



Evaluating the Role of ADR mechanisms in Resolving Climate Change Disputes	<i>Francis Kariuki &amp; Vianney Sebayiga</i>
The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya	<i>Kariuki Muigua</i>
The Place of Mediation in Resolving Disputes in the Built Environment	<i>Kenneth Wyne Mutuma</i>
The Overriding Objective in English Arbitration Act: Some Key Lessons	<i>Wilfred A. Mutubwa</i>
Alternative Dispute Resolution and Arbitrability of Public Procurement Proceedings Disputes in Kenya: A Feasibility or Pious Aspirations?	<i>Ibrahim Kitoo &amp; Kariuki Muigua</i>
Exceptions to the Duty of Confidentiality in Arbitrations	<i>Austin Ouko</i>
Reflections on the Unfolding Significance of Sports Mediation	<i>Jacqueline Waihenya</i>
Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR	<i>Kariuki Muigua</i>
CASE REVIEW: Alternative Dispute Resolution Is an Imperative in Public Procurement Disputes Constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021	<i>Wilfred A Mutubwa</i>
A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration	<i>Jack Shivugu</i>
Disciplined Dissent - Distinguishing Arbitral Awards from Judgments	<i>Suzanne Rattray</i>
Traditional Dispute Resolution Mechanisms in the Kenyan Justice System: Which Way Forward?	<i>Mwangi Patience &amp; Kibet Brian</i>
Mediating Workplace Conflicts	<i>Maryanne Mburu</i>





**CI Arb**  
*evolving to resolve*

*Kenya Branch*

---

# ALTERNATIVE DISPUTE RESOLUTION

---

**Volume 10 Issue 3**

**2022**

Alternative Dispute Resolution is a journal of the Chartered Institute of Arbitrators (Kenya Branch).

For Marketing opportunities contact: [marketing@ciarbkkenya.org](mailto:marketing@ciarbkkenya.org)

Chartered Institute of Arbitrators, Kenya,

Nicholson Drive, Off Ngong Road,

Between Bemuda Plaza and Central Church of Nazerene

P.O. Box 50163-00200, Nairobi

Tel: 2712481, 2722724, Fax: 2720912

Mobile 0734-652205 or 0722-200496

Email: [info@ciarbkkenya.org](mailto:info@ciarbkkenya.org)

Website: [www.ciarbkkenya.org](http://www.ciarbkkenya.org)

Typesetting by:

New Edge GS,

P.O. Box 60561 - 00200,

Tel: +254 721 262 409/ 737 662 029,

Nairobi, Kenya.

Printed by:

Mouldex Printers

P.O. Box 63395,

Tel - 0723 366 839,

Nairobi, Kenya.

Published by:

Glenwood Publishers Limited

P.O. Box 76115 - 00508

Tel +254 2210281,

Nairobi, Kenya.

© Chartered Institute of Arbitrators, Kenya

All rights reserved. No article published in this journal may be reproduced, transmitted in any form, stored in any retrieval system of any nature without prior written permission of the copyright holder. The views expressed in each article are those of the contributors and not necessarily those of the Chartered Institute of Arbitrators, Kenya.

## **EDITOR-IN-CHIEF**

Dr. Kariuki Muigua, Ph.D, Africa Trustee (CIArb), FCIArb, C.Arb

## **ASSOCIATE EDITORS**

Dr. Wilfred Mutubwa, FCIArb, C.Arb

Ms. Jacqueline Waihenya, FCIArb

## **EDITORIAL TEAM**

Mr. Simon Ondiek, FCIArb

Mr. Jack Liaduma, ACIArb

Mr. James Njuguna, MCIArb

Ms. Anne W. Kiramba, ACIArb

Dr. Francis Kariuki, Ph.D, FCIArb

Ms. Endoo Dorcas Chepkemei, MCIArb

## **KENYA BRANCH COMMITTEE**

Africa Trustee (CIArb): Dr. Kariuki Muigua, Ph.D, FCIArb, C.Arb

Chairman & Ex. Committee Convenor: Dr. Wilfred Mutubwa, FCIArb, C.Arb

Vice Chair: Ms. Jacqueline Waihenya, FCIArb

Hon. Treasurer: Arch. Nekoye Masibili, MCIArb

Hon. Secretary: Ms. Wanjiku Muinami, MCIArb

Ass. Hon. Secretary, Chairman Edu., Training & Membership Subcommittee:

Dr. Kenneth Wyne Mutuma, C.Arb

Chairperson, Legal Subcommittee: Ms. Jane Sumbeiywo Mwangi, MCIArb

Chairman Marketing Subcommittee: Eng. Fredrick Aluoch, MCIArb

## **MEMBERS**

Mr. Kyalo Mbobu, C.Arb

Hon. Sen. (Arch). Sylvia Kasanga, MCIArb

Ms. Eunice Lumallas, FCIArb

Mr. Arthur Igeria, FCIArb

Hon. Justice (Rtd) Aaron Ringera, C.Arb.

Mr. Paul Ngotho, C.Arb

Mr. Nyaga B. Kithinji, FCIArb

Mr. Calvin Nyachoti, C.Arb: Past Chairman

Mr. Samuel Nderitu, FCIArb (Chartered Arbitrator) Immediate Past Chairman -  
ex-officio Member.

Patron: The Honourable the Chief Justice & President of the  
Supreme Court of Kenya

*This Journal should be cited as (2022 10(3) Alternative Dispute Resolution*

ISBN 978-9966-046-14-7

## **Editor's Note**

Welcome to the Alternative Dispute Resolution (ADR) Journal, Volume. 10, No.3, 2022.

The Journal is a publication of the Chartered Institute of Arbitrators, Kenya Branch. It provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution.

The role of ADR in access to justice has been recognised under the Constitution of Kenya, 2010. The Journal covers pertinent and emerging issues across all ADR mechanisms including arbitration, mediation, negotiation, adjudication and traditional justice systems.

The Journal has witnessed tremendous growth in terms of its readership since it was launched. It is now one of the most cited publications in the fields of ADR and Access to Justice in Kenya and across the globe. I wish to thank our global audience for enabling the Journal reach these heights. We welcome feedback from our readers to enable us steer the Journal to even greater standards.

The Journal is a peer-reviewed and refereed in order to ensure credibility of information and validity of data.

This volume exposes our readers to a variety of salient topics and concerns in ADR including Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes; The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya; The Place of Mediation in Resolving Disputes in the Built Environment; Alternative Dispute Resolution and Arbitrability of Public Procurement Proceedings Disputes in Kenya: A Feasibility or Pious Aspirations?; Exceptions to the Duty of Confidentiality in Arbitrations; Reflections on the Unfolding Significance of Sports Mediation; Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR; A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration; Disciplined Dissent; Traditional Dispute Resolution Mechanisms in the

Kenyan Justice System: Which Way Forward and Mediating Workplace Conflicts. The Journal also contains two case summaries titled The Overriding Objective in English Arbitration Act: Some Key Lessons and Alternative Dispute Resolution is an Imperative in Public Procurement Disputes: Constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021.

The Editorial Board encourages and welcomes submission of scholarly papers, commentaries, case summaries and book reviews aimed at providing critical analysis of developments in case law, legislation, and practice in Alternative Dispute Resolution and related fields of knowledge. Submissions should be sent to the editor through [admin@kmco.co.ke](mailto:admin@kmco.co.ke) and copied to [info@ciarbkenya.org](mailto:info@ciarbkenya.org). The Editorial Board considers each article submitted but does not guarantee publication. We only publish papers that adhere to the Journal's publication policy after a critical, in depth and non-biased review by a team of highly qualified and competent internal and external reviewers.

CI Arb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to regularly publish this high impact Journal that continues to shape the discourse on ADR and Access to Justice in Kenya and across the globe.

**Dr. Kariuki Muigua, Ph.D; FCI Arb; C.Arb**  
**Editor.**  
**Nairobi, August 2022.**

## **List of Contributors**

### **Dr. Francis Kariuki**

Dr. Francis Kariuki holds a Bachelor of Laws (LL. B) and a Master of Laws degree (LL.M) from the University of Nairobi, and a Doctor of Philosophy in law (PhD) degree from the University of the Witwatersrand in South Africa. He is a lecturer at Strathmore University Law School and director of the Strathmore Dispute Resolution Centre (SDRC). Francis is an Advocate of the High Court of Kenya, and a Fellow of the Chartered Institute of Arbitrators (CIArb) London and Kenya. He is also a listed arbitrator and mediator with the Nairobi Centre for International Arbitration (NCIA) in Kenya, and a member of the Strathmore Dispute Resolution Centre (SDRC). He is also accredited as a mediator by the Mediation Accreditation Committee (MAC) under the Kenyan Judiciary.

His research interests are in natural resources governance, Alternative Dispute Resolution (ADR), traditional justice systems and property law.

*Dr. Kariuki can be reached through [kariukifrancis06@gmail.com](mailto:kariukifrancis06@gmail.com)*

### **Vianney Sebayiga**

Vianney Sebayiga is a Student at the Kenya School of Law and a Trainee Lawyer at Anjarwalla and Khanna LLP. He is an Associate member of the Chartered Institute of Arbitrators. He holds a Bachelor of Laws (LLB) Degree from Strathmore University. After his Undergraduate Studies, he worked as a Graduate Assistant at the Strathmore Law School where he assisted in conducting tutorials for students for about a year.

Vianney is strongly passionate about ADR mechanisms. He worked as a Research Assistant at the Strathmore Dispute Resolution Centre (SDRC), a premier mediation centre in Kenya focused on facilitating and promoting mediation. Additionally, he worked as a Legal Researcher for the CIArb-Kenya on the State of ADR Project. He is also the founder of the Young Arbiters Society-Strathmore University Chapter, a student run club that seeks to create awareness about ADR Mechanisms. His essay on the role of ODR in a Post-Pandemic Africa emerged 2nd best in the Utatuzi Center's ADR Essay Competition 2021.

*He can be contacted via Email: [vianney.sebayiga@strathmore.edu](mailto:vianney.sebayiga@strathmore.edu)*

### **Dr. Kariuki Muigua**

Dr. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CI Arb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal and is the Chartered Institute of Arbitrator's (CI Arb- UK) Regional Trustee for Africa.

He became the first winner of the Inaugural CI Arb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CI Arb Kenya.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the School of Law, University of Nairobi.

*Dr. Kariuki Muigua can be reached through [muigua@kmco.co.ke](mailto:muigua@kmco.co.ke) or [admin@kmco.co.ke](mailto:admin@kmco.co.ke)*

### **Dr. Kenneth Wyne Mutuma**

Dr. Kenneth Wyne Mutuma is a Chartered Arbitrator of the Chartered Institute of Arbitrators as well as a Certified Professional Mediator. He is an advocate of the High Court of Kenya of over twenty-two years standing and a senior lecturer at the University of Nairobi, Faculty of Law. He is the Managing Partner at Kihara & Wyne Advocates, a dynamic medium sized firm based in Nairobi. Dr. Ken holds several academic qualifications including a Doctorate and Masters in Law from the University of Cape Town as well as a law



undergraduate degree from the University of Liverpool. He is also a qualified Architect having graduated with a Bachelor's Degree in Architecture from the University of Nairobi. He has extensive senior management experience across local and international settings as well as practical knowledge of interdisciplinary issues. Dr. Ken possesses a comprehensive understanding of the practice and procedures in ADR having acted as adjudicator, arbitrator and mediator in a wide range of disputes. He sits as a member of the Dispute Resolution Panel of the Architectural Association of Kenya (AAK) and also has vast experience in ADR training having engaged in the various participant training events as a trainer for the Chartered Institute of Arbitrators (Kenya Branch).

*Dr. Mutuma can be reached through [kenmutuma@gmail.com](mailto:kenmutuma@gmail.com) or [wynne@kenyanjurist.com](mailto:wynne@kenyanjurist.com)*

### **Hon. Dr. Wilfred A. Mutubwa**

Hon. Dr. Wilfred A. Mutubwa is a Chartered Arbitrator (C. Arb) and Fellow of the Chartered Institute of Arbitrators (FCI Arb); Chairman of the CI Arb-Kenya Branch. Advocate of the High Court of Kenya, in good standing with a post-Admission experience of 14 years. Holds LL. B (Honours) and LL.M Degrees and LL. D focusing on International Economic Law from the University of South Africa. He also holds a Post Graduate Diploma in Law from the Kenya School of Law and a Post Graduate Diploma in Arbitration (CI Arb -UK). He is an Accredited Mediator by CI Arb-UK and the Court Annexed Mediation Programme (CAMP) of the Kenyan Judiciary.

He is the founding Principal at Mutubwa and Company Advocates; teaches at the Kenya School of Law and at the Mt. Kenya University. He is also a course Director and Tutor in Arbitration and Mediation at CI Arb-UK.

He is currently a member of the Task Force appointed by the Chief Justice of the Republic of Kenya on ADR and specifically mandated to roll out Court Annexed Mediation and other forms of Alternative Dispute Resolution (ADR).

He is an Arbitrator listed on London Court of International Arbitration (LCIA); Mauritius International Arbitration Centre (MIAC); the Nairobi Centre for International Arbitration (NCIA); the Kigali International Centre for

International Arbitration; the African Arbitration Association (AAA); and the CIArb President's Panel Panels. He was recently appointed by the President of the Republic of Kenya to serve on the KNHR Commission Selection Panel, and by the Chief Justice of Kenya to serve as a Member of the Political Parties Disputes Tribunal.

He has experience in over 60 Arbitrations and Mediations, as arbitrator, Mediator and Party Representative. He has published a book, *Commercial and Investment Arbitration: An African Perspective*; and over 20 Articles on the subject in peer reviewed Journals.

In 2017, he was recognised by IArb Africa as one of the top 100 Arbitrators in Africa. In 2020 he was named as one of the Top 50 rising Arbitration Personalities in Africa.

*Hon. Dr. Mutubwa can be reached through [willy@mutubwalaw.co.ke](mailto:willy@mutubwalaw.co.ke)*

### **Ibrahim Kitoo**

Ibrahim is an Advocate of the High Court of Kenya, Commissioner for Oaths & Notary Public, Certified Secretary, Arbitrator, Governance, Ethics, Audit, Risk & Compliance Specialist, Public Procurement, Public Private Infrastructure Partnerships (PPPs) and Projects Management Professional. He is an Alumni of the Oxford University Leading Strategic Projects Programme delivered under the auspice of Saïd Business School; Advanced Investment Arbitration Programme delivered by Georgetown Law Center in conjunction with ICSID & International Law Center; FIDIC Training Programme delivered the auspice of King's College London, Centre of Construction Law & Disputes Resolution/FIDIC Summer School 2021; and The 2018 International Development Assistance (IDA) Program African Fellow of the Public Private Infrastructure Partnerships Programme under the auspices of Department of Foreign Affairs and Trade (DFAT), Australia, the University of Queensland, Brisbane, Australia and Pretoria University, South Africa.

Ibrahim is a Fellow of Sustainable Infrastructure Fellowship Program, under the auspice of Investor Leadership Network (ILN), with the support from the Government of Canada & in collaboration with the Schulich School of Business, York University, Toronto, Canada.

He holds a Bachelors and Master's Degree, Public Finance & Financial Services Law in Law both from the University of Nairobi and is currently pursuing a Ph.D in Law at the same University. \*He currently is the Chief Legal Officer, Projects & Disputes Resolution at the Kenya Electricity Generating Company PLC.

*Ibrahim can be reached [through ibrakito@yahoo.com](mailto:ibrakito@yahoo.com)*

### **Austin Ouko**

Austin Ouko is an Advocate of the High Court of Kenya and a Fellow of the Chartered Institute of Arbitrators (FCI Arb). He holds a Post-Graduate Diploma (PGD) in International Commercial Law from College of Law of England and Wales; Master of the Science of Law from Stanford University Law School, a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from University of Nairobi.

*Austin Ouko can be reached [austinouko@gmail.com](mailto:austinouko@gmail.com)*

### **Jacqueline Wanjiku Waihenya**

Jacqueline Waihenya is an Advocate of the High Court of Kenya having been admitted to the bar in 1998 and she is the Managing Partner of JWM LAW LLP (formerly Jacqueline Waihenya Maina & Co. Advocates) which she founded in 2012.

She holds an LLM from the University of Nairobi specializing in Public Finance & Financial Services Law. She is currently pursuing an LLM in International Dispute Resolution at Queen Mary University of London.

She is the Vice Chairperson of the Chartered Institute of Arbitrators - Kenya Branch and is a Fellow of CIARB and she holds a diploma in International Arbitration. She was the CIARB Kenya Branch Treasurer for 3 years before that and successfully steered the Institute's treasury during the first year of the COVID Pandemic. She further holds an Advanced Certificate in Adjudication from the said Institute and is accredited as a Tutor with CIARB.

She was appointed to represent CIARB on the National Steering Committee National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020.

Jacqueline is an International Mediation Institute Certified Mediator. She is also a Chartered Mediator with the Institute of Chartered Mediators & Conciliators (CM-ICMC) and is one of the pioneer Kenya Judiciary Accredited Mediators.

She is an Associate Editor of the ADR Journal of CIARB Kenya and is the Editor-in-Chief of the Mombasa Law Society Journal. She has published several peer reviewed articles in International Commercial and Investment Arbitration and Mediation and addressed various conferences.


She sits on the Continuing Professional Development Committee of the Law Society of Kenya and is also the Treasurer of the Mombasa Law Society where she founded and convened the Alternative Dispute Resolution Committee as well as the Admiralty & Maritime Committee.

Jacqueline is also a Governance Practitioner. She is a Fellow of the Institute of Certified Secretaries of Kenya (ICS) and was recently elected to the governing council of ICS where she chairs the Research & Publications Committee. She is also an Accredited Governance Auditor, a Legal & Compliance Auditor and Governance Trainer.

Jacqueline Waihenya is the Vice Chairperson of the Kenya National Chamber of Commerce & Industry – Mombasa Chapter.

She is a Patent Agent accredited by the Kenya Industrial Property Institute.

*Jacqueline Waihenya can be reached through [waihenya@jwmadvocates.com/jacqueline.waihenya@gmail.com](mailto:waihenya@jwmadvocates.com/jacqueline.waihenya@gmail.com)*

+254725519058

### **Jack Shivugu**

Jack Shivugu is an Advocate of the High Court of Kenya, an Associate Member of the Chartered Institute of Arbitrators (ACI Arb) and a Legal Researcher. He holds a Bachelor of Laws (LL. B) degree from Moi University and a Post-Graduate Diploma in Law from the Kenya School of Law. He is currently pursuing a Master of Laws (LL.M) degree in Corporate and Financial Law at the

University of Nairobi, School of Law. His interests include Commercial Law, Intellectual Property Law, Arbitration and Alternative Dispute Resolution, Banking and Financial Services Law, Environmental and Natural Resources Law, Conveyancing, Litigation and Legal Research.

He can be reached through [liadumajack@gmail.com](mailto:liadumajack@gmail.com)

### **Suzanne Rattray**

The author is a senior engineer with more than 35 years professional experience in Zambia, Tanzania, Mozambique, DR Congo, Chad and Israel. She has been a practising Adjudicator and Arbitrator since 2008. She is experienced as Sole Arbitrator, Tribunal Member and Presiding Arbitrator and also serves on Dispute Boards in Africa as Chairperson and Member. She is a FIDIC Accredited Adjudicator and is listed on the FIDIC President's List of Approved Dispute Adjudicators.

Mrs Rattray is an Approved Faculty Trainer on the Arbitration, Adjudication and Mediation Pathway Courses of the Chartered Institute of Arbitrators. She served as Chairperson of the Zambia Branch of the Institute from 2018 - 2020. She is Vice-Chairperson of the Board of Directors for the Lagos Chamber of Commerce International Arbitration Centre (2021 - 2024)."

*Suzanne Rattray can be reached through [sattray@rankinengineering.com](mailto:sattray@rankinengineering.com)*

### **Mwangi W. Patience**

Patience W. Mwangi is a 4th year student undertaking a Bachelors of Law (LL.B) at the University of Nairobi. She is currently intern at the Legal and Governance department in NCBA Group where she deals with elements surrounding banking law. Her interests in public international law, diplomacy and international law have seen her serve in the Kenya Model United Nations in various capacities where she currently holds the position of the President of the General Assembly.

*Patience W. Mwangi can be reached through [patymwangi302@gmail.com](mailto:patymwangi302@gmail.com)*

### **Kibet Brian**

Kibet Brian is a 4th Year LL. B student at the University of Nairobi. He has been published severally in leading Legal Journals and Magazines in Kenya. Kibet serves in different capacities in Kenya Model United Nations (KMUN), Students Association for Legal Aid and Research (SALAR) and Young Arbiters Society

(YAS). He is also a trainee Arbitrator with the Chartered Institute of Arbitrators (Kenya Branch). He has worked as a legal research assistant with the Rights and Resilience in Kenya Project (RARE), a project which aims to ensure secure and peaceful access to land for climate change adaptation and thereby the resilience of all Kenyan citizens, particularly amongst pastoralist communities. For his works on Community Land, Kibet was awarded the prestigious C B Madan Award in 2021 in the student's category.

*He can be contacted at [kibetbrian09@gmail.com](mailto:kibetbrian09@gmail.com)*

### **Maryanne Mburu**

Maryanne Mburu is an Advocate of the High Court of Kenya as well as a Certified Professional Mediator and an Associate Member of the Chartered Institute of Arbitrators (CIArb). Maryanne is currently a senior associate at the firm of Kihara & Wyne Advocates. She holds a Post Graduate Diploma in Law from the Kenya School of Law, an Undergraduate Degree in Law from the University of Nairobi and is currently finalising her Master of Development Studies degree from the same institution. Maryanne has a special interest in Alternative Dispute Resolution as an area of practice and has been involved in various ADR related research projects and consultancies.

*Maryanne can be reached through [mburumaryanne2@gmail.com](mailto:mburumaryanne2@gmail.com)*

## Alternative Dispute Resolution – Volume 10 Issue 3

<b>Content</b>	<b>Author</b>	<b>Page</b>
Evaluating the Role of ADR mechanisms in Resolving Climate Change Disputes	Francis Kariuki Vianney Sebayiga	1
The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya	Kariuki Muigua	46
The place of mediation in resolving disputes in the built environment	Kenneth Wyne Mutuma	72
The Overriding Objective in English Arbitration Act: Some Key Lessons	Wilfred A. Mutubwa	96
Alternative Dispute Resolution and Arbitrability of Public Procurement Proceedings Disputes in Kenya: A Feasibility or Pious Aspirations?	Ibrahim Kitoo Kariuki Muigua	100
Exceptions to the Duty of Confidentiality in Arbitrations	Austin Ouko	128
Reflections on the Unfolding Significance of Sports Mediation	Jacqueline Waihenya	153
Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR	Kariuki Muigua	167
Case Review: Alternative Dispute Resolution Is an Imperative in Public Procurement Disputes Constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021	Wilfred A Mutubwa	180
A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration	Jack Shivugu	183
Disciplined Dissent - Distinguishing Arbitral Awards from Judgments	Suzanne Rattray	203
Traditional Dispute Resolution Mechanisms in the Kenyan Justice System: Which Way Forward?	Mwangi Patience Kibet Brian	220
Mediating Workplace Conflicts	Maryanne Mburu	241

## **Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes**

*By: Francis Kariuki\* & Vianney Sebayiga\*\**

### **Abstract**

*Climate change is one of the greatest threats of modern society. It threatens our lives, our children's lives, and the lives of those yet to be born. The manifestations of climate change are diverse and include severe droughts, storms, floods, locust invasions, and very warm temperatures. Climate change is a conflict multiplier. It amplifies already existing conflicts. This paper examines the conflicts and disputes that arise from the impacts of climate change and the various mechanisms for their resolution. It argues that litigation which has been traditionally used to resolve climate change conflicts has proved inadequate inter alia due to case backlogs and delays. This has created the need to embrace other forms of dispute resolution. To this end, the authors assess the appropriateness of Alternative Dispute Resolution (ADR) mechanisms in managing climate change conflicts and disputes. They argue that such mechanisms are best suited to address the needs and interests of the wide range of actors involved in such disputes, for instance, government, local communities, investors, civil society organisations, and private citizens. Lastly, they highlight opportunities presented by climate change to ADR practitioners.*

### **1.0 Introduction**

The United Nations Framework Convention on Climate Change (UNFCCC) defines climate change as a change in the composition of the global atmosphere caused by human activity, in addition to natural climate variability.<sup>1</sup> Warmer temperatures, severe weather patterns, widespread severe droughts, sea level rise, land degradation, and coastal erosion are the manifestations of these

---

\* *PhD (Wits), LLM, LLB (UON), Dip Law (KSL), FCIArb & Lecturer at Strathmore University Law School. Email: [kariukifrancis06@gmail.com](mailto:kariukifrancis06@gmail.com)*

\*\* *LLB (Strathmore University), ACIArb. Email: [vianney.sebayiga@strathmore.edu](mailto:vianney.sebayiga@strathmore.edu)*

1. United Nations Framework Convention on Climate Change (adopted 9 May 1992; entered into force 21 March 1994) Art 1(2).



changes.<sup>2</sup> Climate change is largely attributable to emissions from human activities which substantially increase the atmospheric concentrations of greenhouse gases, such as methane, carbon dioxide, chlorofluorocarbons, and nitrous oxide. Increased concentration of such gases, causes the greenhouse effect, which consequently warms the earth's surface.<sup>3</sup>

Climate change threatens the survival of humanity and planetary health.<sup>4</sup> The world has witnessed many climate change-induced threats and disasters which have led to conflicts and competition for resources to address these catastrophes.<sup>5</sup> For instance, floods have destroyed houses and displaced people in Asia, India, China, and Korea, among other parts of the world, leading to land and resettlement conflicts.<sup>6</sup> Storms and hurricanes have also caused several deaths and destruction of property.<sup>7</sup> In addition, severe drought has struck in many parts of the world such as Northern Argentina, Uruguay, Northern Kenya, Sahel region, and Brazil due to low precipitation thus accelerating conflicts arising from scarcity of water and pastures.<sup>8</sup> The 2019/2020 desert

---

<sup>2</sup> Ellen Messer, *Climate Change & Violent Conflict: A Critical Literature Review*' Oxfam America Research Backgrounder Series (2010) 5.

<sup>3</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC Response Strategies*, 1990, 25. Human activities such as forestry, manufacturing, transport, extractives are some of the carbon emitters to the atmosphere. See Kariuki Muigua, 'The Race to Zero Emissions from an African Perspective' [2021] *Journal of Conflict Management and Sustainable Development*, 1.

<sup>4</sup> IPCC, *Sixth Assessment Report: Climate Change Impacts, Adaptation, and Vulnerability*, 2022, 37.

<sup>5</sup> World Meteorological Organisation (WMO), *Annual Report*, 2017.

<sup>6</sup> Ibid. See also *State of the Global Climate, Provisional Report*, 2020, 2. In 2020, floods displaced over 1 million people in Somalia while landslides in Ethiopia displaced over 300,000 people.

<sup>7</sup> Environmental Justice Foundation (EJA), *Beyond Borders: Our Changing Climate - its Role in Conflict and Displacement*, 2017, 9. Texas and Louisiana were hit by Hurricane Harvey, one of the strongest storms which affected over 13 million people. Similarly, in China, over 29,000 homes were destroyed by the Typhoon Goni storm thus displacing 2.2 million people. See also WMO, *State of the Global Climate, Provisional Report*, 2020, 2.

<sup>8</sup> WMO, *State of the Global Climate, Provisional Report*, 2020, 3. See also Salome Karimi, 'The Role of Good Governance in Combating Climate Change in Africa' [2021] *Journal of Conflict Management and Sustainable Development*, 143.

locust plague in Eastern Africa, the worst of its kind in more than 70 years, was likely exacerbated by shifts in rainfall patterns and intensity as well as higher temperatures.<sup>9</sup> It led to food insecurity due to the widespread destruction of crops.<sup>10</sup>

Climate-related events already pose risks to society through their effects on health, food and water security, livelihoods, economies, infrastructure, and biodiversity.<sup>11</sup> Climate change has ramifications for ecosystem services and can affect patterns of natural resource use as well as the resource distribution across regions within countries.<sup>12</sup> Moreover, weather-related disasters have displaced 21.7 million people since 2008, or 59,600 daily.<sup>13</sup> Climate change may force 1.4 billion people to flee their homes by 2060.<sup>14</sup>

A lot of resources, mostly in Africa, are being devoted toward addressing the socio-economic impacts of climate change such as climate change refugees, civil wars, and disease outbreaks.<sup>15</sup> Little wonder, former UN Secretary General Ban Ki-Moon emphasized the inter-connectedness of the effects of climate change and other issues, saying, “*we must connect the dots between climate change, water scarcity, energy shortages, global health, food security, and women’s empowerment. Solutions to one problem must be solutions for all.*”<sup>16</sup>

Climate change also affects critical rights like the right to life and the right to a clean and healthy environment and gender equality.<sup>17</sup> Severe environmental

---

<sup>9</sup> Bill McCabe and other, *A Weather and Bio-climatic Case Study of Desert Locust Conditions in Northern Kenya* (International Centre for Humanitarian Affairs, 2021)1.

<sup>10</sup> Ibid 5.

<sup>11</sup> UNFCCC Secretariat, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries*, 2006,42.

<sup>12</sup> WMO (n 5) 26.

<sup>13</sup> EJA (n 7)14.

<sup>14</sup> WMO (n 5) 27.

<sup>15</sup> Karimi (n 8).

<sup>16</sup> Reynold Orsua, ‘Resolving Climate Change Related Disputes Through Alternative Modes of Dispute Resolution’ [2022] *Asian Dispute Resolution*,29.

<sup>17</sup> Kariuki Muigua, ‘Recognising a Human Right to a Safe, Healthy, and Sustainable Development [2021] *Journal of Conflict Management and Sustainable Development*, 4.

effects of climate change negatively affect people's quality of life which undermine the right to a clean and healthy environment.<sup>18</sup> Climate change effects like flooding and drought widen the gender inequality gap and affect women more than men because they lack enough resources to respond and adopt to the harsh climatic conditions.<sup>19</sup>

In addition, countries' comparative advantages and trade are also altered by climate change which affects production and consumption patterns.<sup>20</sup> It follows that countries or regions that rely heavily on agriculture may experience a reduction in export because of extreme weather conditions which result in a reduction of crop yields.<sup>21</sup> Floods, landslides, and storms can also weaken and destroy transport and distribution linkages.<sup>22</sup>

Although there is no direct relationship between climate change and conflict, climate-related change can influence factors that lead to or exacerbate conflict.<sup>23</sup> As a conflict multiplier, it has the potential to intensify and broaden the scope of existing conflicts or trigger underlying and latent conflicts.<sup>24</sup> To begin with, climate change may aggravate food insecurity by increasing the frequency and

---

<sup>18</sup> See Kariuki Muigua, 'Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Formality' [2020] *Journal of Conflict Management and Sustainable Development*,101.

<sup>19</sup> United Nations Development Programme (UNDP), *Gender and Climate Change: Overview of Linkages between Gender and Climate Change*,2016,1. Water Scarcity in Northern Kenya and other areas forces women to walk long distances in search for water. See Karimi (n 8) 149; and World Food Programme (WFP), *the Impacts of Climate Change on Food Security and Livelihoods in Karamoja*, 2017,16. Most of the negative consequences of climate change are inextricably linked to the issue of gender equality. See also para 19 of United Nations General Assembly (UNGA) ResA/74/219: Protection of Global Climate for present and future generations of humankind.

<sup>20</sup> United Nations Environment Programme and World Trade Organisation, *Trade and Climate Change*,2009,62.

<sup>21</sup> *Ibid* 63.

<sup>22</sup> *Ibid*.

<sup>23</sup> SIDA, *The relationship between climate change and violent conflict*,2018,4.

<sup>24</sup> Mikkel Funder and others, *Addressing Climate Change and Conflict in Development Cooperation experiences from Natural Resources Management*, Danish Institute of International Studies Report,2012,12.

intensity of climate hazards, decreasing agricultural yields and productivity, raising sanitation and health risks, increasing water scarcity, and exacerbating resource conflicts among communities.<sup>25</sup> As a result, the increased food prices may lead to civil unrest and increase the risk of conflict.<sup>26</sup> Second, drought and low precipitation accelerate water conflicts and cattle rustling, especially among pastoralist communities who live primarily in arid or semi-arid areas leading to violent clashes.<sup>27</sup>

To exemplify the seriousness of climate change, the United Nations General Assembly (UNGA) affirms that climate change is one of the greatest challenges of our time.<sup>28</sup> Being a contributing factor to insecurity and instability as highlighted in the resolutions of the United Nations Security Council, climate change is responsible for the ongoing hostilities in Lake Chad, Mali, Somalia, and Afghanistan which are all affected by climate-related events such as extreme flooding, and drought.<sup>29</sup>

---

<sup>25</sup> Oxfam, *growing disruption: climate change, food and the fight against hunger*, 2013, 2. Prolonged droughts have caused severe food crises in Kenya, Djibouti, Ethiopia, and Somalia.

<sup>26</sup> Funder (n 24).

<sup>27</sup> Beritu Masau, 'Effects of Climate Change on Pastoralist Women in the Horn of Africa' [2021] *Journal of Conflict Management and Sustainable Development*, 62. These communities include the Borana of Northern Kenya, Karamajong in Kenya, Uganda and Sudan, Turkana and Pokot in Kenya, Dudoth, Pian Upe in Uganda, and Toposa in Sudan. See also Conservation Development Centre, International Institute for Sustainable Development and Safer world, *Climate change and conflict Lessons from community conservancies in northern Kenya*, 2009, 4. See also Oli Brown and Michael Keating, 'Addressing Natural Resource Conflicts: Working Towards More Effective Resolution of National and Sub-National Resource Dispute' [2015] *Energy, Environment, and Resources*, 11. The Sudanese region of Darfur has a long history between farmers and pastoralists over access to land, migratory routes for livestock and watering holes. The Darfur conflict has three interacting levels: a local level characterised by clashes between tribal groups, for whom natural resources play an important role; a national-level conflict between key factions and the national government; and an internationalised conflict in which regional political currents are significant.

<sup>28</sup> UNGA, A/RES/71/228: Protection of global climate for present and future generations adopted at the 66<sup>th</sup> plenary session meeting on 21 December 2016. See also UNGA Resolution 73/232

<sup>29</sup> Resolution 2408/2018 (Somalia); Resolution 2423/2018 (Mali); and Resolution

As such, this paper seeks to assess the appropriateness of ADR mechanisms in resolving climate change disputes. Part I is this brief introduction on climate change and its widespread impact on human rights, livelihoods, health, and economies. This section emphasizes that climate change is a multiplier because it intensifies already existing conflicts. Part II typologises the various conflicts and disputes occasioned by climate change and its impact. Part III highlights the various aspects of climate change disputes that can be resolved through ADR mechanisms. It argues that litigation which has been traditionally used to resolve such disputes is inadequate due to case backlogs and lack of expertise by judges in technical matters. Part IV offers a conclusion and highlights various opportunities presented by climate change to ADR practitioners.

## **2.0 Climate Change Conflicts and Disputes**

As earlier demonstrated, climate change creates severe shocks and stresses which can exacerbate conflict risks.<sup>30</sup> Conflicts arising from climate change interact with one another.<sup>31</sup> For instance, water insecurity can cause food insecurity which in turn can cause social unrest and violence.<sup>32</sup> In this section, we attempt to typologise the different types of conflicts occasioned by climate change.

## **2.1 Typologising Climate Change Disputes**

Climate change disputes are disagreements arising out of or in relation to the effects of climate change and climate change policy including disputes arising from the UNFCCC and the Paris Agreement.<sup>33</sup> Climate change can feature

---

2349(Chad). See also Jarani Vivekaranda, Adam Day, and Susanne, *what can the United Nations Security Council do on Climate and Security*, 2020,5.

<sup>30</sup> Mercy Corps, *Addressing the Climate Conflict Nexus: Evidence, Insights, and Future Directions*, 2022,1.

<sup>31</sup> Camilla Born, 'A Resolution for a Peaceful Climate: Opportunities for the United Nations Security Council' Stockholm International Peace Research Institute,4.

<sup>32</sup> Ibid

<sup>33</sup> ICC Arbitration and ADR Commission, *Resolving Climate Change Related Disputes through Arbitration and ADR*,8. (ICC Arbitration and ADR Commission). See Article 14 (1) of the UNFCCC and Article 24 of the Paris Agreement provide that disputes

directly or indirectly in a dispute. In either case, the rights allegedly breached can arise under varied breaches of law ranging from international law (under human rights law and Bilateral Investment Treaties) to domestic laws.<sup>34</sup> First, disputes can arise from poor waste management and land degradation.<sup>35</sup> For instance, in *KM & 9 Others v Attorney General & 7 Others*, petitioners from Owino-Uhuru village in Mombasa County-Kenya sued a Metal Refinery Limited which had set up a lead acid battery recycling factory.<sup>36</sup> The residents of the village were affected by lead poisoning thus infringing on their right to a clean and healthy environment as enshrined under Article 70 of the Constitution of Kenya. The Environment and Land Court awarded the petitioners general damages of Kshs. 1.3 billion shillings.<sup>37</sup>

Secondly, disputes can also arise from lack of comprehensive and transparent Environmental and Social Impact Assessments with robust community consultations.<sup>38</sup> For instance, in *John Kabukuru v County Government of Nakuru*, the court found that the Environmental Impact Assessment was not conducted properly thus violating the right to a clean and healthy environment.<sup>39</sup>

Direct cases involve claimants who have allegedly suffered the negative consequences of climate change or climate change policy and have filed claims against respondents for either their regressive actions (doing too little for, or actively undermining, the environment) or allegedly unfair affirmative actions (preferring 'green' options to the detriment of less environmentally-friendly alternatives).<sup>40</sup> For example, in *Lliuya v RWE AG*, a Peruvian farmer sued an

---

concerning the interpretation of the provisions of the Convention and the agreements be settled first through negotiations and amicable settlement.

<sup>34</sup> Iris Ng, 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes' [2022] *Asian Dispute Review*,21.

<sup>35</sup> Geoffrey Kerecha, James Kirwa, and Jovia Bogere, 'Handling Community Related Grievances in Kenya's Mining Sector: Community Fact sheet' *Extractives Baraza*, 2019, 5.

<sup>36</sup> (2020) eKLR.

<sup>37</sup> Ibid.

<sup>38</sup> Kerecha (n 35)6.

<sup>39</sup> (2016) eKLR.

<sup>40</sup> Ng (n 34)22.

energy company for its role in global warming and contribution to sea level rise and increased flood risk for his locality.<sup>41</sup> In another case of *Rockhopper Exploration Plc v Italy*, a foreign investor with interests in a hydrocarbon deposit sued the Italian government for denying its concession following domestic environmental reform.<sup>42</sup>

Citizens have also sued their home governments for taking inadequate measures in reducing carbon emissions. For instance, Urgenda Foundation, a citizen's platform focused on preventing climate change sued the Dutch government contending that it was not doing enough to combat the grave dangers of climate change. The Hague Court of Appeal upheld an order issued by the Hague District Court requiring the Dutch government to reduce its emissions by at least 25%, relative to 1990 levels, by the end of 2020.<sup>43</sup> Lastly, states directly and immediately affected by climate change may seek to enforce obligations under the UNFCCC and Kyoto Protocol against another state where the latter state has inadequate mitigation measures to reduce carbon emissions.<sup>44</sup>

Indirect cases are those in which claimants do not seek redress for harm arising from climate change but the dispute is nevertheless related to climate change.<sup>45</sup> For instance, a party may allege that a sea level rise constitutes a *force majeure* event that releases it from its previously negotiated contractual rights or excuses its conduct from being an internationally wrongful act.<sup>46</sup> Additionally, disputes may also arise around the utilisation of resources threatened by climate change.<sup>47</sup> Furthermore, disputes may also emerge as a result of a failure to meet

---

<sup>41</sup> Case No. 20 285/15 Essen Regional Court.

<sup>42</sup> *Rockhopper Exploration Plc et al v Republic of Italy*, ICSID Case No ARB/17/14.

<sup>43</sup> 200.178.245/0. The Dutch Supreme Court upheld the decision of The Hague Court of Appeal.

<sup>44</sup> ICC Arbitration and ADR Commission (n 33)10.

<sup>45</sup> Ng (n 34) 22.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Iron Rhine Arbitration (Belgium v Netherlands)* and *Indus Waters Kishenganga (Pakistan v India)*, Award of 20 December 2013. See also *Greenwatch v Golfcourse Holdings Limited H.C MISC. Application No.390 of 2001(Uganda)* where the petitioner (an NGO) sought a

environmental disclosure or reporting obligations.<sup>48</sup> For instance, the Climate Change Act of Kenya obligates public bodies to report on sectoral greenhouse gas inventions for the national inventory.<sup>49</sup> Similarly, it imposes reporting obligations on private companies on the status of their carbon emissions reduction.<sup>50</sup> Failure to which, every director or officer who had knowledge is liable on conviction to a fine not exceeding ten million shillings or to imprisonment not exceeding five years, or to both.<sup>51</sup>

South Africa has also put in place regulations to introduce a single national reporting system for the transparent reporting of greenhouse gas emissions.<sup>52</sup> Private and public companies involved in activities such as construction, manufacturing, transport equipment are required to report on their greenhouse gas emissions. Failure to adhere to the regulations attracts penalties.<sup>53</sup>

---

temporary injunction to stop the respondents from building a hotel in a wetland. Also see *Environment Shield Ltd v Attorney General of Uganda (Reference No 35 of 2020)* before the East African Court of Justice where the applicants allege that the Respondent's actions through its agents of allowing sugarcane growing in Bugoma forest has diverse effects on the climate.

