T. A. (2009). *Organizational behavior*, 13th Ed., Pearson Education, Prentice Hall, NJ.

or tribunal in understanding the technical issues, and they are also well placed to judge the rights and wrongs of the parties given their technical backgrounds in understanding the day-to-day running of a project. As a result of the foregoing the following in my opinion can be drawn.

1. Disputes between the parties to the construction projects are of great concern to all the parties in the industry.
2. An effective claim management process is essential to ensure that any contractual claims arising are dealt with in a way that is fair to each involved party.
3. Better training in the area of contract management, contract administration and dispute resolution to the professionals especially the engineers can be said to be of a great help for better understanding of the contracts in the construction industry.
4. The requirement of contractor involvement during the design process can improve constructability and reduce the probability of design changes to minimize conflicts and disputes.
5. The evolution of dispute resolution processes has led to the development of a range of alternative dispute resolution opportunities to be exploited and embraced by the disputants within the industry.
6. Both ADR and DRB are the most efficient methods of solving the disputes in the construction industry because they give less time to give award and also the procedures filled by them are in the interest of both parties.
7. Whereas the decisions through court cases are more time consuming as well as money consuming. For amicable and earlier solution of claims ADR and DRB are the best.

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Practicability of Neutrality of Mediators: Demystifying the Interplay between Mediator Neutrality and Power Imbalances

*By: Julius Nyota & Bernard Nthiga**

Abstract

One of the fundamental principles of mediation is neutrality with many definitions depicting the mediator as a neutral party who intervenes in a dispute between parties. Many definitions assert that the neutrality and impartiality of the third party are critical elements legitimizing the practice of mediation. Indeed, many people are drawn to mediation on the promise of perceived neutrality. However, there are difficulties shrouding the concept of neutrality with many scholars terming it as one of the most misleading myths and pervasive notion. This paper argues that the ideal concept of neutrality as seen in the theoretical sense cannot be realized in practice especially where the mediator has to deal with power imbalances between the disputants. Whereas there is increasing application of mediation in resolution of disputes, most of the myths and misconceptions on the process should be deconstructed if the parties are to resolve their disputes effectively without causing a miscarriage of justice.

1. Background

Mediation is among the oldest dispute resolution mechanisms and can be traced to ancient era.¹ It mainly comprises two aspects namely mediation in the political sense and mediation in the legal sense.² Mediation in the legal process that is formal and looks forward not to resolution and restoration of relationships but to a settlement as we are going to reveal. Court annexed mediation falls in this category of mediation. The court-annexed mediation

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¹ Kariuki Muigua, *Resolving conflicts through mediation in Kenya*. (Greenwood Publishers, Nairobi 2012) P1

² *Ibid* p. 6

entails referring parties in litigation to mediation and eventually moving back to court for the ratification of the settlement.³ In this regard the autonomy of the parties is compromised in the choice of mediator and owning the process. However, the concept of neutrality of the mediator is used to counter balance the idea of judicial neutrality.

Mediation in the political sense is what this paper focuses on. It is the true mediation that brings forth a resolution.⁴ Arguably, it can best be defined as: "...a method of conflict management in which conflicting parties gather to seek solution to their problems, accompanied by a mediator who facilitates discussions and the flow of information, aiding in the process of reaching agreements."⁵ When a family conflict ensues between individuals or a particular group of people, the council of elders, relatives or friends acts as neutral parties (mediators) to help the disputants come to a mutually compromised agreement.⁶ It looks at the root cause of the problem and focuses greatly on the individual interests of the parties.⁷ This ensures that the bruised relationship between the disputants is restored to health, and harmony returned. This is mediation in the political process that grants parties exclusive autonomy over the choice of the mediator, the process of mediation and the ultimate outcome of mediation.

1.1 Introduction

Pursuant to the above definition, mediation in the political sense manifest the true attributes of mediation including, voluntariness and autonomy of the parties. In this research the word mediation will be used in reference to mediation in the political sense.

³ Ibid p. 75

⁴ Ibid p. 39

⁵ Jacob Bercovitch, "Mediation success or failure: A search for the elusive criteria" (Cordozo journal of conflict resolution vol. 7. 289) P 290

⁶ Taylor, Alison. "Concepts of neutrality in family mediation: Contexts, ethics, influence, and transformative process." *Mediation Quarterly* 14.3 (1997): 215-236. The articles focus on family disputes involving a husband and wife

⁷ Svensson, Isak. "Bargaining, bias and peace brokers: How rebels commit to peace." *Journal of Peace Research* 44.2 (2007): 177-194.

Neutrality is a very important principle in the mediation with the definitions asserting that a mediator is a neutral intervener in the parties' dispute. Many definitions asserts the neutral and impartial third party as key elements legitimizing the practice of mediation. Indeed, many people are drawn to mediation on the promise of perceived neutrality. However, the concept of neutrality is fraught with difficulty with some writers referring to neutrality as the most pervasive and misleading myth about mediation. Some argue that it is neither attainable nor desirable. Some commentators have argued that it is not sufficient to simply claim mediators' neutrality as the mediator have significant amount of power in mediation and there is evidence suggesting that they do not exercise it entirely in a neutral way depending on the outcome and content.⁸ It is imperative that the proponents of mediation are ready to acknowledge that it is a reflection of misconception of the theory and practice to claim that the mediator is neutral. It is on this ground that the many myths about mediation process need to be dispelled if the parties are to access justice through mediation as an increasingly dispute resolution process.

The problem is that while the theory on the concept of neutrality acknowledges the difficulties, these theoretical conceptions have not adequately impacted the practice of mediation. On the contrary, most mediators continue to claim that they are neutral and some go to an extent of claiming to be able to do things that fly on the face of the neutral persona.

Ideally, parties to mediation control the process. However experience has demonstrated that the success of mediation is significantly determined by the quality of the mediator.⁹ In view of the aforesaid a dilemma arises as to how neutral mediators shall influence the outcome in mediation without compromising the autonomy of the parties. This research seeks to unfold that dilemma. It aims at establishing a practical interplay of neutrality principle and the power imbalances between the parties.

⁸ Zamir, Ronit. "The disempowering relationship between mediator neutrality and judicial impartiality: Toward a new mediation ethic." *Pepp. Disp. Resol. LJ* 11 (2010): 467.