<sup>48</sup> Ng (n 45).

<sup>49</sup> Section 15(5), *Climate Change Act* (2016). See also Section 22 which obligate the Cabinet Secretary to make regulations to guide the reporting and verification of climate change actions.

<sup>50</sup> *Ibid* Section 16. In its annual reports, Safaricom publishes initiatives aimed in reducing carbon emissions. For example, in 2021, Safaricom planted 650,000 trees and partnered with M-Kopa to provide solar panels to 822913 households. It seeks to be become a zero-emitting company by 2050. In 2020, Safaricom signed the Business for Nature Call for Action where it joined more than 560 businesses from 54 countries calling on governments to act with courage and urgency by putting nature at the centre of policy making. Additionally, more than 97% of all waste collected from its facilities is recycled. See Safaricom, Sustainable Business Reports, 2020 and 2021.

<sup>51</sup> *Ibid* Section 33(3).

<sup>52</sup> *National Greenhouse Gas Emission Reporting Regulations* 2016 as amended in 2020.

<sup>53</sup> *Ibid*. See also the protests by South Africans against Standard Bank for financing the East African Crude Oil Pipeline that will run from oil fields from Uganda to the ocean ports in Tanzania. It is said that the pipeline will double the carbon emissions of both Uganda and Tanzania combined, thus posing grave danger to the environment. Bill Mckibben, Diana Nabiruma, and Omar Elmawi, 'Let's heed the United Nation's dire warning and stop the EA Oil Pipeline now' available at



According to the *International Chamber of Commerce Commission on Arbitration and ADR Report*, the following are the sources of climate-change disputes: (1) contracts relating to the implementation of energy or other systems transition, mitigation or adaptation measures, in line with commitments under the Paris Agreement; (2) contracts without any specific climate-related purpose or subject-matter, but under which a dispute involves or gives rise to a climate or related environmental issue; and (3) submission or other specific agreements entered into to resolve existing climate change or related environmental disputes potentially involving impacted groups or populations.<sup>54</sup>

*a) Contracts relating to implementation of energy or other systems transition, mitigation, or adaptation*

An investor, funder, industry body, state or state institution may enter into contracts under the first category to implement energy or other system transition, mitigation, or adaptation in conformity with Paris Agreement commitments.<sup>55</sup> Rapid and far-reaching transitions of energy, land, urban and infrastructure (including transport and buildings) and industrial systems require investors and other contracting parties to manage and allocate risk, as far as possible, and reinforcing that through appropriate and effective dispute resolution mechanisms.<sup>56</sup> Examples of UNFCCC-related contracts include Green Climate Fund agreements including “low-emission (mitigation) and climate-resilient (adaptation) projects and programs produced by the public and commercial sectors to contribute to countries’ climate change priorities.<sup>57</sup>

Others are contracts relating to funding, insuring, licensing, commissioning, plant construction or supply of renewable energy, decommissioning of non-renewable power plants, adaptation of existing buildings and infrastructure to

---

<https://www.theguardian.com/global-development/2021/aug/17/lets-heed-the-uns-dire-warning-and-stop-the-east-african-oil-pipeline-now>

<sup>54</sup> ICC Arbitration and ADR Commission (n 33) 8.

<sup>55</sup> Orsua (n 16) 29.

<sup>56</sup> ICC Arbitration and ADR Commission (n 33) 8.

<sup>57</sup> Ibid.

adapt to a warming climate, and enhanced irrigation systems to reduce the greenhouse gas emission.<sup>58</sup> In Kenya, for instance, the Lake Turkana Wind Power Project sought to reduce carbon dioxide emission by replacing electricity generated by fossil fuels.<sup>59</sup> Land disputes arose between the local community in Laisamia District and Lake Turkana Wind Power Limited based on alleged illegal titles and unfair compensation.<sup>60</sup>

Similarly, in *Moffat Kamau & 9 Others v Aelous Kenya Limited*, the Environment and Land Court found that a fresh Environment Impact Assessment (EIA) was mandatory because the Kinangop Wind Power Project had upscaled from 30MW to 60MW and therefore the EIA licence approved at the beginning of the project was not adequate.<sup>61</sup> Consequently, in failing to comply with the *Environmental (Impact Assessment and Audit) Regulations 2003*, the petitioners

---

<sup>58</sup> Ibid.

<sup>59</sup> Lake Turkana Wind Power Limited, *Lake Turkana Wind Project: Environmental and Social Impact Assessment, 2009*,10. The project involves the construction of a 300 MW wind power facility in the greater Laisamia District near Lake Turkana to comprise 365 turbines of 850Kw capacity each to maximise the very high wind speed prevalent in the area.

<sup>60</sup> *Mohamud Kochale & Others v Lake Turkana Wind Power Limited & Others (2021) eKLR*. The petitioners sought the nullification of the project on grounds that the 150,000 acres on which the project is housed was acquired unprocedurally and illegally. Additionally, they alleged that they were not compensated, and that their prior, free and informed consent was not obtained. The Court found that the grant in the name of the first defendant was contrary to Section 2(d) of the *Registered Land Act (Repealed)*. Consequently, the Court gave the defendants one year to follow the proper procedure of setting apart of land, failure of which the land will automatically revert to the community. Concerning compensation, the court refused to grant compensation because no valuation because no valuation reports were presented on the quantum of compensation. The petitioners had claimed that the project violated their cultural rights and the environmental rights. However, the court found that they had failed to demonstrate how the project violated the claimed rights. Lastly, on the issue of nullification of the project, the court held that this could not be done since the project is almost complete.

<sup>61</sup> (2016) eKLR. The Kinangop Wind Power project was a Clean Development Mechanism project by Kenya to reduce carbon emissions in line with the Kyoto Protocol to which it is a party. See para 41 of the Case.

right to a clean and healthy environment was violated.<sup>62</sup> The court ordered that the Kinangop Wind Power Project could only proceed if a fresh EIA was conducted.<sup>63</sup> In 2018, the project was stalled by Kinangop Wind Park Limited citing depletion of funds and hostilities from the communities.<sup>64</sup>

*b) Contracts whose performance is affected by climate change transition, adaptation, and mitigation measures*

For the second category, systems transition consistent with a 1.5°C global warming pathway, mitigation measures, and climate change adaptation may directly or indirectly affect other general commercial contracts in sectors such as energy, infrastructure, transportation, agriculture, and food production (including manufacture and processing).<sup>65</sup> Those contracts may be unrelated to climate change and may even predate the Paris Agreement.<sup>66</sup> Nevertheless, contractual performance across a number of sectors may be impacted by the contracting parties' responses to (i) changes in national laws; (ii) regulation or policy to meet individual country commitments under the Paris Agreement; (iii) voluntary commitments by industry or individual corporations in accordance with climate or sustainability related corporate social responsibility; (iv) environmental impacts of climate change; and/or (v) responses to associated climate change action in national courts and other fora.<sup>67</sup> This category reinforces the fact that energy and other system transition, mitigation, and adaptation actions can affect any corporate activity or contractual relationship.<sup>68</sup>

---

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> <https://www.businessdailyafrica.com/bd/markets/firm-pulls-the-plug-on-sh15bn-kinangop-wind-farm-project-2109034>

<sup>65</sup> ICC Arbitration and ADR Commission (n 33) 9.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid 9.

c) *Submission Agreements*

Climate change disputes may arise from submission agreements in the last category.<sup>69</sup> A submission agreement is formed where a dispute has arisen and a unilateral offer to arbitrate is made.<sup>70</sup> Submission agreements may be utilised in certain instances if all participating parties legally and validly consent to be bound. A local group or population, for example, may be directly impacted by an investment in new or protected forestry areas, impacting their livelihoods and access to natural resources of resident populations.<sup>71</sup> A wind farm or solar panel installation may also impact a community, affecting arable land or fisheries. In such cases, a submission agreement could prevent multiple, multi-jurisdictional, court proceedings with inconsistent outcomes and provide certainty, and finality within a more attractive time frame than might be available through the courts.<sup>72</sup>

Two submission agreements administered by the Permanent Court of Arbitration were entered into under the Bangladesh Factory Accord (to protect labour rights) between the Bangladesh factory workers and 200 international apparel brands.<sup>73</sup> The second one was the Sudan Comprehensive Peace Agreement where the Abyei Arbitration Agreement was entered into between the Sudan People's Liberation Movement/Army and the Republic of Sudan to resolve an intra-state boundary dispute.<sup>74</sup>

d) *Force majeure clauses*

Disputes can also arise from the interpretation of a *force majeure* clause.<sup>75</sup> The term *force majeure* refers to a "superior or irresistible force." Wars, strikes, and

---

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 10.

<sup>75</sup> Nataliya Barysheva, 'Force Majeure in Energy Arbitration: Predicting the Unpredictable' [2018] *International Commercial Arbitration Review*, 69.

natural disasters are examples of *force majeure* events.<sup>76</sup> In a contractual context, *force majeure* is defined as contingencies caused by neither of the parties and which are unforeseeable at the time of concluding the contract, they are uncontrollable and can render the further performance of the contractual obligations impossible.<sup>77</sup>

Supply failure is a common source of contention in oil and gas disputes. In their most common form, these conflicts include an allegation from the buyer claiming the seller has not supplied the agreed-upon quantity or quality of gas.<sup>78</sup> The seller will try to avoid responsibility on commercial or *force majeure* grounds. Other disputes arising from *force majeure* clauses include those between producers and wholesalers, between producers and transport companies, and wholesalers and end users.<sup>79</sup> Furthermore, the wording of the *force majeure* clause frequently has a significant impact on the resolution of any *force majeure*-related dispute.<sup>80</sup> For example, it will be necessary to evaluate whether the clause contains categories such as ‘epidemic’ and ‘acts of government’ that could potentially cover the COVID-19 outbreak.<sup>81</sup>

*e) Local content, land and access to information disputes*

Local content conflicts are also likely to arise in climate change (resilient and adaptation) projects.<sup>82</sup> These conflicts arise due to lack of transparency regarding the potential impact of the project to the community.<sup>83</sup> Local communities can also be aggrieved by challenges in access and allocation of opportunities. Similarly, conflicts can arise where there is inadequate access to

---

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Fabricio Fortese, *Arbitration in Argentina* (Kluwer Law International 2020) 316.

<sup>79</sup> Ibid. See *Pankaj Transport PVT Ltd v SDV Transami Kenya Limited* (2017) eKLR; and *VS Hydro Rwanda Limited v Omnihydro Limited & 5 Others* (2021) eKLR.

<sup>80</sup> Ibid.

<sup>81</sup> Elizabeth Chan, ‘Forecasting Energy Disputes in Asia’ [2020] *Asian International Arbitration Journal*, 40.

<sup>82</sup> Kerecha (n 35)5.

<sup>83</sup> Ibid.

information and engagement of local communities in EIA and consultations.<sup>84</sup> Land grievances are also common where there is poor valuation of land, land degradation, and compulsory acquisition without fair and just compensation.<sup>85</sup> As demonstrated in this section, various actors are involved in climate change disputes. These are states, corporations, individuals and non-governmental organisations. Each actor has different priorities and goals which collectively influence its assessment of the appropriate form of and forum for dispute resolution.<sup>86</sup>

### **3.0 Role of ADR in Managing Climate Change Conflicts**

Conflicts arise when people pursue irreconcilable goals and end up compromising or opposing the interests of another.<sup>87</sup> It is when parties are forced to address a conflict that we have conflict management.<sup>88</sup> Where conflicts are managed constructively, they are a significant source of growth yet, if left unresolved or dealt with in a destructive manner, they can transition into disputes.<sup>89</sup> Conflicts are time consuming, costly and can destroy relationships among people.<sup>90</sup> The reality that disputes are inevitable necessitates the development of quick, cost effective and efficient ways of resolving them.<sup>91</sup> Conflict management is thus the practice of identifying and handling conflicts

---

<sup>84</sup> Ibid. See also *Mui Coal Basin and Local Community v Permanent Secretary Mining of Energy* (2015) eKLR where the High Court set out the principles used in the examining the threshold of public participation that must be met in undertaking environmental projects.

<sup>85</sup> Ibid 5.

<sup>86</sup> Ng (n 34) 22.

<sup>87</sup> Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2018] *Alternative Dispute Resolution*, 4.

<sup>88</sup> Kariuki Muigua, 'Climate Change and Conflict Management' (CIArb-Kenya Inaugural International Conference: *Innovations and Disruptions, ADR for Today and Tomorrow*, Nairobi, April 2022).

<sup>89</sup> Christian Buhring-Uhle, 'Conflict Negotiation Theory as a Conceptual Framework for Conflict Management' [2006] *Arbitration and Mediation in International Business*, 132.

<sup>90</sup> Muigua (n 87) 4.

<sup>91</sup> Lukas and Others, *From Conflict to Collaboration in Natural Resource Management: A Handbook and toolkit for practitioners working in aquatic resource systems* (Collaboration for Resistance, 2014) 20.

in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.<sup>92</sup>

Most climate change disputes have been resolved through courts but with minimal success owing to case backlogs.<sup>93</sup> Besides, litigation is very slow and expensive making it unsuitable to resolve climate change disputes that require urgency.<sup>94</sup> Furthermore, litigation may be unpalatable to many due to potential bias and limited competence among national judges on technical climate change matters.<sup>95</sup> Moreover, climate change involves great scientific and economic complexity and pervasive uncertainty issues hence necessitating multi-pronged innovative solutions.<sup>96</sup>

ADR refers to a set of practices and strategies for resolving disagreements and disputes outside the courts.<sup>97</sup> It is a collective term for negotiation, mediation, conciliation, adjudication, and arbitration. Community based avenues such as traditional dispute resolution mechanisms are also key in resolving conflicts and disputes.<sup>98</sup> Given that climate change is a global concern that necessitates global collaboration, ADR mechanisms are better suited to manage climate change conflicts because of their ability to address the root causes of the conflicts while preserving relationships.<sup>99</sup>

### **3.1 Dispute avoidance strategies and climate change**

In the context of climate change, dispute avoidance strategies include measures towards mitigation and adaptation to climate change, enactment of policies and

---

<sup>92</sup> Muigua (n 87) 5.

<sup>93</sup> Kariuki Muigua. 'Empowering Kenyan People through Alternative Dispute Resolution Mechanisms' [2015] *Alternative Dispute Resolution*,79.

<sup>94</sup> Kariuki Muigua, 'ADR: The Road to Access to Justice in Kenya' [2018] *Alternative Dispute Resolution*, 51.

<sup>95</sup> Orsua (n 16) 31.

<sup>96</sup> Ibid.

<sup>97</sup> Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers, 2015) 68.

<sup>98</sup> Ibid.

<sup>99</sup> Muigua (n 92) 81.

laws, harnessing traditional knowledge, availability of appropriate information, existence of forums for debate, and capacity-building initiatives.<sup>100</sup> Dispute avoidance can be used a strategy in managing climate change conflicts because of two main reasons.<sup>101</sup> First, it allows parties to resolve issues as they arrive before they escalate into a dispute.<sup>102</sup> Second, avoiding disputes preserves good working relationships between the different parties involved.<sup>103</sup>

Governance structures such as liaison committees play a critical role in quelling tensions and violence between local communities and mining companies.<sup>104</sup> They ensure that the local communities are adequately engaged to manage potential disputes and grievances that may arise thus achieving more participatory and inclusive solutions.<sup>105</sup> Community Liaison Committees are set up to educate local communities on their rights such as compensation, relocation, and access to remedies.<sup>106</sup>

Disputes and grievances can also be avoided through Sub-County liaison committees. These groups provide an avenue for a diverse range of stakeholders such as community leaders representing women, youth, disabled, political leaders, religious leaders, civil society, and national and county government to engage with the company on matters affecting the communities.<sup>107</sup> Other

---

<sup>100</sup> UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues, 2006, 5

<sup>101</sup> Nayla Comair-Obeid, 'Dispute Avoidance and Resolution in Times of Crisis' [2018] *The International Journal of Arbitration, Mediation, and Dispute Management*, 4.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Kerecha (n 35), 7.

<sup>105</sup> Francis Kariuki, Geoffrey Kerecha, and James Kirwa, *Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers* (Extractives Baraza 2019) 66.

<sup>106</sup> *Ibid.* Base Titanium has established a number of committees to deal with different grievances, for instance, Access Road, Miembeni, Kibwaga, Vumbu and Nguluku, Kaya elders, and Mtongwe Beach Management Unit. These committees act as an interface between the investor and affected communities.

<sup>107</sup> *Ibid.* 67. Base Titanium has established several sub-county liaison committees such as the



dispute avoidance frameworks include community development agreements) in the mining context that aim at improvement of relationship between the mining companies and local communities; and inter-governmental structures such as the Turkana County Grievance Management Committee and the Inter-ministerial (Escalation and Support) Committee.

### **3.2 Negotiation and Climate Change Disputes**

Public participation in projects has been described as a form of negotiation in which parties with interdependent but incompatible interests make joint decisions.<sup>108</sup> Negotiation is hailed as a process that can lead to empowerment of village-level and government participants, and increase awareness of the conflicts and their causes.<sup>109</sup> It helps parties in a contract or not to work out collaborative arrangements that look into the future.<sup>110</sup>

In most contracts including those for renewable energy and mining, negotiation and amicable settlement are provided as the first port of call whenever disputes arise.<sup>111</sup> For instance, the 2019 Kenyan Model Petroleum Sharing Contract requires the Cabinet Secretary and the chief executive of the contractor to meet and resolve any dispute amicably.<sup>112</sup> In mining, under the Mining Act, a Community Development Agreement (CDA) is a mandatory legal requirement

---

Mining Project Liaison Committee which is the primary channel of communication for affected stakeholders in Msambweni and Lunga sub-counties; Likoni Liaison Committee which provides links to communities near Likoni ship loading facility; and the Kwale Liaison Committee which represents affected communities affected by the transport corridor between Ukunda and Likomi.

<sup>108</sup> Kariuki Muigua, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' [2016] *Alternative Dispute Resolution*, 29

<sup>109</sup> *Ibid.*

<sup>110</sup> Alejandra Verdera, 'Achieving Latin America's Energy Transition: Looking into the Roles of International Arbitration and Dispute Avoidance International Arbitration in Latin America' in Riefrio Piche' and Vollbrecht Sperandio (eds) *Energy and Natural Resources Disputes* (Kluwer Law International, 2021) 440. See also *Mui Coal Basin and Local Community v Permanent Secretary Mining of Energy* (2015) eKLR.

<sup>111</sup> Simon Vorburger and Angelina Pett, *Arbitrating Energy Disputes in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2018) 1281-1284.

<sup>112</sup> Clause 53(1), Model PSC 2019

of a holder of a mining licence. They are tasked with drafting the same while considering the unique circumstances of the communities involved.<sup>113</sup> Negotiations of the CDA terms are conducted by the authorised representatives of the holder of the mining licence and those of the affected community. In their negotiation, they can seek assistance from legal and experts.<sup>114</sup> The CDA must have a procedure for declaring and resolving *force majeure*.<sup>115</sup> Some of the CDAs include the three CDAs between Base Titanium and the local communities in Msambweni, Mrima Bwiti Resettlement schemes and Likoni sub-counties.<sup>116</sup>

### 3.3 Mediation and Climate Change Disputes

Mediation is a viable option in resolving natural resource and land disputes.<sup>117</sup> The benefits of dealing with natural resource conflicts using mediation outweigh the costs of allowing the gravamen to escalate unsolved or mitigating the impact of an escalated dispute.<sup>118</sup> In mediation, mediators help stakeholders identify shared interests, maximise shared benefits and address common problems and challenges together.<sup>119</sup> Additionally, with the adoption of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (Singapore Convention), mediation settlements will be enforced on a global scale.<sup>120</sup> The Convention was opened for signature in Singapore on 7th August 2019 and its adoption is voluntary among states.<sup>121</sup> A party who relies

---

<sup>113</sup> Regulation 4 and Regulation 8, *Mining CDA Regulations 2016*. The CDA must address among other things special programmes that benefit the youth and women, protection of natural resources, treatment of cultural sites, and employment of members from affected communities.

<sup>114</sup> Regulation 9, *Mining CDA Regulations 2016*.

<sup>115</sup> *Ibid* Regulation 11(12).

<sup>116</sup> Copies of the CDAs with the authors.

<sup>117</sup> Alvin Gachie, 'Natural Resource Dispute Resolution: Promoting peace and Security through Alternative Dispute Resolution' [2017] *Alternative Dispute Resolution*, 158. See also Section 40 of the Community Land Act 2016 which provides for mediation as one of the preferred methods of resolving community land disputes.

<sup>118</sup> *Ibid* 161.

<sup>119</sup> Kariuki and Kerecha (n 105)68.

<sup>120</sup> Kariuki Muigua, 'Adopting the Singapore Convention in Kenya: Insight and Analysis' [2021] *Alternative Dispute Resolution*, 26.

<sup>121</sup> *Ibid*.

on a settlement agreement under the Convention is required to provide the settlement agreement signed by the parties; a document signed by the mediator evidencing that the mediation was conducted and an attestation by the institution which administered the mediation.<sup>122</sup>

Any dispute arising as a result of a mineral right in Kenya must be determined through mediation after negotiation has failed.<sup>123</sup> Similarly, where negotiations surrounding CDA terms fail, the local community and the mining licence holder representatives can resolve their differences through mediation.<sup>124</sup> For disputes involving natural resources and extractives disputes, the mediator must gather information about the type, quantity, quality, and location of the natural resources at issue.<sup>125</sup> In their assessment, they must understand the benefits that arise from natural resources, the livelihoods that depend upon them, the negative impacts from their exploitation, and the political economy they support.<sup>126</sup> The assessment should also gauge how effectively natural resources are governed and whether or not the governance structure is a source of conflict among stakeholders.<sup>127</sup>

In the Magarini inquiry in Malindi, the Kenya Association of Manufactures (KAM) engaged Ufadhili Trust in 2016 as a mediator between the community and the mining companies.<sup>128</sup> The mediator was tasked with helping to build trust between the salt companies and the communities.<sup>129</sup> Additionally, the mediator established a common platform of dialogue between the parties on conflicts touching on environmental impacts, labour practices, and land disputes. This enabled the parties to work directly in resolving their conflicts.<sup>130</sup>

---

<sup>122</sup> Ibid.

<sup>123</sup> Section 154 (b), *Mining Act Kenya*.

<sup>124</sup> Regulation 9(5), *Mining CDA Regulations*, 2016.

<sup>125</sup> United Nations Development Programme (UNDP), *Natural Resources and Conflicts: A Guide for Mediation Practitioners*, 2015, 18.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Kariuki and Kerecha (n 1045) 68.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

Mediating climate change related disputes is enhanced where the mediator has expertise in the relevant subject matter.<sup>131</sup> The mediator must conduct an assessment of all aspects of the conflict dynamic.<sup>132</sup> This includes comprehending the following: the nature of the conflict; who the actors are; the bigger context; the sources of power and leverage among the parties as well as their capacity to engage.<sup>133</sup> Given the diverse actors involved in climate change related disputes, the mediators must be able to engage with them. They include top officials, government administrators, civil society and community representatives, private sector actors, individuals knowledgeable about the conflict, relevant technical experts, and those whose voices are often silenced, such as women, children marginalized populations and youth.<sup>134</sup> Indigenous and traditional societies should also be consulted, their customs and history should be considered.<sup>135</sup>

The Olkaria IV Geothermal Project mediation between 2015 and 2016 is one of the most successful mediations conducted in the extractives sector.<sup>136</sup> Olkaria IV is located in Naivasha, Nakuru County. The government, through KenGen, needed land to expand geothermal production to meet its commitment to increase electricity supply while mitigating climate change through the green energy production.<sup>137</sup> In 2014, the EIB received complaints from several individuals and representatives of communities affected by the project. These range from (1) EIB's alleged failure to monitor the involuntary resettlement of four villages (Narasha, oloo Nongot, Oloosinyat, and Cultural Center) in

---

<sup>131</sup> ICC Arbitration and ADR Commission (n 33) 31.

<sup>132</sup> UNDP (125)16.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid 18.

<sup>136</sup> Lillian Nawuma, Raphael Wahome, and Thuita Thenya, 'Mediating Energy Project Implementation Conflicts, a Learning Curve: The Case of Olkaria IV Geothermal Kenya' [2020] *Journal of Conflict Management and Sustainable Development*,6.

<sup>137</sup> European Investment Bank-Complaint Mechanism (EIB-CM), *Final Monitoring Report*,2021. The European Investment Bank (EIB) loaned the government of Kenya amounts up to EUR 119 million for the project while KenGen was the promoter of the said project. The report is available at <https://www.eib.org/attachments/complaints/olkaria-i-and-iv-sg-e-2014-07-sg-e-2014-08-final-monitoring-report-2021-11-23.pdf>

accordance with the Resettlement Action Plan (RAP); and (2) allegations focused on the implementation of the RAP especially the identification of households entitled for compensation, land titling to Project Affected Persons; and restoration of livelihood with special consideration to vulnerable people.<sup>138</sup> Additionally, there were complaints that; KenGen had refused to share EIA report of the well and drilling programme at the land, the community was not involved in the relocation process, and unprocedural relocation of people by KenGen.<sup>139</sup>

The EIB-CM put in place a mediation team composed of a mediation officer of the EIB-CM and two local mediators.<sup>140</sup> The mediation started in August 2015 until May 2016 and the settlement agreement became effective on 29 September 2016.<sup>141</sup> The complainants, KenGen, and representatives of the RAP Implementation Committee were the parties involved in the mediation.<sup>142</sup> The process was observed by EIB-CM management, members of the Ewangan Sinyati Welfare Society which was representing the project affected persons (PAPs).<sup>143</sup>

During the mediation, the local mediators had a number of meetings with all the concerned parties. They would organise information sessions to explain the process, the number of representatives that would participate, and the qualities needed to participate. Following a series of meetings, the terms in the mediation agreement included developing training and opportunities for women, completion of land transfer, construction of five additional houses for PAPs,

---

<sup>138</sup> Ibid para 1.14. See complaints in detail <https://www.eib.org/attachments/complaints/sg-e-2014-07-08-complaint-1-en.pdf> and <https://www.eib.org/attachments/complaints/sg-e-2014-07-08-complaint-2-en-scanned.pdf>

<sup>139</sup> <https://www.eib.org/attachments/complaints/sg-e-2014-07-08-complaint-1-en.pdf>

<sup>140</sup> EIB-CM, Final Monitoring Report, 2021, para 3.1. A representative of the World Bank Grievance Redress Service and the EIB-CM also participated in the meetings.

<sup>141</sup> Ibid para 3.3.

<sup>142</sup> Ibid para 3.2.

<sup>143</sup> Ibid.

completion of a water supply system and tank.<sup>144</sup> The Maasai accepted the mediation results, which included resettlement on 1700 acres of land and compensation of US \$ 5000 as disturbance allowance.<sup>145</sup> In 2020, during the consultation meetings, the community expressed their overall satisfaction with the process. Moreover, all action points agreed upon in the mediation settlement were completed by end of 2021.<sup>146</sup>

The effectiveness and success of mediation in this project demonstrates the potential of mediation in addressing natural resource and energy conflicts, especially where local communities are involved.

### **3.4 Expert Determination and Climate Change Disputes**

Expert determination is a process in which parties submit their dispute to an expert for resolution.<sup>147</sup> It is used in settling factual disputes such as value of work done, satisfactory works and certification, and extensions of time. Additionally, expert determination can also be used to resolve disputes about measure and value, variations, value of additional building and civil works, and the quality of work accomplished, such as concrete finishes, stopping, painting and specialty finishes, flooring, tiling, and waterproofing, among other issues.<sup>148</sup> In the energy sector, expert determination is utilised to resolve pricing and technical disagreements, as well as in cases where parties claim a change of circumstances or legal provisions.<sup>149</sup> Certain long-term oil and gas sale

---

<sup>144</sup> EIB-CM, Olkaria I and IV Kenya, Mediation Report, paras 5.15-6.3. See the mediation report and the mediation agreement <https://www.eib.org/attachments/complaints/sg-e-2014-07-sg-e-2014-08-olkaria-i-and-iv-mediation-report.pdf> and <https://www.eib.org/attachments/complaints/sg-e-2014-08-olkaria-i-iv-mediation-agreement-en.pdf> The parties waived their right to confidentiality since the matter was one of public interest hence the publication of the agreement. Additionally, the World Bank and EIB-CM were engaged to monitor the implement of the actions agreed in the mediation agreement.

<sup>145</sup> Nawuma (n 136) 24.

<sup>146</sup> EIB-CM (n 137) paras 4.3-4.5

<sup>147</sup> Muigua (n 87)15.

<sup>148</sup> Ibid 29.

<sup>149</sup> Simon Vorburger and Angelina Pett, *Arbitrating Energy Disputes Arbitration in Switzerland: The Practitioners Guide* (Kluwer Law International 2018) 1319.

agreements refer to expert determination in conflicts regarding quality, invoicing and payment and, most frequently, pricing.<sup>150</sup> For instance, the Kenyan Model PSC provides for determination of any dispute between a Cabinet Secretary and a contractor by a sole expert within 90 days, whose decision is final and binding.<sup>151</sup> In the event that the sole expert fails to make determination within the said time, the parties can proceed to arbitration.<sup>152</sup> Similarly, if the Cabinet Secretary and the contractor fail to reach an agreement on the value of oil, the Cabinet Secretary, in consultation with the Energy and Petroleum Regulatory Commission can appoint an internationally recognised expert.<sup>153</sup>

Expert determination may facilitate the early resolution of disputes by giving parties an early assessment of the technical facts in issue such as the total greenhouse gas emissions of a certain project.<sup>154</sup> It also allows for the resolution of disputes as the projects continue. Additionally, experts can conduct assessments to map and catalogue differences between the expectations of the parties and review compliance with obligations.<sup>155</sup> Even where settlement is not achieved, a prior expert determination would provide the parties and arbitral tribunal with a good foundation for resolving a dispute.<sup>156</sup>

### **3.5 Adjudication and Climate Change Disputes**

Adjudication is used as the first port of call in construction disputes because it ensures that conflicts are resolved expeditiously - usually within 28 days while maintaining cash flow to facilitate the continuation of the project.<sup>157</sup> This is achieved through its framework of an interim payment mechanisms reflected in

---

<sup>150</sup> Ibid.

<sup>151</sup> Clause 53(2), Model PSC Kenya 2019.

<sup>152</sup> Ibid.

<sup>153</sup> Clause 35(2), Model PSC Kenya 2019.

<sup>154</sup> ICC Arbitration and ADR Commission (n 33) 31.

<sup>155</sup> Kariuki and Kerecha, (105)71.

<sup>156</sup> ICC Arbitration and ADR Commission (n 33) 32.

<sup>157</sup> Hazron Maira, 'The Evolution, Role and Effects of Dispute Boards in Construction Contracts' [2018] *Alternative Dispute Resolution*, 219.

the principle ‘pay now and argue later’.<sup>158</sup> The employer and contractor may agree to use Dispute Adjudication Boards to resolve disputes that arise between them.<sup>159</sup> Nonetheless, such consensual adjudication requires the good will of the parties.<sup>160</sup> In some countries like the United Kingdom, adjudication has been formalised through statute. Statutory adjudication requires fast and economical means of resolving disputes as they arise in the construction process. It also ensures that every contract has an adequate interim payment mechanism.<sup>161</sup>

In a bid to enhance adaptive capacity and mitigate carbon emissions, large scale construction projects are undertaken by investors, governments, and businesses.<sup>162</sup> Additionally, renewable energy projects are being set up to provide alternative sources of energy to fossil fuels with high carbon emissions.<sup>163</sup> Moreover, construction is a major contributor to GDP in the Kenyan economy and plays a leading role in determining economic growth.<sup>164</sup>

Renewable energy and extractives projects often require upfront capital investment and are high risk in nature.<sup>165</sup> Given this feature, they require proper allocation of risks in the contract between the employer and contractor as well as co-venturers. They are also capital intensive and very costly.<sup>166</sup> Nonetheless, conflicts and disputes can arise from resource exploration risks, technology

---

<sup>158</sup> Paul Karekezi and Francis Kariuki, ‘A Case for Statutory Adjudication’ [2017] *Alternative Dispute Resolution*,26.

<sup>159</sup> Ibid

<sup>160</sup> Ibid 25.

<sup>161</sup> Ibid 27.

<sup>162</sup> Tim Martin, ‘Disputes Resolution in the International Energy Sector’ [2011] *Journal of World Energy Law and Business*,7.

<sup>163</sup> Ibid.

<sup>164</sup> Competition Authority of Kenya, *The Construction Industry: Analysis of the State of Competition*,2017,17. See also Alex Kamau, ‘Arbitration for Construction Disputes in Kenya: Kind Master or Errant Servant?’ [2021] *Alternative Dispute Resolution*, 161; and Kenya National Bureau of Statistics, *Economics Survey*, 2019.

<sup>165</sup> Tamlyn Mills and Phoebe Miley-Dyer, ‘*Navigating the Dark Side of the Energy Transition*’ [2021] Norton Rose Fullbright,9.

<sup>166</sup> World Energy Council, *Renewable Energy Projects Handbooks* (World Energy Council, 2004) 45.



risks, financing risks, performance and technical assessments among others.<sup>167</sup> Additionally, conflicts and disputes can arise from delayed payments, poor quality work due to poor workmanship, delivery and use of substandard materials that can be harmful to the environment.<sup>168</sup> All the above disputes can be resolved provisionally through adjudication.<sup>169</sup>

### **3.6 Arbitration and Climate Change Disputes**

Climate change is a global problem that is not geographically limited, thus international arbitration, as a process for resolving cross-border disputes, is well positioned because of its cross-border character.<sup>170</sup> Arbitration is inherently flexible, innovative, and allows parties to choose a neutral third party according to his/her expertise in the subject matter of the dispute.<sup>171</sup> It is one of the methods used in resolving disputes in the extractives sector in Kenya.<sup>172</sup>

It is commonly assumed that the private nature of arbitration precludes it from dealing with environmental disputes. In our view, this argument cannot be sustained because there are rules that can promote transparency.<sup>173</sup> For instance, the UNCITRAL Rules on Transparency in Treaty-based Investor – State Arbitration provide various provisions to ensure transparency in investor-state arbitrations initiated under the said rules provided that they are based on BITs

---

<sup>167</sup> Ibid 46.

<sup>168</sup> Karekezi (n 158) 27-22.

<sup>169</sup> Elizabeth Chan, 'Forecasting Energy Disputes in Asia' [2020] *Asian International Arbitration Journal*, 45-47.

<sup>170</sup> ICC Arbitration and ADR Commission (n 33)16.

<sup>171</sup> Ibid.

<sup>172</sup> Section 117(2)(i) of the *Mining Act* 2016 stipulates that a mining agreement should have a clause on the resolution of disputes through international arbitration or determination by a sole expert. Additionally, under Regulation 41 of the Petroleum (Exploration and Production Regulations, where amicable settlement has failed, the dispute is referred to arbitration in accordance with the UNCITRAL Arbitration Rules. See also Section 41(1) of the *Community Land Act* 2016.

<sup>173</sup> Ng (n 34) 23.

concluded after 2014.<sup>174</sup> The Rules require the automatic publicization of certain documents of the arbitral procedure.<sup>175</sup> Additionally, non-disputant third parties like civil society organisations can participate as *amicus curiae* thus enabling them to provide knowledge and expertise on issues in dispute.<sup>176</sup> Hearings are public and the arbitral tribunal ensures that the public have access to hearings through video links. Nonetheless, the arbitral tribunal has discretion to hold hearings in private to protect confidential information.<sup>177</sup> Therefore, the rules can aid in resolving climate change related disputes by ensuring transparency.<sup>178</sup> Concerning arbitral institutional rules, most of them provide for confidentiality and privacy of the proceedings thus making them unsuitable for climate change related disputes that involve public interest. Nevertheless, they may be used in contracts between parties whose performance is affected by climate change.<sup>179</sup>

Parties are free to choose their arbitrators and may opt to appoint experts in a specific climate change related field. For instance, the Permanent Court of Arbitration (PCA) maintains a list of environmental experts from which parties may choose their arbitrators.<sup>180</sup> This may not be the case in litigation where

---

<sup>174</sup> Article 1, para 1, *UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration*, 2014. However, parties may also agree to adopt the rules for BITs concluded before 2014.

<sup>175</sup> *Ibid* Article 3. These include notice of arbitration, the response to the notice, statement of claim, statement of defence, and written submissions. Expert reports and witness statements are however only made available when requested from the arbitral tribunal by any person

<sup>176</sup> *Ibid* Article 4. They participate through *amicus curia* briefs.

<sup>177</sup> *Ibid* Article 7.

<sup>178</sup> Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' [2017] *Harvard Negotiation Law Review*, 299.

<sup>179</sup> Article 30 of the London Court of International Arbitration Rules 2020, Rule 39 of the Singapore International Arbitration Centre (SIAC) Rules 2016, Appendix II, Article 1 of the International Chamber of Commerce International Court of Arbitration (ICC) 2021, Article 45 of the Hong Kong International Arbitration Centre (HKIAC) 2018, Rules 65 and 34 CIArb-Kenya Arbitration Rules 2020 among others.

<sup>180</sup> Art 8(3) and 27(5), *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment*.

judges are mainly ‘generalists’ and so many need training and help of the neutral expert to understand technical matters.<sup>181</sup> The tribunal can request for a summary of scientific or technical matters.<sup>182</sup> Moreover, the arbitral tribunal can take possible precautionary interim measures to protect the environment including provisional orders necessary to “prevent serious harm to the environment”.<sup>183</sup>

### **3.6.1 Arbitration under the Climate Change International Framework**

Both the UNFCCC and the Paris Agreement contain provisions providing for dispute resolution either by the International Court of Justice or by arbitration. However, arbitration is only available between those states that have expressed consent to the jurisdiction of an arbitral tribunal.<sup>184</sup> Since a limited number of States have indicated their consent, through declarations made at the time of signing the Paris Agreement, it is unlikely that arbitration will be used to enforce states’ mitigation obligations under the Agreement.<sup>185</sup>

### **3.6.2 Commercial Arbitration as an avenue for Climate Change Disputes**

Commercial disputes with climate change related aspects are likely to be brought about by businesses as they adjust to the increasing regulations of emissions following the Paris Agreement.<sup>186</sup> Disputes in the context of asset investment, new renewable energy investments, carbon trading and pricing, and increasingly stringent environmental representations are some of the issues that are emerging in commercial contracts.<sup>187</sup> In 2001, the Permanent Court of Arbitration Environmental Rules based on the 1976 UNCITRAL Arbitration Rules were adopted and modified to reflect the unique characteristics of disputes relating to natural resources, conservation or environmental

---

<sup>181</sup> Orsua (n 16) 32.

<sup>182</sup> Art 24(4) PCA Environmental Rules 2001.

<sup>183</sup> Art 26(1) PCA Environmental Rules 2001.

<sup>184</sup> Article 14 of the UNFCCC and Article 36 of the ICJ Statute.

<sup>185</sup> Christian Drews, 'DIS40 Autumn Conference 2019 “Tuesday for Future: Arbitration and Climate Change’ [2019] *German Arbitration Journal*,347.

<sup>186</sup> ICC Arbitration and ADR Commission (n 33) 16.

<sup>187</sup> *Ibid.*

protection.<sup>188</sup> The Rules empower the arbitral tribunal to take interim measures including provisional orders to prevent serious harm to the environment falling within the subject matter of the dispute.<sup>189</sup> Therefore, arbitration under the PCA can respond to the urgency of climate change related disputes.

States acting as Respondents in ICC Arbitrations may also seek relief by way of counter-claims for environmental damages. They may also be claimants in construction disputes or against suppliers in energy related disputes.<sup>190</sup> Supply chain disputes are complex and require fast cross-border solution which international arbitration offers.<sup>191</sup> To demonstrate the already existing suitability of international commercial arbitration in resolving climate change related disputes, energy arbitration cases accounted for 24% of all cases in the London Court of International Arbitration (LCIA) in 2017.<sup>192</sup> Additionally, 34% of all defendants in LCIA's caseload came from the energy and natural resources industry.<sup>193</sup> According to statistics from the ICC, disputes arising from construction/ engineering and energy generate the highest number of ICC cases.<sup>194</sup>

### **3.6.3 Investor-State Arbitration and Climate Change Disputes**

Investor-state arbitration is not just about corporate rights. Investors' rights cannot supersede the state's sovereign powers. As a sovereign, the host state has obligations towards its people.<sup>195</sup> This is of paramount importance regardless of which investment treaty or agreement is involved. Otherwise, by claiming

---

<sup>188</sup> PCA, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and /or Environment*, 183.

<sup>189</sup> Ibid Rule 26.

<sup>190</sup> Art 5(5), *ICC Arbitration Rules*

<sup>191</sup> Norton Rose Fullbright, *International Arbitration Report*, 2020, 8.

<sup>192</sup> Leslie Zhang, 'Annual Review on Energy Dispute Resolution' 2019, 154

<sup>193</sup> In the 2020 LCIA Case Report, the percentage of arbitrations in energy and natural resources accounted for 26% of cases. In 2019, energy arbitrations accounted for 22% of cases.

<sup>194</sup> ICC Dispute Resolution Statistics, 2020, 17. In 2020, the said categories accounted for 38% of all cases.

<sup>195</sup> Thomas James Biscomb and Mateo Verdias, 'Investment Arbitration as an oxygen tank for the environment' [2020] *Spain Arbitration Review*, 78.

certain rights under certain investment, investors could take any environment-harmful action they consider necessary in pursuit of profits.<sup>196</sup>

Counterclaims are procedural tools that empower the arbitral tribunal to make a foreign and claiming investor accountable for any environmental damage created by its investment.<sup>197</sup> They strengthen the investor's commitment to protecting the environment of the host state. For instance, *Burlington* in 2008 filed an ICSID arbitration claim against Ecuador, challenging several government actions that hampered the company's oilfield investment. Ecuador filed a counterclaim, claiming the investor was liable under domestic tort law for soil clean-up, groundwater remediation, and the abandonment of wells generating mud pits.<sup>198</sup> It also contended that Burlington had failed to maintain investment-related infrastructure prior to the expropriation. Ecuador argued that it had a constitutional obligation to vindicate any environmental harm caused by the investor.<sup>199</sup> The tribunal granted Ecuador USD 41,776,492.77 in its verdict on Ecuador's counterclaim, which included USD 39,199,373 for environmental counterclaims and USD 2,577,119.77 for infrastructural counterclaims. The tribunal found Burlington to be responsible for groundwater contamination at the site of the investment exploitation.<sup>200</sup>

In *Cortec Mining Kenya Limited v Republic of Kenya* an ICSID tribunal dismissed the claims of British investors in a mining project in Kenya whose licences were suspended.<sup>201</sup> Even though there was no express legality requirement of the EIAs in the UK-Kenya BIT, the tribunal confirmed that the BIT protected only 'lawful investments'.<sup>202</sup> Secondly, the tribunal found that the investors had failed to undertake an environmental impact assessment study required by

---

<sup>196</sup> Ibid. 67% of the International Centre Settlement of Investment Disputes (ICSID) cases potentially involve climate-change related issues either directly or indirectly.

<sup>197</sup> Biscomb (n 195).

<sup>198</sup> *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5)

<sup>199</sup> Biscomb (n 197).

<sup>200</sup> Ibid.

<sup>201</sup> ICSID Case No. ARB/15/2

<sup>202</sup> Ibid.

Kenyan law as a condition precedent to acquiring a valid mining licence.<sup>203</sup> Consequently, the claim was dismissed on the basis that the investment was not made in accordance with the environmental laws of Kenya and was therefore not a protected investment. In a decision dated 19 March 2021, an ICSID *ad hoc* Annulment Committee (the Annulment Committee or Committee) rejected the claimants' application for annulment of the Cortec Mining Award.<sup>204</sup>

The Cortec Mining award – rendered under a BIT that contains no language concerning the environment or sustainable development – is arguably the first investment arbitration case that integrates environmental concerns into the norms of foreign investment protection.<sup>205</sup> Such integration, if followed by subsequent tribunals, might bring about desired reform more quickly than the time taken to revise treaties, conventions, and procedural rules.<sup>206</sup> In the Cortec Mining award, the tribunal demonstrated how the investment treaty regime can be modernized to meet the increased environmental and sustainability concerns without necessarily having to renegotiate investment treaties.<sup>207</sup> If each investment treaty is interpreted to contain an implicit legality requirement – and if, in turn, the relevant host State's regulatory regime contains environmental requirements for certain activities (which one would expect given the increased exigency of environmental concerns and the increased prevalence of environmental norms and standards) – foreign investors would inevitably need to comply with such requirements to acquire and maintain the coveted protections under the investment treaty regime.<sup>208</sup>

---

<sup>203</sup> Ibid.

<sup>204</sup> Alexandre de Gramont, 'Investment Arbitration and Environmental Protection: The Winds of Reform and the Significance of Cortec Mining v Republic of Kenya' [2021] *NCIA Journal*, 14-16.

<sup>205</sup> Ibid

<sup>206</sup> Ibid 23.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid 37.

Some countries have developed model BITs that include provisions for climate change and sustainable development.<sup>209</sup> The Dutch Model Bilateral Investment Treaty (BIT) expressly recognizes obligations under the Paris Agreement stating: '*the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labour standards and the protection of human rights to which they are party, such as the Paris Agreement*' and emphasizes 'the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.'<sup>210</sup>

The 2016 Nigeria–Morocco BIT also integrates sustainable development as a principle and an underlying objective.<sup>211</sup> The preamble recognises the important contribution investment can make to the sustainable development of the state parties' and seeks to promote, encourage, and increase investment opportunities that enhance sustainable development within the territories of the state parties.<sup>212</sup> In accordance with its goals, the treaty defines a covered investment in line with its objectives. Prior to making any investment, investors must meet certain requirements relating to environmental and social impact assessments.<sup>213</sup>

The BIT further provides that each state has a broad discretion to take any measure otherwise consistent with the agreement they consider appropriate to ensure that the investment activity is undertaken in a manner sensitive to

---

<sup>209</sup> Anja Ipp, 'Regime Interaction in Investment Arbitration: Climate Law, International Investment Law, and Arbitration' <<http://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/>> accessed on 30 March 2022. See Article 14 and 16.1 of the Indian Model BIT, USA Model BIT, and Article 13 of the SADC Model BIT, Article XX of Columbia's revised Model BIT

<sup>210</sup> Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change' [2021] *Journal of International Arbitration*, 318.

<sup>211</sup> Article 23, *Morocco-Nigeria BIT*. Article 24 obligates investors to strive to make the maximum feasible contributions to sustainable development of the host State and local community.

<sup>212</sup> *Ibid*, Preamble.

<sup>213</sup> *Ibid*, Article 14.

environmental and social concerns.<sup>214</sup> The treaty not only regulates pre-investment conduct and the manner in which investment is made, but also the conduct of operations. First, investors must maintain an environmental management system.<sup>215</sup> Additionally, investors must apply the precautionary principle in assessing the environmental impact of their investments.<sup>216</sup> Third, investors must comply with international labour and environmental standards, as well as the labour and human rights obligations of the home or host state.<sup>217</sup> Fourth, investors must apply the Sustainable Development Goals (SDGs) and specific or sectorial standards of responsible practice and corporate social responsibility requirements.<sup>218</sup> The BIT also requires investors and their investment never to engage in corrupt practices failure to which they will be prosecuted in domestic courts of the host state.<sup>219</sup> The BIT has been critiqued for its controversial provision on dispute prevention.<sup>220</sup>

### 3.6.4 Greening Arbitration Practice

Arbitrators and practitioners should audit their own practices to reduce carbon emissions.<sup>221</sup> This can be achieved by creating a workspace with a reduced environmental footprint, avoiding printing, requesting electronic rather than hard copies of documents, reducing air travel, promoting the use of electronic

---

<sup>214</sup> Ibid, Article 13(4).

<sup>215</sup> Ibid, Article 18.

<sup>216</sup> Ibid, Article 14(3).

<sup>217</sup> Ibid, Article 18.

<sup>218</sup> Ibid, Article 24.

<sup>219</sup> Ibid, Article 17(1) and (2).

<sup>220</sup> Ibid 4. See also Article 26(1) and 26(2), Morocco-Nigeria BIT. These provisions require that before initiating the arbitral procedure, any dispute between the parties is to be assessed through consultations and negotiations by the Joint Committee subject to a written request by the home state of the investor. The Committee is established in Article 4 to oversee the administration of the treaty and is composed of representatives from both states. The BIT is not clear as to how the representatives of the committee will be appointed or their tenure. There are issues of potential political interference and inadequate representation of the interests of foreign investors because only states can elect such representatives. It is also unclear as to why a foreign investor is not allowed to negotiate directly with the host state.

<sup>221</sup> Greenwood (n 210) 321.



bundles at hearing, and considering and/or recommending that witnesses or experts give evidence through video-conferencing rather than in person.<sup>222</sup>

The campaign for Greener Arbitration was started by Lucy Greenwood to promote awareness of the environmental impact of arbitrations and produce best practice guides in minimising carbon footprint. In 2020, the Campaign for Greener Arbitrations established a Steering Committee comprised of arbitrators, institutions, law firms and other stakeholders, to develop a framework and set of protocols to promote better environmental behaviours.<sup>223</sup> The six protocols serve as a practical guidance for reducing the carbon footprint of arbitration. For instance, the Green Protocol for Arbitrators provides measures that can be undertaken by arbitrators to reduce global emissions. Such measures include using environmentally friendly toner and ink where printing is deemed necessary, maintaining electronic case files, designing our offices to take in natural light thus reducing the emissions from the generation of electricity, and disposing off printing material in an environment friendly manner.<sup>224</sup>

So far, the greatest contributor to the carbon footprint of arbitration proceedings is international travel.<sup>225</sup> This can be reduced by greater use of technology to conduct hearings remotely, as well as a greater embrace of electronic documents.<sup>226</sup> As with the rest of the world, the international arbitration community has been thrust into an accelerated adoption of these technologies in light of the COVID19 pandemic. China was already promoting online dispute resolution even before the coronavirus outbreak, particularly for internet-

---

<sup>222</sup> Ibid.

<sup>223</sup> The Protocols are: The Green Protocol for Arbitral Institutions, Arbitration Hearings and Venues, Arbitration Conferences, Law firms and Chambers, Arbitral Proceedings, Legal Service Providers Working in Arbitration.

<sup>224</sup> Steering Committee of the Campaign for Greener Arbitrations, *Green Protocol for Arbitrators*, 2020.

<sup>225</sup> Mohit Mahla, 'When the Answer is Becoming the Question: Impacts of Arbitrations on the Environment' <http://arbitrationblog.kluwerarbitration.com/2020/11/29/when-the-answer-is-becoming-the-question-impact-of-arbitrations-on-the-environment> accessed on 18 April 2022.

<sup>226</sup> Ibid.

related disputes including cases about domain names and ecommerce.<sup>227</sup> The CIArb-Kenya Branch has put in place rules embracing virtual hearings.<sup>228</sup> Parties to arbitration may also adopt the *Africa Arbitration Academy Protocol on Virtual Hearings in Africa 2020* which details recommendations on virtual hearings dependent on the parties' agreement.<sup>229</sup> In adopting virtual hearings, the rate of carbon emissions reduces because of limited flight travel and reduced use of paper which is derived from cutting down trees.

### **3.7 Traditional Dispute Resolution Mechanisms and Climate Change**

International commercial arbitration may not be a favourable dispute resolution mechanism for disputes between the local community and the government or the business enterprise.<sup>230</sup> This is due to the exclusion of local communities as parties to the arbitration agreement, and yet they have an interest in the dispute.<sup>231</sup> Traditional justice systems in the form of elders who are the custodians of traditional knowledge (TK) can help in resolving climate change related disputes involving land and natural resources.<sup>232</sup> For instance, the *Kaya*

---

<sup>227</sup> Judith Levine and Nicola Swan, 'Climate Change Dispute Options' in Michael J. Moser and Chiann Bao (eds), *Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions* (Kluwer Law International 2021) 359.

<sup>228</sup> Article 45 of the *CIArb-Kenya Arbitration Rules* (2020) provides that unless otherwise agreed, the tribunal may on the application of either party or its own motion, direct the conducting of virtual and/ or hybrid arbitration hearings where it is not possible to have face-to-face hearings.

<sup>229</sup> Article 3.1.2 obligates the arbitral tribunal to consider the different time zones of the parties and also ensure that the integrity of oral evidence is not vitiated by virtual hearings. Parties can also agree to utilise a cloud-based storage service to host all documents introduced in virtual hearings and ensure that such storage is password-protected and secure.

<sup>230</sup> Benoit Le Bars, 'Recent Developments in International Energy Dispute' [2015] *Journal of International Arbitration*, 549.

<sup>231</sup> Alvin Gachie et al, 'Community Participation, Conflict Management and Alternative Dispute Resolution in the Extractives Industry in Kenya: Mechanisms to Promote Foreign Direct Investment for Sustainable Development' [2018] *Alternative Dispute Resolution*, 26.

<sup>232</sup> Francis Kariuki, 'Protecting Traditional Knowledge in Kenya: Traditional Justice Systems as Appropriate *Sui Generis* Systems' *WIPO-WITO Colloquium Papers*, 2019, 96. Traditional Knowledge refers to knowledge resulting from intellectual activity in a traditional context and includes know how, skills, and innovations. TK can be found in

elders among the *Mijikenda* govern issues of access, use and control of natural resources including traditional knowledge in accordance with customary law.<sup>233</sup> In order to regulate access to natural resources like forests, *Kaya* elders use secrets, oral agreements, and taboos.<sup>234</sup> The *Kaya* forests are listed as a world heritage site by United Nations Educational Scientific and Cultural Organisation (UNESCO) courtesy of the conservation work of the elders. All these are aspects of TK that is relevant in tackling climate change.

Similarly, the *Njuri Cheke* elders among the *Ameru* people have developed customs for protecting their TK.<sup>235</sup> Through TK, they are able to play a critical role in environmental conservation and conflict resolution of land and cattle rustling disputes within and outside the community.<sup>236</sup>

Traditional justice systems are more appropriate in managing climate change related disputes because customary laws underpin them. They allow for the use of local languages and apply implicit sanctions (both social and spiritual) thus making compliance easier.<sup>237</sup> Methods such as local peace dialogues, problem-solving workshop, consensus building techniques, and peace committees to resolve disputes among the disputing communities are used. These methods

---

wide variety of contexts including agricultural knowledge, scientific knowledge, ecological knowledge, and medical knowledge. See also Section 39(1) of the Community Land Act 2016 which provides that TDRMs can be used in resolving disputes involving community land.

<sup>233</sup> Ibid. See also Francis Kariuki, 'Conflict Resolution by Elders: Successes, Challenges, and Opportunities' [2015] *Alternative Dispute Resolution*.

<sup>234</sup> Ibid.

<sup>235</sup> Francis Kariuki, 'Traditional Justice Systems as Sui Generis Frameworks for the Protection of Traditional Knowledge in Kenya' (PhD thesis, University of Witwatersrand, 2019) 218.

<sup>236</sup> Ibid. See also Francis Kariuki, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' [2015] *Alternative Dispute Resolution*, 191. The Kamasian Council of Elders, for example, among the Kipsigis community, deals with disputes ranging from land and natural resources. Disputes among the Karimojong and the Teso communities are settled by a council of elders *Akiriket* and *Ariiget* respectively

<sup>237</sup> Kariuki (n 233) 30.

allow elders to address underlying causes of conflict that may otherwise go unnoticed if brought before the formal court system.<sup>238</sup> Therefore, TK including TEK is needed in adapting and mitigating the effects of climate change.<sup>239</sup>

Climate change is a growing driver of biodiversity loss and ecosystem degradation. Sustainable use of biodiversity and ecosystem through TEK contributes significantly to climate change adaptation as well as disaster risk reduction.<sup>240</sup> For instance, Nyakyusa people of Southern Tanzania have employed traditional conflict resolution techniques to resolve conflicts from environmental occurrences like floods and droughts which in turn lead to a scarcity of natural resources. They hold discussions under a special tree called 'indola', a very stable tree indicating that the decisions made under that tree were supposed to be respected by all.<sup>241</sup> The elders ensure that all persons within the community including women and children are consulted about the conflicts and that their views are taken into account.<sup>242</sup>

Traditional and customary conflict resolution have a number of advantages including the following: they encourage participation by community members and respect local values and customs; they are more accessible due to their low cost, flexibility in scheduling and procedures; they encourage decision-making based on collaboration, and consensus from wide-ranging discussions thus fostering reconciliation.<sup>243</sup> Due to the legitimacy and local acceptance of

---

<sup>238</sup> Gachie (n 231) 28.

<sup>239</sup> Francis Kariuki, 'Protecting Traditional Knowledge in Kenya: Traditional Justice Systems as Appropriate *Sui Generis* Systems' *WIPO-WITO Colloquium Papers*, 2019, 97.

<sup>240</sup> UNGA, Resolution 74/219: Protection of Global Climate for Present and Future Generations adopted on 19 December 2019.

<sup>241</sup> Ipyana Mwamugobole, 'Putting tested wisdom into practice Relevance and applicability of Nyakyusa traditional conflict resolution practices to contemporary environmental challenges in Tanzania' in Donald Anthony Mwiturubani and Jo-Ansie van Wyk, *Climate Change and Natural Resources Conflict* (Institute for Security Studies 2010)130.

<sup>242</sup> *Ibid* 129.

<sup>243</sup> Francis Kariuki, 'Customary Justice Systems in Kenya: An Exploration of their Jurisdiction' [2019] *Alternative Dispute Resolution*. See also the case of *Lubaru M'imanyara v Daniel Murungi* (2013) eKLR where parties filed a consent seeking to have the land

traditional processes and institutions, they offer immense opportunities for resolving climate change related grievances.<sup>244</sup>

#### 4. Conclusion

This paper has demonstrated that the effects of climate change are already with us. It has also discussed the various conflicts and disputes that arise from climate change and their impacts. It makes a case for the management of such disputes through ADR mechanisms such as negotiation, mediation, expert determination, adjudication, arbitration, and TDRMs. The paper concludes by highlighting various opportunities presented by climate change to ADR practitioners:

First, lawyers will have to draft *force majeure* clauses that anticipate climate change disasters following the increased impacts of climate change that may affect their clients' businesses. Additionally, lawyers are likely to receive more instructions on cases involving climate change. For instance, those related to environmental harms and natural resources. Furthermore, lawyers have to advise their clients especially businesses and companies to adhere to reporting obligations of the carbon emissions and environmental impact assessments hence lawyers require technical skills and knowledge on climate change.

Second, with many transitions to renewable energy, disputes relating to access to and control of land will increase. A natural resource mediator can assist stakeholders including local communities in coming to a consensus. Climate change-related conflicts and civil wars will also escalate in the coming decade. Mediators can contribute to global peace by facilitating negotiations and dialogue among people and communities involved in conflicts and civil wars. All in all, mediators need to equip themselves with skills and knowledge in climate change to effectively mediate climate change disputes.

---

dispute to the *Njuri NCheke* elders. The Court citing Article 159 (2)(c) of the Constitution referred the dispute to the elders. The consent reached by the parties was adopted as an order of the court.

<sup>244</sup> Francis Kariuki, 'Conflict Resolution by Elders: Successes, Challenges, and Opportunities' [2015] *Alternative Dispute Resolution*, 45-47.

As large-scale investment projects such as renewable energy are set up to mitigate the emission of greenhouse gasses, conflicts are bound to arise in the construction process. This presents an opportunity for engineers, quantity surveyors, lawyers, and adjudicators to serve as experts and members of dispute boards to quickly resolve disputes that arise in the building industry. They can also testify as expert witnesses in cases and matters involving energy projects and construction. Similarly, engineers can advise their clients to implement energy transitions, mitigation, and adaptation measures in line with the Paris Agreement.

In the near future, interpretation claims concerning new BITs like Morocco-Nigeria BIT and the Dutch Model BIT will emerge. Arbitral tribunals will be asked to interpret what investments contribute to sustainable development. The state's power to regulate the environment will increasingly be questioned. Arbitrators, especially African arbitrators need to sharpen their appreciation of investor-state arbitration to grab such opportunities. They should also get specialised training and knowledge on climate change law and policy due to the uncertainty and technicality of climate change disputes. Additionally, arbitrators have an opportunity to reduce the emission of greenhouse gases in the atmosphere. Often times, arbitrators are viewed as profit motivated individuals and unconcerned with the public good. However, arbitrators can embrace green arbitration by adopting e-submissions, virtual hearings, minimising flights unless necessary, and adopting e-waste. This will reduce the pressure on the environment through carbon emission.

Lastly, those working on climate change mitigation and adaptation need to engage TDRM practitioners and elders since they are custodians of TK which holds huge promise in dealing with climate change. TDRM practitioners can help in evaluating the social and environmental impact of the potential projects on local communities. Moreover, with the increasing growth of the extractives and renewable energy industries, TDRM practitioners are needed to resolve land and natural resource conflicts between the state, companies, investors, and local communities.

All in all, ADR mechanisms are appropriate in resolving climate change disputes as demonstrated by the authors. Climate change presents numerous opportunities to ADR practitioners.

## References

Alex Kamau, 'Arbitration for Construction Disputes in Kenya: Kind Master or Errant Servant?' [2021] *Alternative Dispute Resolution*.

Alvin Gachie, 'Natural Resource Dispute Resolution: Promoting peace and Security through Alternative Dispute Resolution' [2017] *Alternative Dispute Resolution*.

Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' [2017] *Harvard Negotiation Law Review*.

Benoit Le Bars, 'Recent Developments in International Energy Dispute' [2015] *Journal of International Arbitration*.

Beritu Masau, 'Effects of Climate Change on Pastoralist Women in the Horn of Africa' [2021] *Journal of Conflict Management and Sustainable Development*.

Bill McCabe and other, *A Weather and Bio-climatic Case Study of Desert Locust Conditions in Northern Kenya* (International Centre for Humanitarian Affairs, 2021).

Christian Buhning-Uhle, 'Conflict Negotiation Theory as a Conceptual Framework for Conflict Management' [2006] *Arbitration and Mediation in International Business*.

Christian Drews, 'DIS40 Autumn Conference 2019 "Tuesday for Future: Arbitration and Climate Change' [2019] *German Arbitration Journal*.

Climate Change Act of Kenya (2016).

Ellen Messer, *Climate Change & Violent Conflict: A Critical Literature Review*' Oxfam America Research Backgrounder Series (2010).



*Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes: Francis Kariuki & Vianney Sebayiga* ((2022)10(3) *Alternative Dispute Resolution*)

Environmental Justice Foundation (EJA), *Beyond Borders: Our Changing Climate – its Role in Conflict and Displacement*, 2017.

Fabricio Fortese, *Arbitration in Argentina* (Kluwer Law International 2020).

Francis Kariuki, 'Conflict Resolution by Elders: Successes, Challenges, and Opportunities' [2015] *Alternative Dispute Resolution*.

Francis Kariuki, 'Customary Justice Systems in Kenya: An Exploration of their Jurisdiction' [2019] *Alternative Dispute Resolution*.

Francis Kariuki, Geoffrey Kerecha, and James Kirwa, *Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers* (Extractives Baraza 2019).

Francis Kariuki, 'Protecting Traditional Knowledge in Kenya: Traditional Justice Systems as Appropriate *Sui Generis* Systems' *WIPO-WITO Colloquium Papers*, 2019.

Francis Kariuki, 'Traditional Justice Systems as *Sui Generis* Frameworks for the Protection of Traditional Knowledge in Kenya' (PhD thesis, University of Witwatersrand, 2019).

Geoffrey Kerecha, James Kirwa, and Jovia Bogere, 'Handling Community Related Grievances in Kenya's Mining Sector: Community Fact sheet' *Extractives Baraza*, 2019.

*Greenwatch v Golfcourse Holdings Limited H.C MISC. Application No.390 of 2001*(Uganda).

Hazron Maira, 'The Evolution, Role and Effects of Dispute Boards in Construction Contracts' [2018] *Alternative Dispute Resolution*.

ICC Arbitration and ADR Commission, *Resolving Climate Change Related Disputes through Arbitration and ADR*

Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC Response Strategies*, 1990.

Iris Ng, 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes' [2022] *Asian Dispute Review*

Kariuki Muigua, 'Adopting the Singapore Convention in Kenya: Insight and Analysis' [2021] *Alternative Dispute Resolution*.

Kariuki Muigua, 'ADR: The Road to Access to Justice in Kenya' [2018] *Alternative Dispute Resolution*.

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

Kariuki Muigua. 'Empowering Kenyan People through Alternative Dispute Resolution Mechanisms' [2015] *Alternative Dispute Resolution*.

Kariuki Muigua, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' [2016] *Alternative Dispute Resolution*.

Kariuki Muigua, 'Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Formality' [2020] *Journal of Conflict Management and Sustainable Development*.

Kariuki Muigua, 'Recognising a Human Right to a Safe, Healthy, and Sustainable Development' [2021] *Journal of Conflict Management and Sustainable Development*.

Kariuki Muigua, 'The Race to Zero Emissions from an African Perspective' [2021] *Journal of Conflict Management and Sustainable Development*.

Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change' [2021] *Journal of International Arbitration*.

Mercy Corps, *Addressing the Climate Conflict Nexus: Evidence, Insights, and Future Directions*, 2022.

*Moffat Kamau & 9 Others v Aelous Kenya Limited* (2016) eKLR.

*Mui Coal Basin and Local Community v Permanent Secretary Mining of Energy* (2015) eKLR.

Nayla Comair-Obeid, 'Dispute Avoidance and Resolution in Times of Crisis' [2018] *The International Journal of Arbitration, Mediation, and Dispute Management*.

Nataliya Barysheva, 'Force Majeure in Energy Arbitration: Predicting the Unpredictable' [2018] *International Commercial Arbitration Review*.

*Pankaj Transport PVT Ltd v SDV Transami Kenya Limited* (2017) eKLR.

Paul Karekezi and Francis Kariuki, 'A Case for Statutory Adjudication' [2017] *Alternative Dispute Resolution*.

Reynold Orsua, 'Resolving Climate Change Related Disputes Through Alternative Modes of Dispute Resolution' [2022] *Asian Dispute Resolution Rockhopper Exploration Plc et al v Republic of Italy*, ICSID Case No ARB/17/14.

Salome Karimi, 'The Role of Good Governance in Combating Climate Change in Africa' [2021] *Journal of Conflict Management and Sustainable Development*.

Simon Vorburger and Angelina Pett, *Arbitrating Energy Disputes in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2018).

Tamlyn Mills and Phoebe Miley-Dyer, 'Navigating the Dark Side of the Energy Transition' [2021] Norton Rose Fullbright.

*Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes: Francis Kariuki & Vianney Sebayiga* ((2022)10(3) *Alternative Dispute Resolution*)

Thomas James Biscomb and Mateo Verdias, 'Investment Arbitration as an oxygen tank for the environment' [2020] *Spain Arbitration Review*.

Tim Martin, 'Disputes Resolution in the International Energy Sector' [2011] *Journal of World Energy Law and Business*.

*UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration*, 2014.

United Nations Development Programme (UNDP), *Gender and Climate Change: Overview of Linkages between Gender and Climate Change*, 2016.

United Nations Framework Convention on Climate Change (adopted 9 May 1992; entered into force 21 March 1994).

World Meteorological Organisation (WMO), *Annual Report*, 2017.

## **The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya**

*By: Kariuki Muigua\**

### **Abstract**

*For the longest time, Alternative Dispute Resolution practice and infrastructure in Africa has been focusing on the traditional processes dealing with traditional commercial and investment related disputes. However, with the evolution of technology, many new areas of commerce have emerged, especially in the area of digital technologies and businesses. This paper makes a case for African countries to embrace digital dispute resolution mechanisms in addressing the emerging disputes related to digital commerce, in a timely and cost effective manner, through putting in place responsive legal and institutional infrastructure.*

### **1. Introduction**

A perusal through many of the African countries' legal, policy and institutional frameworks on Alternative Dispute Resolution (ADR) practice reveal that most of them are still focused on the traditional arbitral processes that are mainly physical in nature. However, with technological evolution, there has been emergence of new areas of commerce which naturally also come with related disputes. One such area is the digital commerce platforms. Consumer behavior and business models have changed dramatically as a result of digitalisation and technological disruption, which has been expedited by the effect of the COVID-19 pandemic.<sup>1</sup> Apart from pandemic impacts, the rise of information technology, globalization of economic activity, blurring of distinctions between professions and sectors, and increased integration of knowledge have all

---

*\*PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law.*

<sup>1</sup> 'Digital Economy Agreements' <<https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements>> accessed 16 April 2022.

contributed to developments in the legal sector.<sup>2</sup> Technology has greatly impacted the way law and legal experts are operating in this era as far as enhancing efficiency is concerned.<sup>3</sup>

Furthermore, the rise of platforms and apps with multiple integrated services ranging from transportation to finance and telemedicine has altered how services are consumed, with businesses increasingly relying on electronic transactions and digital solutions for everything from sourcing to invoicing and payments. Secure and smooth cross-border data transfers are critical for the digital economy's growth and the protection of consumers' interests.<sup>4</sup>

The traditional legal and institutional frameworks on arbitration cannot, arguably, respond to the related disputes as they currently are. This paper makes a case for African countries, with a focus on Kenya, to respond to this digital and technological evolution by putting in place corresponding infrastructure to address the disputes that are bound to arise from the same.

---

<sup>2</sup> Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 <<https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 11 April 2022.

<sup>3</sup> Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated – Law Schools Are Trying to Stay Ahead of the Curve' (CNBC, 7 February 2020) <<https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html>> accessed 10 April 2022; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (*Daily Business Review*) <<https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/>> accessed 10 April 2022; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (*Medium*, 19 July 2019) <<https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9>> accessed 10 April 2022; 'Disruptive Technology in the Legal Profession' (*Deloitte United Kingdom*) <<https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html>> accessed 10 April 2022; 'New Technologies and the Legal Profession' (*nyujlb*) <<https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession>> accessed 10 April 2022; Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 *Potchefstroom Electronic Law Journal*.

<sup>4</sup> *Ibid.*

OECD points out that the digital transformation has decreased the costs of international commerce, facilitated the coordination of global value chains (GVCs), aided the diffusion of ideas and technology, and connected a larger number of firms and customers throughout the world.<sup>5</sup> It goes on to point out that even if international commerce has never been easier, the adoption of new business models has resulted in more complicated international trade transactions and policy challenges.<sup>6</sup> As a result, Governments are confronted with new regulatory problems in today's fast-paced and linked world, not just in addressing concerns originating from digital disruption, but also in ensuring that the potential and advantages of digital commerce are realized and shared equally.<sup>7</sup>

Notably, Kenya is making positive steps towards enhancing the productivity of the digital economy as evidenced by the development of the 2019 Digital Economy Blueprint<sup>8</sup>. The Blueprint proposes five pillars as foundations for the growth of a digital economy which include: Digital Government; Digital Business; Infrastructure; Innovation-Driven Entrepreneurship and Digital Skills and Values.<sup>9</sup> The Blueprint sets clear results, recognizes open doors and regions that need further concentration, while outlining relating game plans for Government, private area and the citizens. By working together, citizens can partake in the chances of a developing, all around the world serious present day economy, empowered by innovation.<sup>10</sup>

The paper makes some comparative analysis borrowed from countries that have made reasonable progress in this area.

---

<sup>5</sup> 'Digital Trade - OECD' <<https://www.oecd.org/trade/topics/digital-trade/>> accessed 16 April 2022.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Republic of Kenya, *Digital Economy Blueprint*, 2019. Available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf> [Accessed on 16 April 2022].

<sup>9</sup> Ibid, chapter Two.

<sup>10</sup> Ibid, p. 28.

## **2. Nature of Digital Economy**

With the fast development of the web beginning in the mid-1990s, the advanced scene has extended and changed how organizations work and how shoppers take part in exchanges with organizations and with one another.<sup>11</sup> It has been contended that the digital economy is fundamentally different from the traditional economy as it existed during the twentieth century, when many economic theories crystallized, and that traditional theories fail to capture the abstract, global, oligopolistic, intangible, and knowledge-driven nature of the digital economy as it has emerged in the twenty-first century.<sup>12</sup>

The digital economy has revolutionized the way we do business and live our lives, and the growth of digitized innovation, such as cloud, mobile services, and artificial intelligence, has accelerated this shift and given us with unprecedented services and benefits.<sup>13</sup>

There are no universally accepted definitions of the terms ‘digital economy’ or ‘digital trade’. The United States International Trade Commission (USITC) defines digital trade as the delivery of products and services over fixed-line or wireless digital networks. This includes both domestic and international trade, but excludes most physical goods, such as goods ordered online and physical goods with a digital counterpart, such as books and software, music, and movies sold on CDs or DVDs.<sup>14</sup> The United Kingdom Digital Dispute Resolution Rules defines a digital asset includes a cryptoasset, digital token, smart contract or other digital or coded representation of an asset or transaction; and a digital

---

<sup>11</sup> Barefoot, K., Curtis, D., Jolliff, W., Nicholson, J.R. and Omohundro, R., ‘Defining and Measuring the Digital Economy’ (2018) 15 US Department of Commerce Bureau of Economic Analysis, Washington, DC, p.3.

<sup>12</sup> Usman W Chohan, ‘Some Precepts of the Digital Economy’ [2020] SSRN Electronic Journal 1 <<https://www.ssrn.com/abstract=3512353>> accessed 16 April 2022.

<sup>13</sup> Watanabe, C., Naveed, K., Tou, Y. and Neittaanmäki, P., ‘Measuring GDP in the Digital Economy: Increasing Dependence on Uncaptured GDP’ (2018) 137 Technological Forecasting and Social Change 226, at p. 226.

<sup>14</sup> Lund S and Manyika J, ‘How Digital Trade Is Transforming Globalisation’ (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), 3.



asset system means the digital environment or platform in which a digital asset exists.<sup>15</sup>

Physically delivered and digitalized purchases of digital services, such as remote cloud computing or architectural plans delivered on-line; or digitally enabled but physically delivered goods and services, such as the purchase of a good on an online marketplace or the booking of a hotel through a matching service. Because trade policy commitments and norms for goods (GATT) and services (WTO) differ, the trade policy environment will be determined by how the transaction is delivered and what sort of product is being transacted (GATS).<sup>16</sup>

Digitization minimizes marginal production and distribution costs while widening access to global commerce, lowering the cost of engaging in trade not only for major enterprises, but also for individuals, small businesses, and entrepreneurs. This is already causing business model innovations and the rise of micro-multinationals, micro-work, and micro-supply chains that may take advantage of international markets.<sup>17</sup>

### **3. Traditional Alternative Dispute Resolution Processes Versus Digital Disputes**

ADR procedures have been linked to a number of benefits over litigation, including being quicker, cheaper, and less restrictive on procedural norms. In the twenty-first century, alternative dispute resolution (ADR) aims to develop a faster, more cost-effective, and more efficient approach than litigation, which is time-consuming and expensive.<sup>18</sup> Foreign investors prefer mediation or

---

<sup>15</sup> Rule 2, *Digital Dispute Resolution Rules*, 2021.

<sup>16</sup> González JL and Jouanjean M-A, "Digital Trade: Developing a Framework for Analysis OECD." *Trade Policy Papers* 205 (2017), at p. 13.

<sup>17</sup> Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), at p.1.

<sup>18</sup> Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

arbitration over the national court system because they are concerned about the effectiveness of national courts in cross-border conflicts. In the context of cross-border commerce, dispute resolution through arbitration/ADR is not just a domestic but also an increasingly rising worldwide phenomena.<sup>19</sup>

Contemporary ADR methods and procedures are thought to be more efficient and constructive than traditional schemes for managing conflicts and settling disputes because they help parties collaborate by reducing animosity and diminishing competitive incentives during the process, and in part, allows for a more satisfactory process through the conflict management expertise of professional negotiators and state-of-the-art in the field.<sup>20</sup> The features of flexibility, cheap cost, absence of complex processes, collaborative issue solving, salvaging relationships, and familiarity with the general public are the core selling points of ADR methods.<sup>21</sup>

Digital disruption has been felt across all modes: digital versions of products or services compete with physically embodied versions, and digital distribution/facilitation business models compete with conventional distribution business models.<sup>22</sup>

Technology has also crept into the realm of alternative dispute resolution thanks to advancements in the field. There is now online mediation, online arbitration, and even block chain arbitration, which employs the same block chain

---

<sup>19</sup> Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at [http://www.hg.org/articles/article\\_1530.html](http://www.hg.org/articles/article_1530.html)

<sup>20</sup> Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.5.

<sup>21</sup> Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

<sup>22</sup> Ciuriak D and Ptashkina M, 'The Digital Transformation and the Transformation of International Trade' [2018] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), at p. 1.

technology as cryptocurrencies. Alternative conflict resolution, sometimes known as "online dispute resolution," is becoming more popular.<sup>23</sup>

The United Kingdom's Digital Dispute Resolution Rules provide for an automatic dispute resolution process which means a process associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system (including by operating, modifying, cancelling, creating or transferring digital assets).<sup>24</sup> It is, however, worth pointing out that these Rules have also created room for the traditional ADR mechanisms by providing that 'any dispute between interested parties arising out of the relevant contract or digital asset that was not subject to an automatic dispute resolution process shall be submitted to arbitration in accordance with the current version of these rules at the time of submission; however, any expert issue shall be decided by an appointed expert acting as such rather than as an arbitrator'.<sup>25</sup>

The emergence of Online Dispute Resolution (ODR) as a supplement to Alternative Dispute Resolution (ADR) might result in a meaningful paradigm shift in how conflicts are resolved outside of conventional court systems.<sup>26</sup> It has been argued that the traditional court system is incapable of administering justice 'on a large scale,' and that ADR and ODR are more appropriate because they provide the architecture and tools to handle online disputes and can more proportionally handle functions that judicial authorities can no longer handle.<sup>27</sup> International commercial disputes may quickly grow into huge trade disputes

---

<sup>23</sup> Yeoh D, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (*Kluwer Arbitration Blog*, 29 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>> accessed 17 April 2022.

<sup>24</sup> Rule 2, United Kingdom Digital Dispute Resolution Rules 2021.

<sup>25</sup> *Ibid*, Rule 5.

<sup>26</sup> Peters S, "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p. 3.

<sup>27</sup> Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.6.

with significant political and economic ramifications, necessitating the greater use of extrajudicial dispute settlement rather than litigation in national courts.<sup>28</sup> As a result of globalization, effective and dependable systems for resolving commercial and other general issues involving parties from several jurisdictions have become not only desirable but also essential.<sup>29</sup>

#### **4. Kenya's Preparedness in Embracing Digital Dispute Resolution**

While various factors have contributed to the Internet economy's rise, the growing rate of innovation in information and communication technology remains the most significant.<sup>30</sup>

It has been observed that E-commerce has risen significantly in Kenya, owing to legislation regulating information and communications technology (ICT) services, e-commerce transactions, data protection, and information access.<sup>31</sup>

In April 2021, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules which are meant to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications.<sup>32</sup> They must be agreed upon in

---

<sup>28</sup> Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 675.

<sup>29</sup> *Alternative Dispute Resolution Methods*, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September, 2000) <[http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document14/DocSeries14.pdf](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf)> accessed 17 April 2022.

<sup>30</sup> Ahmed U and Aldonas G, 'Addressing Barriers to Digital Trade' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2015), at p.1.

<sup>31</sup> Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: *Adapting to the Digital Era: Challenges and Opportunities* (pp.92-109), World Trade Organization, at p.94 <[https://www.wto.org/english/res\\_e/booksp\\_e/adtera\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf)> accessed on 16 April 2022.

<sup>32</sup> United Kingdom, *Digital Dispute Resolution Rules*, April 2021 <[https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech\\_DDRR\\_Final.pdf](https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf)> accessed on 16 April 2022.

writing by both parties, either before or after a disagreement arises. The guidelines provide language for use in a contract, a digital asset (such as a cryptoasset, digital token, smart contract, or other digital or coded representation of an asset or transaction), or a digital asset system.<sup>33</sup> There is need for African countries to consider investing in similar rules to enhance the growth of digital dispute resolution mechanisms.

#### **4.1. Data Privacy Protection: Data Transfer, Processing, and Storage**

Most modern enterprises are progressively bound by national and international data privacy laws, which require companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and to implement strict controls around the processing, use, and transfer of such PII and PHI.<sup>34</sup> Due to the considerable dangers and problems offered by technology in terms of such data, the impact of this will become even more apparent as businesses adopt technology.<sup>35</sup> Data breach notification procedures, Data Subject Access Requests (DSARs), and cross-border e-discovery projects are just a few examples of legal processes that demand extreme caution in identifying and managing PII and PHI while working under tight deadlines.<sup>36</sup> Data protection rules in one nation may not be as sophisticated as those in another, necessitating a significant investment in this area not only to earn the trust of clients and partners in another country, but also to avoid the legal ramifications that may result from a data privacy breach.<sup>37</sup>

---

<sup>33</sup> 'Ground-Breaking Digital Dispute Resolution Rules Published' (*Walker Morris*) <<https://www.walkermorris.co.uk/publications/ground-breaking-digital-dispute-resolution-rules-published/>> accessed 17 April 2022

<sup>34</sup> Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <<https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521>> accessed 3 June 2020.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <[https://unctad.org/en/PublicationsLibrary/dtlstict2016d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf)> 10 April 2022; 'How

Local businesses must make a deliberate decision to invest in data protection infrastructure that will allow them to function efficiently and secure their clients' data regardless of the state of local data protection regulations. As dispute resolution professionals and corporate legal departments seek more cost-effective ways to improve the delivery of legal services, they should look for paralegals and legal assistants with experience in technology-driven systems who can not only help the firm operate more efficiently but also ensure data privacy.<sup>38</sup>

It may be necessary for policymakers to collaborate closely with other stakeholders to reexamine existing data protection rules in order to improve their efficacy. Relevant personnel should also be prepared with the required data protection skills and knowledge. Information security management, for example, is a collection of rules and procedural controls that Information Technology (IT) and business organizations use to safeguard their informational assets against threats and vulnerabilities-security of information.<sup>39</sup> These professionals would be in charge of an institution's or company's Information Security Management System (ISMS). ISMS is essential to ensure that any data is kept secret, has integrity, and is conveniently accessible when needed. Regardless of whether the data is stored in a digital or physical format, the discipline of Information Security Management is essential for preventing illegal access or theft.<sup>40</sup> This is because any technology-driven business operation, including the legal profession, is vulnerable to security and privacy

---

Organizations Can Stay Ahead of Changing Privacy Laws' (*Digital Guardian*, 22 August 2019) <<https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws>> accessed 10 April 2022.