⁹ Freddie Strasser and Paul Randolph, *Mediation: A psychological insight into conflict resolution* (Continuum international publishing group London 2004)

Like arbitrators and judges, mediators are not super human. As Kariuki Muigua contends, they cannot be absolutely neutral.¹⁰ Similarly, the disputants are expected to produce solutions to their issues. Usually, disputants seek mediation after meeting a deadlock in their negotiations thus the need to engage a neutral third party.¹¹ Unlike arbitrators, there seems to lack substantive legislation to guide mediators. There is need therefore to establish a criteria for guiding mediators in mediation. This paper will examine the practical meaning of mediator neutrality as well as power imbalance between the parties. Further, it seeks to establish principles that would guide mediators in discharging their delicate mandate of striking a balance between their neutrality in relations to addressing the power imbalance between the disputants' in order to achieve successful mediation.

2. Meaning of Mediator Neutrality

A key attribute of mediation is the concept of neutrality of the mediator²⁴. There is no single definition of neutrality because different authors view it differently. Evans Rock for instance defines neutrality as impartiality or absence of bias²⁵. As per this view; neutrality, impartiality or lack of bias are synonymous. On the other hand, Trachte contends that neutrality refers to the concept that mediators do not stand to achieve personal gain from a mediation settlement; whereas impartiality implies mediators do not have preconceive bias on how the conflict should be resolved²⁶. Further, the ordinary English meaning of neutrality and impartiality entails not supporting one person or group than the other²⁷. This research has established that the words neutrality and impartiality are not technical words thus do not need a special interpretation. The ordinary meaning suffices the rationale of neutrality principal is that a mediator should not take sides. After examining the meaning of concept of mediator neutrality, a question that arises is whether a person can be absolutely neutral.

¹⁰ Op cit Muigua P3

¹¹ Kariuki Muigua. Settling disputes through arbitration in Kenya. (Glenwood Publishers, Nairobi 2017) P. 19

2.1 Mediators' neutrality in the theoretical and practical sense

Theoretically, neutrality is a concept which has different elements of meanings and understanding. In the broad sense, it is seen by many as lack of interest in the outcome of any dispute resolution, to others, it is lack of bias on any of the parties while others associate it with lack of prior knowledge on the dispute.¹² In this regard, under the broader sense of neutrality, the mediator is presumed not to make any judgment on the parties and the dispute at hand and the idea that they will be fair and open-minded. However, it is important to acknowledge that this theoretical sense of neutrality is not real as in practical sense not all mediators are neutral in all aspects. The theoretical aspects of neutrality reflect on the relatively measured and reasonable approach to the concept of neutrality.¹³ In this regard, it is important this concept is distinguished from impartiality. Whereas neutrality is mainly used to describe the mediator's aspect of lacking interest in the outcome of mediation, impartiality, on the other hand, refers to the fairness and objectivity to the parties through the entire mediation process. It is possible for the mediator to be objective and fair through the entire mediation process without being neutral. In practice, there is need to look at neutrality as multidimensional, and all dimensions may not be present in all the instances.

Based on the semantic differences between the neutrality and impartiality, it is possible to justify some of the mediator's actions or interventions throughout the mediation process which may contradict the principle of neutrality but are within the realm of impartiality. However, the idea of addressing the power imbalances between the parties contracts the notion of impartiality. This raises questions of how neutrality in theoretical and practical sense work. Further, there are questions on what mediators believe to be mediation and what they explain to the parties as mediation. In practice, a mediator is supposed to start in the opening remarks by stating their roles as neutral and impartial facilitators.

¹² Kishore, Shyam. "The evolving concepts of neutrality and impartiality in mediation." *Commonwealth Law Bulletin* 32.2 (2006): 221-225.

¹³ Bogdanoski, Tony. "The "Neutral" Mediator's Perennial Dilemma: to Intervene or Not to Intervene'(2009)." *The Queensland University of Technology Law and Justice Journal* 9: 26-39.

Even in the most experienced and developed jurisdictions, it is not advisable for the mediator to discuss with the parties the reality of neutrality.¹⁴ Notwithstanding the theoretical distinctions, there are no requirements that the mediator should explain the myth of neutrality or distinguish the principle of neutrality and impartiality. This is not the direction that a party should take in trying to portray their neutrality nor should they try to explain the neutrality dimension applicable in the particular case.¹⁵

Despite there being much literature on neutrality many mediators continue to assert their neutrality and impartiality. In literature, there are well considered and resonate approach to neutrality, and what it can mean to the parties in mediation, practically this concept is never explored nor explained. This is the issue is so serious that continuing to assert the issue of mediators neutrality even in the introductory statements amounts to a misrepresentation of what the mediator can provide to the parties. In this regard, there is need to explore effusive ways of on which the mediator can explain the reality of their role to the parties.

2.2 The interplay between mediator neutrality and power imbalances

Advancing the ideology that the mediators are neutral and impartial and can address the power imbalances entrenches further misrepresentation. This is because the only way a mediator can be able to address the power imbalances is by preceding the neutrality and impartiality aspect so that they can in a transparent manner intervene for the benefit of the party at the power disadvantage.¹⁶ The claims about redressing the power imbalances in mediation should acknowledge that if the mediator has to intervene to help the party at

¹⁴ Evan M. Rock, *Mindfulness Meditation, The Culture of Awareness, Mediator Neutrality and the Possibility of Justice* (Cardozo Journal of Conflict Resolution Vol.6:347)

¹⁵ Exon, Susan Nauss. "The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation|(2007-2008)." *USF L Rev* 42: 577.

¹⁶ Mulcahy, Linda. "The possibilities and desirability of mediator neutrality-towards an ethic of partiality?." *Social & Legal Studies* 10.4 (2001): 505-527.

the power disadvantage then effectively, they cannot be seen to be having an open mind on the way they treat the parties.

In both theory and practice, there is debate whether the mediator is obligated to take steps either to increase the powers of the weaker party or to reduce the powers of the stronger party. The main issue, in this case, is how the power imbalances can be addressed and its implications on the claims of neutrality and impartiality. This has been a troubling question to many mediators as they try to juxtapose on the two fundamental issues which are that having an open mind when dealing with parties with unequal bargaining power will disadvantage the weaker party and that intervening in the mediation process for the benefit of the weaker party undermines the principle of neutrality.