<sup>38</sup> 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 10 April 2022.

<sup>39</sup> 'What Is Information Security Management?' (*Sumo Logic*) <<https://www.sumologic.com/glossary/information-security-management/>> accessed 10 April 2022.

<sup>40</sup> *Ibid.*

concerns.<sup>41</sup> The security controls can follow common security standards or be more focused on the industry.<sup>42</sup>

## **4.2. Training/Education in E-Literacy**

To meet the needs of today's legal consumer, it has been correctly stated that "with the emerging concepts of artificial intelligence, Block chain, Education, and digital technology, capabilities and potential must develop, and efforts must be made at the school and university level for upgrading digital skills, running special basic and advanced skill-based programs."<sup>43</sup> Law schools must step in to bridge the knowledge and skills gap if attorneys are to stay relevant and on top of their game. Indeed, it has been correctly said that "the rivalry in the field of law has expanded tremendously to the point that it is now a worldwide platform and every student who steps into the shoes of a lawyer is required to manage many topics."<sup>44</sup>

To prepare the overall population, there is a requirement for the Government, through the Ministry of Information Communication Technology in a joint effort with the other significant partners to make it simple for general society to procure the applicable abilities in innovation through customized courses at all levels of the school educational program as well as through other improved on courses accessible to those all-around out of school and not liable to profit from work related phases of preparation nearby. This will also make it simpler for the general population to have meaningful interactions with the legal system.

This is especially relevant given that the judiciary is on the verge of incorporating technology into the administration of justice.

---

<sup>41</sup> 'Introduction to Information Security Management Systems (ISMS) - BMC Blogs' <<https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/>> accessed 10 April 2022.

<sup>42</sup> Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <<https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained>> accessed 10 April 2022.

<sup>43</sup> Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 189.

<sup>44</sup> *Ibid*, 189.

The necessity for embracing justice – to allow efficient access to justice for all – will be defeated if the disseminators/facilitators of justice are empowered and the consumers of justice are excluded.

Leaving them out will instead encourage digital apartheid, which is the systematic exclusion of particular populations from digital access and experience as a result of political and commercial policies and practices.<sup>45</sup> With the increased digitization of government services, such as the Huduma Center service delivery model, a Government of Kenya initiative aimed at advancing citizen-centered public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centers across the country, there is an urgent need to address digital illiteracy in order to improve access for all. The process will benefit from virtual access to justice.<sup>46</sup> The government can collaborate with the judiciary to establish Digital Villages Projects around the country to improve access to justice-related services.<sup>47</sup> Such centers should concentrate on providing digital training and education relating to access to justice.

In addition, the government should work with both domestic and international IT businesses to spread out internet access services across the country so that everyone has easy access. They should also collaborate with local mobile service providers to make mobile data accessible to the majority of Kenyans.

---

<sup>45</sup> Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

<sup>46</sup> Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; 'Study Heaps Praise on Revolutionary Huduma Centres' (*Daily Nation*) <<https://www.nation.co.ke/https://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030>> accessed 11 April 2022.

<sup>47</sup> 'Broadband in Kenya | Broadband Strategies Toolkit' <<http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya>> accessed 11 April 2022.



Furthermore, all people should be able to afford electricity. The Kenyan government's efforts to guarantee that all Kenyans have access to power through the Last Mile Electricity Connectivity Project are noteworthy.<sup>48</sup>

## **5. Digital Dispute Resolution: The Future of Commercial Alternative Dispute Resolution?**

With the introduction of diverse social media platforms that allow interconnectivity beyond national boundaries and enable cross-border relationships between clients and their dispute resolvers, the experts can use technology to tap into the ever-growing international Alternative modes of Dispute Resolution such as international arbitration, mediation, and Online Dispute Resolution (ODR), especially in the face of rapidly growing networking and borderless legal practice.<sup>49</sup>

### **5.1. Online Mediation**

Mediation is a negotiation process between two parties in the presence of a third party. Through a framework that will not force any solution that is not mutually acceptable, negotiation permits parties to fully control both the process and the

---

<sup>48</sup> 'Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <<https://inclusiveinfra.github.org/case-studies/last-mile-connectivity-program-kenya/>> accessed 11 April 2022; 'Kenya - Last Mile Connectivity Project II' <<https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013>> accessed 11 April 2022; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (*African Development Bank - Building today, a better Africa tomorrow*, 24 January 2020) <<https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report>> accessed 11 April 2022; 'Last Mile Project - Ministry of Energy' <<https://energy.go.ke/?p=914>> accessed 11 April 2022.

<sup>49</sup> Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' *Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects* <[https://www.academia.edu/40663364/law\\_lawyers\\_and\\_the\\_social\\_media\\_in\\_the\\_21st\\_century\\_challenges\\_and\\_prospects](https://www.academia.edu/40663364/law_lawyers_and_the_social_media_in_the_21st_century_challenges_and_prospects)> accessed 10 April 2022.

outcome.<sup>50</sup> As an informal dispute resolution procedure, negotiation gives parties complete authority over the process of identifying and discussing their difficulties, allowing them to negotiate a mutually acceptable solution without the involvement of a third party. It focuses on the parties' similar interests rather than their respective strength or position.<sup>51</sup> It is linked to voluntariness, cost-effectiveness, informality, an emphasis on interests rather than rights, innovative solutions, personal empowerment, greater party control, addressing fundamental causes of conflict, non-coerciveness, and long-term results. This makes it particularly applicable to normal life conflicts that would otherwise be exacerbated by any attempts to resolve them through litigation.<sup>52</sup> When participants in a negotiation reach a stalemate, they invite a third party of their choosing to assist them in resolving the issue, which is known as mediation.<sup>53</sup> Mediation has many of the same benefits as negotiating. However, because mediation has no enforcement mechanism and relies on the goodwill of the parties, it suffers from its non-binding character, which means that if compliance is necessary, one must go to court to acquire it.<sup>54</sup>

The added advantages of online mediation are that parties need not to travel and the cost of mediation is fixed and parties can prepare financially from the start.<sup>55</sup>

---

<sup>50</sup> See generally, Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Nairobi: Glenwood Publishers, 2017).

<sup>51</sup> Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

<sup>52</sup> Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

<sup>53</sup> Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 115.

<sup>54</sup> See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

<sup>55</sup> 'The Benefits of Online Mediation' (*Mediation Center of Los Angeles | MCLA*, 2 November 2020) <<https://www.mediationla.org/the-benefits-of-online-mediation/>> accessed 17 April 2022.

## **5.2. Online Commercial Arbitration**

Due to its clear benefits over litigation, arbitration has grown in favour as the preferred method of resolving disputes, particularly among businesses.<sup>56</sup> The most notable advantage of arbitration over litigation is its transnational application in international conflicts with low or no intervention from national courts, giving parties confidence that justice would be served in the most efficient manner possible. As a result, countries and regions all over the world are advocating international arbitration as the preferred method for resolving international conflicts.<sup>57</sup>

International commercial arbitration in Africa will assist the business and investment community because it provides a viable structure for resolving international and regional conflicts.<sup>58</sup> However, while commercial arbitration's inherent flexibility has allowed it to adapt well to recent global changes, particularly the Covid-19 pandemic, due to its familiarity with remote communications, videoconferencing, and the use of technology to drive efficiencies, holding proceedings entirely (or nearly entirely) virtually has posed its own set of challenges, including concerns about worries over fair treatment, straightforwardness, secrecy, security, data protection and management; the presentation of submissions in a different way; how to manage numerous time regions; screen weariness; and network issues.<sup>59</sup>

---

<sup>56</sup> See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675 at p.678.

<sup>57</sup> Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

<sup>58</sup> Muigua, K., 'Promoting International Commercial Arbitration in Africa,' *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 2, (2017), pp. 1-27.*

<sup>59</sup> 'Recent Trends in International Arbitration' (*Walker Morris*) <https://www.walkermorris.co.uk/publications/recent-trends-in-international-arbitration/> accessed 17 April 2022.

Thus, even as the world moves towards embracing online commercial arbitration, there is a need for countries and stakeholders to come up with ways of overcoming the above listed challenges.

### **5.3. Block Chain Arbitration**

Blockchain is defined as a "open, distributed ledger that can efficiently and permanently record transactions between two parties." In its most basic form, a blockchain's functioning premise is built on the connection of each transaction or movement as a "block" to the system, allowing the platform to develop indefinitely. The whole system is updated with each new transaction, and the transaction is accessible to all parties involved anywhere in the globe.<sup>60</sup>

The self-executing, next generation contracts used in Smart Contracts, Blockchain, and Arbitration are designed to achieve preset conditions. By activating the arbitration clause embedded in the smart contract, Blockchain Arbitration can enable the storage and verification of rules, as well as automatic implementation (on a specific occurrence constituting a breach of the agreement).<sup>61</sup>

If a disagreement arises, the smart contract will alert the Arbitrator via a blockchain-based dispute resolution interface. A party can digitize the conditions of an agreement, lock the cash in a smart contract, and condition the smart contract such that the work is completed and the monies are received. The smart contract's self-executing nature will automatically enforce the award and transmit the stipulated fee to the Arbitrator once the procedure is completed.<sup>62</sup> Due to its decentralized nature, blockchain arbitration currently presents several incompatibilities with the existing arbitration legal framework, such as

---

<sup>60</sup> 'Blockchain, Smart Contracts And Arbitration - Technology - Turkey' <<https://www.mondaq.com/turkey/fin-tech/967452/blockchain-smart-contracts-and-arbitration>> accessed 17 April 2022.

<sup>61</sup> 'Blockchain Arbitration: The Future of Dispute Resolution' (Foxmandal, 23 November 2021) <<https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/>> accessed 17 April 2022.

<sup>62</sup> Ibid.

the cryptographic form of the arbitration agreement and the lack of a seat of arbitration, to name a few.<sup>63</sup>

The notion of blockchain arbitration is one of the most recent advancements in ADR, and it aims to harness the benefits of the technology in dispute resolution. It is linked to the proliferation of e-contracts and smart contracts in commercial transactions throughout the world.<sup>64</sup> There is, however, need for independent and further research on the topic of blockchain arbitration even as the international community moves to embrace the process.

## **6. Conclusion**

The expansion of digital trade and digitally enabled transactions has been tremendous in Kenya, and digitization has become a vital element of a wide range of daily activities and service delivery.<sup>65</sup> With more and more individuals throughout the globe engaged in immediate cross-border exchanges of digital commodities, and as the infrastructure that supports the Internet increases, obstacles of distance and cost that previously appeared insurmountable have begun to fall away.<sup>66</sup>

The transnational nature of this kind of commerce and the limitations that come with the traditional means of dispute resolution create the need for enhanced

---

<sup>63</sup> Chevalier M, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (*Kluwer Arbitration Blog*, 4 March 2022)

<http://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/> accessed 17 April 2022.

<sup>64</sup> Bansal R, 'Enforceability of Awards from Blockchain Arbitrations in India' (*Kluwer Arbitration Blog*, 21 August 2019)

<http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/> accessed 17 April 2022.

<sup>65</sup> Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: *Adapting to the Digital Era: Challenges and Opportunities* (pp.92-109), World Trade Organization, at p.94.

<sup>66</sup> Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), at p.1.

use of digital dispute resolution in Africa. 'The quality of an institute depends on the incorporation of current changing dynamics and environmental challenges, and if institutions fail to keep pace with these changes, they will be perceived as increasingly irrelevant, failing to add value to society and shaping and grooming future leaders who can contribute in creative ways to accelerating sustainable economic development,' it has been correctly stated.<sup>67</sup> This, therefore, calls for investment in institutional frameworks that will ably overcome the challenges that come with digital economy, as far as management of the digital trade disputes is concerned.

Alternative Dispute Resolution practice is rapidly evolving-there is clearly a need to invest in Digital Dispute Resolution in Kenya and the rest of the world.

---

<sup>67</sup> Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.

## References

‘Blockchain Arbitration: The Future of Dispute Resolution’ (Foxmandal, 23 November 2021) <<https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/>> accessed 17 April 2022.

‘Blockchain, Smart Contracts And Arbitration - Technology - Turkey’ <<https://www.mondaq.com/turkey/fin-tech/967452/blockchain-smart-contracts-and-arbitration>> accessed 17 April 2022.

‘Broadband in Kenya | Broadband Strategies Toolkit’ <<http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya>> accessed 11 April 2022.

‘Digital Economy Agreements’ <<https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements>> accessed 16 April 2022.

‘Digital Trade - OECD’ <<https://www.oecd.org/trade/topics/digital-trade/>> accessed 16 April 2022.

‘Future Law Office 2020: Redefining the Practice of Law | Robert Half’ <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 10 April 2022.

‘Ground-Breaking Digital Dispute Resolution Rules Published’ (Walker Morris) <<https://www.walkermorris.co.uk/publications/ground-breaking-digital-dispute-resolution-rules-published/>> accessed 17 April 2022.

‘How Organizations Can Stay Ahead of Changing Privacy Laws’ (Digital Guardian, 22 August 2019) <<https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws>> accessed 10 April 2022.

‘Introduction to Information Security Management Systems (ISMS) - BMC Blogs’

<<https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/>> accessed 10 April 2022.

‘Kenya - Last Mile Connectivity Project II’

<<https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013>> accessed 11 April 2022.

‘Last Mile Connectivity Program Kenya - Inclusive Infrastructure’

<<https://inclusiveinfra.github.org/case-studies/last-mile-connectivity-program-kenya/>> accessed 11 April 2022.

‘Last Mile Project – Ministry of Energy’ <<https://energy.go.ke/?p=914>> accessed 11

April 2022.

‘New Technologies and the Legal Profession’ (nyujlb)

<<https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession>> accessed 10 April 2022.

‘Recent Trends in International Arbitration’ (Walker Morris)

<<https://www.walkermorris.co.uk/publications/recent-trends-in-international-arbitration/>> accessed 17 April 2022.

‘Study Heaps Praise on Revolutionary Huduma Centres’ (Daily Nation)

<<https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030>> accessed 11 April 2022.

‘The Benefits of Online Mediation’ (Mediation Center of Los Angeles | MCLA, 2

November 2020) <<https://www.mediationla.org/the-benefits-of-online-mediation/>> accessed 17 April 2022.

‘What Is Information Security Management?’ (Sumo Logic)

<<https://www.sumologic.com/glossary/information-security-management/>> accessed 10 April 2022.



Abdalla, A.G., Kiragu, J.K., Waswa, F.A., Ono, F.T., Kariuki, J.W. and Ikua, D.M., 'Effect of Huduma Centers (One Stop Shops) in Service Delivery - A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102.

Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated – Law Schools Are Trying to Stay Ahead of the Curve' (CNBC, 7 February 2020) <<https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html>> accessed 10 April 2022.

African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (African Development Bank - Building today, a better Africa tomorrow, 24 January 2020) <<https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report>> accessed 11 April 2022.

Ahmed U and Aldonas G, 'Addressing Barriers to Digital Trade' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2015).

Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (Daily Business Review) <<https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/>> accessed 10 April 2022.

Alternative Dispute Resolution Methods, Document Series No. 14, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September, 2000) <[http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document14/DocSeries14.pdf](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf)> accessed 17 April 2022.

Bansal R, 'Enforceability of Awards from Blockchain Arbitrations in India' (Kluwer Arbitration Blog, 21 August 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/>> accessed 17 April 2022.

Barefoot, K., Curtis, D., Jolliff, W., Nicholson, J.R. and Omohundro, R., 'Defining and Measuring the Digital Economy' (2018) 15 US Department of Commerce Bureau of Economic Analysis, Washington, DC.

Barnard-Ashton, P., Adams, F., Rothberg, A. and McInerney, P., 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

Chevalier M, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (*Kluwer Arbitration Blog*, 4 March 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/>> accessed 17 April 2022.

Ciuriak D and Ptashkina M, 'The Digital Transformation and the Transformation of International Trade' [2018] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB).

Disruptive Technology in the Legal Profession' (*Deloitte United Kingdom*) <<https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html>> accessed 10 April 2022.

Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31.

González JL and Jouanjean M-A, "Digital Trade: Developing a Framework for Analysis OECD." *Trade Policy Papers* 205 (2017).

Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on

Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <<https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521>> accessed 11 April 2022.

Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 <<https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 11 April 2022.

Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: *Adapting to the Digital Era: Challenges and Opportunities* (pp.92-109), World Trade Organization < [https://www.wto.org/english/res\\_e/booksp\\_e/adtera\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf)> accessed on 16 April 2022.

Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <<https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained>> accessed 10 April 2022.

Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016). Muigua, K., 'ADR: The Road to Justice in Kenya' *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.

Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Nairobi: Glenwood Publishers, 2017).

Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006).

Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17.

Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188.

Republic of Kenya, *Digital Economy Blueprint*, 2019. Available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf> [ Accessed on 16 April 2022].

Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675.

Samuel Omotoso, 'Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects' *Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects*

<[https://www.academia.edu/40663364/law\\_lawyers\\_and\\_the\\_social\\_media\\_in\\_the\\_21st\\_century\\_challenges\\_and\\_prospects](https://www.academia.edu/40663364/law_lawyers_and_the_social_media_in_the_21st_century_challenges_and_prospects)> accessed 10 April 2022.

Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 *International Journal of Scientific and Research Publications*.

Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (*Medium*, 19 July 2019) <<https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9>> accessed 10 April 2022.

SurrIDGE & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at [http://www.hg.org/articles/article\\_1530.html](http://www.hg.org/articles/article_1530.html)

Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 *Potchefstroom Electronic Law Journal*.

United Kingdom, Digital Dispute Resolution Rules, April 2021 <[https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech\\_DDRR\\_Final.pdf](https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf)> accessed on 16 April 2022.

United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <[https://unctad.org/en/PublicationsLibrary/dtlstict2016d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf) > 10 April 2022.

Usman W Chohan, 'Some Precepts of the Digital Economy' [2020] *SSRN Electronic Journal* 1 <<https://www.ssrn.com/abstract=3512353>> accessed 16 April 2022.

Watanabe, C., Naveed, K., Tou, Y. and Neittaanmäki, P., 'Measuring GDP in the Digital Economy: Increasing Dependence on Uncaptured GDP' (2018) 137 *Technological Forecasting and Social Change* 226.

Yeoh D, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (*Kluwer Arbitration Blog*, 29 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>> accessed 17 April 2022.

## **The Place of Mediation in Resolving Disputes in the Built Environment**

*By: Kenneth Wyne Mutuma \**

### **Abstract**

*Mediation as a mode of dispute resolution is not a novel practice. It has gained popularity in the resolution of various commercial disputes in Kenya. Just like any other type of commercial relationship, a construction contract is bound to bring about various forms of disputes in the course of the implementation of the contract goals and objectives. This paper will examine the use of mediation in the resolution of disputes in the built environment or otherwise referred to as the construction industry. The paper will begin by conceptualizing the built environment as well as what a construction contract would ideally contain. It will then explore the nature and causes of disputes that arises from the contracting stage as well as those that occur during the implementation of the contract. The above will have set a basis for the discussion on the current dispute resolution framework in the built environment with particular focus on Construction Adjudication. Thereafter the paper will analyze the place of Mediation in construction disputes and delve into its suitability for the same. Finally, the paper will seek to provide recommendations on the way forward with regard to the proper implementation of Construction Mediation in Kenya.*

### **1.0 Introduction**

The construction industry plays a key role in spurring economic growth. Other than providing construction facilities for the various sectors,<sup>1</sup> it creates employment opportunities and demand for goods and services required in the industry but produced in the manufacturing sector, such as cement, paint and steel. It also creates demand for services required in the industry but offered by

---

*\* PhD (UCT), LLM (UCT), LLB (Liverpool), B Arch Studies (UON), Senior Lecturer (University of Nairobi), Chartered Arbitrator, FCI Arb. Certified Secretary (ICS), Gov. Auditor, Advocate of High Court Kenya, Accredited Mediator of the High Court.*

<sup>1</sup> Hillebrandt, P. M. (2000). Economic Theory and the Construction Industry. London: Palgrave Macmillan UK.

the service sector, for example, construction financing through loans.<sup>2</sup> For this reason, the industry has inter-linkages with other sectors, creating interdependency relationships that affect the way these other sectors operate if the industry is not run efficiently.<sup>3</sup> One of the ways of achieving such efficiency is to ensure that many of the disputes it generates<sup>4</sup> do not stall growth in these other sectors.

## **2.0 Conceptualizing the built environment**

The built environment is said to refer, in general terms to the: manmade surroundings that provide the setting for human activity, ranging from the large-scale civic surroundings to the personal places.<sup>5</sup>

The built environment touches all aspects of our lives, encompassing the buildings we live in, the distribution systems that provide us with water and electricity, and the roads, bridges, and transportation systems we use to get from place to place. It can generally be described as the man-made or modified structures that provide people with living, working, and recreational spaces.<sup>6</sup>

It goes without saying that the relationships in the built environment or the construction industry emanate from a construction contract. A construction contract is an agreement between an employer (sometimes referred to as the client) and a contractor to construct, repair, modify, renovate or even demolish something in an agreed time frame, for an agreed price and to agreed

---

<sup>2</sup> Abwunza, A. A. "Development of A Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya" Doctor of Philosophy (Construction Project Management) Jomo Kenyatta University of Agriculture and Technology 2021

<sup>3</sup> *Ibid*

<sup>4</sup> Fenn, P., Lowe, D., & Speck, C. (1997). Conflict and dispute in construction. *Construction Management and Economics*, 15(6), 513-518. doi:10.1080/014461997372719.

<sup>5</sup> Sebastian Moffat & Niklaus Kohler (2008) Concept of the Built Environment as a Social-Ecological System, *Building Research & Information*, 36:3, 248-268

<sup>6</sup> United States Environmental Protection Agency, "What is the Built Environment? Available at: <https://www.epa.gov/smm/basic-information-about-built-environment> Accessed on 7th October, 2021



standards.<sup>7</sup> The contract is signed by both the employer and the contractor. As with any contract, once the construction contract is signed, both the contractor and the employer must follow the terms of the contract or face possible legal action.<sup>8</sup>

Joint Building Council (1999) standard contract is the most widely used building contract.<sup>9</sup> The contents of a valid construction contract are *inter alia*: standard definitions used in the contract, obligations of all parties to the contract; list of contract documents for example drawings, bills of quantities; contract bills and contract price; liability clauses; terms and conditions on access, possession of the site and commencement of works; architect's instructions; specification of goods, materials and workmanship; provisions on intellectual property rights; suspension of works; terms and conditions on variation of the contract; provisions on subcontracting and works by other persons engaged by the employer; payments; provisions on extension of time and consequences therein; provisions on termination of the contract by parties and provisions on settlement of disputes.

The built environment deals basically with the construction processes, parties involved in these processes as well as the means of resolving disputes that may arise within the course of the execution of the construction contract.

### **3.0 Who are the Stakeholders in the Built Environment?**

In order to fully understand how the built environment comes to be, it is important to know who exactly the stakeholders are involved in it. An stakeholders are, expansively speaking, : "*those groups or individuals with whom the organization interacts or has interdependencies...any individual or group who can*

---

<sup>7</sup> A Guide to Construction Contracts –Bowmans Available at:

<https://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-ConstructionContracts.pdf>  
Accessed on 7th October 2021

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid* at 2

*affect or is affected by the actions, decisions, policies, practices or goals of the organization".<sup>10</sup>*

In a construction project, the stakeholders comprise the owners and facility users, project management, team members, facilities managers, designers, shareholders, public administration, workers, subcontractors, services suppliers competitors, banks insurance companies, media, community representative, neighbours, general public, clients, regional development agencies. Each has certain influence at various points in the course of the project. While this influence is felt continuously, it will, majority of the times be at a set time.<sup>11</sup>

#### **4.0 Disputes in the Built Environment: Causes and Nature of Disputes in the Built Environment**

As seen above, the construction process may involve a number of parties and inevitably their interests or objectives more often than not tend to differ. There are instances in which the purpose of each party seems contradictory in achieving their goals which could lead to conflict. The conflict may be caused by the owner, consultants, contractors, contracts and specifications, human resources, and project conditions.<sup>12</sup>

Conflicts are inevitable in the construction industry due to differences in perceptions among the project participants. If conflicts are poorly identified and/or managed, they often quickly turn into disputes, which are among the major factors preventing the successfully project completion. It therefore becomes important to be aware of the causes of disputes in order to complete the construction project in the desired time, budget and quality.<sup>13</sup>

---

<sup>10</sup> Carroll, A.B. and Buchholtz, A.K. (2006). *Business & Society: Ethics and Stakeholder Management*

<sup>11</sup> "Stakeholder Management in the Construction Sector: Who are the Project Stakeholders?" Available at: <https://salineropampliega.com/2013/10/stakeholder-management-in-construction.html> Accessed on 7th October 2021

<sup>12</sup> Anita Rauzana, 'Causes of Conflicts and Disputes in Construction Projects' (2016) 13 IOSR Journal of Mechanical and Civil Engineering 44.

<sup>13</sup> *Ibid*

Having remarked that the implementation of construction projects is beset by many challenges, it is pertinent to note that the several indicators of successful project performance.<sup>14</sup> A project is considered successfully implemented if it is completed on schedule, within the set budget and technical specifications set.<sup>15</sup> To realise this, the above-named stakeholders ought to ensure that their roles and responsibilities mesh for the smooth running of the project with fewer hiccups than would be expected in light of the involvement of all those players.

Kumaraswamy<sup>16</sup> has summarized 20 common causes of construction disputes, including speed of construction, cost and quality control, technological advances, stringent building regulations and economic difficulties that becomes basics for many studies later regarding conflict and disputes in construction industry. Kumaraswamy & Yogeswaran<sup>17</sup> indicated in their study that the sources of construction disputes are mainly related to contractual matters, including variation, extension of time, payment, quality of technical specifications, availability of information, administration and management, unrealistic client expectation and determination.

These section shall analyze various causes of construction disputes below.

## **5.0 Contractual Problems**

A contract in construction industry can be defined as an agreement that specifies the work needed to be carried out by the contractors and the required payments for them by the employer.<sup>18</sup> In the contract, it contain the statement about work

---

<sup>14</sup> Omondi, Nallo "Stakeholder Engagement Conflicts and Implementation of Expansion and Modernisation Projects at Jomo Kenyatta International Airport in Nairobi, Kenya" Research Paper Submitted at the University of Nairobi, October 2018

<sup>15</sup> Mbaluka, H., &Bwisa, H. (2013). Delay factors in Construction Projects implementation in the Public. A case study of the Kenya Agriculture Research Institute Construction Projects. 15 (2)

<sup>16</sup> Kumaraswamy, M. M. (1997). Conflicts, claims and disputes in Construction. Journal of Engineering, Construction, Architecture Management, 4(2), 95-111.

<sup>17</sup> Kumaraswamy, M., & Yogeswaran, K. (1998). Significant sources of construction claims. International Construction Law Review, 15 (1), 144-160.

<sup>18</sup> San L. "A Study of Causes and Effects of Conflict in Construction Industry" Report, Faculty of Technology University of Malaysia Pahang, December 2013

specified to be done by contractors or sub-contractors, quality of work, time for completion the project task, payment, and responsibilities of parties involved towards the project.<sup>19</sup> The following are some of the contractual problems.

Ambiguities in construction contracts are the one of the key causes of conflicts in the construction industry. According to the Black's Law Dictionary, an ambiguity is an indistinctness or uncertainty of meaning of the expressing used in a written instrument.<sup>20</sup> Ambiguity in contract documentation may present itself as being unclear about the activities, responsibilities and the risks that the project at hand would involve. These are the core issues in a contract and if they are not clearly put across then inevitably conflicts arise.

Second, errors and omissions in the contract are another cause of disputes. These can present themselves as misinterpretations on the design plan, miscalculations on costs and possible timelines or omissions on the required contract material or processes.

Thirdly, are unclear payment terms. A construction contract should comprise of the payments that are required to be made to the different stakeholders in the construction process and the timelines or conditions in which these payments are to be made. A consequent delay in payments may result in delay in the project timelines as some of the contracted persons may choose to put down their tools until these payments are made.

### **5.1 Design/Scope Related Problems**

First, changes in the original design project scope. The Project Management Institute defined the project scope as the work that needs to be performed to deliver a unique product, service, or result.<sup>21</sup> It is formulated and agreed on by the stakeholders in the construction project in its early stages. Of course the

---

<sup>19</sup> O'Reilly, "Civil Engineering Construction Contracts" 2<sup>nd</sup> Edition Thomas Telford Ltd.

<sup>20</sup> 'AMBIGUITY Definition & Meaning - Black's Law Dictionary' (The Law Dictionary, 4 November 2011) <<https://thelawdictionary.org/ambiguity/>> accessed 2 August 2022

<sup>21</sup> Project Management Institute, "A Guide to the Project Management Body of Knowledge" (PMBOK GUIDE) Fourth Edition

design scope often undergoes different rectifications and updates when need be. The examples of scope changes are change in contract price and term, increase in building area, an increase or decrease in the number of floors.<sup>22</sup>Inevitably then, conflicts arise due to loss profit to contractors, delay operations and loss of revenues to the project developers due to the over budget from the accumulate impacts<sup>23</sup>.

Secondly, errors and omissions in the design scope just as in the contract drafting and implementation also lead to construction disputes. Errors and omissions can be identified during construction and also during the design and advertising phases. Once the project starts, it will costly to do correction if it is late to identify the design errors.<sup>24</sup> Conflicts arise when blame is thrown around when these errors and emissions become apparent since more often than not, there are a number of people who are involved and most do not take responsibility for them.

Thirdly, conflicts may arise due to differing site conditions which are indicated when the physical site conditions are different from what was originally shown in the contract as well as the construction plans. If the site conditions are unbearable they will affect the amount of work required for project implementation, the costs of the project in terms of the materials that would be required to rehabilitate it as well as the timelines allocated for the project due to the time taken to do the same.

## **5.2 Stakeholder Engagement and Interdependence Conflicts**

The factors affecting stakeholder conflict in projects include the gap between stakeholders' expectations and the expectations of the regulatory regimes.<sup>25</sup>

---

<sup>22</sup> San L (n19)

<sup>23</sup> Bonhomme-Delprato, D. (2008). Pricing Cumulative Impacts of Differing Site Conditions and Design Changes in Construction. *Cost engineering*, 50, 12-16.

<sup>24</sup> San L (n 19)

<sup>25</sup> Ekung, S.; Ogboji, M.; & Okonkwo, E. (2014). Extenuating Community Protest in Controversial Projects Scenarios in the Niger Delta-a Case for CSR, in Ibrahim, A.D. (ed) *Proceeding of the 1st NIQS Research Conference, Innovative and Sustainable*

Interdependence conflicts on the other hand arise when a project cannot be undertaken by a single organization either because of the scope, sensitivity, legal requirement or capital intensity and national interest in the project.<sup>26</sup>

Prioritization of stakeholders needs is an essential part of planning having in mind that multiple instance which may cause conflict given the complexity and competitiveness of the environment in which participants with different views, talents and levels of knowledge of the construction process work together. In this complex environment, participants from various professions, each of which has its own goals and each expects to make the most of its own benefits. The increase in the number of participants of different cultural background in the construction value chain means more business interactions and arguments, whether contractual or social, resulting in an increase in the number of construction disputes.<sup>27</sup>

### **5.3 Behavioural and Relationship Conflicts**

Behavioural problems and relationship conflicts emanate from human interaction, personality, cultures and professional background among the project team. Other issues in human behaviour such as individual's ambition, frustration, dissatisfaction, desire for growth, communication and level of power, fraud and faith are also causes of disputes<sup>28</sup> Each stakeholder in the construction process has their needs and goals. Therefore when something unanticipated or not properly recognized interferes with the fulfilment process, goals and security are jeopardized, communications become strained, and strains seem always to be followed by demands, refusals, other more intense strains, hard, then harder positions, and money losses.<sup>29</sup> These problems arise

---

Management of Building and Infrastructure Projects, International Conference Centre, 11(2)

<sup>26</sup> Omondi Omondi and Kimutai (n 15).

<sup>27</sup> Kumaraswamy, M and Yogeswaran, K (n 18).

<sup>28</sup> Vorster, M. C. (1993). Dispute prevention and resolution. Austin, Texas: Construction Industry Institute (CII).

<sup>29</sup> N. Jaffar, A. H. Abdul Tharim, and M. N. Shuib, 'Factors of Conflict in Construction Industry: A Literature Review' [2011] *Procedia Engineering* 20 193.

when there is lack of team spirit and poor communication among the project teams.<sup>30</sup>

#### **5.4 Uncertainty**

According to Galbraith<sup>31</sup> uncertainty is the difference between the amount of information required to do the task and the amount of information already processed by the organization. The amount of information needed depends on the task complexity that is the number of different factors that have to be coordinated or performance requirements such as time or budget constraints. Clearly, even though the necessary information about a project and the process undertaking it has been acquired, it is definitely difficult to influence all outcomes and thus this brings about uncertainty when it comes to project completion. The uncertainty may lead to unrealistic client expectation such as unrealistic contract duration, late instructions or information from architect or engineer, overdesign, inadequate site or soil investigation report, error and incomplete technical specifications and many others.<sup>32</sup>

#### **5.5 Leadership and Project Implementation Conflicts**

There are numerous empirical studies that vouch for appropriate leadership skills as the panacea for challenges bedeviling implementation of projects.<sup>33</sup> The studies suggest that there are key personal and professional attributes that a project manager should possess in order to resolve various challenges in the course of project implementation.<sup>34</sup> Examples are technical proficiency, persistence, ability to make informed choices, integrity, trustworthiness and ability to solve disputes. If a project manager lacks these and more skills and attributes that are meant to instil confidence in the team working with them then there are bound to be conflicts due to the lack of a leader's influence in the project.

---

<sup>30</sup> *Ibid*

<sup>31</sup> Galbraith, J. (1973). *Designing complex organizations*: Addison-Wesley.

<sup>32</sup> N. Jaffar, A. H. Abdul Tharim, and M. N. Shuib (n 30).

<sup>33</sup> Ahmed & Azhar (2008). *Cost Overrun in Construction Industry of Pakistan*. NED University of Engineering & Technology, Pakistan. Degree in Bachelor of Real Estate at The University of Nairobi

<sup>34</sup> Omondi Omondi and Kimutai (n 15).

## **6.0 Resolution of Construction Disputes: An Overview of the Conflict Resolution Mechanisms**

As mentioned before, conflicts are inevitable in project management and can be time consuming, expensive and unpleasant in that they can destroy the relationship between the contractual parties.<sup>35</sup> They can bog down and impede the smooth implementation of projects. Some scholars have argued that disputes and conflicts in projects divert valuable resources from the overall aim, which is completion of the project on time, on budget and to the quality specified.<sup>36</sup>

In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.<sup>37</sup>

Parties agree on the dispute settlement method to be applied in the event of a dispute during the contract negotiation stage. If the parties agree contractually to adopt certain procedures one party cannot insist on the use of other procedures, or even any other methods of implementing agreed procedures, without the consent of the other.<sup>38</sup> This section that follows will briefly discuss the dispute resolution mechanisms in the construction industry with particular focus on Adjudication as the main method employed.

### **6.1 Litigation**

This is an adversarial process where parties take their claims to a court of law adjudicated upon by a judge or a magistrate who renders a judgement binding

---

<sup>35</sup>Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis, op. cit.

<sup>36</sup>Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CI Arb, London, 2002), at p. 12.

<sup>37</sup>Sourced from <http://www.buildingdisputestribunal.com.nz/html> Accessed on 12<sup>th</sup> October 2021.

<sup>38</sup>See generally, Dispute Resolution Guidance at <http://www.ogc.gov.uk/documents/dispute-resolution.pdf>. Accessed on 9<sup>th</sup> October 2021



on the parties subject to rights of appeal. The judicial authority in Kenya is exercised by the courts and tribunals.<sup>39</sup>

### **6.1.1 Advantages and disadvantages of Litigation**

Although litigation is the most common and proffered mode of dispute resolution, the parties to the disputes have little or no control over the forum, process and outcome of the process and thus bringing about uncertainties. Unlike the ADR mechanisms that are interest based and aim at maintaining relationships between parties, litigation is factually a process that espouses a winner takes all approach and barely restores relationships between disputing parties. Nevertheless, litigation could be the preferred dispute resolution method if the dispute involves legal issues or point of law that are best determined by a judge.<sup>40</sup> There are properly laid down procedures and laws that govern the process and this in a sense provides confidence to litigants.

### **6.2 Dispute Resolution Boards**

A Dispute Resolution Board is a panel of three experts from construction industry who follow the progress of a construction project by visiting the site and attending project meetings.<sup>41</sup> Normally, it is set up at the outset of a contract and remains in place throughout its duration to assist the parties in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.<sup>42</sup>

There are three members in the DRBs and they are required to have particular expertise in the area the project entails, have no conflict of interests and not under any 3<sup>rd</sup> Party Agreement with any of the parties to the disputes. They are

---

<sup>39</sup> See Article 159 of the Constitution of Kenya, Government Printer, Nairobi. Muigua, K. "Dealing with Conflicts in Project Management" 2018

<sup>40</sup> Harmon, K.M.J. (2003), "Resolution of construction disputes: a review of current methodologies", *Journal of leadership and management engineering*, Vol.3 No.4, pp. 187- 201.

<sup>41</sup> Nur Ezan Rahmat and Nazirah Abdul Rahim "The Suitability of the Use of Mediation in the Settlement of Construction Disputes in Malaysia" Faculty of Law, Universiti Teknologi MARA (UiTM), 40450 Shah Alam, Selangor, Malaysia

<sup>42</sup> Sourced from <http://www.buildingdisputestribunal.co.nz/DRBS.html> Accessed on 21st October, 2021

appointed at the beginning of the project and are basically supposed to periodically visit the project site, be kept upraised on the progress of the same and therein resolve disputes that arise within the course of the project implementation. They can also be called upon to give advisory opinions on issues that have not yet escalated into disputes.<sup>43</sup>

Subsequent upon the appointment of the board, a third-party agreement is executed by the panellists and the project parties establishing the parties purpose, scope of work, responsibilities, duration of the agreement, payment for services, and termination of panellists.<sup>44</sup> The hearings are informal and “focus on the issues in dispute” with each party required to have representatives with direct knowledge of the problem, who are given a reasonable opportunity to present their case. After the close of the hearing and all requested information or documentation has been received, the DRB issues a comprehensively written finding as to how it believes the dispute should be resolved. Their findings and recommendations are non-binding and the parties are free to accept them, reject them, or keep negotiating based on the parties’ respective risk exposure, taking into account the DRB’s analysis.<sup>45</sup>

### **6.3 Construction arbitration**

The Bouver’s Law Dictionary defines arbitration as the investigation and determination of matters of differences between contending parties by one or more unofficial persons, called arbitrators or referees, chosen by the parties. Construction arbitration is based on the consent of the disputing parties, unless made compulsory by law.<sup>46</sup>

---

<sup>43</sup> Muigua (n 40)

<sup>44</sup> Wesam S., Mohammed W., and Bassam A. “A comprehensive review of disputes prevention and resolution in construction projects” Civil and Environmental Engineering Department, Universiti Teknologi PETRONAS, Seri Iskandar, Malaysia

<sup>45</sup> Muigua (n 40)

<sup>46</sup> Construction Industry Arbitration Commission-Philippines “Construction Arbitration: Mode of Settling Construction Disputes, A Primer on Construction Arbitration”

Consent can be manifested in three ways: if the contracting parties provide for an arbitration clause in the construction contract; if there is no arbitration clause in the contract, disputing parties may sign a joint statement of issues of the dispute(s) and/or a voluntary agreement to undertake construction arbitration and through any written agreement or submission to arbitration in the form of exchange of letters (by post or telefax), telexes, telegrams, emails, or any other mode of communication, even if unsigned by the parties, as long as the intent is clear that the parties agree to submit to arbitration.<sup>47</sup>

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules 1997, the Civil Procedure Act and the Civil Procedure Rules 2010. As lawyers enter the practice of arbitration, they apply delay tactics and import complex legal arguments and procedures into the arbitral process making arbitration increasingly formal and cumbersome.<sup>48</sup> The Civil Procedure Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court.