On the claims about addressing the power imbalances between the parties in the mediation process, several points have been put across. First, the mediators should not make any presumption about the existing power relations, and in exploring the ability to resolve the disparity, they should encourage the parties to share knowledge. Further the mediator should use the parties desire to reach an amicable solution to compensate for the parties with low negotiation skills , interrupt in case of intimidating negotiation patterns, create an accommodative environment for language differences where they exist and respect the needs of the weaker party to ensure that settlement is not reached of fear or retaliation.¹⁷ Finally, the mediator is supposed to conduct the process in the context the offers support and information to the parties and that which does not rush to settle. In these points, neutrality is only recognized where the mediator is supposed to intervene on behalf of the party with poor negotiation skills.¹⁸ This intervention as envisages should take the form of helping the party to identify their concerns and help in developing options as well as reflecting on their consequences.

¹⁷ Jacobs, Scott. "Maintaining neutrality in dispute mediation: Managing disagreement while managing not to disagree." *Journal of pragmatics* 34.10-11 (2002): 1403-1426.

¹⁸ Rock, Evan M. "Mindfulness mediation, the cultivation of awareness, mediator neutrality, and the possibility of justice." *Cardozo J. Conflict Resol.* 6 (2004): 347.

However, the mediator must provide the help required in the context of serving and being perceived as a neutral and impartial third party to the dispute. In this regard, it may be important to explain to the parties that the mediator is not taking a position but just trying to create an equitable negotiation environment to reach a reasonable settlement to be honored by all the parties.¹⁹ However, the reality of this is in doubt given that the mediator is not in the position to ensure all the relevant information is disclosed unlike a lawyer in the adversarial system who can seek the order from the court for the production of all the relevant documents. Further in situations where the power imbalances led to issues like domestic violence, it is not easy for the mediator to intervene and help the victim without the perpetrator feeling that they are taking a position.²⁰ It is likely that the perpetrator will question the neutrality of the mediator or even disrupt the whole process which they feel is working against them. This demonstrates in reality how it is difficult for the mediator to address the power imbalances while appearing impartial and neutral.

The mediator's ability to address the power imbalances can also be seen to be premised on the mediation process and the role of a mediator. The structure of the mediation process allows the mediator to address the power imbalances between the parties by controlling the process, determining the course of negotiation and reaching of the final settlement.²¹ The mediator's neutrality and impartiality should not be construed as the lack of power as their power is derived from the control they have over the entire process. This power enables the mediator to address the power imbalances, and it impacts on the concept of mediator neutrality.

¹⁹ Field, Rachael. "Neutrality and power: Myths and reality." *ADR Bulletin* 3, no. 1 (2000): 16-19.

²⁰ Cobb, Sara, and Janet Rifkin. "Neutrality as a discursive practice: The construction and transformation of narratives in community mediation." *Studies in law, politics, and society* 11 (1991): 69-91.

²¹ Astor Hillary, *Mediator Neutrality: Making Sense of Theory and Practice*. Available at <http://journals.safepub.com> Accessed on 28th May 2020.

3. Implications of the intersection of claims about neutrality and mediators' abilities to redress power imbalances

The failure to acknowledge the intersection of these issues has serious repercussions on the parties who are using mediation to resolve their disputes. Consequently, with the use of mediation increasing and gaining constitutional recognition, the parties affected are likely to increase.²² What is of particular concern is that if it cannot openly be said of what mediation can offer the parties regarding the third party's neutrality and what a mediator can and what they cannot do to address the power imbalances, then the whole process is being misrepresented.²³ Engaging in this type of misrepresentation provides a fertile ground for injustices and inequitable outcomes. Further failure to describe the process honestly and accurately is likely to lead to a scenario where the weaker parties are ambushed with agreements that reflect the wishes of, the stronger parties.

There is need to describe mediation to the parties in a right and accurate way. The mediators need to change the way they promote mediation and perhaps contemplate on the complete reassessment of the concept of neutrality. For the sake of those on power disadvantage, there is need to ensure that the promises made to them on neutrality reflect the reality.²⁴ Alternatively, there is need to abandon the rhetoric about the mediator's ability to address the power imbalances while remaining neutral. It is only in situations where the party at the power disadvantage are given full and adequate information about the disadvantages they may face as a result of power imbalances and the possible consequences of the disadvantages on the equitability of the outcomes, can mediation be said to offer just result to the power disadvantaged.²⁵ In

²² Katsoris, Melissa. "Does Nationality Influence Neutrality? The Ethical Standards and Expectations of International Mediators." *Fordham Int'l LJ* 39 (2015): 695.

²³ Nicholson, Alastair. "Mediation in the Family Court of Australia." *Family Court Review* 32, no. 2 (1994): 138-148

²⁴ Douglas, Kathy, and Rachael M. Field. "Therapeutic jurisprudence: Providing some answers to the neutrality dilemma in court-connected mediation." *Transforming Legal Processes in Court and Beyond* (2007): 67-84.

²⁵ Rifkin, Janet, Jonathan Millen, and Sara Cobb. "Toward a new discourse for mediation: A critique of neutrality." *Mediation Quarterly* 9.2 (1991): 151-164.

preparation for the mediation process, parties should not be given false promises that the power imbalances can be redressed or that the mediator can be neutral.

Mediators need to undertake two exercises in order to be effective. First, they need to be conscious of their unconscious influences of likes, biases, prejudices and aspirations. Secondly, they need to be focused on the parties' expectation that mediators should not show preference to any party. We earlier discussed the meaning on neutrality. This research, avers that neutrality should be understood to mean lack of bias or showing preference to any party as well as avoiding personal interests in the settlement. Mediators should always be conscious that they are not party to the dispute. They are an umpire to assist the disputants settle their issues⁴¹. This is achievable. The consciousness of their mission allows mediators to give parties an opportunity to take the lead in finding solutions for their dispute.

In so far as mediators do not impose themselves or their views to the parties therefore, party autonomy is promoted. This marks the interplay between the two principals. The moment mediators realize that they are biased or have a sense of preference to any party plus start developing a sense of personal gain from the settlement, neutrality becomes compromised. When neutrality is compromised mediators fail to uphold the dignity of the parties inversely injuring the parties' autonomy.

4. Recommendations

This paper has argued that it is not possible for the mediator to address the power imbalances between the parties while remaining neutral. Many definitions asserts the neutral and impartial third party as key elements legitimizing the practice of mediation. The concept of neutrality of the mediator is used to counter balance the idea of judicial neutrality hence it must be safeguarded

The first intervention is dealing decisively with the gatekeepers. The resistance by the power advantages party in the mediation is a major threat to the neutrality of the mediator. The powerful party has all the advantage and the failure to resolve the dispute is not a problem to them. This calls for measures to engage, challenge and disarm them.

The other intervention is locating and understanding the subjects. Different parties and different subjects of the disputes requires different approaches. There is need to understand the particularities of these groups which is will help to address the causes, manifestations and consequences of power imbalances. This approach engages the parties and, maps the relationships of the power imbalances among them and the manifestations of lack of partiality on the mediator. It also requires engagement of other structures that generate power imbalances such as religion and culture.

Finally, there is need to counter the knowledge hegemonies on the mediators neutrality. There is need to invest time to allow parties to tell their stories and experience separately which will help the mediator to frame appropriate responses.

5. Conclusion

There is increasing use of mediation especially in family disputes where power imbalances are evident. To ensure that the parties get justice in such circumstances, we cannot simply rely on the mediator's neutrality and their innate ability to address the power imbalances. There is need to assess the practice of mediation and allow it to be informed by the theoretical understanding which is more clear. In theory, mediation is more honest on the reality of the mediator's neutrality than it is the case in practice. However, if mediation is to be informed by the theory, then the mediators need to be honest on the level of neutrality they can offer. More specifically if the mediator claims any level of neutrality, then they should avoid giving false hope that they can appropriately address the power imbalances. Otherwise, if the mediators still wish to work in the context where power imbalances, exist, then they should drop the aspirations of neutrality.

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Towards Resolution of the Trophy Hunting Conflict

By: *Leslie Olonyi**

Abstract

There is a sharp lack of consensus in the wildlife conservation arena concerning the ethics and usefulness of trophy hunting in the African continent. The emergent scenario generally pits conservation organizations, nature enthusiasts and anti-trophy hunting African governments on one side against pro-trophy hunting African governments and trophy hunting clubs on the other side. The debate about trophy hunting was reignited in December of 2019 after Botswana lifted its ban on trophy hunting only for an elephant that had been collared for research purposes to be shot during a trophy hunt. This paper intends to analyse the trophy hunting conflict between the above-mentioned stakeholders which also regularly plays out in international conferences while also considering the place or opportunity for environment conflict resolution to inform consensus. International environmental law is based on the realisation that the environment must be protected as an international public good and in the general interest of humanity. As a result, a number of international environmental agreements have incorporated ADR mechanisms as part of the dispute resolution process.

1. Introduction

Scientists from diverse disciplines are in agreement that there has been a rapid acceleration in the extinction rate of species and that direct and indirect impact of human activity on the Earth's natural systems is primarily to blame. Some scientists assert that we are either entering, or in the midst of the sixth great mass extinction while geologists have even proposed a new epoch in the geologic time scale referred to as the "Anthropocene" which is characterised by humans altering Earth's natural systems.¹ One of the anthropogenic human actions has been both legal and illegal wildlife trade in wildlife species. These two forms of trade pose risks to humans and their environment for the reason that they both involve movement of species from native to non-native zones.

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¹ Bruce Smith & Melinda Zeder, 'The onset of the Anthropocene.' (2013) Vol 4, Anthropocene pp. 8-13.

Nevertheless, the risks associated with illegal wildlife trade are more substantial. They extend well beyond the direct impacts that are easily perceptible, identifiable or quantifiable. Some of the identifiable risks include; loss of biodiversity, risk to public health as is clearly demonstrated by the devastating effects of the ongoing COVID 19 pandemic which is believed to be a zoonotic disease caused by illegal wildlife trade, loss of livelihoods, invasive species and organized crime.

Unsustainable development has emerged as a significant threat to conservation and protection of the environment. There is mounting dissatisfaction, especially in the developing world, at the traditional adversarial approaches to resolving environmental conflicts. A multiplicity of reasons are behind this wariness and they include: judicial systems that are beholden to the executive which is the very arm of government that initiates unsustainable projects, weak environmental laws and lack of enforcement capacity or infrastructure of environmental laws and environment related court decrees. A more overarching reason for dissatisfaction with adversarial approaches to resolving of environmental conflicts is that Alternative Dispute Resolution (ADR) mechanisms of environmental disputes are more suited to ascertaining the truth or the most reasonable solution which is in the best interest of the environment and by extension humanity.

International environmental law is based on the realisation that the environment must be protected as an international public good and in the general interest of humanity.² With that in mind, a number of international environmental agreements have incorporated ADR mechanisms as part of the dispute resolution process. For instance; the Revised African Convention on the Conservation of Nature and Natural Resources³, Convention on Biological Biodiversity⁴, the Vienna Convention for the Protection of the Ozone Layer⁵, the

² Francesco Francioni, 'The private sector and the challenge of implementation in Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards,' in Pierre-Marie Dupuy and Jorge E. Viñuales (eds) (2013) at pp. 30-31

³ Revised African Convention on the Conservation of Nature and Natural Resources, art XXX.

⁴ Convention on Biological Diversity, art 27

⁵ The Vienna Convention for the Protection of the Ozone Layer, art 11

Antarctic Treaty⁶, the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region⁷, the United Nations Framework Convention on Climate Change⁸, the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁹ and the United Nations Convention on the Law of the Sea¹⁰ all include ADR mechanisms either as mandatory steps or options for dispute resolution. ADR methods like arbitration or mediation can serve as the bridge between objectives and outcomes of environmental as well as climate change agreements and also as enforcement mechanisms. For example, the landmark South China sea arbitration¹¹ settled a dispute that contained significant environmental components thus demonstrating the growing importance of ADR in resolving environmental disputes. In the above matter, the Permanent Court of Arbitration ruled that China engaged in environmentally harmful fishing practices¹² and also violated environmental protection provisions.¹³

In 2015, the killing of Cecil the Lion in Zimbabwe's Hwange National Park by a trophy hunter reignited the deep-seated debate on trophy hunting in the African continent. Multiple iterations of conferences under international environmental agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) have revealed a fundamental lack of consensus concerning the ethics, acceptability and usefulness of trophy hunting in conservation. Thus far, decisions that enable trophy hunting have been met with significant pushback, including the decision at CITES to increase South

⁶ The Antarctic Treaty, art XI

⁷ Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, art 26

⁸ United Nations Framework Convention on Climate Change, art 14

⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art XVIII.