It is hardly practicable to describe arbitration in Kenya as an expeditious and cost effective process which can be used in settling disputes arising out of the construction contracts where project implementation and delivery is at the heart of the contract. In essence arbitration is really a court process since once it is over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.<sup>49</sup>

Advantages of arbitration include that party's freedom in choice of arbitrator; arbitrator expertise in the area of dispute; choice of party representative; flexibility; cost-effectiveness; confidentiality; speed and binding results.<sup>50</sup> Unlike court proceedings which are open to the public, arbitral proceedings in

---

<sup>47</sup>*Ibid*

<sup>48</sup> See Muigua, K., "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th - 6th May, 2011.

<sup>49</sup> Muigua (n 40)

<sup>50</sup> Muigua (n 40)

commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.<sup>51</sup>

#### **6.4 Construction adjudication**

Adjudication is defined under the Chartered Institute of Arbitrators (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.<sup>52</sup>

Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract)<sup>53</sup>, flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.<sup>54</sup>

##### **6.4.1 The Process of Adjudication<sup>55</sup>**

Adjudication is begun, by either party, by issuing a Notice of Adjudication which sets out the brief details of the dispute and the remedies requested by the referring party. The referring party then must arrange for the appointment of an Adjudicator, which can be, an Adjudicator named in the Contract, can be chosen by agreement or by independent nomination, and it must serve the referral on that Adjudicator within 7 days of the Notice of Adjudication.

The responding party will usually provide their response within 1-2 weeks of the referral. There would generally then be further submissions in the form of a reply, rejoinder and surrejoinder. At this stage, there may be a meeting between the parties and the Adjudicator; there may also be a site visit either as

---

<sup>51</sup> *Ibid*

<sup>52</sup> Rule 2.1 of The CI Arb (K) Adjudication Rules

<sup>53</sup> Rule 23.1. of The CI Arb (K) Adjudication Rules

<sup>54</sup> Rule 29 of The CI Arb (K) Adjudication Rules

<sup>55</sup> 'What Is Adjudication in Dispute Resolution?' (Warner Goodman) <<https://www.warnergoodman.co.uk/site/blog/news/what-is-adjudication-in-dispute-resolution>> accessed 2 August 2022.

part of that meeting or otherwise. Adjudication is designed to be a 28 day process from when the matter is referred to when a decision is made. The referring party may unilaterally extend this period by 14 days to 42 days and the parties may also agree extensions of any length.

The decision of an Adjudicator is said to be partially binding, meaning that it is binding until the matter is finally decided by a court or, where applicable, by arbitration. The effect of this is that an Adjudicator's decision can and will, more often than not, be enforced by the courts. If a party wishes to challenge an Adjudicator's decision, by way of litigation or arbitration, they will be expected to comply with it first before they may challenge it. A common example of this would be if an Adjudicator orders a sum of money to be paid, the court will expect that it is paid before it will finally determine the matter.

It is important to note that Adjudication is a costs neutral form of dispute resolution. This means that each party must pay their own legal costs; it is extremely rare for these to be payable by the other side. The Adjudicator's costs are however usually apportioned on the normal basis, which is that the losing party will pay them. This is not always the case, and is fact and issue specific.

#### **6.4.2 Advantages and Disadvantages of Construction Adjudication**

Kenya does not also have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators and other professional bodies.<sup>56</sup> These Adjudication Rules provide for the basic procedure for adjudication and for adjudication to be applicable, the subject construction contract must have an adjudication clause.<sup>57</sup> This is because at present, adjudication cannot be imposed by the law even where the contract in question is ideal for it. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of

---

<sup>56</sup> Muigua (n 40)

<sup>57</sup> See generally, Muigua, K., Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, A Paper presented at Nairobi Club on 23rd September, 2008.

arbitration under the Arbitration Act 1995. Rule 29 of the CIArb Adjudication Rules makes it feasible to refer the matter to arbitration or litigation. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process.<sup>58</sup> This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya.<sup>59</sup>

### **6.5 Suitability of mediation in construction disputes**

Mediation is a voluntary, non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.<sup>60</sup> It is a cost effective, flexible, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control and allows for personal empowerment and hence suitable in settling disputes to ensure effective project management and implementation. Mediation is particularly useful in projects because of the need to preserve the ongoing relationship between the parties and enhance communication.<sup>61</sup>

Examples of construction disputes that are most frequently mediated are: contractor's defective work; architect's defective plans and specifications; delays in project completion and other schedule issues; payment issues; changes to the scope of work; differing site conditions; property damage to the project; disputes arising from termination of a contractor or subcontractor.<sup>62</sup>

Construction claims are largely fact-based. Without an investigation and understanding of the facts underlying the dispute, a realistic assessment of the strengths and weaknesses of a party's position in the dispute cannot usually be

---

<sup>58</sup> Muigua, K. "Dealing with Conflicts in Project Management" 2018

<sup>59</sup> *Ibid* at 49

<sup>60</sup> Fenn, P (n 37).

<sup>61</sup> Muigua (n 58)

<sup>62</sup> Rahmat and Rahim (n 42).

made. It is only when the factual framework of the dispute is sufficiently understood that construction mediation should be considered.<sup>63</sup>

Mediation is a response to the financial cost and emotional stress to contractors, owners, developers, design professionals, and others who resort to arbitration or litigation to resolve their construction disputes. All too often, arbitration is not a low-cost alternative to litigation... Mediation allows the business executive to minimize legal costs, control the decision-making process, avoid most of the emotional stress, maintain business relationships, and provides the most rapid process for full and final resolution of disputes.<sup>64</sup> As many construction disputes also tend to be between businesses, the advantages of mediation as a confidential process and which can result in a confidential settlement, if the parties so wish, is useful in protecting brand image and reputation and not causing loss of customer or client confidence.<sup>65</sup>

According to a survey conducted by the Construction Industry Federation of Ireland (CIF), the preferred method of ADR to resolve construction disputes by those surveyed was mediation (52%), followed by conciliation (45%), and arbitration (3%).<sup>66</sup>

Mediation is particularly well suited to construction dispute because this dispute tends to occur as a result of a breakdown in communication between the parties and, as such, mediation provides the setting for parties to communicate and negotiate effectively with the presence of a neutral third party. It is submitted that, with regard to small, low value construction disputes,

---

<sup>63</sup>The Mediation of Construction Disputes and Win-Win Solutions Accessible at: <https://www.singleton.com/2016/06/the-mediation-of-construction-disputes-and-win-win-solutions> Accessed on 26th October, 2021

<sup>64</sup> Tarlow, "Mediation of Construction Disputes" (2008). Online article Available at: [www.ramco-ins.com](http://www.ramco-ins.com) Accessed on 23<sup>rd</sup> October 2021

<sup>65</sup> The Impact of Mediation in Construction Accessible at: <https://www.adrodrinternational.com/the-impact-of-mediation-in-construction> Accessed on 23<sup>rd</sup> October, 2021

<sup>66</sup> Lang "Dispute Resolution: Construction Industry Federation Experience to Date" Paper presented at the Irish Commercial Mediation Association Conference, Dublin, 6th March 2009. Available at [www.icma.ie](http://www.icma.ie) Accessed on 24<sup>th</sup> October 2021

mediation is strongly recommended and advised where conventional negotiation methods have failed.<sup>67</sup>

## **7.0 Way forward**

From the above analysis of construction mediation, its benefits cannot be gainsaid. Despite its development and its application, it is not a popular mode of dispute resolution just yet. Mediation techniques are useful for any type of construction claim from payment issues and material men lien issues to liquidated damage claims or defective design claims<sup>68</sup>, as well as other disputes as outlined in the previous section. Its applicability is vast and therefore a suitable avenue for dispute resolution especially in the initial stages of a dispute.

A major way of promoting its applicability in Kenya for the resolution of construction disputes is the inclusion of a mediation clause or a provision for the use of mediation in Construction Disputes. These clauses/provisions are drafted to stipulate that in the event of a dispute arising out of a construction contract, mediation shall be the first mode of dispute resolution adopted. This shall then popularize its use for construction disputes.

Despite the fact that the construction industry is one of the key economic drivers of the country and the fact that mediation is a court linked process, there's no comprehensive and integrated framework that provides for construction mediation. The second and equally important recommendation therefore would be to bolster the framework that would be useful in the promoting and guiding the use of construction mediation in Kenya.

## **Conclusion**

There is a need to have a streamlined and efficient conflict resolution mechanism in the construction industry. It will not only save the time and costs incurred as a result of the disruptions caused by these conflicts; but the amicable resolution of conflicts works to maintain and or repair the business relationships

---

<sup>67</sup> Rahmat and Rahim (n 42)

<sup>68</sup> The Importance of a Mediation Provision in a Construction Contract Available at: <https://cobblawgroup.net/blog/2019/04/10/the-importance-of-a-mediation-provision-in-construction-contracts>



between the parties. This in turn creates confidence in the parties and greatly contributes to the robust growth of the construction sector. Dispute resolution should therefore be placed at the forefront beyond the making of profits from these projects. The implementation of Mediation would be set to grow increasingly having considered its advantages in dispute resolution. There's more that needs to be done to make this a reality but there is hope for the future of Construction Mediation.

## References

*A Guide to Construction Contracts* (Bowmans)

<<https://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Construction-Contracts.pdf>>

Abwunza AA, 'Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya' (Thesis, JKUAT-COETEC 2021)

<<http://localhost/xmlui/handle/123456789/5424>>

Alaloul W, Hasaniyah M and Tayeh B, 'A Comprehensive Review of Disputes Prevention and Resolution in Construction Projects' (2019) 270 MATEC Web of Conferences 05012

'AMBIGUITY Definition & Meaning - Black's Law Dictionary' (The Law Dictionary, 4 November 2011) <<https://thelawdictionary.org/ambiguity/>>

Amy Ohlendorf, *Conflict Resolution in Project Management, Information Systems Analysis*

Bonhomme-Delprato D, 'Pricing Cumulative Impacts of Differing Site Conditions and Design Changes in Construction' [2008] undefined <<https://www.semanticscholar.org/paper/Pricing-Cumulative-Impacts-of-Differing-Site-and-in-Bonhomme-Delprato/ec19bc398e6cc460941b3f861dcd63f5258182a>>

Carroll, A.B and Buchholtz, A.K, *Business and Society: Ethics and Stakeholder Management* (Mason, Ohio: Thomson/South-Western 2006)

Constitution of Kenya, 2010

Construction Industry Arbitration Commission-Philippines "Construction Arbitration: Mode of Settling Construction Disputes, A Primer on Construction Arbitration"

Cullyer A, 'What Is Adjudication in Dispute Resolution?' (Warner Goodman) <<https://www.warnergoodman.co.uk/site/blog/news/what-is-adjudication-in-dispute-resolution>>

Dispute Resolution Guidance at <http://www.ogc.gov.uk/documents/dispute-resolution.pdf>

Ekung, S.; Ogboji, M.; & Okonkwo, E.. Extenuating Community Protest in Controversial Projects Scenarios in the Niger Delta-a Case for CSR, in Ibrahim, A.D. (ed) (2014) Proceeding of the 1st NIQS Research Conference, Innovative and Sustainable Management of Building and Infrastructure Projects, International Conference Centre

Fenn P, *Introduction to Civil and Commercial Mediation* (Workbook on Mediation, Chartered Institute of Arbitrators, 2002)

Fenn P, Lowe D and Speck C, 'Conflict and Dispute in Construction' (1997) 15 *Construction Management and Economics* 513

Galbraith JR, *Designing Complex Organizations*. (Addison-Wesley Pub Co 1973)

Harmon KMJ, 'Resolution of Construction Disputes: A Review of Current Methodologies' (2003) 3 *Leadership and Management in Engineering* 187

Hillebrandt PM, *Economic Theory and the Construction Industry* (Palgrave

Macmillan UK 2000) <<http://link.springer.com/10.1057/9780230372481>>

Institute PM, *A Guide to the Project Management Body of Knowledge: PMBOK Guide* (Project Management Institute 2008)

Irshad EM, 'Cost Overrun Factors in Construction Industry of Pakistan' [2008] NED University of Engineering & Technology, Pakistan <[https://www.academia.edu/29783031/Cost\\_Overrun\\_Factors\\_In\\_Construction\\_Industry\\_of\\_Pakistan](https://www.academia.edu/29783031/Cost_Overrun_Factors_In_Construction_Industry_of_Pakistan)>

Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya' (2008)

Kumaraswamy M, 'Conflicts, Claims and Disputes in Construction' (1997) 4 Journal of Engineering, Construction, Architecture Management 95

Kumaraswamy, M and Yogeswaran, K, 'Significant Sources of Construction Claims' (1998) 15 International Construction Law Review 144

Lang, 'Dispute Resolution: Construction Industry Federation Experience to Date' (2009)

Mbaluka, H and Bwisa, H, 'Delay Factors in Construction Projects Implementation in the Public. A Case Study of the Kenya Agriculture Research Institute Construction Projects'

Moffatt S and Kohler N, 'Conceptualizing the Built Environment as a Social-Ecological System' (2008) 36 Building Research & Information 248

Muigua K, 'Dealing with Conflicts in Project Management' (2018) 6 Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution. 1

N. Jaffar, A. H. Abdul Tharim, and M. N. Shuib, 'Factors of Conflict in Construction Industry: A Literature Review' [2011] Procedia Engineering 20 193  
Omondi NN and Kimutai G, 'Stakeholder Engagement Conflicts and Implementation of Expansion and Modernisation Projects at Jomo Kenyatta International Airport in Nairobi, Kenya' <<https://ir-library.ku.ac.ke/handle/123456789/22260>>

O'Reilly M, *Civil Engineering Construction Contracts 2nd Edition* (Revised ed edition, Thomas Telford Ltd 1999)

“Overview of Arbitration and Mediation in Kenya”; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR)

Mechanisms for Labour Relations in Kenya, Held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6 Th May, 2011.’

Rahmat NE and Rahim N, ‘The Suitability of the Use of Mediation in the Settlement of Construction Disputes in Malaysia’ (2018)

Rauzana A, ‘Causes of Conflicts and Disputes in Construction Projects’ (2016) 13 IOSR Journal of Mechanical and Civil Engineering 44

San L, ‘A Study of Causes and Effects of Conflict in Construction Industry’ (Faculty of Technology University of Malaysia Pahang 2013)

‘Stakeholder Management in the Construction Sector’  
<<https://pmideas.es/2013/10/stakeholder-management-in-construction.html>>

Tarlow. A. L, ‘Mediation of Construction Disputes’ <[www.ramco-ins.com](http://www.ramco-ins.com)>  
‘The Impact of Mediation in Construction’ (22 March 2019)  
<<https://www.adrodrinternational.com/the-impact-of-mediation-in-construction>>

‘The Importance of a Mediation Provision in Construction Contracts’  
<<https://cobblawgroup.net/blog/2019/04/10/the-importance-of-a-mediation-provision-in-construction-contracts/>>

‘The Mediation of Construction Disputes and Win-Win Solutions’  
<<https://www.singleton.com/2016/06/the-mediation-of-construction-disputes-and-win-win-solutions/>>

US EPA O, ‘Basic Information about the Built Environment’ (13 April 2017)  
<<https://www.epa.gov/smm/basic-information-about-built-environment>>

Vorster, M. C., ‘Dispute Prevention and Resolution. Austin, Texas: Construction Industry Institute (CII)’

The CI Arb (K) Adjudication Rules  
<http://www.buildingdisputestribunal.com.nz/html>

*The Place of Mediation in Resolving Disputes in the  
Built Environment: **Kenneth Wyne Mutuma***

**(2022)I0(3) Alternative Dispute Resolution)**

<http://www.buildingdisputestribunal.co.nz/DRBS.html>

## **The Overriding Objective in English Arbitration Act: Some Key Lessons**

*By: Wilfred A. Mutubwa*

### Case Summary

#### Parties

<u>Claimant/ Respondent</u>	<u>Respondent/ Appellant.</u>
AIC Ltd	Federal Airports Authority of Nigeria

#### Facts in Issue

The Matter Arises from an attempt by the Appellant (AIC) to enforce a 2010 Nigerian arbitral award against the Respondent (FAAN) against its assets in England, under the New York Convention 1958 pursuant to sections 66 and 101 of the Arbitration Act 1996.

AIC sought and obtained an order in its favor to enforce the award from the English High Court.

This was subsequently overturned on the basis that FAAN would provide security in the form of funds by a set date. However, FAAN was unable to do so, and despite extensions being given, the security was not provided in time. Consequently, the High Court gave an oral order enabling AIC to enforce the award.

Before the order could be drawn up and sealed, FAAN provided the bank guarantee and successfully applied to have the order rescinded on the basis that even though the order had been given verbally, it had not been sealed or "perfected" and so was not a final order.

AIC appealed to the Court of Appeal.

The Court of Appeal found in favor of AIC and re-instated the order enabling AIC to enforce the award and also the guarantee, which despite being deposited late, had been provided. AIC called on the guarantee, which was paid in full. Consequently, FAAN appealed to the UK Supreme Court.

### **Issues**

The Supreme Court considered that it has 2 roles in this dispute:

1. To determine whether the judge and/or the Court of Appeal went wrong in their application of the relevant principles to the facts.
2. If they did, to re-exercise the judge's original discretion afresh, on the basis of the facts as they currently are.

### **Rules**

1. CPR 1.1 (1) sets out the Overriding Objective in English litigation proceedings, which is namely to "deal with cases justly and at proportionate cost."
2. Re L (Children) decision by Baroness Hale of Richmond: Power to reverse can be exercised before an order is sealed but it ought to be weighed to ensure justice is delivered.
3. The Denton Test which requires courts to;
  - a) Identify and assess the seriousness and significance of the non-compliance with court directions.
  - b) Consider why the breach occurred.
  - c) Evaluate all circumstances of the case so that the application is dealt with fairly.

### **Analysis**

In reaching its judgment the Supreme Court considered:



### **A. The Basis On Which the Courts Should Review and Vary Judgments and Orders Made but Not Sealed;**

The Supreme Court endorsed the approach taken by *Baroness Hale of Richmond in re L (Children)* which involved a Preliminary Finding in a matter regarding the power to reverse a decision.

The Supreme Court considered that the Civil Procedural Rules (CPRs) and the Overriding Objective had to be applied in determining the approach to be taken when considering the reversal of a decision.

CPR 1.1 (1) sets out the Overriding Objective in English litigation proceedings, which is namely to "deal with cases justly and at proportionate cost".

The Supreme Court determined that finality was a fundamental issue when considering whether to overturn a judgment or order already made but not sealed. It preferred the reliance on finality to the Court of Appeal's two-stage test.

The Supreme Court found that the Court of Appeal had not given sufficient weight to the question of finality, and it, therefore, decided to exercise its discretion to review the terms of the order.

The judgment recognized that the bank guarantee was provided by FAAN within minutes of the order being made. This amounted to an important change in circumstances, one sufficient enough to depart from the principle that a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones" set down in earlier authorities.

### **B. The Application of the Denton Test on Relief of Sanctions**

The Supreme Court determined that the order giving leave to enforce the award was in effect a sanction on FAAN for their failure to provide the bank guarantee in time. As such, it fell within the remit of the Denton test on relief of sanctions.

In looking at whether the three stages of the Denton test were satisfied, the Supreme Court held:

- i. The failure to provide the guarantee in time was a very serious breach, as required under Denton;
- ii. There was no good reason for the failure to provide the guarantee;
- iii. That in so far as the third stage was concerned, FAAN's eventual provision of the guarantee and its ongoing arbitration appeal proceedings in Nigeria were such that in the circumstances relief should be granted to FAAN, and so ordered that the enforcement of the award be stayed, pending the outcome of the Nigerian arbitration appeal proceedings.

## **Judgement**

**The Supreme Court gave its ruling as follows:**

1. It set aside the order allowing AIC to enforce the award;
2. It stayed AIC's application to enforce the award until the appeal proceedings in Nigeria are concluded; and
3. It Allowed AIC to retain the money it has already recovered under the guarantee provided by FAAN.

## **Alternative Dispute Resolution and Arbitrability of Public Procurement Proceedings Disputes in Kenya: A Feasibility or Pious Aspirations?**

**By: Ibrahim Kitoo\***  
**&**  
**Kariuki Muigua\***

### **Abstract**

*Alternative Disputes Resolution (ADR) and arbitration remains a popular, preferred and recognised form of disputes resolution in several commercial transactions. Indeed, the Constitution of Kenya, 2010<sup>1</sup> under Article 159(2)(c) recognises and encourages utilisation of arbitration, among other ADR mechanisms like reconciliation, mediation and traditional disputes resolution, by the Kenyan courts and tribunals in resolving disputes.*

*With a multitude of public procurement proceedings disputes both in number and sheer value, constrained capacity of the Public Procurement Administrative Review Board (PPARB)<sup>2</sup> members and the courts, the limited timelines within which public procurement matters ought to be determined and challenges brought by the fact that*

---

**\* Advocate of the High Court of Kenya, Commissioner for Oaths & Notary Public, Certified Secretary, Arbitrator, Governance, Ethics, Audit, Risk & Compliance Specialist, Public Procurement, Public Private Infrastructure Partnerships (PPPs) and Projects Management Professional.**

**\* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law.**

<sup>1</sup> Promulgated on 27<sup>th</sup> August 2010.

<sup>2</sup> This is the central independent public procurement appeals review board as established under and whose functions and composition are as per Sections 27, 28 and 29 of the Public Procurement and Asset Disposal Act, 2015.

*once a letter of award has been issued by a Public Entity<sup>3</sup> (PE) to a successful bidder, it cannot be withdrawn save through the determination of the PPARB and the courts, application of ADR including arbitration regarding public procurement proceedings disputes is now a live subject of much debate. The debate is majorly informed by the strategic advantages and benefits often associated with ADR and how ADR aligns (if at all) with the provisions of the PPADA, 2015, the Arbitration Act, of Kenya, among others. To this extend statutory interpretation and public policy questions arise and are interrogated.*

*This treatise seeks to benchmark the Kenya public procurement law provisions with the practice and provisions of UNCITRAL Model law<sup>4</sup>, prevailing laws and practice in identified jurisdictions like Poland and the United Kingdom (UK), and ultimately returns a verdict, conclusions and recommendations on the applicability and efficacy of ADR/arbitration as a mechanism of resolving disputes arising out of public procurement proceedings in Kenya. It is argued here that amidst the controversy, there no doubt exists host of opportunities that could be explored towards having in place an optimal and fit-for-purpose legal and policy framework for the application and mainstreaming of ADR/arbitration to shore up the already existing disputes resolution structures and mechanisms under the PPADA, 2015.*

**Keywords:** *Alternative Disputes Resolution; Arbitration; Constitution of Kenya; Public Procurement; Public procurement and Asset Disposal Act, 2015; Public Procurement Administrative Review Board; High Court; Court of Appeal; Public Policy; UNCITRAL Model Law on Public Procurement.*

---

<sup>3</sup> Public Entity as defined under Section 2 of the Public Procurement and Asset Disposal Act, 2015.

<sup>4</sup> The Model Law is designed to help states reform or develop their public procurement systems. UNCITRAL, as the name suggests, is actually an organisation concerned with promoting trade, and the rationale for adopting the Model Law – as with the adoption of other UNCITRAL instruments was that trade with governments will improve if countries move towards a more standardised approach to public procurement. The main overarching purpose of the law has been to help states in achieving their domestic procurement objectives of value for money, efficiency, probity etc.

## **1.0. Introduction**

*“The courts of this country should not be the places where resolution of disputes begins. They should instead be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.” – Sandra Day O’Connor.<sup>5</sup>*

Alternative Disputes Resolution (ADR) is an “umbrella” terms that refers to various methods used to resolve disputes without resorting to litigation<sup>6</sup> the basic premise being that that litigation can and should be avoided whenever possible. The American Bar Association<sup>7</sup> defines ADR as, “an array of non-binding and binding dispute resolution methods that involve the use of third – party neutrals to aid in resolving controversies via a structured settlement process”. ADR seeks to resolve disputes expeditiously, amicably, with least controversy and often with less cost compared with litigation by keeping the process away from litigating counsels, judges and courts.

Article 159 of the Constitution of Kenya, provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.<sup>8</sup> It further provides that in exercising judicial authority, the courts and tribunals shall be guided by among other principles, alternative forms of disputes resolution, these being reconciliation, mediation, arbitration and traditional disputes resolution and that these principles shall be promoted.<sup>9</sup> Thus, courts are entering into an era where they are required as a matter of law to increasingly incorporate ADR

---

<sup>5</sup> Justice Sandra Day O’Connor was the first woman to serve in the US Supreme Court and was appointed to the Supreme Court by President Ronald Reagan, and served from 1981 until 2006. Following her retirement from the Court on January 31, 2006, Justice O’Connor remained active as a tireless advocate for judicial independence and the Rule of Law throughout the world. In recognition of her lifetime accomplishments, President Barack Obama awarded Justice O’Connor with the nation’s highest civilian honor, the Presidential Medal of Freedom, on August 12, 2009.

<sup>6</sup> Nolan-Haley, 1992.

<sup>7</sup> (ABA, 1999).

<sup>8</sup> Article 159(1) of the Constitution of Kenya.

<sup>9</sup> Article 159(2)(c) of the Constitution of Kenya.

mechanisms in settling disputes. This expanded arbitrability scope has the implication of integrating more matters into the scope of ADR.<sup>10</sup>

For public procurement proceedings disputes purposes, ADR can broadly be construed to mean the use of any of the above methods to resolve a dispute with a bidder as a result of a public procurement process. The concept of ADR as an alternative to litigation is globally accepted and has become institutionalised as the primary source for conflict resolution in many judicial systems<sup>11</sup>. There however exists very little quantitative research to measure its acceptance and use by procurement and review board officials, judges, and courts of law generally in resolving public procurement proceedings related disputes.

Considering the fact that public procurement process is conducted under the guardrails of the PPADA, 2015 with other parties like the successful bidder and not just the aggrieved bidder and the procuring entity, questions abound as to the practicality and efficacy of ADR including arbitration in resolving disputes arising out of public procurement proceedings. Indeed, and despite ADR's popularity and appealing qualities as a mechanism for resolving other commercial disputes including disputes arising out of signed public procurement contracts, it remains to be seen how practical and effective it is for ADR/arbitration to be used for resolution of disputes arising out of public procurement proceedings.

The purpose of this paper is to thus interrogate the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter conveniently referred to as PPADA, 2015) on public procurement proceedings disputes and to what

---

<sup>10</sup> Dr. Kariuki Muigua, *Emerging Jurisprudence in the law of Arbitration in Kenya: Challenges and Promises*, available at

<http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf>. (accessed on 29/07/2022). The author posits that there are more issues and new problems to deal with in that even as arbitration takes shape in Kenya, it must be consistent with the other laws of the land.

<sup>11</sup> Shamir Yona, *Alternative Dispute Resolution Approaches and Their Application*, Israel Center for Negotiation and Mediation (ICNM).

extent (if any) it encompasses and facilitates ADR/arbitration. The paper examines and gauges ADR's/arbitration efficacy, acceptability and applicability in resolving public procurement proceedings related disputes.

## **2.0. Interrogating Arbitration & Arbitrability**

### **2.1. Arbitration**

The Arbitration Act, 1995<sup>12</sup> defines arbitration to mean – *any arbitration whether or not administered by a permanent arbitral institution*. Thus, and going by this definition, it is important to note that the Arbitration Act, encompasses both institutional and *ad hoc* arbitration. In the absence of a statute or regulation compelling arbitration, arbitration is a matter of contract and a party cannot be forced to arbitrate any claim the party has not agreed to submit to arbitration.<sup>13</sup> In binding arbitration (usually referred simply as “arbitration”), the arbitrator’s decision is final and binding on the parties. The arbitrator hears the evidence from each side and renders a decision that is normally binding on the parties. The procedure is normally less formal than a judicial process.

Arbitration can provide a prompt and efficient method for resolving disputes without the expense, delays, or complications that are inherent in litigation. In most instances, arbitration is able to produce a decision more quickly than the courts are capable of accomplishing, and it can function at a lower cost than litigation. The informal atmosphere of the arbitration may, in some cases, promote goodwill in a dispute, thus preserving or sustaining a long-term business relationship. In some instances, judges may lack relevant expertise in commercial transactions. In this case, and especially in commercial disputes, arbitrators can be chosen who are familiar with the practices and customs of the parties. Another advantage is that it affords greater privacy and confidentiality.

---

<sup>12</sup> No. 4 of 1995, Chapter 49, Laws of Kenya, Revised Edition 2012 [2010]

<sup>13</sup> *AT & T Technologies, Inc. – V – Communications Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89L .Ed.2d 648, 121 L.R.R.M. (BNA) 3329, 104 Lab. Cas. (CCH) 1178 (1986).

Arbitration is not without disadvantages though. It is noteworthy that there are limitations that emerge in the application and practice of law of arbitration in disputes settlement in Kenya. These limitations range from mere technicalities to core ones, touching on the substantive as well as procedural law on arbitration.<sup>14</sup>

## **2.2. Arbitrability**

A dispute is arbitrable if it is 'capable of settlement by arbitration'.<sup>15</sup> This definition implies that there are disputes which are incapable of resolution by arbitration. Disputes may be non-arbitrable owing to public interest, public policy and the need for judicial protection.<sup>16</sup> As a consensual process, arbitration can be utilised as a dispute resolution process only if parties expressly or by implication<sup>17</sup> consent to use the process.<sup>18</sup>

The question whether a dispute is capable of settlement by arbitration can thus, and in the views of Joseph Mante<sup>19</sup>, which I do fully associate myself with, be answered by looking at four different aspects of the arbitration process namely the subject matter of the arbitration, the existence or otherwise of an arbitration agreement, the scope of the agreement and the capacity of the parties.

---

<sup>14</sup> Dr. Kariuki Muigua, *Emerging Jurisprudence in the law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (accessed on 29/07/2022), p.4.

<sup>15</sup> See the New York Convention (n3), Articles II (1) and V (2)(a); the UNCITRAL Model Law (n2) Articles 34(2)(b) and 36(1) (b)(i).

<sup>16</sup> Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 82.

<sup>17</sup> Situations where consent is implied. See e.g. *Stellar Shipping Co. LLC – V – Hudson Shipping Lines* [2010] EWHC 2985; [2012] 1 C.L.C. 476 where a guarantor of an agreement containing an arbitration clause was held to be bound by the clause even though it was not party to the original agreement and so had not expressly consented to the arbitration clause therein. See also Park, William W. *Non-signatories and International Contracts: An Arbitrator's Dilemma* (OUP 2009)

<sup>18</sup> An exception here will be statutory arbitrations.

<sup>19</sup> Mante, J. 2015, *Arbitrability and Public Policy: An African Perspective*. Presented at the Society of legal scholars conference, 2015, 1 – 4 September, 2015. Held on OepnAIR (online). Available from: [openair.rgu.ac.uk](http://openair.rgu.ac.uk).



In both domestic and international arbitration, states have the prerogative of determining what subject matters are capable of settlement by arbitration within their respective jurisdictions. This position is supported by provisions from two key instruments on international commercial arbitration namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC) and the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (the Model Law).<sup>20</sup> This means that a subject matter arbitrable in one jurisdiction may not automatically be arbitrable in another jurisdiction.

Arbitration in Kenya is governed by the Arbitration Act, No. 4 of 1995. Like the UNCITRAL Model Law on International Commercial Arbitration, the Arbitration Act of Kenya does not define arbitrability or list disputes that are or are not arbitrable. Rather, Section 3 provides that parties may submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. There however exists some limitations created looking at the provisions of Section 35(2)(b) read with 37(1)(b) of the same Act.<sup>21</sup> For instance, Section 35(2)(b) provides for the grounds the High Court may set aside an arbitral award. These are:- (i) if the subject matter is not one capable of settlement by arbitration under the Laws of Kenya and; (2) if the award is in conflict with the public policy of Kenya. Section 37(1)(b) provides for the same as grounds for the refusal to recognise or enforce arbitral awards.

Conventionally, instances of non-arbitrable disputes include those relating to rights and liabilities arising out of criminal offences for instance under the Penal Code.<sup>22</sup> These instances pertain to actions *in rem*, in essence rights exercisable

---

<sup>20</sup> See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V (2) (a) and the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006), Articles 1(5) and 34(2)(b)(i).

<sup>21</sup> The two Sections are a replication of Articles II (1) and (V)(2) of the New York Convention.

<sup>22</sup> Cap. 63, Laws of Kenya.

against the world at large and are principally adjudicated by public fora like courts or tribunals.

On the other hand, action *in personam* relates to action which determines the rights and interests of the parties themselves in the subject matter of the dispute. Generally, all disputes relating to rights *in personam* are ‘compromisable’ and amenable to alternative disputes resolution including arbitration.

### **3.0. Disputes Resolution Mechanisms and Structures Under the Public Procurement and Asset Disposal Act, 2015**

The PPADA, 2015 outlines the procedures for efficient procurement by public entities. It as well provides an elaborate dispute resolution avenues and structures to resolve public procurement proceedings disputes.

#### **3.1. The Public Procurement Administrative Review Board (the PPARB)**

It is trite law that courts and decision-making bodies such as the PPARB can only act in cases where they have jurisdiction. On what constitutes jurisdiction, Nyarangi JA stated as follows in the locus classicus case of *The Owners of Motor Vessel “Lillian S” – Vs – Caltex Oil Kenya Ltd*<sup>23</sup> stated thus:-

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it....The limits of this authority are limited by the statute, charter, or commission under which the courts constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal depends on the existence of a particular state of facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision, amounts to*

---

<sup>23</sup> [1989]

nothing. Jurisdiction is everything, without it the court has no power to make one more step but to down its tools. jurisdiction must be acquired before judgment is given. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings" (Emphasis is ours]

Similar views have been held in the case of *Kakuta Maimai Hamisi – V– Peris Pesu Tobiko & 2 Others*<sup>24</sup> the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:-

*"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any juridical proceedings is concerned. It is a threshold question and best taken at inception. It is a definitive and determinative and prompt announcement on it, once it appears to be in issue, is a desideratum imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in cul-de-sac. Courts, like nature must not act and must not sit in vain..."*

The PPARB is established under Section 27<sup>25</sup> of the PPADA, 2015 and is charged with admitting, reviewing, hearing and determining tendering and asset disposal disputes.<sup>26</sup> Parties that are allowed to invoke the jurisdiction of the PPARB are limited to a candidate or tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach at any stage of the procurement process.<sup>27</sup> In emphasizing the critical, specialised role and powers of the PPARB, the Court of Appeal in *Kenya Pipeline Co. Limited – V – Hyosung Ebara Co. Ltd & 2 Others*<sup>28</sup> at page 9 stated thus:-

*"The Review Board is a specialised statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach*

---

<sup>24</sup> [2013] eKLR

<sup>25</sup> Section 227- Establishment of Public Procurement Administrative Review Board.

<sup>26</sup> Section 28 - Functions of the Review Board.

<sup>27</sup> Section 167(1) of the PPADA, 2015.

<sup>28</sup> [2012] eKLR

*of duty by procurement entity. It follows that its decisions in matters within its jurisdiction should not be lightly interfered with."*

### **3.2. The Review, Judicial Review and Appeal Mechanism & Process**

The application for review should be made within **fourteen (14) days** of the notification of the award or the date of occurrence of the alleged breach at any stage of the procurement process.<sup>29</sup> The PPARB has up to **twenty-one (21) days** from receipt of the request to complete the review and in no case should any appeal under the Act stay or delay the procurement process beyond the stipulated time under the Act.<sup>30</sup>

The PPARB is expected to complete its review within **twenty-one (21) days** of receipt of the request. The Act further states that appeals under the Act should not delay the procurement process beyond the time mandated by the Act.<sup>31</sup> Upon completion of review the PPARB has the power to annul anything the accounting officer of the procuring entity has done in the procurement proceedings, give directions to the accounting officer of a procuring entity with respect to anything to be done or done in the procurement proceedings, substitute the decision of the PPARB for any decision of the accounting officer of the procuring entity in the procurement or disposal proceedings, order payment of costs as between parties to the review in accordance with the scale as prescribed and order termination of the procurement process and commencement of a new procurement.<sup>32</sup>

---

<sup>29</sup> Section 167(1) - Request for a review. In compliance with this provision, the PPARB has in a plethora of cases held that public procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before it at the earliest, and within the strict timelines provided under the Public Procurement and Asset Disposal Act, otherwise their request for review, juridical review or appeal will not be entertained for being guilty of laches.

<sup>30</sup> Section 171 – Completion of review.

<sup>31</sup> Section 171 of the PPADA, 2015 - Completion of Review

<sup>32</sup> Section 174 of the PPADA, 2015 - Powers of the Review Board.

Decisions made by the PPARB are considered final and binding on the parties unless judicial review is initiated within **fourteen (14) days** from the date of the Review Board's decision.<sup>33</sup> A party to the review that is aggrieved by the decision of the Review Board may file judicial review proceedings to the High Court, whose decision as a rule of the thumb must be rendered within **forty-five (45) days** of the judicial review application.<sup>34</sup> A party that is aggrieved by the decision of the High Court may lodge an appeal before the Court of Appeal within **seven (7) days** of the decision and the Court of Appeal shall make their decision within **forty-five (45) days** and **the decision shall be final**<sup>35</sup>. The

---

<sup>33</sup> Failure to file the Judicial Review within these timelines renders any filing fatally defective. This has been the decision in the *High Court of Kenya Judicial Review Application No. E057 of 2022 – Tsavo Oilfields Limited – V – Public Procurement Administrative Review Board & Another (the Accounting Officer, Kenya Electricity Generating Company PLC)*.

<sup>34</sup> Section 175(3) of the PPADA, 2015. Reference is made to the Court of Appeal decision in *Aprim Consultants – V – Parliamentary Service Commission & Another* (Civil Appeal No. E039 of 2021) whereby the Court of Appeal declared a nullity a High Court Judicial Review decision made outside the statutory timelines of forty – five (45) days. The said decision declared bad law the decisions by Justices Odunga and Aburili in *R – V – Kenya Revenue Authority Ex-Parte Webb Fontaine Group & 3 others* [2015] eKLR and *R – V – Public Procurement Administrative Review Board & Another Ex Parte Kleen Homes Security Services Limited* [2017] whereby the judges expressed themselves as vested with jurisdiction to continue and make a determination on judicial review matters despite the clear provisions of Section 175(3) of the PPADA. The *Aprim* decision has been cited with approval in subsequent decisions like *HCC Nairobi Judicial Review No. E156 of 2021 (The Joint Venture of Lex Oilfield Solutions Limited & CFAO Limited – V – The PPARB & The Accounting Officer, Kenya Electricity Generating Co. PLC, H. Young & Co. (E.A) Limited and also JR No. E1155 of 2020 (Republic – V – Public Procurement Administrative Review Board & 2 Others Ex Parte Express Automation Limited)*.

<sup>35</sup> Section 175(4) of the PPADA, 2015. For instance, in the High Court of Kenya at Eldoret, Misc. Judicial Review Application No. E002 of 2020 (*the Republic & Moi Teaching and Referral Hospital – V – The Public Procurement Administrative Review Board; The Consortium of Rentco Africa Limited & Pharmaken*), the High Court (at page 5 – 6) stated that section 175 of the PPADA has not made any statutory provisions for the enlargement of time, within which an applicant may out of time file an application for review; where such applicant has failed to file such an application within the permitted fourteen (14) days and additionally, the 2010 Constitution of Kenya has not provided for the period within which an applicant may be allowed by the court to file out of time an application for judicial review proceedings. In the absence of enabling constitutional and/or statutory provisions, a court of law is not allowed by law through interpretation, to allow an

finality of the decision of the Court of Appeal as stipulated under section 174(4) of the PPADA, 2015<sup>36</sup> is in our view aimed at accelerating timely disposal of public procurement disputes proceedings, putting an end to protracted litigation and paving the way for the implementation of government projects.

Finally, in the event that both the High Court and the Court of Appeal fail to make a decision within the prescribed timelines, as described above under the PPADA, 2015, then the decision of the Review Board shall be binding on all parties.<sup>37</sup>

#### **4.0. Challenges to the ADR/Arbitrability of Tender Proceedings Disputes**

The path to growing consensus of ADR/arbitration as a mode of resolving disputes arising out of public procurement proceedings is not without hurdles. ADR/Arbitration is yet to gain traction in resolving such disputes and the primary reasons can be identified as follows: -

---

aggrieved applicant to file judicial review out of time. In the words of the court in *Republic – V – PPARB & Another, ex parte, Teachers Service Commission*,<sup>35</sup> a court of law cannot go round the legislative edict of section 175(1) of the PPADA by craft or innovation. Indeed, the constitutionality, propriety and legality of the statutory timelines set out in Section 175(1) of the PPADA vis – a vis the limitation on access to justice under the Constitution, was adjudicated upon in the *Teachers Service Commission* case above, and in the *Republic – V- PPARB & Another, ex parte, Wajir County Governor*, and the courts in those two cases found no conflict.