¹⁰ United Nations Convention on the Law of the Sea, Part XI. Section 5

¹¹ The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China) 2013-19. Available at <<https://pcacases.com/web/sendAttach/2086>>

¹² The South China Sea Arbitration, PCA 2013-19 Pp 397. Available at <<https://pcacases.com/web/sendAttach/2086>>

¹³ *Ibid* Pp 475 - 476

Africa's black rhino trophy hunting quota¹⁴ and Botswana's unilateral lifting of an elephant hunting moratorium.¹⁵ These actions not only reveal the extent of the conflict between the pro- and anti-trophy hunting sides, but also call into question the effectiveness of existing conflict management channels if any.

This paper attempts to analyse the trophy hunting disagreement under the CITES framework between the pro- and anti-trophy hunting parties by applying insights from conflict resolution literature namely, the Dynamics of Conflict Resolution by Bernard Mayer. The paper applies the conflict analysis principles espoused in the above book which a conflict intervener such as a mediator, negotiator or facilitator would require to better understand the conflict. The objectives are to establish clear definitions surrounding the issue; identify the major issues at hand; identify stakeholders and the key sources of conflicts between the parties.

2. Definitions

Before delving into the conflict resolution analysis, it is crucial to first define the conceptual context within which trophy hunting exists. Conservation may be broadly defined as actions that directly enhance the chances of habitats, species and entire ecosystems persisting in the wild.¹⁶ This also includes conservation of geodiversity, which is the variety of geological, geomorphological and soil features. Hunting is the active pursuit and harvest of wild animals. For the purposes of this paper, the definition of a wild animal is an animal that is legally defined and protected as wild by law. The motivation behind hunting is used to distinguish the groups of persons who engage in hunting. These groups are:

¹⁴ Damian Carrington, 'South Africa gets go-ahead to increase black rhino trophy hunting.' (The Guardian, 19 Aug 2019)

<<https://www.theguardian.com/environment/2019/aug/19/south-africa-gets-go-ahead-to-increase-black-rhino-trophy-hunting#maincontent>>.

¹⁵ Krista Mahr, 'Why Botswana Is Lifting Its Ban on Elephant Trophy Hunting.' (NPR, 28 September 2019)

<<https://www.npr.org/sections/goatsandsoda/2019/09/28/763994654/why-botswana-is-lifting-its-ban-on-elephant-trophy-hunting>>.

¹⁶ Kapos, V., A. Manica, R., Aveling, P., et al., 'Defining and measuring success in conservation.' in N. Leader-Williams, W.M. Adams & R.J. Smith (eds) *Trade-Offs in Conservation: Deciding What to Save*. (Wiley-Blackwell, 2010) pp. 73–93

- (i) Subsistence hunters who hunt to survive by obtaining food for immediate family use. Such hunting is carried out mostly by rural communities. By-products like animal hides are used by the family.
- (ii) Commercial hunters who seek to acquire animal products like venison or trophies to sell for profit.
- (iii) Recreational hunters who hunt for sport or as a 'leisure' activity. This category can be subdivided further into:
 - a) Sport hunters who are usually motivated by the experience of the hunt or the chase.¹⁷
 - b) Trophy hunters, in comparison, are motivated by the kill, the glory, or the trophy.¹⁸
- (iv) Retaliatory hunting occurs in situations where an animal has repeatedly destroyed property, mostly livestock, or killed members of the public. This sort of hunting is rare but might become more common with increasing incidences of human-wildlife conflict as populations grow.

Hunting that takes place illegally is referred to as poaching.¹⁹ Culling, another term widely used in ecology and wildlife management, is occasionally associated with hunting but is entirely different. Culling is a method where wildlife populations classified as overabundant are reduced by killing. Though controversial among some animal enthusiasts, culling is scientifically well established and sensitive to animal welfare.

¹⁷ Peterson, M. N., 'An approach for demonstrating the social legitimacy of hunting.' (2004) *Wildlife Society Bulletin*, 32, 310 - 321.

¹⁸ *Ibid*

¹⁹ Taking a wild resource out of season or taking through an illegal means, usually involves the killing or trapping of endangered, rare or protected species.

3. Major Sources of Conflict

(a) Conservation Ethics

Anti-trophy hunting groups and countries aver that animals have an intrinsic value and are sentient beings that ought to be treated humanely.²⁰ These groups also argue that wild animals, despite playing a key role in ensuring ecological balance on earth, are a species just like man and have an equal right to exist on earth and not to be used as objects to satisfy blood lust. Pro-trophy hunting groups on the other hand believe that they are conserving the endangered species by paying for expensive hunts to kill a small number of animals which will not affect the overall population while the funds are reinvested in conservation efforts.²¹ Anti-trophy hunting groups and countries retort that there is no evidence or tangible impact of any such reinvestment of funds and that photographic safaris provide a more sustainable source of funds.²²

(b) Wildlife Crime

Anti-trophy hunting groups and countries view widespread trophy hunting as providing an opportunity for poachers to kill wildlife and launder the trophies including wildlife products like ivory or rhino horn. Parties holding this opinion argue that such illegally obtained trophies generally find their way into the lucrative illegal wildlife trade markets. Poaching has had devastating effects on wildlife populations across Africa with iconic species like elephants, lions, leopards and Rhino bearing the brunt.²³ Groups and countries in support of trophy hunting respond that well-regulated trophy hunting will have checks and balances to prevent such laundering through methods like issuing of export

²⁰ Jeffrey Flocken, 'Trophy hunting: 'Killing animals to save them is not conservation' (CNN, 4 Jan 2018) <<https://www.cnn.com/2015/05/19/opinions/trophy-hunting-not-conservation-flocken/index.html>>

²¹ Adam Cruise, 'The Effects of Trophy Hunting on Five of Africa's Iconic Wild Animal Populations in Six Countries - Analysis' (Conservation Action Trust, Jan 2016) <<https://conservationaction.co.za/resources/rcports/effects-trophy-hunting-fiveafricas-iconic-wild-animal-populations-six-countries-analysis>>

²² John R. Platt, 'Elephants Are Worth 76 Times More Alive Than Dead: Report, Sci. AM. (Oct. 8, 2014),' <<https://blogs.scientificamerican.com/extinction-countdown/elephants-are-worth-76-times-more-alive-than-dead-report/>>

²³ Jani Actman, 'Poaching animals, explained' (National Geographic, 12 Feb 2019) <<https://www.nationalgeographic.com/animals/reference/poaching-animals/>>

and import permits of trophies. However, such permitting processes have been prone to abuse.²⁴

4. Stakeholders Analysis

(a) States

Wildlife are located within State territories and each State has its unique wildlife management strategies and practices. International cooperation is however required where protection and conservation of wildlife involves migratory species that regularly cross-national boundaries of range states. Some States support trophy hunting of wildlife for varying reasons, others are vehemently opposed to it while some remain neutral or shift stances depending on their national interests. Countries can also be further classified as those that are range states²⁵ for the iconic species that are the subject matter of this paper and those that are non-range states. This helps in clarifying and highlighting the underlying nuances of positions held by these countries. The CITES member states analysis in *table I* below zeroes in on trophy hunting positions adopted by countries on one of the most iconic and on demand species by trophy hunters, the African Elephant (*Loxodonta Africana*.)

²⁴ Willow Outhwaite, 'Addressing corruption in CITES documentation processes' (TRAFFIC, March 2020) < <https://rmportal.net/biodiversityconservation-gateway/projects/current-global-projects/targeting-natural-resource-corruption-tnrc/tnrc-resources/addressing-corruption-in-cites-documentation-processes>>

²⁵ Convention on the Conservation of Migratory Species of Wild Animals, Article I (1) (h) any State that exercises jurisdiction over any part of the range of a migratory species. <<https://www.cms.int/en/convention-text>>

Table I

Pro-Trophy Hunting	Anti-Trophy Hunting	Neutral
Zambia, South Africa, Zimbabwe, Botswana, Namibia <i>Destination States</i> ²⁶ USA, EU, China, Canada, Mexico, Argentina, New Zealand ²⁷	Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Republic of the Congo, Rwanda, Senegal, Sierra Leone, Somali, Sudan, South Sudan, Togo, Uganda ²⁸	Tanzania, Mozambique, Angola, Cameroon, Burkina Faso

i) Pro-Trophy Hunting Countries

Position: Trophy hunting and commercial trade in hides and leather goods is a sustainable use of wildlife species. Hunting of wildlife from the national population quotas does not threaten the survival of the species since the national populations are secure. Trophy hunting confers a value on wildlife as a renewable resource and, when properly controlled, actively encourages conservation.

Interests: The primary interest of these nations is generation of revenue from licensing costly trophy hunts to wealthy hunters mostly from North America, Europe and more recently China. Such governments claim that they intend to plough back revenue derived from trophy hunting into development projects

²⁶ Countries where most trophies are exported to and have the bulk of trophy hunting groups.

²⁷ The Humane Society International, 'Trophy Hunting by the Numbers' <https://www.hsi.org/wp-content/uploads/assets/pdfs/report_trophy_hunting_by_the.pdf> Pp 4. See also World Atlas, 'Where do Hunting Trophies Come From?' <<https://www.worldatlas.com/articles/top-countries-of-origin-for-hunted-trophy-imports-to-the-us.html>>

²⁸ The African Elephant Coalition <<https://www.africanelephantcoalition.org/>>

for communities living in wildlife rich areas and into wildlife conservation and anti-poaching programs.

ii) Anti-Trophy Hunting Countries

Position: Countries against trophy hunting of wildlife, especially endangered or threatened species assert that wildlife, have an intrinsic value and are part of their national heritage. The practice of hunting for fun is cruel, unsustainable and should be outlawed. They further state that any trade in trophies of endangered species should be abolished.

Interests: These countries prioritize conservation of the population of wildlife species especially the endangered species within their territories. They are also cognizant of the fact that trophy hunting may enable instances of wildlife specimen laundering which will encourage poaching. Poached wildlife trophies or specimens may be passed off and sold as products obtained under licensed trophy hunting. Permitting trophy hunting is seen as the first steps towards a resumption of trade in items like Ivory that fuelled the poaching nightmare in the continent.

(b) Trophy Hunting Groups

Position: Trophy hunting is a conservation tool like any other and if well-regulated helps to conserve wildlife for posterity.

Interests: Groups supportive of trophy hunting want to secure rights to be allowed to enjoy the exhilaration of trophy hunting and to transport their trophies back to their countries to add to their collection. Trophy hunting groups also contend that trophy hunting places an economic value on wildlife which is an incentive for local communities to conserve the species. A few groups known for conservation activities like the World Wildlife Fund (WWF) do controversially support regulated trophy hunting.²⁹

²⁹ WWF and trophy hunting
<https://wwf.panda.org/our_work/wildlife/species_news/wwf_and_trophy_hunting/>

(c) Anti-trophy hunting groups and Conservation Groups

Position: Majority of conservation-oriented groups are vehemently opposed to trophy hunting and aim to see all trophy hunting activities abolished because animals are sentient beings and for conservation of the environment as a whole.

Interests: These groups want to put a stop to the accelerated extinction of species and the global plummeting of wildlife populations. They believe that hunting wildlife for fun is detrimental to wildlife conservation and perpetuates untold suffering on wildlife which should instead be conserved for the enjoyment of present and future generations.

5. Analysis of the Issue Wheel of Conflict

Understanding and locating the source of the conflict helps in creating a roadmap to navigate through the conflict towards resolution and addressing the needs of the conflicting parties.³⁰ This helps to create approaches that are more deliberate and targeted at the specific sources of conflict. The two sources of conflict that are most apparent are;

(a) History

The conflict and controversy that surrounds trophy hunting has been in existence for almost a century. The issue has in recent decades come to the fore due to rapid degradation, biodiversity extinction and accelerated climate change. The interdependence of States economically and environmentally is clear to all and now more pronounced than ever due to globalization as well as the indiscriminate effects of climate change across all nations. It is now close to impossible to control climate change or preserve biological diversity without international cooperation.