The court further held that it should be borne in mind that the constitutional right of access to courts is not an absolute right rather it is one of those rights that may be limited in terms of article 24 of the Constitution and that the only rights that cannot be limited are those set out in article 25 of the Constitution. The Court made a determination that the limitation imposed by Section 175 of the PPADA in requiring an aggrieved party to file judicial review proceedings within fourteen (14) days is not in conflict with the Constitution and held that the purpose of the said limitation is as per the Teachers Service Commission decision geared towards expeditious resolution of procurement disputes and that a further justification on the limitation is towards reducing prolonged litigation with its attendant monetary expenses; which is not conducive to investors who transact commercial business in the country.

<sup>36</sup> Barring any appeal to the Supreme Court under Article 163(4)(b) of the Constitution on the basis of the matter being of general public importance.

<sup>37</sup> Section 175 (5) of the PPADA, 2015.

#### **4.1. The PPADA, 2015 does not expressly provide for ADR/Arbitration**

Save for disputes arising out of signed public procurement contracts, a literal interpretation of the PPADA, 2015 easily yields to a conclusion that the Act does not recognise the utilisation and application of ADR/arbitration as a dispute resolution mechanism in public procurement proceedings disputes. This is before the matter is referred for review to the PPARB or even when the same is under consideration by the PPARB. In essence, the Act only recognises review, judicial review and appeal as the preferred statutory disputes resolution methods of such disputes. All these mechanisms fall under the realm of litigation and not ADR/Arbitration. This architecture of the disputes resolution mechanism hence clearly militates against use of ADR/arbitration as a public procurement proceedings disputes resolution mechanism.<sup>38</sup>

#### **4.2. PPADA, 2015 already provides for timely disputes resolution structures**

There is also a popular and rapidly growing school of thought that although ADR/arbitration mechanism seek to ensure speedier resolution of disputes, the same is already achieved by the fact that the PPADA, 2015 already provides for statutory timelines for the filing and determination of public procurement proceedings in the review, judicial review and appeal.<sup>39</sup> The argument is that this makes redundant and superfluous the need for ADR/arbitration as a disputes resolution mechanism for public procurement proceeding disputes.

#### **4.3. ADR/Arbitration is likely to offend Public Policy and Public Interest**

In *Egerton – V- Earl of Brownlow*,<sup>40</sup> Parke B observed as follows in relation to public policy:-

*“Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of*

---

<sup>38</sup> Refer to footnotes 30 – 38 above. It is important to mention though that although the PPADA, 2015 does not expressly provide for ADR/arbitration as a disputes resolution mechanism, the same Act does not specifically oust the application of the ADR/arbitration mechanisms.

<sup>39</sup> Refer to footnotes 30 – 38 above.

<sup>40</sup> HL ([1853] 4 HLC 484, [1853] 4 HLC 1, [1853] EngR 885, Commonlii, (1853) 10 ER 359).

*being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not...."*

In Kenya, public policy was defined by Ringera J (as he then was), in *Christ For All Nationals – V – Apollo Insurance Co. Ltd*<sup>41</sup>, in the following words:-

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

- (a) inconsistent with the Constitution or other Laws of Kenya, whether written or unwritten; or*
- (b) inimical to the national interest of Kenya; or*
- (c) contrary to justice and morality."*

The learned judge however warned that the above list was not exhaustive. Indeed Ransley J, in *Mahican Investment – V – Giovanni Gaida*<sup>42</sup>, adopted the definition of public policy in the above decision, and stated thus: -

*"I would with respect agree that there is not an all-embracing definition which exhaustively defines what public policy includes. Suffice it to say that what is contrary to public policy will be a matter to be determined by a judge in any case where it is alleged to have been infringed."*

A further and closely related reason to the above, for setting aside of an arbitral award may be that the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya<sup>43</sup> and further, on the basis that the arbitration agreement is not valid under the law to which the parties have

---

<sup>41</sup> [2002] 2 E.A. 366.

<sup>42</sup> [2005] eKLR 7.

<sup>43</sup> Section 35(2)(b)(i) of the Arbitration Act.



subjected it to, in this case the Public Procurement and Asset Disposal Act, 201 (emphasis ours), or the Laws of Kenya.<sup>44</sup>

In addition, arbitral decisions are not made public, so people who are not involved in that case are unaware of the hearings or the findings of the arbitration. This may hinder the interests of the general population, who may be interested in the outcome of public procurement. Furthermore, there may be cases of claims motivated by business interests, which may necessitate an investigation into the parties' motives, which can only be adequately determined by the PPARB or the courts with expertise on these matters. Hence confidentiality, which is an advantageous aspect of arbitration, must be weighed against public interest. When it comes public procurement proceedings disputes, public policy and interest thus becomes an important aspect which ADR/arbitration may undermine.

ADR/Arbitration by its very nature, is often done in respect of *right in personem* as it is a contractual and amicable process that establishes the right and obligations of parties to the contract. Arbitration cannot bind third party who is not a party to the arbitration. As a result, it is well established that it cannot be exercised in the case of *right in rem*.

An important point to further note is that the parties to review under the Act are: the person who requested the review, the accounting officer of a procuring entity, the tenderer notified as successful by the procuring entity; and any other person as the Review Board may determine.<sup>45</sup> The rationale against using arbitration as a method of resolving public tender proceedings disputes is that arbitration is often a two party arrangement/agreement and in the case of public procurement the default ones being the accounting officer of the procuring entity and the aggrieved unsuccessful bidder. The outcome of their ADR/arbitration arrangement/agreement thus cannot legally and factually bind a third-party (in this case the winning/successful bidder) and any other

---

<sup>44</sup> Section 35(2)(a)(ii) of the Arbitration Act.

<sup>45</sup> Section 170 of the PPADA, 2015.

person as the PPARB may determine and who has not given their consent or actively participated in the ADR/arbitration process. This thus as a public policy issue fundamentally neuters the practical application of ADR/arbitration in public procurement proceedings related disputes.

In a nutshell, Kenyan courts (including tribunals) have leaned towards a legal position that entertaining processes that have a whiff of illegality or not underpinned by law is inimical to the business of courts that is always geared toward upholding the processes as provided by law, rules of law and/or legality.<sup>46</sup> As such the courts and/or tribunals are less likely to give way to ADR/arbitration in public procurement proceedings disputes.

#### **4.4. The Overriding Principle of Party Autonomy**

ADR/arbitration is premised on the principle of party autonomy. In the words of Lord Mustill in the case of *Coppee-Lavalin – V – Ken-Ren Chemicals and Fertilises Ltd*<sup>47</sup>:-

*“The first [concept] is ‘party autonomy’, which emphasizes that arbitration is a consensual process, and that national courts should within very broad limits recognize and give effect to any agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted. This is now widely recognised as a first principle of arbitration law, and the English courts in common with those of other nations with developed systems of arbitration strive to give effect to it.”*

Proponents of arbitration have argued, which argument we support, that even when national laws appear to make certain disputes non-arbitrable, their intention should be considered facilitative as opposed to prohibitive. Kellor has captured the spirit of arbitration and outlined the role of national laws on arbitrability thus:-

---

<sup>46</sup> A case in point is *Mapis Investment (K) Ltd – V – Kenya Railways Corporation (2006) eKLR*  
<sup>47</sup> [1994] 2 All E.R. 449 at 458.

*“Arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration. Accordingly, with the exceptions of arbitrability and public policy which are reserved for the *lexi fori*, the *lexi fori* has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that national arbitration laws are only to supplement and fill lacunae in the parties’ agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of arbitration.”<sup>48</sup>*

In most cases, public procurement disputes arise before a public procurement contract is in place. The overriding principle in arbitration is party autonomy. A defining feature is the need for an arbitration agreement which is basically an agreement where parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator and that they will honour the award decision. An arbitration agreement has also been defined as an agreement to submit present or future disputes to arbitration. Hence, where there is no evidence of an arbitration agreement, disputes may be incapable of settlement by ADR/arbitration making such disputes non-arbitrable.<sup>49</sup> Similarly, disputes outside the scope of the agreement to arbitrate are non-arbitrable, in principle not as a result of a statutory injunction but because the parties’ consent/agreement to arbitrate does not extend to such disputes.<sup>50</sup>

---

<sup>48</sup> Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (New York, 1941)

<sup>49</sup> See American case of *MCI Telecommunications Corp - V - Exalon Indus. Inc.* 138 F. 3d 426 (1<sup>st</sup> Cir. 1998) cited in Rau, Alan Scott *‘The Arbitrability Question Itself’* (1999) 10 Am. Rev. Int’l Arb. 287, 355 (where the judge argued that absence of arbitration agreement raises a fundamental question of arbitrability).

<sup>50</sup> Rau, Alan Scott *‘The Arbitrability Question Itself’* (1999) 10 Am. Rev. Int’l Arb. 287.

A purposeful reading of Section 174 of the PPADA, 2015<sup>51</sup> however may yield to an interpretation that ADR/arbitration may be one of the contemplated and available legal mechanisms for utilisation under the Act. This may be so if the tender document incorporated an ADR/Arbitration agreement or clause binding the bidders to ADR/arbitration as a first instance disputes resolution mechanism under the tender and the bidders accepted the same at the time of bidding and never raised an issue with it. Before entering into an ADR/arbitration related mechanisms though the Parties should interrogate and come to a conclusion that the said arrangement remains arbitrable and for abundance of caution does not run foul of public policy and the law and that any resultant arbitral award shall remain valid not to run the risk of being set aside or suffer non-recognition or enforcement by the courts for being non-arbitrable.

#### **5.0. Benchmarking - ADR/Arbitration Under the United Nations Commission on International Trade Law Model Law**

Article 64 of the United Nations Commission on International Trade Law<sup>52</sup> provides that a supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned. It further provides that the challenge may be made by way of [an application for reconsideration to the procuring entity under Article 66 of this Law or, and an application for review to the [name of the independent body] under Article 67 of this Law or an application or appeal to the {name of the court or courts}].

---

<sup>51</sup> The Section provides that the right to request a review under the Act is in addition to any other legal remedy a person may have.

<sup>52</sup> The Model Law is a template for domestic procurement legislation. Its main objectives are to enhance efficiency and effectiveness, and to avoid abuse in the procurement process (through promoting competition and participation, integrity, fair and equitable treatment and transparency).

Article 66 provides that:-

1. A supplier or contractor **may** apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.
2. Applications for reconsideration shall be submitted to the procuring entity in writing within the following periods:
  - a) Applications for reconsideration of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;
  - b) Application for reconsideration of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted within the standstill period applied pursuant to paragraph 2 of article 22 this Law, or, where has been applied, prior to the entry into force of the procurement contract or the framework agreement.<sup>53</sup>
3. Promptly after receipt of the application, the procuring entity shall publish a notice of the application and shall, not later than three (3) working days after receipt of the application:
  - a) Decide whether the application shall be entertained or dismissed and, if it is to be entertained, whether the procurement proceedings shall be suspended. The procuring entity may dismiss the application if it decides that the application is manifestly without merit, the application was not submitted within the deadlines set out in paragraph 2 of this article or the applicant is without standing. Such a dismissal constitutes a decision on the application;

---

<sup>53</sup> Article 66(2) of the UNCITRAL Model Law on Public Procurement.

- b) Notify all participants in the procurement proceedings to which the application relates about the submission of the application and its substance;
- c) Notify the applicant and all other participants in the procurement proceedings of its decision on whether the application is to be entertained or dismissed;
  - i. If the application is to be entertained, the procuring entity shall in addition advise whether the procurement proceedings are suspended and, if so, the duration of the suspension;
  - ii. If the application is to be dismissed or the procurement proceedings are not suspended, the procuring entity shall in addition advise the applicant of the reasons for its decision.
4. If the procuring entity does not give notice to the applicant as required in paragraph 3 (c) and 8 of this article within the time-limit specified in paragraph 3 of this article, or if the applicant is dissatisfied with the decision so notified, the applicant may immediately therefore commence proceedings [in the [name of the independent body] under article 67 of this Law or in the [name of the court or courts]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.
5. In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.
6. The decision of the procuring entity under paragraph 5 of this article shall be issued within ...working days. [the enacting State specifies the period] after receipt of the application. The procuring entity shall

immediately there-after communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

7. If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of paragraph 6 and 8 of this article, the applicant is entitled immediately therefore to commence proceedings [in the [name of the independent body] under article 67 of this Law or in the [name of the court or courts]]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application cases.
8. All decisions of the procuring entity under this article shall be in writing, shall state the action taken and the reasons therefore, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this article.

The distinctive feature of review by the procuring entity is that no third-party neutral body is involved in dealing with the dispute. The purpose of providing for first-instance consideration by the procuring entity (or of the approving authority) is essentially to allow for the correction of defective acts, decisions or procedures. Such an approach can avoid unnecessary burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive state. The policy rationale behind requiring initiation of reconsideration before the procuring entity only if the procurement contract has not been entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the procuring entity could usefully require.

Moreover the Guide to the Enactment of the 2011 Model Law stresses that:-

*“Significantly, this system is an option for suppliers or contractors, and not a mandatory first step in the challenge process. The system has been included so as to facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessary*

*burdening of other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs<sup>54</sup>.*

## **6.0. Benchmarking - ADR/Arbitration Under (I) United Kingdom; & (II) Poland**

### **6.1. ADR/Arbitrability in United Kingdom**

In the UK, the courts have all the necessary powers to grant interim or final injunctions, including suspending procedures, setting aside decisions and awarding damages. A breach of the regulations gives grounds for an action by suppliers who have suffered, loss or damage. Suppliers however must inform the purchaser that they intend to bring an action and explain the grounds. Claims must be brought promptly and in any event within three (3) months unless the court decides that there are good reasons to allow a longer period. In cases where a contract has been signed damages remain the only available remedy. The basis for damages is left to the Court to decide and may, for example, relate to tendering costs, lost opportunity or lost profit. Generally, though, there appears to be a relatively high level of compliance with the public procurement law in UK, a fact partially attributed to the already well developed public procurement system, professionalism of procurement staff and good governance. There is currently a trend towards ADR as an alternative to, or precursor to litigation, particularly in cases involving construction contracts.<sup>55</sup>

### **6.2. ADR/Arbitration in Poland**

The Public Procurement Act of 1994, grants contractors the right of review of their complaints when their legal interests have been infringed upon through a violation by the procuring entity of the principles described in the Act. The provisions on the complaints and appeals do not apply if the value of the

---

<sup>54</sup> The 2011 Model Law Guide to Enactment: 230, para 11. Just like the 1994 UNCITRAL Model Law, the Directives allow for a compulsory procedure whereby the case is first submitted to the procuring entity.

<sup>55</sup> CCNM/SIGMA/PUMA (2000) 114, SIGMA Papers No. 30, *Public Procurement Review Procedures*, OECD, P.29. Available on <https://dx.doi.org/10.1787/5km/60wOqbof-en>. (Accessed on 29<sup>th</sup> July, 2022).



procurement contract is below 30000 euro. The procedure starts when the supplier/contractor submits a written request to the procuring entity. A complaint must contain reasons for the complaint being submitted and must be filed within seven (7) days from the date the supplier learns of the breach. The procuring entity may not sign the procurement contract until the complaint is resolved.

Under the Act, the supplier/contractor may file an appeal with the Chairman of the Office of Public Procurement (PPO). Speed is one of the guiding principles behind the appeal proceedings; thus an appeal must be determined within fourteen (14) days of filing by a panel of three (3) arbiters selected from the arbiters' list. The Chairman of the Office of Public Procurement maintains a register of arbiters and manages the arbitration process within the office. When upholding an appeal, the panel or arbiters may (1) order the procuring entity to do or redo an action, (2) declare an action invalid (save for the signing of the procurement contract), or (3) cancel the procurement proceedings. The panel may not allow an appeal to be withdrawn or allow the parties to conclude an agreement between themselves. Within one month after a decision, either party may file a complaint in court requesting annulment of the panel's decision.<sup>56</sup>

## **7.0. Conclusion and Recommendations**

Effective means to review acts and decisions and procedures of procuring entities is essential to ensure the proper functioning of the procurement system and to promote confidence in the system. It is recognised that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of general mechanisms and procedures for review of administrative acts. Majority of legal systems provide for review of acts of administrative organs

---

<sup>56</sup> CCNM/SIGMA/PUMA (2000) 114, SIGMA Papers No. 30, Public Procurement Review Procedures, OECD, P.25 - 26. Available on <https://dx.doi.org/10.1787/5km/60wOqbvf-en>. (Accessed on 29<sup>th</sup> July, 2022).

and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity otherwise known as hierarchical administrative review. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialised independent administrative bodies whose competence is sometimes referred to as “quasi-judicial”. Those bodies are not, however, considered in those States to be courts within the judicial system. Other national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

ADR/arbitration of public procurement proceedings however still remains largely a challenge and unsettled debate under the Kenyan public procurement law. For instance, the Public Procurement and Asset Disposal Act, 2015 and Regulations 2020 make no specific or direct provision for or against ADR/arbitration in settling disputes arising out of public procurement proceedings. This is despite the fact that there are instances where public entities find themselves in cases where awards are given but then issues emerge warranting or justifying withdrawal of a letter of award or regret. With the current Public Procurement and Asset Disposal Act, 2015 providing for no clear avenue for ADR/arbitration in such justifiable instances there is no doubt a justification for Kenya to look into its public procurement law with possibilities of amending it to facilitate amicable settlement mechanisms. The debate should now move towards how the legislature and arbitration bodies in Kenya can supplement and mainstream as opposed to supplanting or ‘disenfranchising’ ADR/arbitration. This will help to harness its attendant efficiencies and benefits as a dispute resolution mechanism in procurement related disputes whilst judiciously safeguarding against public policy abuse. A starting point would be

to review the law to align it with Articles 64 – 68 with specific emphasis on Article 66 [application for consideration before the procuring entity – amicable settlement] of the UNCITRAL Model Law on Public procurement. Cue may be taken from the practice of ADR in tax related disputes in Kenya. For instance, Section 28 of The Tax Appeals Tribunal Act [TATA]<sup>57</sup> as read with Section 55 of the Tax Procedures Act [TPA],<sup>58</sup>. Section 28 of the TATA provides that any of the parties to the dispute may apply to the Tribunal to settle the matter out of the Tribunal on terms which the latter will stipulate. Section 55 of the TPA provides that where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be within ninety (90) days from the date the Court or the Tribunal permits the settlement and that where the parties fail to reach settlement within the ninety (90) days, the dispute shall be referred back to the Court or the Tribunal that permitted the settlement. Buoyed by the benefits often associated with ADR, the above provisions, Section 59C of the Civil Procedure Act<sup>59</sup>, and importantly to give effect to Article 159(2)(c) of the Constitution, the Kenya Revenue Authority also has in place a robust, albeit with its good share of challenges, ADR Framework for tax disputes<sup>60</sup>.

Such an approach would greatly enable public entities and contractors/suppliers to enjoy the benefits often associated with ADR including preservation of relationships, efficiency, cost cutting and cost-effectiveness and save many projects and public contracts from challenges often arising out of disputes resolution mechanisms currently in place under the PPADA, 2015. A low hanging fruit would be in disputes by a bidder in cases of direct procurement and where other than the procuring entity and the bidder there is no other party involved. Such a change will be a starting point in aligning the

---

<sup>57</sup> No. 4 of 2013 as amended in 2022.

<sup>58</sup> No. 29 of 2015.

<sup>59</sup> Cap 21 Laws of Kenya.

<sup>60</sup> The Kenya Revenue Authority Alternative Dispute Resolution (ADR) Framework (Launched on 17<sup>th</sup> June, 2015 and Revised on 27<sup>th</sup> June, 2019). Its preamble states that the framework is put together to introduce ADR as an additional and/or alternative means of resolving tax disputes outside the judicial and quasi-judicial processes.

Kenyan public procurement law with the provisions of Article 159 of the Constitution of Kenya.

Section 3 of the Arbitration Act, 1995, defines Arbitration Agreement to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The fact that the defined legal relationship need not be contractual already expanded arbitrability scope in Kenya.<sup>61</sup> This expanded arbitrability scope has the potential of bringing on board more matters including public procurement proceedings matters into the scope of ADR/arbitration provided however that the parties concede to the same at the point of bid advertisement and submission. This article has confirmed that ADR/arbitration does apply in public procurement disputes under the UNICTRAL Model law, United Kingdom and Poland, albeit at a slow rate. In the meantime, ADR/arbitration as disputes settlement mechanism in respect of public procurement proceedings disputes is yet to gain much acceptance and traction.

---

<sup>61</sup> Dr. Kariuki Muigua, *Emerging Jurisprudence in the law of Arbitration in Kenya: Challenges and Promises*. At page 4. Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf>. (accessed on 29/07/2022).

## References

1. UNCITRAL Model Law on Public Procurement, 2011;
2. The Constitution of Kenya, 2010;
3. Statutes
  - (i) Public Procurement and Asset Disposal Act, No. 33 of 2015, Laws of Kenya;
  - (ii) Kenya Revenue Authority Act, Cap 469, Laws of Kenya;
  - (iii) The Arbitration Act, Cap. 49, Laws of Kenya, Revised Edition 2012 [2010];
  - (iv) Tax Procedures Act, No. 29 of 2015, Laws of Kenya;
  - (v) The Tax Appeals Tribunal Act, No. 4 of 2013, Laws of Kenya;
  - (vi) Civil Procedure Act, Cap. 21, Laws of Kenya;
4. Secondary Sources
  - (i) The Kenya Revenue Authority ADR Framework as revised in 2019.
  - (ii) CCNM/SIGMA/PUMA (2000) 114, SIGMA Papers No. 30, Public Procurement Review Procedures, OECD, P.25 - 26.
5. Articles
  - (i) Alfred Oseko Nyanchoka, The Scope of Arbitrability under the Kenyan Law, (2013) 79 Arbitration, Issue 3, Chartered Institute of Arbitrators;
  - (ii) Dr. Kariuki Muigua, *Emerging Jurisprudence in the law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf>.
  - (iii) Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (New York, 1941)
  - (iv) John R. Miller, *Alternative Disputes Resolution (ADR): A Public Procurement Best Practice that has Global Application*, International Public Procurement Conference Proceedings, 21 – 23, September, 2006;

- (v) Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell*, (1992) West Publishing Company, 1992;
- (vi) Mante, J. *Arbitrability and Public Policy: An African Perspective.*, (2015) Presented at the Society of legal scholars conference, 2015, 1 - 4 September, 2015. Held on OepnAIR (online). Available from: [openair.rgu.ac.uk](http://openair.rgu.ac.uk).
- (vii) Shamir Yona, *Alternative Dispute Resolution Approaches and Their Application*, (2004) Israel Center for Negotiation and Mediation (ICNM).

## Exceptions to the Duty of Confidentiality in Arbitrations

By: *Austin Ouko*\*

### **Abstract**

*The paper discusses the implied duty of confidentiality in arbitrations through a comprehensive review of the Constitution of Kenya, Legislations and Court decisions. The paper argues that the duty is not absolute and is subject to several exceptions under certain circumstances, which it discusses in detail.*

### **I. Introduction**

Confidentiality, other than flexibility is one of the perceived advantages of arbitration over court litigation. Parties often choose to arbitrate in order to keep details of their dispute private.<sup>1</sup> It is premised on the logic that private relationships mean private disputes. Recourse to the ordinary courts traditionally impedes privacy whereas arbitration allows the parties to sidestep the publicity of official court proceedings in matters that are very sensitive both in terms of public opinion as well as competitors.<sup>2</sup> Confidentiality is generally understood as covering the very existence of the dispute and the commencement of arbitral proceedings, the course of the proceedings, and the

---

*\*Advocate of the High Court of Kenya, a Fellow of the Institute of Certified Secretaries - Kenya (FCS), and a Fellow of the Chartered Institute of Arbitrators (FCIArb); Dip. In Arbitration (UK); Post-Graduate Diploma (PGD) in International Commercial Law from College of Law of England and Wales; Master of the Science of Law from Stanford University Law School (JSM), a Master of Laws (Public Finance and Financial Services) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from University of Nairobi.*

<sup>1</sup>Aishani Narain, 'Transparency in Arbitration Proceedings', (2019) 11(1) Arbitration Law Review

<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1255&context=arbitrationlawreview> accessed on 10 March 2022.

<sup>2</sup>Bernardo M. Cremades Rodrigo Cortés, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis', (September 2013) Vol. 23 No. 3 Journal of Arbitration Studies, pp. 25 - 38.

award.<sup>3</sup> This extends to the hearing, the documents and submissions generated (and disclosed) in the dispute.

The Kenyan Arbitration Act 1995 is silent on the question of confidentiality.<sup>4</sup> There is no statutory definition of confidentiality in the Act despite the parties having an implied duty to maintain the confidentiality of the proceedings. The principle of party autonomy as provided in sections 20 and 25 of the Arbitration Act gives the parties the right to agree on all procedural and evidential matters. The source of the obligation of confidentiality is the arbitration agreement – either by implication or through express confidentiality provisions.<sup>5</sup>

However, the Nairobi Centre for International Arbitration Act 2013<sup>6</sup>, enjoins directors, officers, employees, agents or any person who in the course of interaction with the Arbitration Centre established thereunder obtains access to any record, material, information or documents relating to the business of the centre which such person acquired in the performance of his duties or the exercise of his functions to divulge such information only under circumstances set out under the provisions of the Act.<sup>7</sup> Section 15 goes further to provide for criminal sanctions in respect of anyone who contravenes the confidentiality clause.<sup>8</sup> Likewise, Rule 34 of the Arbitration Rules of the Nairobi Centre for International Arbitration<sup>9</sup> places a confidentiality obligation on the parties over the arbitral proceedings and the award such that the parties cannot divulge

---

<sup>3</sup>Elina Zlatanska, 'To publish, or not to publish arbitral awards: that is the question...,' (February 2015) 81(1), *The International Journal of Arbitration, Mediation and Dispute Management*,

<sup>4</sup>Arbitration Act, Chapter 49 of the Laws of Kenya. The Act was assented to 10 August 1995 and commenced operation on 2 January 1996.

<sup>5</sup>Mark Darian-Smith, Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration,' (2015) 81(4) *The International Journal of Arbitration, Mediation and Dispute Management* pp. 360 – 366.

<sup>6</sup>Nairobi Centre for International Arbitration Act No. 26 of 2013.

<sup>7</sup>Section 15; See Wilfred Mutubwa, 'Confidentiality in Arbitration under the Constitution of Kenya 2010: Reality or Illusion?', (2016) 82(3) *The International Journal of Arbitration, Mediation and Dispute Management*, pp. 254 – 264.

<sup>8</sup>*Ibid.*

<sup>9</sup>Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255 of 2015.



details of the proceedings or awards unless they agree to do so in writing, the parties are under a legal duty to do so, or to enforce or challenge the award..

The United Nations Commission on International Trade Law (UNCITRAL) Model Law from which the Kenyan Arbitration Act is premised does not say anything about confidentiality nor has no provision dealing with confidentiality.<sup>6</sup> It gives importance to party autonomy and the drafters of the Model Law expressed that the parties are free to determine whether or not they want to impose the confidentiality obligation on themselves. The parties may accordingly incorporate such a clause in their agreement to arbitrate.<sup>6</sup> The UNCITRAL Arbitration Rules also do not have express provisions with regard to confidentiality except in respect to the award that can be made available to the general public only with the parties' consent.<sup>10</sup> Therefore, the confidential nature of arbitration proceedings rests upon a rather weak legal foundation and that a party who for some reason wishes to publicise a dispute is unimpeded in doing so.<sup>11</sup>

Similarly, there is no statutory definition of confidentiality in the UK Arbitration Act 1996. The 1989 Report by the Departmental Advisory Committee on Arbitration Law (the DAC Report) states that this was a deliberate decision.<sup>12</sup>

---

<sup>10</sup>Krrishan Singhanian & Alok Vajpeyi, 'India: Confidentiality In Arbitration: An Indian Outlook', <<https://www.mondaq.com/india/arbitration-dispute-resolution/832720/confidentiality-in-arbitration-an-indian-outlook>>; UNCITRAL Arbitration Rules, art. 32(5). See also The UNCITRAL Notes for Organizing Arbitral Proceedings make the following points: (a) There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case. (b) Parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. (c) Participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected.

<sup>11</sup>Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, *International Commercial Arbitration*, at Transnational Perspective American Casebook Series, West Academic Publishing.

<sup>12</sup> Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996), Ch.2, p.7.

The drafters of the Act considered giving confidentiality a firm statutory basis in the Act, but the exercise proved too controversial and difficult. One issue was whether it was possible to give an accurate exposition of the principle of confidentiality in the abstract. Another concern was that the myriad of exceptions and qualifications to the principle of confidentiality made it difficult to formulate acceptable statutory guidelines.<sup>13</sup> The DAC Report concluded by stating that, because the principles are unsettled, they are better left to the common law to evolve on a pragmatic case-by-case basis. It went on to indicate that if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill.<sup>14</sup> As things stand, as a matter of English law, there is an implied duty of confidentiality in arbitration – making confidentiality a presumption.<sup>15</sup>

From the above stated it is clear that the definition of the scope of the duty of confidentiality is a major problem. That is why so few definitions at the legislative and institutional levels have been attempted, and why the existing definitions are not completely successful.<sup>16</sup> Practitioners who do attempt to find a contractual definition quickly find out how difficult a mutually acceptable solution is to achieve, which is why, in practice, there are few model clauses available. In common law countries, attempts have been made to define the duty through the courts, mainly through the device of the implied term, but these

---

<sup>13</sup>Victoria Clark, 'The English Arbitration Act turns 25: Is it time for an update?' <https://www.bclplaw.com/en-US/insights/the-english-arbitration-act-turns-25-is-it-time-for-an-update.html>

<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup>The 1996 New Zealand Arbitration Act, as amended in 2007, governs the conduct of arbitration. Section 14B of New Zealand's Arbitration Act provides that "the parties and the arbitral tribunal must not disclose confidential information"<sup>16</sup> in arbitration agreements governed by the law of New Zealand. Section 2 defines confidential information as any information relating to the arbitral proceedings or to an award made in those proceedings including, but not limited to, the statement of case, pleading, evidence, notes, and transcripts. Similar to other jurisdictions where the duty of confidentiality is subject to exceptions, Section 14C of New Zealand's Arbitration Act also provides for numerous exceptions, indicating that the duty of confidentiality is not absolute.<sup>169</sup> Section 14C(a) is particularly important because it provides that disclosure of confidential information to the parties' professional or other advisers may be allowed.

attempts have run into conceptual difficulties, although they have provided valuable insights into the nature and scope of the problem.<sup>17</sup>

Moreover, confidentiality is not absolute and can be overridden in certain situations.<sup>18</sup> Consequently, parties and arbitral practitioners should not automatically assume that privacy equates to absolute confidentiality of the arbitration itself, the proceedings and the award.<sup>19</sup> Further, in today's globalized world and market, the increasing demand for transparency in commercial activities is beginning to undermine this hitherto virtually untouchable principle of confidentiality.<sup>20</sup> The fact that the parties involved in an arbitral proceeding could stipulate, modify, or, where called for, suppress confidentiality naturally it is also implied that confidentiality does not have to be an inherent characteristic of arbitration present in every single case.<sup>21</sup>

It is against this backdrop that this article will discuss the presumption of confidentiality in arbitration and the instances where the duty of confidentiality can be overridden in arbitration. The article is divided into four parts. Part II will discuss in detail the presumption of confidentiality in arbitration. Part III will examine instances where the presumption can be overridden. Part IV concludes.

## **2. Presumption of Confidentiality**

In order to better understand confidentiality, firstly, it is necessary to distinguish confidentiality from a like concept known as privacy. While both are two sides of the same coin, the difference is only as to their scope and ambit. Privacy as opposed to confidentiality is a narrower concept and only refers to concealing information from third parties by disallowing them to participate in the arbitral proceedings.<sup>22</sup> The objective of privacy is to repel any kind of third

---

<sup>17</sup>Hwang & Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration', (2009) 26 J. OF INT'L ARB. 609, 610.

<sup>18</sup>Zlatanska, *Supra* note 3.

<sup>19</sup>*Ibid.*

<sup>20</sup>Cortés, *Supra* note 2.

<sup>21</sup>*Ibid.*

<sup>22</sup>Signhania & Vajpeyi, *Supra* note 10.

party intervention in the arbitral proceedings.<sup>23</sup> On the other hand, Confidentiality refers to the obligation of not disclosing information concerning the arbitration to third parties.<sup>24</sup> The duty of confidentiality extends not only in prohibiting third parties from attending the arbitration hearings, but also prohibiting them from disclosure of hearing transcripts, written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and as well as the arbitral awards.<sup>25</sup>

Thus, it can be argued that confidentiality derives from privacy. The mere fact that third parties are automatically excluded from arbitrations implies that the parties to the dispute should not be allowed to disclose information obtained during the proceedings. Furthermore, the duty of confidentiality should not only be respected by the parties, but also by the arbitrators, the counsels, experts, interpreters, and any other person involved in the procedure.<sup>26</sup> Indeed, if one reveals information outside the procedure, the principle of privacy would be meaningless, as it aims to keep the dispute out of the reach of third parties. In fact, both principles are linked to each other, to the extent that one has no sense without the other. It may therefore be assumed that confidentiality is an implicit obligation that derives from the very nature of arbitration, as a private and confidential method of dispute resolution.<sup>27</sup>

There are numerous advantages conferred by confidentiality in arbitration. For example, confidentiality reduces the possibility of damaging continuing business relations between the parties, and avoids setting adverse judicial precedents. Additionally, the process offers parties the freedom to make arguments that they would be reluctant to make in a public forum.<sup>28</sup> The

---

<sup>23</sup>*Ibid.*

<sup>24</sup> Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) at 103.

<sup>25</sup>*Ibid.*

<sup>26</sup>Olivia de Lovinfosse, 'Arbitration and Confidentiality: Illusion or Disillusion?' (2015), [https://dial.uclouvain.be/memoire/ucl/fr/object/thesis:3418/datastream/PDF\\_01/view](https://dial.uclouvain.be/memoire/ucl/fr/object/thesis:3418/datastream/PDF_01/view)

<sup>27</sup>*Ibid.*

<sup>28</sup>Avinash Poorooye & Ron'an Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, (2017) 22 *Harvard Negotiation Law Review* 275,

information contained in the arbitration filings can be critical as they may contain sensitive commercial information such as profit margins, pricing policies, production costs, know-how or trade secrets, the disclosure of which could harm one or both parties involved in the arbitration. It could also expose the financial situation of a company or the existence of a defective product which could compromise the image of a company in front of the public and favor competitors.<sup>29</sup>

Duties of confidentiality in arbitration can arise contractually: by specific party agreement or by the incorporation of institutional arbitration rules that contain confidentiality obligations.<sup>30</sup> Negotiation of detailed confidentiality provisions in a dispute clause at the time of contract negotiation is usually not easy.<sup>31</sup> A party at a contract negotiation, in the relationship-building stage of a commercial venture, is usually not disposed to predict or discuss what types of disputes are likely to arise, or what its confidentiality position would be. Negotiation of mutual confidentiality obligations once a dispute has arisen is also fanciful in the face of animosity between disputing parties.<sup>32</sup> Consequently, arbitration agreements are often silent on the confidentiality obligations attaching to them. Whilst it is possible to insert specific confidentiality provisions into an arbitration agreement, it is not difficult to agree with a contention that successfully negotiating a functional contractual confidentiality clause is virtually impossible. If arbitral institutions and national legislatures are unable to provide adequately for the protean nature of exceptions to confidentiality, it is perhaps wishful to expect parties, in heat of the moment

---

[https://www.hnlr.org/wp-content/uploads/sites/22/HNR203\\_crop-1.pdf](https://www.hnlr.org/wp-content/uploads/sites/22/HNR203_crop-1.pdf).

<sup>29</sup>Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?', (September 2018) Kluwer Arbitration Blog, available at <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/>.

<sup>30</sup>Michael Fesler, 'The Extent of Confidentiality in International Commercial Arbitration', (2012) 78(1)*The International Journal of Arbitration, Mediation and Dispute Management*, pp. 48 – 58.

<sup>31</sup>M. Pryles, "Confidentiality" in L. Newman and R. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (New York: Juris Publishing, 2008), p.548 as cited in Fesler, *Ibid*.

<sup>32</sup>*Ibid*.

negotiations to be able to do so, leave alone agree on sanctions (for breach of confidentiality) provisions.<sup>33</sup> However, the specific needs of confidentiality can be addressed during the arbitral proceedings at an early directions meeting by parties and/or the tribunal of its own motion and an order (ideally a consent order) be issued laying out the parameters of confidentiality applicable to the particular arbitration.<sup>34</sup>

That notwithstanding, a breach of the confidentiality obligation is a breach of agreement that sounds in damages.<sup>35</sup> Breaches may be restrained by an injunction or censured by declaration. Assessing damages for breach will often be difficult. However, it is not necessary to quantify the damage in order to seek an injunction. The difficulty of the assessment may allow a court to more easily conclude that damages are not a sufficient remedy. Given the uncertainty of potential damages to be awarded, parties would be imprudent to disclose arbitration materials in subsequent proceedings without first obtaining the leave of the court or the tribunal. Disclosure in such circumstances is unlikely to improve the party's standing before the forum in the subsequent proceedings and may result in a significant damages award.<sup>36</sup>

Moreover, common law steps fill in the gaps on confidentiality left by statute law. Section 3 (1) of the Judicature Act states the 'hierarchy of norms' that is applicable in Kenya. Common law applies in Kenya so long a "statute does not apply, and so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."<sup>37</sup> The doctrine of precedent is one of the tenets of common law. It states that decisions of higher courts on disputable issues bind the lower courts.

---

<sup>33</sup>*Ibid.*

<sup>34</sup>Hwang & Chung, *Supra* note 17.

<sup>35</sup>Smith & Ghosh, *Supra* note 5.

<sup>36</sup>*Ibid.*

<sup>37</sup>As per the Court of Appeal in David Sironga Ole Tukai v Francis Arap Muge, Samuel Kirui & Johannah Mosonik Nairobi Civil Appeal No. 76 of 2014. See also section 3 of the Judicature Act, Cap 8, Laws of Kenya as cited in Eric Muchiri Thige, A Review of Privacy and Confidentiality in Arbitration in Kenya, (LL.M Thesis, University of Nairobi 2018).

This ensures predictability of the law, and “*liberates courts from considering every disputable issue as if it were being raised for the first time.*”<sup>38</sup>

As stated above the Kenyan Arbitration Act is silent on the issue of confidentiality. Presumably, this issue is for the parties to determine.<sup>39</sup> The presumption finds support in the case of *Nedermar Technology BV Ltd v KACC & AG*.<sup>40</sup> The case involved a contract on security installations in Kenya which had been fully performed save for the issue of payment by the government to the Applicant. The government had after the completion of the installation entered into a second contract with the Applicant for payment of the contract sums which second contract it breached. The Applicant filed for arbitration against the government at the Hague as provided for in the second contract. While the arbitration proceedings were ongoing, the defunct Kenya Anti-Corruption Commission sought evidence, materials and documents related to the second contract on the basis of investigations into corruption. The Applicant commenced judicial review proceedings against the Kenya Anti-Corruption Commission and the Attorney General. In a ruling on an application for interim orders against the investigations by the Kenya Anti-Corruption Commission – which orders were later granted in the final ruling on the petition - the court had this to say about confidentiality of the proceedings at the Hague:

*The other reason for the suitability of the matters falling within the ambit of the Arbitral Tribunal is the confidentiality of the Arbitral process. The Arbitral process whether international such as in this matter or domestic is absolutely confidential.*

After some differences of judicial opinion in the English courts on various issues surrounding the implied duty of confidentiality, a definitive statement finally emerged from the English Court of Appeal in the case of *John Forster Emmott v Michael Wilson & Partners Ltd* (“Emmott”),<sup>41</sup> which seems to have settled the

---

<sup>38</sup>High Court in *Martha Wangari Karua & another v. IEBC & 3 others Kerugoya Election* Petition 2 of 2017 as cited in Thige, *Ibid*.

<sup>39</sup>*Ibid*.

<sup>40</sup>Milimani High Court Petition No. 390 of 2006.

<sup>41</sup>[2008] EWCA Civ 184; [2008] Bus LR 1361.

juridical basis of the implied duty.<sup>42</sup> In Emmott, the Court laid down the following principles:

- a) The obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.
- b) This obligation is a substantive rule of law masquerading as an implied term.
- c) It imposes an obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration.
- d) The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in question; the limits of the obligation are still in the process of development on a case-by-case basis.
- e) The principal cases in which disclosure will be permissible are where:
  - (i) there is consent (express or implied) of the parties;
  - (ii) there is an order or leave of the court;
  - (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
  - (iv) the public interest or the interests of justice require disclosure.

Whatever may be the juridical basis of the implied duty, it is clear that the duty cannot be an absolute one. Several practical situations immediately come to mind which call for exceptions to the duty.<sup>43</sup> The next part of the paper will discuss in detail the exceptions to the implicit duty of confidentiality.

---

<sup>42</sup>Hwang & Chung, *Supra* note 17.