Trophy hunting was the preserve of colonial masters. It has been opined that 1848 is the year that popular fascination with African game hunting captured the imagination of the British public. An Englishman named Roualeyn Gordon-Cumming sparked this captivation when he returned to England from Southern Africa with various stuffed trophies of exotic animals that he had hunted in

³⁰ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*. (Jossey-Bass, 2000) Pp 8

expeditions.³¹ He was fondly referred to with titles such as 'Pioneer or Father of South African Sport', and 'the lion hunter of Central Africa, in the prime of manhood.'³² With the advent of colonization proper, more Europeans engaged in trophy hunting as Africa opened up to the rest of the world. Africans were initially not allowed to engage in the hunt but were forced to work as scouts and porters of the loot.

Such a background when taken together with the dehumanization that accompanied colonization and consequent struggle for independence has played a part in influencing countries that reject trophy hunting as a colonial relic perpetrated against their natural heritage. Countries which support trophy hunting look past this history associated with trophy hunting to tap into the purported economic gains that they associate with it. To help resolve the conflict, a conflict intervener such as a mediator or facilitator should understand this historical context and beware that some parties to the conflict regard it as part of their fight for identity.³³

(b) Values

People usually believe that their values are rooted in virtues³⁴ thus making it difficult to convince them to change or compromise what they perceive to be virtue based. As a result, value-based conflicts can be difficult to resolve. In this instance, there is a stark conflict of values between the parties with one group declaring that their position is of an ethical and moral stance. This group proclaims that wild animals are sentient beings that must not be hunted for fun and human activity is already depleting the earth off its animal species. The pro-trophy hunting group is more interested in the yet to be substantiated economic gains brought about by trophy hunting and counter that funds obtained are

³¹ Roualeyn Gordon-Cumming, 'Five Years of a Hunter's Life in the Far Interior of South Africa. With Anecdotes of the Chase and Notices of the Native Tribes,' New edition (1855), 2: 381

³² David B. Espey, 'Imperialism and the Image of the White Hunter,' Research Studies 46. (March 1978) Pp: 13.

³³ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*. (Jossey-Bass, 2000) Pp 13

³⁴ Gertrude Himmelfarb, *The De-Moralization of Society: From Victorian Virtues to Modern Values*. (Vintage Books, 1996) Prologue.

ploughed back into conservation activities.³⁵ The key to a breakthrough will be where the parties in conflict are able to find a level on which they share values.³⁶ Bridging the divide through reinforcement of shared values could prove to be particularly suitable.³⁷

6. Nature of Conflict

The conflict plays out in conferences³⁸, scientific arenas, political arenas, online, media, social media and on the streets as various anti-trophy hunting groups resort to demonstrations or mass action³⁹ in an attempt to sensitize the public and at the same time force governments to pay closer attention. Conflict about trophy hunting occurs along all three dimensions of conflict namely cognitive, emotional and behavioural which all need to be addressed if the conflict is to be resolved.⁴⁰ The conflict is clearly not a linear conflict⁴¹ but is composed of varied dynamics in these different dimensions.

(a) Cognitive (perception) dimension

There is incompatibility in the needs of the parties involved. One group views trophy hunting as a legitimate means of providing revenue to further conservation of endangered species and develop local communities. The anti-trophy hunting group terms trophy hunting as incompatible with conservation, a guise to indulge in blood thirst and contribute towards extinction especially of endangered species that instead need maximum protection. They also assert

³⁵ David Smith, 'Trophy Hunting May be the Key to Saving Endangered Big Game' (Wide Open Spaces, 8 May 2017) <<https://www.wideopenspaces.com/trophy-hunting-may-key-saving-endangered-big-game-pics/>>

³⁶ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*. (Jossey-Bass, 2000) Pp 12

³⁷ Bernard Mayer, *The Dynamics of Conflict*. (Jossey-Bass, 2012) Pp. 269.

³⁸ Humane Society International, 'Demand EU Action at CITES to End Cruel Trade in Wild-Caught Elephants' (22 Aug, 2019) <<https://www.hsi.org/news-media/stars-letter-eu-cites-wild-caught-elephants/>>.

³⁹ Davis Harper, 'The Global March for Elephants and Rhinos, Putting an end to wildlife trade' (Sierra Club 3 Oct, 2017) <<https://www.sierraclub.org/sierra/global-march-for-elephants-and-rhinos>>

⁴⁰ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*. (Jossey-Bass, 2000) Pp 4

⁴¹ *Ibid* Pp 7

that other forms of tourism can supply much needed revenue to local communities. Within this dimension of conflict, the perspective held by anti-trophy hunting countries is that wildlife is part of their heritage, not up for misuse by colonial powers while pro trophy hunting countries see wildlife as an economic resource to be exploited. Cognitive resolution is often the most challenging to attain especially where the parties are deeply attached to their values and perceptions about a conflict. Resolution usually occurs when the parties believe that the main issues have been addressed.

(b) Emotional (feeling) dimension

The parties to this conflict have often expressed their emotions in different ways and that will make it harder for a conflict intervener to read and plan for the mood of the parties. Activists and trophy hunter groups usually do not hold back their feelings, country representatives act diplomatically and conceal their emotions while conservation groups behaviour may often depend on the culture of the organization they represent. Emotional resolution will be achieved when the parties to the conflict tone down and experience less intense to zero outrage, anger, disgust, animosity and other similar emotions that are associated with the conflict.

(c) Behavioural (action) dimensions

Both parties in this conflict have engaged in often hostile conflict behaviour to express their dissatisfaction, disagreement or to attempt to get their needs met. Extreme anti-trophy hunting activists have gone to the extent of issuing death threats and stalking trophy hunters.⁴² On the other hand, a trophy hunter who hunted a giraffe provocatively stated that the giraffe was delicious, and that she will not stop trophy hunting escapades after receiving hostile attention from anti-trophy hunting activists.⁴³ Giraffes species as a whole are listed as vulnerable species after their numbers declined by 40 percent in the last 30 years

⁴² Michael Hollan, 'Hunter says she gets death threats for pics with dead animals, despite using meat to feed family' (Fox News, 18 November 2019) <<https://www.foxnews.com/great-outdoors/hunter-mom-death-threats-factory-farming>>