<sup>43</sup>*Ibid.*



### **3. Exceptions to the Duty of Confidentiality**

The obligation of confidentiality is subject to several exceptions under certain circumstances. For example, when disclosing the existence of arbitration is reasonably necessary to protect the legitimate interests of one of the parties vis-à-vis third parties, or to enforce or protect a right against a third party acting as a plaintiff or defendant. It has also been stated that there is no violation of the duty of confidentiality if certain information related to the arbitration is communicated but there is a legitimate reason to do so.<sup>44</sup> However, Consent is the simplest—if the parties to the arbitration agree to the disclosure, it is permissible. Instances where the implied duty of confidentiality can be overridden are discussed in detail below:

#### **a) Consent of the parties**

As discussed above, the consent of the parties to public disclosure of the existence of an arbitration as well as arbitration-related information is the simplest exception to the implied obligation of confidentiality.<sup>45</sup> The consent of the parties can be written into the substantive agreement between the parties, or given after a dispute has arisen in a post-dispute arbitration agreement. The implied consent of the parties can arise from the parties' conduct after a dispute has arisen. An example of this is where an arbitrating party applies to the court for the removal of an arbitrator, in which case that arbitrating party implicitly gives consent to the challenged arbitrator to disclose matters concerning the arbitration to court. A further question that arises in this context is whether an application to court arising out of an arbitration, without an arbitrating party asking for those proceedings to be held in camera amounts to a consent to public disclosure of all facts and documents put before the court.<sup>46</sup>

---

<sup>44</sup>Meza-Salas, *Supra* note 29.

<sup>45</sup>Hwang & Chung, *Supra* note 17.

<sup>46</sup>*Ibid.*

*b) Disclosure required by court or law*

Parties can bring arbitration proceedings into the public eye when seeking from Court interim measures, stay of proceedings, challenges to arbitrator's appointment, appeals and reviews or when commencing enforcement proceedings.<sup>47</sup> Papers filed become part of the court record. It is difficult to determine how many matters may remain confidential in view of the fact that the court process is a public process, with persons not parties to the arbitration allowed to access court records.<sup>48</sup> There is no express rule applying confidentiality to arbitration proceedings before the courts. It is at the court's discretion whether or not details of an underlying arbitration will be made publicly available.<sup>49</sup>

Courts also have inherent and statutory jurisdiction to compel parties to litigation to produce documents and adduce evidence which overrides the implied obligation of confidentiality.<sup>50</sup>

Moreover, statutory provisions may override any obligation of confidentiality that parties may have provided for in an arbitration agreement and compel disclosure of arbitration-related documents.<sup>51</sup> If a party is under an affirmative legal obligation to disclose confidential materials—for instance, a statutory requirement to report crime, fraud or regulatory infractions—then this will trump confidentiality.<sup>52</sup> Similarly, mandatory reporting requirements to national regulatory bodies or to a stock exchange may also permit disclosure. Once in the public domain, the materials may also be used in private litigation. However, this is often an oblique and uncertain way to seek to use the arbitration materials.<sup>53</sup>

---

<sup>47</sup> See Sections 6, 7, 13, and 14 of the Arbitration Act.

<sup>48</sup> Mutubwa, *Supra* note 7.

<sup>49</sup> *Ibid.*

<sup>50</sup> Smith & Ghosh, *Supra* note 5.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

In addition, courts have previously held that if the parties to the earlier arbitration and the subsequent arbitration are the same, the use of materials from the earlier arbitration will not conflict with the obligation of confidentiality.<sup>54</sup> In such cases, confidentiality is maintained because the parties are the same and the proceedings are private. However, this exception does not apply to subsequent proceedings involving a related or parent company of a party which are distinct legal entities.<sup>55</sup>

*c) To protect or enforce legal rights*

Article 35 (1) of the Kenyan Constitution allows any citizen access to information held by the State and any other person, if such information will aid in the protection of the citizen's right or fundamental freedom. A citizen can apply to court to access the evidence, materials, notes and awards in an arbitration that would otherwise have been shielded by the confidentiality.<sup>56</sup> The Constitution seems to give *carte blanche* to any citizen regardless of whether such citizen requires it for enforcement, exercise or protection of any right or fundamental freedom. This becomes more worrying if seen in the context of an arbitration in which the government or statutory corporations are a party.<sup>57</sup>

Confidentiality clauses or agreements in an arbitration can therefore be ousted on an application by a citizen who has only to show that the access to evidence, transcripts, proceedings and awards in a domestic or international arbitration whose juridical seat is Kenya will be used to further a right or freedom.<sup>58</sup> Such rights may include the right to access justice by using such documents to file a suit in court. The same can be said of an applicant who seeks correction of what he deems or perceives as untrue or misleading information that affects him. But perhaps the most open-ended provision is that which permits any citizen to

---

<sup>54</sup>*Ibid*; See Associated Electric and Gas Insurance Services [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [8], [11], per Lord Hobhouse.

<sup>55</sup>Ali Shipping Corp [1999] 1 W.L.R. 314 at 328-329, per Potter LJ.

<sup>56</sup>Mutubwa, *Supra* note 7.

<sup>57</sup>*Ibid*.

<sup>58</sup>*Ibid*.

require the state to publish and publicise “any important information affecting the nation” .<sup>59</sup>

However, Section 6 of the Access to Information Act, 2016 lists various limitations to this right under Article 35 as provided under Article 22.<sup>60</sup> As Lady Justice Ngugi stated in *Nairobi Law Monthly Company Limited v KENGEN & 2 others*:<sup>61</sup>

As correctly submitted by the 1st Interested Party and the Amici Curiae, the reasons for non-disclosure [of information under Article 35 (1)] must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.

Likewise, if arbitration materials are “reasonably necessary” to protect the interests or vindicate the rights of a party, they may be disclosed in subsequent proceedings. The exception is limited to the parties to the original arbitration. This exception is particularly applicable when a party seeks to use arbitration

---

<sup>59</sup>*Ibid.*

<sup>60</sup>Access to Information Act, Act No. 31 of 2016; Eric Muchiri Thige, A Review of Privacy and Confidentiality in Arbitration in Kenya, (LL.M Thesis, University of Nairobi 2018); It limits access to information if it is likely to: undermine the national security; impede the due process of law; involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made; substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained; significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

<sup>61</sup>*Nairobi Law Monthly Company Limited v KENGEN, Edward Njoroge & the AG Milimani HC Petition No. 278 of 2011.*

materials in a subsequent proceeding. Arbitration and litigation, by their very nature, affect the legal rights of the parties.<sup>62</sup>

While on its face, this exception seems quite broad and flexible, courts have interpreted the “reasonably necessary” standard narrowly. Materials must be “unavoidably necessary for the protection of the rights of the parties”, not “merely helpful”, in order to satisfy the test. Courts have been concerned that a lax application of the test would permit the exception to undermine the mutual intention of the parties that arbitration materials are confidential.<sup>63</sup>

#### *d) Public interest/interests of justice exception*

In Kenya, it would appear that due to the colonial heritage of a common law legal system, the English position on implied confidentiality was retained.<sup>64</sup> That was until 2010 when Kenya promulgated a new constitutional order which places the Constitution as the basis of rule of law and governance in Kenya. Whereas the Constitution enjoins courts and tribunals to promote alternative forms of dispute resolution including arbitration<sup>65</sup>, it also lists transparency and accountability as applicable values and principles in enactment, application or interpretation of any law in Kenya.<sup>66</sup> Further, every citizen now has the constitutionally-enshrined right of access to information, although it can be limited.<sup>67</sup> With such provisions, the previously implied attributes of privacy and confidentiality as discussed above would appear to have had their range clipped.<sup>68</sup>

In *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others*,<sup>69</sup> the High Court held that arbitrations should be open to the public just like litigations,

---

<sup>62</sup>Smith & Ghosh, *Supra* note 5.

<sup>63</sup>*Ibid.*

<sup>64</sup>Thige, *Supra* note 37.

<sup>65</sup> Article 159 (2) (c) of the Constitution.

<sup>66</sup> Article 10.

<sup>67</sup>Article 35.

<sup>68</sup>Thige, *Supra* note 37.

<sup>69</sup>Nairobi JR Misc. Application No. 374 of 2013 as cited in Thige, *Ibid.*

especially where the dispute involves a public entity. In learned judge Odunga's view, such public hearing furthers the value of transparency as is required under Article 10 of the Constitution.<sup>70</sup>

The core of the exception relates to matters of public importance involving the exercise of public power or statutory authorities, it has been extended to situations where disclosure is necessary for the subsequent court or tribunal to have a proper understanding of the matter.<sup>71</sup>

The public interest exception is potentially very broad. One commentator has expressed the concern that the exception may overwhelm the general confidentiality obligation.<sup>72</sup> However, the public interest exception is likely to be difficult to establish in practice, other than in cases involving government, statutory corporations or matters of truly significant public interest. An appealing aspect of the public interest exception is that it cannot be excluded by the parties' agreement. Despite the autonomy of the parties to define their bargain and the arbitration tribunal's power to define its jurisdiction, courts retain the power to intervene.<sup>73</sup>

Lastly, if a party has given inconsistent evidence in two separate arbitrations, it is clear that the interests of justice (sometimes called public interest) would require disclosure of arbitration documents in spite of any obligation of confidentiality. Where a witness is proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest due to the interests of the fair disposal of the proceedings.

<sup>74</sup>

---

<sup>70</sup>Senator Johnstone Muthama v Tanathi Water Services Board & 2 others Nairobi JR Misc. Application No. 374 of 2013 at paragraphs 13 and 18.

<sup>71</sup>Smith & Ghosh, *Supra* note 5.

<sup>72</sup>Matthew Groves, "The implied undertaking restricting the use of material obtained during legal proceedings" (2003) 23 A.B.R. 314, 337-338.

<sup>73</sup>Smith & Ghosh, *Supra* note 5.

<sup>74</sup>Hwang & Chung, *Supra* note 17.

This issue arose in the case of *London & Leeds Estates Ltd. v. Paribas Ltd.*<sup>75</sup> The question that arose in this matter is whether the parties in an arbitration owe any duty of confidentiality to an expert witness in an arbitration where the witness was found to have given evidence that was inconsistent with the evidence that he had given in previous arbitrations. *London & Leeds* arose out of a rent review arbitration between the plaintiff landlord and the defendant tenant. The landlord retained an expert valuer (the “Expert”) who gave evidence on the office rental market in London’s West End relevant to the review date of April 1991. The Expert was also involved in two previous arbitrations, the “Euston Tower” arbitration and “Delta Point” arbitration, in which the Expert had given contrary expert evidence on behalf of the tenants. Counsel for the defendant tenant in this arbitration had also been counsel for the tenant in the Euston Tower arbitration, and had cross-examined the Expert on the evidence he had given in the Euston Tower arbitration. The defendant’s expert in this arbitration was the arbitrator in the Delta Point arbitration, but he had completed and published his award, and the only ancillary matters left outstanding were costs and interest. Subsequently, the defendant tenant issued subpoenas addressed to the Expert relating to his Euston Tower and Delta Point proofs (witness statements), and to the defendant’s expert relating to the Expert’s Delta Point proof. The plaintiff landlord and Expert applied by separate summons to set aside the subpoenas addressed to the Expert and the defendant’s expert.

*Mance, J.* held that the plaintiff landlord had no *locus standi* in the matter as it was not a party to any confidential relationship involving the information sought by the subpoenas. However, *Mance, J.* went on to hold that the Expert had *locus standi* to object to the subpoenas as he was owed a duty of confidentiality by the parties to the Euston Tower and Delta Point arbitrations in respect of his evidence. The issue before *Mance, J.* was whether it was necessary for the fair disposal of the action or for the saving of costs for the duty of confidentiality to be overridden. *Mance, J.* held that, where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the

---

<sup>75</sup> [1995] 1 E.G.L.R. 102 (Q.B.).

interests of individual litigants involved and in the public interest. Mance, J. therefore concluded that the duty of confidentiality attaching to the proof in the Euston Tower arbitration was overridden in the interest of the fair disposal of the proceedings.<sup>76</sup>

It is useful to note that there is an issue of whether the interests of justice is an exception in itself, or whether it is part of a wider public interest. The English courts appear to be divided in their opinion on this.<sup>77</sup>

*e) With leave of court*

Although various cases have recognized the disclosure of arbitration-related documents with leave of court as an exception to the obligation of confidentiality, the question remains as to whether or not a court or tribunal order for disclosure overrides the obligation of confidentiality.<sup>78</sup> If a party is put in a “potentially extremely hazardous” position and cannot decide whether to disclose documents as in doing so he may therefore be in breach of his duty of confidentiality to the opposite party to the arbitration or be accused of failing to disclose a relevant document in his possession which would be necessary for fairly disposing of the litigation, he should first write to his opposite party in the arbitration inviting consent to disclose; if this is not forthcoming, he can decline to let the third party inspect the same without first obtaining an order of court.<sup>79</sup>

The source of the problem is the general lack of power to consolidate two arbitrations, which is generally viewed as a deficiency in the arbitral process that is an inevitable consequence of the principle of the consensual basis of arbitral jurisdiction.<sup>80</sup>

---

<sup>76</sup>Hwang & Chung, *Supra* note 17.

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*

<sup>79</sup>Hassneh Insurance Co of Israel v Steuart J Mew, [1993] 2 Lloyd’s Rep 243, Colman, J.

<sup>80</sup>Hwang & Chung, *Supra* note 17.



However, the English Court of Appeal in *Emmott* expressed the view that the court does not have a general power to order or give permission for disclosure of arbitration-related documents when an arbitration is underway. Thomas, L.J. considered that leave of the court is a matter which arises in circumstances where the court is deciding the issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party) or in circumstances where the arbitration has come to an end. Thomas, L.J. further considered that:<sup>81</sup>

[i]t is difficult to see readily how it is consistent with the principles in the 1996 Act that there is to be an implied term which requires resort to the court during the currency of the arbitration for the court to determine these issues as between the parties to the arbitration ... I cannot accept that the implied term of confidentiality should be formulated to confer by this means jurisdiction on the court; it would be contrary to the ethos and policy of the Act.

*f) Where there is an obligation of disclosure*

Companies owe an obligation of disclosure to various stakeholders who would, according to conventional theory, be strangers to the arbitration, but who certainly have a legitimate interest in the progress and outcome of the arbitration. Such stakeholders include: shareholders; bond holders; beneficiaries of trust corporations; any stock exchange or professional body to which an arbitrating party belongs; joint venture partners or anyone covered by the *uberrimae fidei* principle; a potential new shareholder acquirer conducting due diligence; and insurers under an indemnity policy covering the subject matter of the arbitration. Likewise, insurance and reinsurance companies may owe obligations of disclosure to each other. Parties who are in contracts with back to back obligations may also be subject to an obligation of disclosure.<sup>82</sup>

---

<sup>81</sup>John Forster *Emmott v Michael Wilson & Partners Ltd*, [2008] EWCA Civ 184 at para. 124.

<sup>82</sup>Hwang & Chung, *Supra* note 17.

*g) Everyday situations*

The media is always reporting on cases of arbitrations.<sup>83</sup> The authorities do not discuss everyday situations which would most certainly be exceptions to the obligation of confidentiality, but one can conceive of a myriad of such everyday situations. Some examples of these situations include: discussing an arbitration with members of the family (after swearing them to secrecy); discussing an arbitration with lawyers in the same firm to check for conflicts; discussing an arbitration with potential arbitrators; disclosing details of an arbitration to an immigration office in a visa application.<sup>84</sup>

Arbitral confidentiality is, as the Lord Mayor observed is, “overrated”.<sup>85</sup> Why? Because the market tends to know which parties are involved in which arbitrations and what the arbitration is about.<sup>86</sup> He recalled in one of the market conferences on the UK Arbitration Bill in July 1995, a very well-known member of the insurance community pointed out how easy it was to acquire any award in the insurance market. This shocked the purists, but reflected reality. And then even when confidentiality and privacy are maintained during the arbitration, it does not stay so for long, as information leaks and private markets in the trade of arbitral decisions develop.<sup>87</sup>

---

<sup>83</sup>Thige, *Supra* note 34; See <https://www.businessdailyafrica.com/bd/corporate/industry/nssf-assets-marked-for-auction-over-sh744m-row-1980892>;  
<https://www.businessdailyafrica.com/bd/corporate/companies/kebs-faces-sh379m-claim-from-contractor-2160564>; <https://www.businessdailyafrica.com/bd/corporate/companies/gatabaki-back-in-court-over-fourways-row-2211180>.

<sup>84</sup>Hwang & Chung, *Supra* note 17.

<sup>85</sup>Lord Thomas of Cwmgiedd, Speech on Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration, The Bailii Lecture 2016, 9 March 2016 available <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>

<sup>86</sup>*Ibid.*

<sup>87</sup>*Ibid.*

***h) Where disclosure is made to professional or other advisers and persons assisting in the conduct of the arbitration***

Where the disclosure of arbitration documents is made to professional or other advisers and persons assisting in the conduct of the arbitration, this should be treated as a legitimate exception to the obligation of confidentiality. Any disclosure to lawyers who are not involved in the arbitration should not be a problem because lawyers are subject to legal professional privilege in any case. Any disclosure made to persons assisting in the conduct of the arbitration should also be an exception to the obligation of confidentiality.

Such persons include: potential witnesses, both factual and expert; private investigators; executives or in-house counsel of affiliate companies; secretaries and personal assistants to persons working on the arbitration even if not employees of the arbitrating party (e.g., from related or affiliated companies); and independent providers of business services (transcribers, interpreters, photocopiers, hotel business centers, couriers).<sup>88</sup>

**Conclusion**

As discussed in the paper, Confidentiality is one of the perceived advantages of arbitration over court litigation. Parties often choose to arbitrate in order to keep details of their dispute private. There is no statutory definition of confidentiality in the Arbitration Act despite the parties having an implied duty to maintain the confidentiality of the arbitral proceedings as the parties have the right to agree on all procedural and evidential matters. The source of the obligation of confidentiality is the arbitration agreement; either by implication or through express confidentiality provisions. However, as the article has shown this implied duty is subject to several exceptions under certain circumstances.

---

<sup>88</sup>Hwang & Chung, *Supra* note 17.

## **References**

Access to Information Act, Act No. 31 of 2016.

Aishani Narain, 'Transparency in Arbitration Proceedings', (2019) 11(1) *Arbitration Law Review*  
<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1255&context=arbitrationlawreview>.

Ali Shipping Corp [1999] 1 W.L.R. 31.

Avinash Poorooye & Ron'an Feehily, Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, (2017) 22 *Harvard Negotiation Law Review* 275,  
[https://www.hnlr.org/wp-content/uploads/sites/22/HNR203\\_crop-1.pdf](https://www.hnlr.org/wp-content/uploads/sites/22/HNR203_crop-1.pdf).

Arbitration Act, Chapter 49 of the Laws of Kenya.

Associated Electric and Gas Insurance Services [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [8], [11]

Bernardo M. Cremades Rodrigo Cortés, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis', (September 2013) Vol. 23 No. 3 *Journal of Arbitration Studies*, pp. 25 - 38.

David Sirona Ole Tukai v Francis Arap Muge, Samuel Kirui & Johannah Mosonik Nairobi Civil Appeal No. 76 of 2014.

Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill (February 1996).

Elina Zlatanska, 'To publish, or not to publish arbitral awards: that is the question...,' (February 2015) (81)1, *The International Journal of Arbitration, Mediation and Dispute Management*.

Eric Muchiri Thige, *A Review of Privacy and Confidentiality in Arbitration in Kenya*, (LL.M Thesis, University of Nairobi 2018).

Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012).

*Hassneh Insurance Co of Israel v Stuart J Mew*, [1993] 2 Lloyd's Rep 243.

Hwang & Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration', (2009) 26 J. OF INT'L ARB. 609.

*John Forster Emmott v Michael Wilson & Partners Ltd*, [2008] EWCA Civ 184. Judicature Act, Cap 8, Laws of Kenya.

Krrishan Singhanian & Alok Vajpeyi, 'India: Confidentiality In Arbitration: An Indian Outlook',

<<https://www.mondaq.com/india/arbitration-dispute-resolution/832720/confidentiality-in-arbitration-an-indian-outlook>>.

Lord Thomas of Cwmgiedd, *Speech on Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, The Bailii Lecture 2016, 9 March 2016 available <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>

Mark Darian-Smith, Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration', (2015) 81(4) *The International Journal of Arbitration, Mediation and Dispute Management* pp. 360 - 366.

Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?', (September 2018) *Kluwer Arbitration Blog*, available at <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/>.

*Martha Wangari Karua & another v. IEBC & 3 others Kerugoya*, High Court Election Petition 2 of 2017.

Matthew Groves, 'The implied undertaking restricting the use of material obtained during legal proceedings' (2003) 23 A.B.R. 314, 337–338.

Michael Fesler, 'The Extent of Confidentiality in International Commercial Arbitration', (2012) 78(1)*The International Journal of Arbitration, Mediation and Dispute Management*, pp. 48 – 58

M. Pryles, "Confidentiality" in L. Newman and R. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (New York: Juris Publishing, 2008).

Nairobi Centre for International Arbitration Act No. 26 of 2013.

Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255 of 2015.

Nairobi Law Monthly Company Limited v KENGEN, Edward Njoroge & the AG Milimani HC Petition No. 278 of 2011.

Olivia de Lovinfosse, 'Arbitration and Confidentiality: Illusion or Disillusion?' (2015),  
[https://dial.uclouvain.be/memoire/ucl/fr/object/thesis:3418/datastream/PDF\\_01/view](https://dial.uclouvain.be/memoire/ucl/fr/object/thesis:3418/datastream/PDF_01/view).

Senator Johnstone Muthama v Tanathi Water Services Board & 2 others Nairobi JR Misc. Application No. 374 of 2013.

The Constitution of Kenya 2010.

Tibor Varady, John J. Barcelo III, Stefan Kroll & Arthur T. von Mehren, *International Commercial Arbitration*, at *Transnational Perspective American Casebook Series*, West Academic Publishing.

Wilfred Mutubwa, 'Confidentiality in Arbitration under the Constitution of Kenya 2010: Reality or Illusion?', (2016) 82(3)*The International Journal of Arbitration, Mediation and Dispute Management*, pp. 254 – 264.

*Exceptions to the Duty of Confidentiality in Arbitrations:* **((2022) 10(3) Alternative Dispute Resolution)**  
**Austin Ouko**

Victoria Clark, 'The English Arbitration Act turns 25: Is it time for an update?'  
<https://www.bclplaw.com/en-US/insights/the-english-arbitration-act-turns-25-is-it-time-for-an-update.html>

## Reflections on the Unfolding Significance of Sports Mediation

By: *Jacqueline Waihenya*\*

*Approaches to Sports Disputes Resolution continue to evolve with the defacto traditionally mechanism being sports arbitration. However, a quiet revolution has been occurring particularly at the Court of Arbitration of Sports (CAS) since the adoption of the CAS Mediation Rules in 1999 with statistical estimates indicating that almost 85% of CAS disputes are determined via mediation. This paper is therefore a reflection on what sports mediation mounts to as well as some of its inherent dynamics in an evolving space.*

### 1. What Is Sports Mediation?

Crafting a definition for the term sports mediation presents several challenges the key being that we do not have universally accepted definitions in respect of both the terms “sports” and “mediation”. We tend to define mediation as that Alternative Dispute Resolution (ADR) mechanism facilitated by a third-party neutral who guides parties to a dispute towards a mutually accepted resolution

---

\* *Advocate of the High Court of Kenya; LLM University of Nairobi (Public Finance & Financial Services Law); LLB (Hons) University of Nairobi; Kenya School of Law (Post Graduate) Diploma; Fellow of the Chartered Institute of Arbitrators (FCI Arb); International Mediation Institute IMI Certified Mediator; FIFA Approved Mediator; Chartered Mediator-Institute of Chartered Mediators & Conciliators (ICMC)[2018]; Certificate of Completion Taxation Mediation Masterclass-Mediation Training Institute [2022]; Certified Advance Mediator(Sports)-Mediation Training Institute [2021]; Certified Advance Mediator(Commercial)-Mediation Training Institute [2018]; Certified Advance Mediator (Family & Divorce) - Mediation Training Institute [2015]; Certified Professional Mediator - Mediation Training Institute [2012]; Kenya Judiciary Accredited Mediator [2016]; Fellow Certified Public Secretary-Institute of Certified Public Secretaries (ICPSK); Accredited Governance Auditor ICPSK; Governance Ethics Risk & Compliance Expert ICPSK [2021, Legal & Compliance Auditor - Kenya School of Law]; Vice Chair - Chartered Institute of Arbitrators Kenya Branch [2017 to 2022]; Member, National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020/2021; Vice Chair - Kenya National Chamber of Commerce & Industry (Mombasa Chapter) [2019-2021]; Vice Chair - Mombasa Law Society [2021] and Associate Editor, CIARB-ADR Journal 2020/2021.*



without having any decision-making power over them<sup>1</sup>. Such neutral party nudges parties to a dispute to focus on their interests, that is to say, their needs, desires or concerns that underlie their respective positions with the intent of establishing the nexus between both the parties' interests and usually therein lies the solution called settlement in mediation<sup>2</sup>.

*It is nevertheless worth highlighting that The United Nations Convention on International Settlement Agreements Resulting from Mediation*<sup>3</sup> known as the Singapore Convention defines mediation as follows:

*“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”<sup>4</sup>*

The concept of sports for its part is wide and far ranging and for instance within Kenya it is typically bundled up with arts and social development administratively housed in the Ministry of Sports, Culture and Heritage and whose activities are funded by the Sports, Arts and Social Development Fund<sup>5</sup> out of the Exchequer with a significant portion sourced from proceeds pursuant

---

<sup>1</sup> Jacqueline Waihenya & Arthur Igeria, *Mediation Advocacy in Kenya – Remoulding the Gladiator in the Room to the Valuable Ally of Dispute Resolution* (2021) 9(2) *Alternative Dispute Resolution*

<sup>2</sup> Program on Negotiation, *What is a Neutral Third Party?* (2022) Harvard Law School, Available at <https://www.pon.harvard.edu/tag/neutral-third-party/> [last accessed on 31 July 2022]

<sup>3</sup> United Nations Commission on International Trade Law (UNCITRAL), *The United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018). Available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [Last accessed on 1 August 2022]

<sup>4</sup> Article 2(3) of the Singapore Convention

<sup>5</sup> Regulation 3 of the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018

to the Betting, Lotteries and Gaming Act,<sup>6</sup> Income Tax Act<sup>7</sup> and Excise Duty Act<sup>8</sup> as well as grants and donations.<sup>9</sup>

### **1.1 An Attempt at a Definition:**

The closest attempt at defining sports mediation can be found in the CAS Mediation Rules<sup>10</sup> at Article 1 thus:

*CAS mediation is a non-binding and informal procedure, based on an agreement to mediate in which each party undertakes to attempt in good faith to negotiate with the other party with a view to settling a sports-related dispute. The parties are assisted in their negotiations by a CAS mediator.*

Any attempt at a definition of sports mediation would therefore of necessity canvass the fact that it is an ADR process involving a third-party neutral known as a sports mediator who does not have any binding decision making authority but who guides discussions between parties, both or all of whom are engaged within the sports, arts and social development sphere. Such sports mediator assists the parties to arrive at a mutually accepted resolution or settlement.<sup>11</sup>

### **1.2 Sports Mediation in Action:**

*Fédération Internationale de Football Association* (FIFA), the international governing body of association football, recently established the FIFA Approved Mediators list in a bid to modernize and provide efficient service to parties and

---

<sup>6</sup> Regulation 4(a)

<sup>7</sup> Regulation 4(b)

<sup>8</sup> Regulation 4(c)

<sup>9</sup> Regulation 4(e)

<sup>10</sup> Court of Arbitration for Sport, Mediation Rules, 1999 Available at <https://www.tas-cas.org/en/mediation/rules.html> [Last accessed on 1 August 2022]

<sup>11</sup> Though the term “sports mediation” is used by Anubhab Banerjee the writer does not attempt to define the same in the article and the foregoing definition is crafted along the lines of the commonly used definition for mediation with specific reference to the sports industry - Banerjee, Anubhab, *Resolution of Sports Disputes through Mediation* (January 4, 2020). Available at

SSRN: <https://ssrn.com/abstract=3513859> or <http://dx.doi.org/10.2139/ssrn.3513859>

stakeholders in the football universe annexed to the Football Tribunal.<sup>12</sup> Sports Mediation comes in as an ADR mechanism to allow parties to put an end to their controversies in a swift and efficient manner allowing parties to put their disputes to bed.<sup>13</sup> This initiative follows in the footsteps of Court of Arbitration for Sport (CAS) Mediation which came into being with the introduction of the CAS Mediation Rules on 18<sup>th</sup> May 1999<sup>14</sup> by the International Council of Arbitration for Sport on the basis that the rules would operate alongside arbitration as they encourage and protect fair play and the spirit of understanding and affirmed that they were made to measure for sport.<sup>15</sup> The formal structures notwithstanding it is safe to state that sports mediation remains an underutilized dispute resolution process<sup>16</sup> around the world. It is nevertheless estimated that at least 85% of all matters before CAS are resolved through Sports Mediation.<sup>17</sup>

Further sports mediation largely remains present on the international plane and is yet to make any impact in Kenya though the legal framework has taken recent steps to incorporate specific reference to sports mediation. Thus, the *Kenyan Constitution 2010* lays a firm foundation at Article 159(2)(c) for mediation generally and the *Sports Disputes Tribunal*

---

<sup>12</sup> FIFA Mediators engage in Online Workshop (25 March 2022) Available at <https://www.fifa.com/legal/news/fifa-mediators-engage-in-online-workshop> [Last accessed on 31 July 2022]

<sup>13</sup> Ibid

<sup>14</sup> Ian Blackshaw, *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport* (June 2003) *Entertainment and Sports Law Journal*. DOI:10.16997/eslj.139

Available at

[https://www.researchgate.net/publication/237285130\\_The\\_Court\\_of\\_Arbitration\\_for\\_Sport\\_An\\_International\\_Forum\\_for\\_Settling\\_Disputes\\_Effectively\\_'Within\\_the\\_Family\\_of\\_Sport](https://www.researchgate.net/publication/237285130_The_Court_of_Arbitration_for_Sport_An_International_Forum_for_Settling_Disputes_Effectively_'Within_the_Family_of_Sport) [last accessed on 31 July 2022]

<sup>15</sup> Ibid

<sup>16</sup> Robert Pannullo, *Facilitating Change: Addressing the Underutilization of Mediation in Professional Sports* (2019) 25 *Harv Negot L Rev* 103 Available on Heinonline [last accessed on 1 Aug 2022]

<sup>17</sup> Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence An Empirical Inquiry into Lex Sportiva* (2019) ASSER International Law Sports Series, Springer

Rules, 2022<sup>18</sup> have amplified the Sports Tribunal ADR capacity in the Sports Act clothing the Tribunal not only with the ability to apply ADR methods to sports disputes and provide the necessary expertise and assistance in this regard<sup>19</sup> but to further apply mediation in the following terms:

*20. (1) The Tribunal may, on its own motion or upon the request of parties, order that any in a proceeding be mediated before a member of the Tribunal or an independent person.*

*(2) The member of the Tribunal who sits as a mediator under paragraph (1) shall not, unless the parties' consent, sit on the panel hearing the substantive matter.*

*(3) Costs of the independent mediator shall be borne by parties.*

*(4) The Tribunal may refer the parties to such other forms of alternative dispute resolution as it deems appropriate.*

## **2. When is Sports Mediation Appropriate?**

Sports mediation is appropriate in commercial and financial issues such as sponsorship and endorsement contracts but is specifically excluded in disciplinary anti-doping cases.<sup>20</sup> As a general rule though mediation presents an opportunity at win-win for all parties concerned and guarantees a forum where the said parties can explore possibilities to preserve and promote fiduciary, financial and commercial relationships between players and management.<sup>21</sup> The presence of a mediator maintains dialogue between the parties, enables parties to re-evaluate their interests vis-à-vis their positions and ultimately gives them the forum for crafting a resolution that takes into accounts their respective interests.<sup>22</sup> Critically Mediation is a process that ring fences and protects the

---

<sup>18</sup> The new Rules were gazetted on 28<sup>th</sup> March 2022.

<sup>19</sup> Section 59, Sports Act No.25 of 2013 and Regulation

<sup>20</sup> Supra Ibid Note 10

<sup>21</sup> Rodney A. Max & Joshua J. Campbell, *Formal Mediation in Professional Sports* (2007) 1 Am J Mediation 17 Available at Heinonline [last accessed on 31 July 2022]

<sup>22</sup> Ibid

intangible sense of dignity and respect between parties upon which teamwork and championships are built.<sup>23</sup>

Despite mediation's benefits the process does encounter limitations the key of which is the lack of precedent. In *Woodhall v. Warren Richie*<sup>24</sup> Woodhall sought to terminate his management and promotional contracts with the Defendant and refused to fight for him. The Defendant for his part lay determined in the validity of the contracts compelling the Plaintiff to go to court seeking an early hearing date because per the rules of the World Boxing Organization he was required to defend his title in September 1999.<sup>25</sup> Once the case was before the Court the dispute was referred to mediation at Centre for Effective Dispute Resolution (CEDR) and the dispute was resolved within 72 hours.<sup>26</sup>

### **3. Pre-Requisites for Sports Mediation:**

To my mind the key prerequisites for sports mediation are that (1) the parties must be ready to commit to the mediation process<sup>27</sup> and (2) the dispute must be ripe for resolution.<sup>28</sup>

#### **3.1 Parties require to be ready to commit to the mediation process:**

In sports unlike many other commercial spaces athletes, coaches, national sports organizations and officials tend to err towards not hurting their respective disciplines or events and their colleagues. This tends to make them more amenable towards seeking confidential for resolution as opposed to engaging in prolonged public disputes premised on principle and position alone. Most are part of teams with strong value systems and brands which they are invested in protecting and possibly have been a part of over a prolonged period and they

---

<sup>23</sup> Ibid

<sup>24</sup> Bulletin TAS CAS Bulletin 1/2014 – Articles & Commentaries pg.27

<sup>25</sup> *Handbook on International Sports Law* - edited by James A. R. Nafziger, Stephen F. Ross pgs.81-82

<sup>26</sup> Supra Ibid Note 15

<sup>27</sup> Supra Ibid Note 12

<sup>28</sup> William Zartman, 'Ripeness': *the importance of timing in negotiation and conflict resolution* (20 December 2008)E-International Relations ISSN 2053-8626 Available at <https://www.e-ir.info/2008/12/20/ripeness-the-importance-of-timing-in-negotiation-and-conflict-resolution/> [last accessed on 1 August 2022]

have grown together in their “sports family.”<sup>29</sup> Sports mediators can therefore leverage these relationships keeping in mind that a significant portion of disputes arise out of perceptions of suspicious political activity in the process of selection, funding which can be nudged into discussion, sharing of perspectives and ultimate resolution.<sup>30</sup>

### **3.2 Dispute requires to be ripe for resolution:**

A ripe moment depends on the parties’ perception of a mutually hurting stalemate generally associated with an impending past or recently avoided catastrophe.<sup>31</sup> Thus parties reach a point where they cannot reasonably escalate to victory based on their position and this deadlock is painful to both of them though not necessarily in equal measure and they thus each seek a way to resolve their stalemate.<sup>32</sup>

### **4. Dynamics of Sports Mediation:**

Almost every sports mediation is time sensitive, there are fixed deadlines that require to be met. Missed deadlines can mean an athlete is locked out of an event and even the time taken to finalise the process means that this is time spent away from typically bruising training routines. Further, every moment lost tends to interfere with a party’s ability to participate for an event that requires prolonged periods, read years of preparation.

A sports mediator further requires to be sensitive to the fact that a sizeable portion of today’s elite top performing athletes are fairly young which presents its own unique dilemmas and ethical conundrums. Especially, since a young athlete’s decision-making capacity may be highly influenced by parents and

---

<sup>29</sup> While some families exhibit an ingrained family sport culture and proceed to dominate in certain disciplines such as the Williams Sisters in Tennis, or the American Football First Family Mannings or the Boxing Mayweathers many athletes come to view their team as a surrogate family creating strong and lasting bonds.

- Nick Dimengo, Top 20 Most Well-Known Sports Families (12 November 2014) Available at <https://bleacherreport.com/articles/2263106-top-20-most-well-known-sports-families> [last accessed on 1 August 2022]

<sup>30</sup> Mediation Training Institute Sports Mediators Masterclass (2022)

<sup>31</sup> Supra Ibid Note 29

<sup>32</sup> Ibid

legal guardians and they may have been exposed to questionable coaching practices.<sup>33</sup> Some may not have legal representatives and they may be coming up against seasoned specialist lawyers in the field with international footprints particularly in regard to international events and competitions. The geographical spread may therefore be significant and the parties may speak different languages and emanate from different cultural backgrounds. There is further a very real possibility that disputes may involve multi-parties subject to a plethora of rules and regulations at international and domestic levels.<sup>34</sup>

### **5. Enforcement of Sports Mediation Settlement Agreements:**

The *United Nations Convention on International Settlement Agreements Resulting from Mediation*<sup>35</sup> known as the Singapore Convention entered into force on 12 September 2020, i.e., six months after the deposit to the Secretary-General of the United Nations of the third ratification instrument by Qatar, in accordance with Articles 10, 11(4) and 14 of the Singapore Convention.<sup>36</sup> This Convention is widely considered as adding legal certainty in the enforcement of mediation settlement agreements on the international plane<sup>37</sup> as an answer to the New York Convention whose success it seeks to emulate.<sup>38</sup> Mediation Settlement Agreements between parties who are nationals of contracting states may therefore avail themselves of the enforcement provisions under the Convention.

On the local level we can anticipate that mediation settlement agreements arrived under the auspices of the newly minted *Sports Disputes Tribunal Rules*,

---

<sup>33</sup> Ohio University, *Ethical Issues in Sports and How Athletic Leaders Can Address Them* (2022) Ohio University Online Master of Athletic Administration. Available at <https://onlinemasters.ohio.edu/blog/ethical-issues-in-sports/> [last accessed on 1 August 2022]

<sup>34</sup> Supra Ibid Note 22

<sup>35</sup> Supra Ibid Note 4

<sup>36</sup> International Arbitration, *2018 Singapore Convention on Mediation* (1 January 2021) Available at <https://www.international-arbitration-attorney.com/2018-singapore-convention-on-mediation/> [Last accessed on 1 August 2022]

<sup>37</sup> Jacqueline Waihenya, *Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement* (2021)9(4) *Alternative Dispute Resolution*. Available at <https://ciarbkenya.org/wp-content/uploads/2021/10/Volume-94-.pdf> [last accessed on 1 August 2022]

<sup>38</sup> Ibid

2022 will lend themselves to recognition and enforcement pursuant to Section 59C of the Kenyan *Civil Procedure Act*<sup>39</sup> and those emanating from private arrangements will be effected through Section 59D.<sup>40</sup> Where adopted by the courts under these provisions such mediation settlement agreements are deemed orders of the court from which no appeal lies.

## **6. Reflections and Recommendations:**

The 2022 World Athletics Championships in Oregon, USA came to an end a couple of days ago at the tail end of July 2022 with Kenyan athletes ranking fourth overall with 104 points<sup>41</sup> and they are currently competing at the Birmingham 2022 XXII Commonwealth Games in the United Kingdom.<sup>42</sup> Another major highlight in the international sporting calendar is the FIFA World Cup 2022, a first of its kind being the first Winter World Cup scheduled to kick off on 21<sup>st</sup> November with the grand finale on 18<sup>th</sup> December 2022. It will be held in historically the smallest host nation ever in the city of Doha, Qatar right in the middle of the Middle East and the first one that will be totally carbon neutral.<sup>43</sup>

As can be gleaned from the Gidey/Obiri contest in the 10,000m race<sup>44</sup> invariably there shall be incidents on and off the field with the potential to become full blown disputes. There is therefore value for international and national sports organizations, their top leadership and players within the sports dispute arena

---

<sup>39</sup> Chapter 21 of the Laws of Kenya (2012 Edition)

<sup>40</sup> Ibid

<sup>41</sup> World Track Organization (July 2022) Available at <https://world-track.org/2022/07/world-athletics-championships-2022-medal-table-standings-points-table/> [last accessed on 30 July 2022]

<sup>42</sup> Ibid

<sup>43</sup> Callum, O'Neill, *20 Things Qatar is Known and Famous for* (March 2022) <https://heyexplorer.com/what-is-qatar-known-and-famous-for/#:~:text=Qatar%20is%20famous%20for%20Oil,Waqif%2C%20and%20much%20much%20more!> [last accessed on 30<sup>th</sup> July 2022]

<sup>44</sup> Gidey beats Hassan and Obiri to claim 10,000m gold | World Athletics Championships Oregon 22 (17 July 2022) Available at <https://www.youtube.com/watch?v=ZCvU3x6VfZg> [last accessed on 1 August 2022]



to engage sports mediation within predictable frameworks that lend themselves to engaging greater use of this ADR mechanism.

On the domestic front the Sports Tribunal's move to amplify the mediation provisions in our laws is lauded. A framework to operationalize these provisions will be most welcome and we can test whether on the local front we can match or surpass the statistical performance of CAS mediation of 85%!