⁴³ Ines Novacic ' "He was delicious": Trophy hunters defend killing iconic animals' (CBS News, 7 June, 2019) <<https://www.cbsnews.com/news/trophy-hunting-killing-or-conservation-cbsn-originals/>>

to approximately 68,000 in the wild. These remaining herds are fragmented and face a multitude of threats, from habitat loss to poaching. Some of the giraffe subspecies like the Kordofan giraffe are down by 90% to about 1400 individuals⁴⁴ and the Nubian giraffe in Kenya reduced by 98% to 455 individuals.⁴⁵ The two subspecies are listed as critically endangered meaning that they face an extremely high risk of extinction in the wild. Countries portray this conflict behaviour at the CITES conferences of parties where they lobby hard to outdo each other at the plenary session where voting on important issues takes place or sponsor resolutions against the known position of the opponent country. A first step towards behavioural resolution would entail a discontinuation of provocative, threatening and other related conflict behaviour. Once this first step is achieved, both parties will have to commit to actively and positively move the process forward.⁴⁶

7. Recommendations

Majority of the legally binding international resolutions regarding trophy hunting over the past few decades have relied on the platform provided by CITES. With the modality of a triennial multilateral Conference of the Parties (COP), CITES has indeed been able to achieve great international cooperation over a range of conservation issues, however, there is more progress to be made.

To assist in tackling the broad issues that the trophy hunting debate has exposed in the CITES COP processes, national-level decision-making processes should allow for broader facilitated stakeholder participation as countries prepare their country positions and country proposals for submission to the CITES conference of parties. Facilitation is an alternative dispute resolution procedure in which the facilitator helps the parties design and follow a meeting agenda and assists parties to communicate more effectively throughout the process. The facilitator has no authority to make or recommend a decision and is neutral thus allowing

⁴⁴ IUCN Red List, Kordofan Giraffe

<<https://www.iucnredlist.org/species/88420742/88420817>>

⁴⁵ IUCN Red List, Nubian Giraffe

<<https://www.iucnredlist.org/species/88420707/88420710>>

⁴⁶ Ellen Kandell, 'Cognitive, Emotional and Behavioral Resolution of Conflict.' (Alternative Resolutions, 2 June 2014)

<<https://www.alternativeresolutions.net/2014/06/02/june-2014-newsletter/>>

the stakeholders, who represent the public, to ventilate their opinions. In most cases, citizens of many countries are usually not aware of what their government positions are especially on controversial issues like trophy hunting quotas that are discussed and voted on at the CITES conference of parties. Glaring discrepancies between known national public sentiments and the pattern of eventual votes cast by national delegates are not uncommon. The gulf in sentiments between the public and the government usually comes to fore after the fact when no form of recourse is available. For example, at the CoP 18 in Geneva, the United States was among the 18 countries that opposed a proposal to prohibit the capture and export of wild African elephant calves to zoos.⁴⁷ This vote occurred despite the public outburst among Americans earlier that year, when 35 elephants calves were torn from their mothers in the wild in Zimbabwe for export to Chinese zoos. A facilitated public participation process would allow for diversity in points of view to enrich the country positions and inform the decision-making process.⁴⁸ Significant impacts and contentious issues are not concealed or glossed over when a public participation is carried out by a neutral facilitator as opposed to a public participation process without a neutral facilitator. The benefits of good decision making can be expected by all stakeholders through a facilitated public participation process, which would also act as a system of early conflict identification and resolution while the policy making process is still upstream. Facilitated public participation, for instance through workshops or public meetings helps improve the transparency and accountability of decision-making and increases public and stakeholder confidence in decisions made.⁴⁹ The onus is on the national CITES scientific authorities and national CITES management authorities to coordinate and ensure maximum stakeholder participation and adoption of alternative dispute resolution methods to arrive at holistic decisions.

⁴⁷ Al Jazeera 'Momentous' Near-total ban on trade in wild elephants for zoos' (Al Jazeera, 27 Aug 2019 <<https://www.aljazeera.com/news/2019/08/total-ban-trade-wild-elephants-zoos-190827185509924.html>

⁴⁸ UNEP EIA Training Resource Manual: Public Involvement (2nd Edn, 2002) Pp 164. <https://unep.ch/etu/publications/EIA_2ed/EIA_E_top3_body.PDF>

⁴⁹ James L. Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*. (Jossey-Bass 2005) Pp 22.

Negotiation and facilitation among state parties on controversial issues prior to the conference or before voting by delegates, should be encouraged. Negotiation is a method of alternative dispute resolution where parties to a dispute meet to solve a problem or to find a strategy to address an issue that affects them.⁵⁰ Negotiation deals with a non-linear process due to the expected sequence of developmental breakthroughs as well as delays or set-backs over the period of resolving the dispute. Member states may choose to integrate negotiation as an alternative dispute resolution process or strategy for building consensus with other member states or accredited delegates prior to the conference of parties or at any time before actual voting on resolutions and decisions during the conference. Principled negotiation⁵¹, a method of negotiation where issues are decided on their merits rather than only through a haggling process could be adopted for disputes brought about by such multilateral environmental policy making processes. In principled negotiations, parties agree to mutual gains whenever possible. However, where the interests conflict the negotiator pursues a position that the result be based on an objective or fair criterion, independent of the will of either party. In principled negotiations the focus is on the interests of the parties as opposed to positions and parties are encouraged to innovate options for mutual gain.

Hybrid alternative dispute resolution processes which combine the advantages of different ADR methods, whilst attempting to minimize or eliminate potential disadvantages can also be applied to this dispute. For instance, a conflict intervener may start by neutral facilitation of discussions and may also switch to conciliation. Under conciliation, the intervener plays a direct role in the resolution of a dispute and even advises the parties or offers proposals and solutions.

8. Conclusion

CITES deals with environmental issues that affect all humanity and thus decisions made should not be competition based, hostile or power based where individual states stick obstinately to prior determined positions but should be

⁵⁰ Howard Raiffa, *The Art and Science of Negotiation*. (Harvard University Press, 1982)

⁵¹ Roger Fisher, William Ury, Bruce Patton., *Getting to Yes*. (Penguin, 1991) Pp xviii.

focused at preserving species and habitats that provide essential ecological services which enable humanity to survive. Such a holistic approach will reduce acrimony, speed up settlement of environmental disputes and help build consensus and goodwill between parties with the common goal being to protect and conserve the environment.

Call for Submissions

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