## **Bibliography: - Statutory Instruments: Kenya**

the Constitution of Kenya, 2010

the Civil Procedure Act Chapter 21 of the Laws of Kenya

the Public Finance Management (Sports, Arts and Social Development Fund)  
Regulations, 2018

the Sports Act, No.25 of 2013 Laws of Kenya

the Sports Dispute Tribunal Rules, 2022

Court of Arbitration for Sport, Mediation Rules, 1999 Available at  
<https://www.tas-cas.org/en/mediation/rules.html> [Last accessed on 1 August 2022]

United Nations Commission on International Trade Law (UNCITRAL), *The United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018). Available at  
[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [Last accessed on 1 August 2022]

United Nations Commission on International Trade Law (UNCITRAL), *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> [last accessed on 1 August 2022]

Bulletin TAS CAS Bulletin 1/2014 – Articles & Commentaries pg.27

### **Case Law: United Kingdom**

*Woodhall v. Warren Richie* - Bulletin TAS CAS Bulletin 1/2014 – Articles & Commentaries pg.27

### **Books & Monographs:**

Banerjee, Anubhab, *Resolution of Sports Disputes through Mediation* (January 4, 2020). Available at

SSRN: <https://ssrn.com/abstract=3513859> or <http://dx.doi.org/10.2139/ssrn.3513859>

Callum, O'Neill, *20 Things Qatar is Known and Famous For* (March 2022)

[https://heyexplorer.com/what-is-qatar-known-and-famous-](https://heyexplorer.com/what-is-qatar-known-and-famous-for/#:~:text=Qatar%20is%20famous%20for%20Oil,Waqif%2C%20and%20much%20much%20more!)

[for/#:~:text=Qatar%20is%20famous%20for%20Oil,Waqif%2C%20and%20much%20much%20more!](https://heyexplorer.com/what-is-qatar-known-and-famous-for/#:~:text=Qatar%20is%20famous%20for%20Oil,Waqif%2C%20and%20much%20much%20more!) [last accessed on 30<sup>th</sup> July 2022]

*FIFA Mediators engage in Online Workshop* (25 March 2022) Available at

<https://www.fifa.com/legal/news/fifa-mediators-engage-in-online-workshop> [Last accessed on 31 July 2022]

*Handbook on International Sports Law* - edited by James A. R. Nafziger, Stephen F. Ross pgs.81-82

Ian Blackshaw, *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport* (June 2003) *Entertainment and Sports Law Journal*. DOI:10.16997/eslj.139 Available at

[https://www.researchgate.net/publication/237285130\\_The\\_Court\\_of\\_Arbitration\\_for\\_Sport\\_An\\_International\\_Forum\\_for\\_Settling\\_Disputes\\_Effectively\\_'Within\\_the\\_Family\\_of\\_Sport](https://www.researchgate.net/publication/237285130_The_Court_of_Arbitration_for_Sport_An_International_Forum_for_Settling_Disputes_Effectively_'Within_the_Family_of_Sport) [last accessed on 31 July 2022]

*International Arbitration, 2018 Singapore Convention on Mediation* (1 January 2021) Available at

<https://www.international-arbitration-attorney.com/2018-singapore-convention-on-mediation/> [Last accessed on 1 August 2022]

Jacqueline Waihenya & Arthur Igeria, *Mediation Advocacy in Kenya – Remoulding the Gladiator in the Room to the Valuable Ally of Dispute Resolution* (2021) 9(2) *Alternative Dispute Resolution*

Jacqueline Waihenya, *Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement* (2021)9(4) *Alternative Dispute Resolution*.

Available at <https://ciarbkenya.org/wp-content/uploads/2021/10/Volume-94-.pdf> [last accessed on 1 August 2022]

Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence An Empirical Inquiry into Lex Sportiva* (2019) ASSER International Law Sports Series, Springer

Mediation Training Institute Sports Mediators Masterclass (2022)

Nick Dimengo, Top 20 Most Well-Known Sports Families (12 November 2014)  
Available at <https://bleacherreport.com/articles/2263106-top-20-most-well-known-sports-families> [last accessed on 1 August 2022]

Ohio University, *Ethical Issues in Sports and How Athletic Leaders Can Address Them* (2022) Ohio University Online Master of Athletic Administration.  
Available at <https://onlinemasters.ohio.edu/blog/ethical-issues-in-sports/> [last accessed on 1 August 2022]

Program on Negotiation, *What is a Neutral Third Party?* (2022) Harvard Law School, Available at <https://www.pon.harvard.edu/tag/neutral-third-party/> [last accessed on 31 July 2022]

Robert Pannullo, *Facilitating Change: Addressing the Underutilization of Mediation in Professional Sports* (2019) 25 Harv Negot L Rev 103 Available on Heinonline [last accessed on 1 Aug 2022]

Rodney A. Max & Joshua J. Campbell, *Formal Mediation in Professional Sports* (2007) 1 Am J Mediation 17 Available at Heinonline [last accessed on 31 July 2022]

William Zartman, *'Ripeness': the importance of timing in negotiation and conflict resolution* (20 December 2008)E-International Relations ISSN 2053-8626  
Available at <https://www.e-ir.info/2008/12/20/ripeness-the-importance-of-timing-in-negotiation-and-conflict-resolution/> [last accessed on 1 August 2022]

World Track Organization (July 2022) Available at <https://world-track.org/2022/07/world-athletics-championships-2022-medal-table-standings-points-table/> [last accessed on 30 July 2022]

### **Video**

*Gidey beats Hassan and Obiri to claim 10,000m gold* | World Athletics Championships Oregon 22 (17 July 2022) Available at <https://www.youtube.com/watch?v=ZCvU3x6VfZg> [last accessed on 1 August 2022]

## **Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR**

By: **Kariuki Muigua\***

### **Abstract**

*The paper discusses the need for promoting professional conduct, ethics, integrity and etiquette in Alternative Dispute Resolution (ADR). It critically addresses some of the ethical concerns in ADR that can potentially hinder the efficacy of the various mechanisms. It then discusses attempts towards enacting rules of ethics in ADR by various institutions and national laws. The paper concludes by suggesting solutions towards promoting professional conduct, ethics, integrity and etiquette in ADR.*

### **1.0 Introduction**

The practice of Alternative Dispute Resolution has evolved and now encompasses various mechanisms including arbitration, mediation, adjudication, conciliation and traditional justice systems. ADR practitioners are increasingly viewing themselves as part of a distinct profession<sup>1</sup>. Despite the fact that most ADR practitioners are associated with other professions such as law, engineering and accounting and are subject to the professional standards of those professions, there is consensus that the practice of ADR raises its own distinctive concerns that may not be adequately addressed by the codes of individual professions<sup>2</sup>. Due to the multidisciplinary nature of the practice of ADR, codes of individual professions may not be applicable to some ADR practitioners. For example, requiring arbitrators to be guided by the code of conduct applicable to the legal profession may not be attainable since arbitrators

---

\* *PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law.*

<sup>1</sup> Feerick, J et al., 'Standards of Professional Conduct in Alternative Dispute Resolution' Journal of Dispute Resolution, Issue 1, 1995

<sup>2</sup> Ibid

can be members of other professions such as engineering and accounting thus not bound by such rules.

The extraterritorial nature of some ADR mechanisms further raises concern in respect of promoting a professional code of conduct. Some ADR mechanisms such as International Commercial Arbitration and International Commercial Mediation apply across jurisdictions which means that enforcement of national ethical codes applicable to different professions may not be suitable<sup>3</sup>. Further, differences in cultures, languages and legal traditions in such mechanisms means that ADR practitioners may abide by different ethical obligations which could potentially result in conflict of laws with respect to ethics in the practice of ADR<sup>4</sup>. This may necessitate regulation of such mechanisms at an international level to ensure uniformity and certainty<sup>5</sup>.

However, despite these concerns, there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution<sup>6</sup>. It is arguable that regulation of ADR through a code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners<sup>7</sup>.

The paper critically looks at the need for a professional code of conduct, ethics, integrity and etiquette in ADR. It discusses the relevant sources of professional conduct and ethics in ADR. The paper also highlights the ethical concerns in ADR and suggests reforms towards promoting professional conduct, ethics, integrity and etiquette in ADR.

---

<sup>3</sup> Rogers. C., 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' 23Mich. J. Int'l L. 341 (2002).

<sup>4</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 Fordham Urb. L.J. 979-990 (2001)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Keli. J., 'Mediation as A Profession in Kenya: A Call for Regulation' (2018) 6(3) Alternative Dispute Resolution

## **2.0 Professional Conduct, Ethics, Integrity & Etiquette in ADR in Kenya**

Professional conduct, ethics, integrity and etiquette in ADR principles can be discerned from various sources. These sources are discussed below.

### **2.1 Constitution of Kenya 2010**

The Constitution of Kenya sets out national values and principles of governance that are to bind and guide all persons. These values and principles include integrity, transparency and accountability<sup>8</sup>. ADR practitioners in Kenya are thus bound by these principles and should ensure that their conduct is done in a transparent and accountable manner. Further, the Constitution also recognises the role of ADR mechanisms as tools of access to justice<sup>9</sup>. To this extent, the Constitution sets out certain principles to guide persons exercising judicial authority including ADR practitioners. Among these principles is fairness, the need for expeditious management of disputes and respect of the Constitution<sup>10</sup>.

ADR practitioners should be guided these principles in discharge of their mandate. The Constitution of Kenya 2010 thus represents a good source of authority for professional conduct, ethics, integrity and etiquette in ADR.

### **2.2 Civil Procedure Act**

The Act provides for the management of disputes through ADR mechanisms such as arbitration and mediation<sup>11</sup>. The Act establishes the Mediation Accreditation Committee whose mandate is certification of mediators and maintaining a register of qualified mediators<sup>12</sup>. The Committee is also mandated to enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators<sup>13</sup>. The Mediation Accreditation Committee established under the Civil Procedure Act is thus an important body in promoting professional conduct and ethics for mediators.

---

<sup>8</sup> Constitution of Kenya, 2010, Article 10 (2) (c)

<sup>9</sup> Ibid, article 159 2 (c)

<sup>10</sup> Ibid

<sup>11</sup> Civil Procedure Act, Cap 21, Part VI

<sup>12</sup> Ibid, S 59 A (4)

<sup>13</sup> Ibid



### **2.3 The International Bar Association Guidelines on Conflicts of Interest in International Arbitration**

One of the fundamental ethical concerns in International Commercial Arbitration is conflict of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration seek to address this concern by stipulating a code of conduct on conflict of interest in international arbitration.<sup>14</sup> Among the salient provisions of the guidelines is the aspect of impartiality. The guidelines provide that every arbitrator shall remain impartial and independent of the parties at the time of appointment and shall remain so until the final award is rendered<sup>15</sup>. The guidelines further provide that an arbitrator shall decline to accept an appointment or refuse to continue to act where there is likelihood of conflict of interest<sup>16</sup>. There is also a requirement for arbitrators to disclose facts that may give rise to doubts as to the arbitrator's impartiality or independence<sup>17</sup>.

The IBA guidelines represent an attempt to formulate a code of conduct, ethics, integrity and etiquette in ADR at the international level. The guidelines have gained wide acceptance within the international arbitration community<sup>18</sup>.

### **2.4 The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009**

The Code sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness of the dispute resolution process and withdraw if this is no longer possible<sup>19</sup>. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the

---

<sup>14</sup> International Bar Association, 'Guidelines on Conflicts of Interest in International Arbitration' available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (accessed on 24/05/2022)

<sup>15</sup> Ibid, General Standard 1.

<sup>16</sup> Ibid, General Standard 2.

<sup>17</sup> Ibid, General Standard 3.

<sup>18</sup> Ibid

<sup>19</sup> The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009, Part 2, Rule 2, available at <https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-october-2009.pdf> (accessed on 25/05/2022)

dispute resolution process<sup>20</sup>. It further requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced<sup>21</sup>. The Code also requires members to ensure that parties are adequately informed of all the procedural aspects of the process<sup>22</sup>. It further requires members to maintain trust and confidence of the dispute resolution process<sup>23</sup>. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators.

### **2.5 The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020**

The rules stipulate the expected code of conduct for arbitrators in respect of arbitration proceedings conducted under the auspices of the Chartered Institute of Arbitrators (Kenya). The rules provide for the independence and impartiality of an arbitral tribunal<sup>24</sup>. The rules require an arbitrator to disclose circumstances likely to give justifiable doubts as to the impartiality or independence of an arbitrator<sup>25</sup>. The rules further require arbitration proceedings to be private and confidential<sup>26</sup>. Arbitrators should thus not disclose proceedings unless by consent of the parties. The rules also require arbitrators to avoid conflict of interest<sup>27</sup>.

### **2.6 Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021**

The Code stipulates fundamental ethical guidelines for persons appointed to mediate disputes under the NCIA mediation rules. Among its fundamental

---

<sup>20</sup> Ibid, Rule 3

<sup>21</sup> Ibid, Rule 4

<sup>22</sup> Ibid, Rule 5

<sup>23</sup> Ibid, Rule 8

<sup>24</sup> The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020, available at <https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf> (accessed on 24/05/2022)

<sup>25</sup> Ibid

<sup>26</sup> Ibid, Rule 134

<sup>27</sup> Ibid, Rule 8

ethical rules is independence and impartiality<sup>28</sup>. Before accepting an appointment to act, a mediator is required to disclose anything within his/her knowledge that may materially affect his/her impartiality<sup>29</sup>.

The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation<sup>30</sup>. Conflict of interest in mediation can potentially arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process.

The Code further requires a mediator to possess the necessary competence required to mediate effectively<sup>31</sup>. Competence in mediation can be acquired through training, experience and cultural understandings. In addition, the Code requires mediators to promote confidentiality, quality and fairness of the mediation process<sup>32</sup>.

## **2.7 The Alternative Dispute Resolution Bill**

The purpose of the Bill is to provide for an Act of parliament that will govern the settlement of civil disputes through ADR mechanisms and in particular conciliation, mediation and traditional dispute resolution mechanisms<sup>33</sup>. The Bill sets out certain guiding principles and ethical considerations to govern management of disputes through the stipulated ADR mechanisms. The Bill requires ADR practitioners to promote confidentiality in the process except in the case of traditional dispute resolution<sup>34</sup>. Further, the Bill requires ADR

---

<sup>28</sup> Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at <https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS-2021.pdf> (accessed on 25/05/2022)

<sup>29</sup> Ibid

<sup>30</sup> Ibid, Principle 3

<sup>31</sup> Ibid, Principle 4

<sup>32</sup> Ibid, Principles 5 and 7.

<sup>33</sup> Alternative Dispute Resolution Bill, available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf> (accessed on 25/05/2022)

<sup>34</sup> Ibid, Clause 5.

practitioners to facilitate expeditious determination of disputes taking into account the nature of the dispute<sup>35</sup>. ADR practitioners are also required to be impartial and disclose any conflict of interest that may arise during the process<sup>36</sup>. Finally, the Bill requires ADR practitioners to be competent in their respective fields before facilitating the management of disputes<sup>37</sup>. If enacted into law, the ADR Act will enhance professional conduct, ethics, integrity and etiquette in the practice of ADR in Kenya.

### **3.0 Ethical Concerns in Alternative Dispute Resolution**

The practice of ADR raises certain ethical concerns. These include:

#### **3.1 Confidentiality**

One of the fundamental attributes of ADR mechanisms is confidentiality. Confidentiality in ADR entails maintaining integrity of the process and not disclosing matters to third parties<sup>38</sup>. Confidentiality is central to ADR since it allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties<sup>39</sup>. The parties and the neutral thus have a duty to maintain confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed<sup>40</sup>.

Confidentiality in ADR raises fundamental ethical concerns. Where this duty is breached, information pertaining the process may be leaked to third parties thus affecting the integrity of the process. The importance of confidentiality in ADR

---

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' University of Miami Law Review, Volume 56, No.4

<sup>39</sup> Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006)

<sup>40</sup> Muigua. K., 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> (accessed on 25/05/2022)

has seen various Codes of Conduct on ADR capturing it as an important ethical obligation<sup>41</sup>. However, there may be situations where confidentiality in ADR may be limited. This could be by consent of the parties; where prescribed by law or in situations where a crime may be committed<sup>42</sup>.

### **3.2 Conflict of Interest**

Conflict of interest is a major concern in the practice of ADR. The rules on conflict of interest in ADR are aimed at preventing bias in management of disputes which could arise due to involvement by a neutral with the subject matter of the dispute or relationship between the neutral and either of the participants in the ADR process<sup>43</sup>. This is in line with the principles of natural justice and the right to a fair hearing enshrined under the Constitution<sup>44</sup>. Conflict of interest concerns includes situations where the same individual performs multiple roles such as an arbitrator or mediator and later as a party representative<sup>45</sup>. It also includes situations where mediators and arbitrators practice in law firms with other advocates who may represent parties before such a mediator or arbitrator<sup>46</sup>. The rules on conflict of interest are aimed at addressing such situations and ensuring that there is fairness and integrity in the ADR process.

### **3.3 Competence**

Competence is critical for the success of all ADR mechanisms. Since most ADR mechanisms especially arbitration and mediation rely on courts for their enforcement, there is need for competence that may be exhibited through the

---

<sup>41</sup> The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021 and the Alternative Dispute Resolution Bill among other laws and rules capture confidentiality as a fundamental ethical obligation.

<sup>42</sup> Muigua. K., *Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future*, Op Cit

<sup>43</sup> See for example the the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, Principle 3

<sup>44</sup> Constitution of Kenya, 2010, Article 50.

<sup>45</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

<sup>46</sup> Ibid

writing of reasoned awards and mediation agreements<sup>47</sup>. Competence in ADR may also be exhibited through following due process, rules of conduct and evidence. Where this duty is breached, there may challenges against the outcome of the ADR process such as arbitral awards. In Kenya, the Arbitration Act provides recourse to the High Court against an arbitral award on grounds including where the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration<sup>48</sup>. Competence is thus essential to ensure that arbitrators confine themselves within the scope of reference to arbitration. To address this concern, most Codes of conduct on ADR stipulate competence as fundamental ethical obligation<sup>49</sup>. Competence in ADR may be acquired through education, training and experience. Further to ensure competence, ADR institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration provides for a system of accreditation of their members.

### **3.4 Costs and Fees**

The issue of costs and fees raises ethical concerns in the practice of ADR. Such concerns involve the appropriateness and reasonableness of fees charged by ADR practitioner such as arbitrators and mediators<sup>50</sup>. In some instances, these practitioners have been accused of charging exorbitant fees thus defeating the essence of ADR of facilitating cost effective management of disputes. To guard against this, some ADR mechanisms such as arbitration allow parties to negotiate with the arbitrator over the scale of fees to be charged. Further, arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration have formulated fees schedules governing administrative costs and arbitral fees.

---

<sup>47</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

<sup>48</sup> Arbitration Act, No.4 of 1995, S 35 (2) (iv).

<sup>49</sup> See for example the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Alternative Dispute Resolution Bill.

<sup>50</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

#### **4.0. Way Forward**

Various measures can be undertaken towards promoting professional conduct, ethics, integrity and etiquette in ADR. They include:

##### **4.1 Promoting Access to Justice through ADR**

The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as litigation<sup>51</sup>. There is therefore need to enhance access to justice through these mechanisms in order to benefit from their advantages. ADR practitioners such as mediators, conciliators and arbitrators should spearhead the principles inherent in these mechanisms in order to promote public confidence in their uptake. Enactment into law of the ADR Bill in Kenya will be an important step towards promoting access to justice through ADR.

##### **4.2 Promoting Standards and Accreditation of ADR Practitioners**

It is argued that promoting standards and accreditation in ADR will enhance accountability, efficiency and competence of ADR practitioners<sup>52</sup>. This can also serve the purpose of promoting public awareness and confidence in the use of ADR mechanisms. To achieve this goal, ADR institutions have developed various tools such as training of practitioners and maintaining a list of licensed individuals<sup>53</sup>. This is important towards promoting ethics and integrity in ADR since practitioners are expected to adhere to the rules of conduct stipulated by the respective institutions.

---

<sup>51</sup> See generally Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

<sup>52</sup> Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency:

Government Arbitrations in Light of the Constitution of Kenya 2010,' Alternative Dispute Resolution, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

<sup>53</sup> See for example the training programme offered by the Chartered Institute of Arbitrators, Kenya Branch, available at <https://ciarbkenya.org/our-courses/> (accessed on 27/05/2022)

### **4.3 Adhering to the Rules of Conduct, Ethics, Integrity and Etiquette by ADR Practitioners**

ADR practitioner should always adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate. These rules include impartiality and integrity in management of disputes. ADR practitioners should thus avoid conflict of interest in order to promote the right to a fair hearing. They should also only accept appointments in situations where they are competent to manage the dispute in question. By adhering to such rules, it will be possible to enhance efficient management of disputes through ADR mechanisms.

### **5.0 Conclusion**

Rules of conduct, ethics, integrity and etiquette are important in ADR. These rules ensure efficiency and viability of ADR mechanisms. There have been challenges in adopting and promoting such rules due to the multidisciplinary practice of ADR and the international nature of some ADR mechanisms such as international commercial arbitration and international commercial mediation. However, the success of ADR mechanisms calls for adoption of these rules. This has seen various ADR institutions adopting codes of conduct and ethics to govern such concerns<sup>54</sup>. There is thus need for promoting access to justice through ADR, promoting standards and accreditation for ADR practitioners and adhering to the rules stipulated by various ADR institutions. Promoting professional conduct, ethics, integrity and etiquette in ADR is an ideal which can be achieved.

---

<sup>54</sup> These include the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators.



## References

Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

Alternative Dispute Resolution Bill, available at <http://www.parliament.go.ke/sites/default/files/2021-06/34The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf>

Arbitration Act, No.4 of 1995

Civil Procedure Act, Cap 21

Constitution of Kenya, 2010

Feerick.J et al., 'Standards of Professional Conduct in Alternative Dispute Resolution' *Journal of Dispute Resolution*, Issue 1, 1995

Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006)

International Bar Association, 'Guidelines on Conflicts of Interest in International Arbitration' available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918>

Keli. J., 'Mediation as A Profession in Kenya: A Call for Regulation' (2018) 6(3) *Alternative Dispute Resolution*

Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)

Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4

Muigua. K., 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf>

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

Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at <Https://Ncia.Or.Ke/Wp-Content/Uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS-2021.Pdf>

Rogers. C., 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' 23Mich. J. Int'l L. 341 (2002).

The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020, available at <https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf>

The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009, available at <https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-october-2009.pdf>

**Case Review: Alternative Dispute Resolution is an Imperative in Public Procurement Disputes  
Constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021**

*By: Wilfred A. Mutubwa*

**Parties**

Petitioners

1.Stephen Mosesti Mirambo	2.Boaz Atanga Warugu
---------------------------	----------------------

Respondents

1.The Independent Electoral and Boundaries Commission	2.The Honorable Attorney General
---	----------------------------------

Interested Parties

1.Smartmatic International Holdings B.V	2.Inform Lykos (Hellas) S.A
---	-----------------------------

**Facts in Issue**

- On 14<sup>th</sup> of April 2021 the IEBC advertised a tender for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System as well as its hardware, equipment and accessories. (KIEMS TENDER).
- The IEBC also advertised for the supply and delivery of Ballot Papers, Registers of Voters, and Results Declaration Forms to be used at polling stations. (BALLOT PRINTING TENDER)
- Both tenders were advertised as International Open Tenders.
- The Petitioners were aggrieved that the tenders were awarded to the interested Parties; Smartmatic Int’L Holdings and Inform Lykos respectively in what they deemed an uncompetitive, unfair, opaque and unconstitutional manner.

**The Petitioners' Case:**

- a) There was no adequate Public Participation in the awarding of the Kenya Integrated Election Management System and Ballot tenders to Lykos and Smartmatic International respectively.
- b) The requisite quorum of IEBC Commissioners to conduct the tendering process was not met.
- c) The adequate preference margins in favour of local contractors as mandatorily required by the Constitution and the Public Procurement and Asset Disposal Act (PPDA) were not met.

**The Respondent's' Case:**

- a) The Petition does not meet the threshold of jurisdiction for the High Court set under Article 165(4).
- b) The court did not have jurisdiction as matters to do with procurement were dealt with by the Public Procurement Review Board which has special jurisdiction over such matters.
- c) The issues in the Petition regarding public participation were addressed in the Judicial Review Case No. 132 of 2021 and were hence sub-judice.
- d) The matter had been heard and conclusively dealt with by the Public Procurement Administrative Review Board and was therefore res judicata.
- e) The Petition was defective for failing to enjoin successful bidders who had proprietary interests and expectations arising out of the dispute.
- f) The Commission was in line with the preference margins set out under the Procurement Act.
- g) It was inequitable for the Petitioners not to have instituted the suit at the time of publication.

## **Rule**

- a) Jurisdiction goes to the very heart of a matter, a court with no jurisdiction can do nothing but down its tools.
- b) The Public Procurement Review Board has the jurisdiction to determine whether the Constitution and Law were violated by a public procurement entity.
- c) Parties must exhaust all other available remedies for resolution outside the courts before coming in for the court process.
- d) When a general word is followed by a list of specifics, the general word or phrase will be interpreted to only include items in the same class as those listed i.e. the ejus dem generis rule.

## **Analysis**

- a) The tenders in dispute were advertised in both print and electronic media in line with the Commission's calendar. Hence the Tenders were properly advertised and public participation was adequate as determined in the **Judicial Review Case No 132 of 2021**.
- b) The Constitution explicitly provides for Alternative Dispute Resolution and creates specialized bodies and entities to deal with specific disputes. The Public Procurement Review Board being one such entity is more expertly endowed than the contemporary court in procurement matters. The doctrine of non justiciability thus applies as the parties had not sought adequate audience before the Review Board before coming to court.
- c) Seeing as the petitioners were spirited litigants concerned with the outcome of the procurement process they were therefore accounted for under the ejus dem generis rule under Section 170 of the Procurement Act i.e "Such Other persons as the Review Board may determine." They, therefore, had Locus Standi and ought to have sought audience with the Review Board to present their grievances. The court's jurisdiction in this Petition as therefore improperly invoked and the matter was struck out for want of jurisdiction.

## **A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration**

*By: Jack Shivugu\**

### **Abstract**

*This paper critically discusses the doctrine of public policy and its place in international commercial arbitration. The paper argues that there is ambiguity over the definition, nature and scope of public policy in international commercial arbitration. The paper argues that this ambiguity has hindered the growth of international commercial arbitration. It analyses various definitions and typologies of public policy in international commercial arbitration. The paper further discusses the judicial approach towards public policy as a ground for setting aside and refusal of recognition or enforcement of arbitral awards. Through this discussion, the paper proposes a pro enforcement policy of arbitral awards in line with the spirit of the New York Convention with the doctrine of public policy being applied in limited circumstances.*

### **1.Introduction**

Arbitration is a private system of dispute management. It has been defined as a process where parties to a dispute or an appointing authority appoints a neutral third party who is mandated to hear and determine a dispute by giving an arbitral award that is final and binding.<sup>1</sup> It has also been defined as a private system of managing disputes that produces a final and binding decision which can be enforced by national courts.<sup>2</sup> Arbitration as a form dispute management has been recognised at the international level under the Charter of the United Nations. The Charter provides that parties to a dispute shall in the first instance seek a solution by negotiation, enquiry, conciliation, mediation, *arbitration*, judicial settlement, resort to regional agencies or arrangements, or other

---

*\* LL.M Candidate; UON; LLB (Hons) Moi; Dip. In Law (KSL); ACI Arb; Advocate of the High Court of Kenya; Legal Researcher.*

<sup>1</sup> Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 3<sup>rd</sup> Edition, 2017, Pg 1

<sup>2</sup> Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2<sup>nd</sup> Edition, 2017, Cambridge University Press

peaceful means of their own choice.<sup>3</sup> In Kenya, arbitration is one of the forms of Alternative Dispute Resolution (ADR) recognised under the Constitution. The Constitution requires courts and tribunals while exercising judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, *arbitration* and traditional dispute resolution mechanisms.<sup>4</sup>

The Arbitration Act defines arbitration as international if the parties to an arbitration agreement have their places of business in different states; the juridical seat of the arbitration or the place where a substantial part of the obligations is to be performed is situated outside the state where the parties have their places of business and where parties have agreed that the subject matter of the arbitration relates to more than one state.<sup>5</sup> In the context of international commercial arbitration, arbitration offers a neutral forum for the determination of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system. In international commercial arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system.<sup>6</sup> Arbitration has the ability to guarantee a fair hearing by addressing this concern.

The viability of international commercial arbitration is further enhanced by the presence of a legal framework for the recognition and enforcement of foreign arbitral awards. The New York Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards which is essential in providing legitimacy to such awards despite jurisdictional differences between states.<sup>7</sup> The Arbitration Act gives the High Court the power to recognise and enforce both domestic and international arbitration awards.<sup>8</sup> The Act further

---

<sup>3</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>4</sup> Constitution of Kenya, 2010, Article 159 (2) (c)

<sup>5</sup> Arbitration Act, No.4 of 1995, S 3

<sup>6</sup> Moses. L.M, '*The Principles and Practice of International Commercial Arbitration*' Supra note 2

<sup>7</sup> Muigua. K., '*Promoting International Commercial Arbitration in Africa*' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Promoting-International-Commercial-Arbitration-In-Africa.pdf> (accessed on 24/07/2022)

<sup>8</sup> Arbitration Act, No. 4 of 1995, S 36.

recognizes the New York Convention and provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the Convention or any other convention to which Kenya is signatory and relating to arbitral awards<sup>9</sup>.

However, it has been argued that courts being the custodian of public policy in Kenya should not merely perform a rubber stamping role by blindly recognising and enforcing domestic and international arbitration awards.<sup>10</sup> Consequently, the Act gives the High Court powers to scrutinise an arbitral award. The Court may thus set aside or refuse to recognise or enforce an arbitral award pursuant to the conditions set out under sections 35 and 37 of the Act. Indeed, both the New York Convention and the Arbitration Act of Kenya stipulate public policy as one of the grounds for setting aside or refusal of recognition or enforcement of an arbitral award<sup>11</sup>.

This paper seeks to critically examine the doctrine of public policy and its place in international commercial arbitration. The paper defines public policy and discusses judicial interpretation of this concept as a ground for setting aside or refusing to recognize and enforce foreign arbitral awards. It further examines whether public policy has hindered the growth of international commercial arbitration in Kenya and suggests recommendations towards effective application of public policy in international commercial arbitration.

---

<sup>9</sup> Ibid, S 36 (2)

<sup>10</sup> Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration' available at <http://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf> (accessed on 24/07/2022)

<sup>11</sup> United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958 "New York Convention" Article V (2) (b); Arbitration Act, No.4 of 1995, S 35 (2) (b) (ii) & 37 (1) (b) (ii)



## **2.0 Definition of Public Policy in International Commercial Arbitration**

Public policy has no accepted universal definition. This ambiguity over the definition of the nature and scope of public policy has created uncertainty over its application in the recognition and enforcement of foreign arbitral awards. Whereas the New York Convention and the Arbitration Act of Kenya identify public policy as one of the grounds for setting aside or refusing to recognise and enforce an arbitral award, the two legal instruments do not define what public policy entails.

Various attempts have been made to define the concept of public policy in international commercial arbitration. It has been argued that the concept of public policy is vague and amorphous in nature.<sup>12</sup> This has seen it being compared to an unruly horse.<sup>13</sup> However, it has been asserted that public policy can be defined to entail a state's fundamental legal principles and moral values.<sup>14</sup> It has further been postulated that public policy is a parameter of the law expressed in statutes and the Constitution.<sup>15</sup> The author argues that public policy dictates consent or restraint, prohibition or permission when the law is silent.<sup>16</sup>

In Kenya, the most profound definition of public policy was rendered in the case of *Christ For All Nations -vs- Apollo Insurance Co. Ltd.*<sup>17</sup> In that case, it was asserted that an award will be set aside on grounds of public policy where the award is inconsistent with the laws of Kenya; is inimical to the national interest of Kenya;

---

<sup>12</sup> Bansal. C., & Aggarwal. S., 'Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach' *International Journal of Law and Management*, (2017) 59 (6)

<sup>13</sup> In Richardson -vs- Mellish (1824), Burrough. J stated that 'Public policy...is a very unruly horse, and once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fall.'

<sup>14</sup> Bansal. C., & Aggarwal. S., Supra note 12

<sup>15</sup> Buchanan M, „Public policy and international commercial arbitration,“ 26 *American Business Law Journal* (1988), 511-513.

<sup>16</sup> Ibid

<sup>17</sup> *Christ For All Nations -vs- Apollo Insurance Co. Ltd*, (2002) 2 EA 366

or where it is contrary to justice and morality<sup>18</sup>. Flowing from this decision, it has been argued that public policy in Kenya can be inferred from policy documents, statutes and the Constitution<sup>19</sup>. The Constitution of Kenya is thus the grundnorm in expressing the public policy of Kenya.<sup>20</sup>

From the above definitions, it is evident that there is ambiguity over the definition of public policy in international commercial arbitration. It has been argued this ambiguity has given national courts a 'blank cheque' to refuse the recognition and enforcement of foreign arbitral awards.<sup>21</sup> The uncertainty over the definition of this doctrine is one of the main obstacles in the recognition and enforcement of foreign arbitral awards.<sup>22</sup> The paper shall proceed to explore the various forms of public policy and how the concept has been interpreted in various judicial decisions with a view of ascertaining its impact on international commercial arbitration.

### **3.0 Forms of Public Policy**

The doctrine of public policy has been defined to entail domestic public policy; international public policy and transnational public policy. Each of these forms is discussed below.

#### **3.1 Domestic Public Policy**

Domestic public policy concerns a nation's standards of morality and justice<sup>23</sup>. Thus, the threshold for setting aside or refusing to recognise an arbitral award on the grounds of domestic public policy is whether the award violates a nation's basic standards of justice and morality.

---

<sup>18</sup> Ibid

<sup>19</sup> Mutubwa.W., 'Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute' *Alternative Dispute Resolution*, (2016) 4 (2)

<sup>20</sup> Ibid

<sup>21</sup> Kariuki. F., 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' *Alternative Dispute Resolution*, (2016) 4 (1)

<sup>22</sup> Ibid

<sup>23</sup> Curtin. K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws' 64 *Def. Counsel J.* 271 (1997)

Domestic courts have upheld this form of public policy and decided that enforcement of an arbitral award would be denied if it violated the forum state's most basic notions of morality and justice. In *Parsons vs Whittemore*<sup>24</sup>, the United States Court of Appeals decided that enforcement of a foreign award should be denied only where enforcement would violate the forum State's most basic notions of morality and justice. Further, in the Kenyan context, it has been decided that enforcement of an award would be denied on grounds of domestic public policy where such an award is inconsistent with the laws of Kenya, is inimical to the national interest of Kenya or where it is contrary to justice and morality<sup>25</sup>.

### **3.2 International Public Policy**

International public policy has been defined as the public policy of a state whereby if violated, a party will be prevented from invoking a foreign law, judgment or award<sup>26</sup>. It is thus a body of rules and principles which are recognised by a particular state which may bar the recognition or enforcement of an award made in the context of international commercial arbitration in cases where such recognition or enforcement may violate such rules and principles either due to the contents of the award or the procedure through which it was made<sup>27</sup>. It entails the rules of a state's domestic public policy that will also be applied by courts of that state in international commercial arbitration<sup>28</sup>.

Its scope is considered to be narrower than domestic public policy. Due to the narrow scope of its application, it favours a pro enforcement approach and thus public policy shall not be a ground for setting aside or refusing the recognition and enforcement of an award unless such an award violates really fundamental

---

<sup>24</sup> *Parsons vs Whittemore*, (United States Court of Appeals, 1974).

<sup>25</sup> *Christ for All Nations -vs- Apollo Insurance Co. Ltd*, (2002) 2 EA 366

<sup>26</sup> Mayer. P & Sheppard. A., 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' *Arbitration International Volume 19 Number*

<sup>27</sup> *Ibid*

<sup>28</sup> Curtin. K.M, *Supra* note 23

conceptions of legal order in the concerned state<sup>29</sup>. An example of international public policy is the American concept of ‘international due process.’ This allows a foreign award compatible with the generally accepted standards of due process of law such as where the award is fundamentally fair to be enforced by American courts without being subjected to the due process requirements under American law due to the complex nature of domestic due process<sup>30</sup>. Furthermore, under French law, breach of public policy as a ground for setting aside or refusing to recognise and enforce an award is understood to mean the French conception of international public policy<sup>31</sup>.

International public policy is thus the recommended test for setting aside or refusal of recognition and enforcement of awards on public policy grounds<sup>32</sup>. Due to its restrictive approach, international public policy can result in consistent decisions in relation to the setting aside or refusal of recognition and enforcement of awards in different jurisdictions<sup>33</sup>. It thus balances interests of domestic public policy, the public policy of other nations and the interests of international commerce.

### **3.3 Transnational Public Policy**

Transnational public policy has been referred to as ‘truly international public policy<sup>34</sup>.’ It is the form of public policy that is common to many states and forms part of public international law. Transnational public policy has a universal application. It is very narrow in scope and is concerned with fundamental rules of law accepted among civilized nations. This could be expressed by fundamental rules of natural law, general principles of law accepted by nations and rules of *jus cogens*<sup>35</sup>. Thus, to warrant the setting aside or refusal to

---

<sup>29</sup> Fazilatfar. H., ‘Public policy and mandatory rules of law: definition, distinction, and function’ available at <https://www.elgaronline.com/view/9781788973847.00009.xml> (accessed on 24/07/2022)

<sup>30</sup> Ibid

<sup>31</sup> French Code of Civil Procedure, Article 1502.5

<sup>32</sup> Mayer. P & Sheppard. A, Supra note 26

<sup>33</sup> Ibid

<sup>34</sup> Fazilatfar. H., Supra note 29

<sup>35</sup> Mayer. P & Sheppard. A, Supra note 26

recognise or enforce an award on grounds of transnational public policy, there has to be a consensus within the international community in relation to the rule, principle or norm under consideration. Such consensus can be expressed in instruments such as international conventions.

It has been argued that in international commercial arbitration, the applicable policy should be transnational public policy and thus, courts should consider the public policy of all states<sup>36</sup>. However, there is uncertainty over the existence, scope and operation of transnational public policy. Thus, due to the vague nature of what constitutes 'transnational principles' courts have been reluctant to apply transnational public policy<sup>37</sup>. International public policy has therefore continued to be the preferred form of public policy in international commercial arbitration.

#### **4.0 Judicial Interpretation of Public Policy in Kenya**

Since the Arbitration Act recognizes public policy as a ground for both setting aside and refusal of recognition and enforcement of arbitral awards, there have been numerous court applications to that effect. In some instances, have allowed these applications and set aside or refused to recognize and enforce arbitral awards on grounds of public policy. However, in other cases courts have dismissed applications to set aside or refusal of recognition and enforcement of international arbitral awards on grounds of public policy. This part discusses these two instances and analyses some of the public policy considerations adopted by courts in their decisions.

#### **4.1 An Analysis of Decisions Where Courts Have Set Aside Arbitral or**

##### **Refused to Recognize and Enforce Awards on Grounds of Public Policy**

In *Glencore Grain Ltd -vs- TSS Grain Millers Ltd*<sup>38</sup>, the Respondent sought setting aside of an award arising of a dispute between the parties in relation to a contract for supply and delivery of a certain quantity of US No.2 white corn. The applicant instead supplied white maize of South African origin contrary to

---

<sup>36</sup> Curtin. K.M, Supra note 23

<sup>37</sup> Mayer. P & Sheppard. A, Supra note 26

<sup>38</sup> *Glencore Grain Ltd -vs- TSS Grain Millers Ltd*, Civil Suit No. 388 of 2000, (2002) eKLR

the agreement between the parties which was found to be unfit for human consumption. The Respondent refused to pay for the delivery resulting in arbitration proceedings where an award was made in favour of the Applicant. The Respondent sought setting aside of the award on grounds of public policy. The court in its determination held that 'a contract will be against the public policy of Kenya if it is illegal or immoral or if it violates the basis legal and moral principles or values of the Kenyan society. The court found the contract to be illegal since it would result in a health risk if the maize found to be unfit for human consumption was released to the public. On this basis the court found the award to be against the public policy of Kenya and decided that it cannot be used to enforce an award whose subject matter is found to be illegal, void or immoral and thus against the public policy of Kenya. The court set aside the award.

In *Tanzania National Roads Agency v Kundan Singh Construction Limited*<sup>39</sup> the Respondent sought the setting aside of an award on grounds of public policy on the basis that the tribunal ignored to apply the laws of Tanzania and applied English law contrary to the contract between the parties. The court found that the award was arrived at in breach of the express terms of the agreement between the parties to the effect that any dispute between the parties shall be referred to arbitration and shall be governed by the laws of Tanzania. The court further found that the decision of the majority in the final award was made contrary to the laws of Tanzania. On this basis, the court found that there is no legal or moral justification to condone a breach of contract between two parties and it would be contrary to the public policy of Kenya to allow a court to be used to that end. Consequently, the court declined to recognize and enforce the award.

In *Cape Holdings Limited -vs- Synergy Industrial Credit Limited*<sup>40</sup>, the applicant applied to court to set aside an arbitral award made in favour of the Respondent arising out of a dispute in relation to purchase of an office block. The application

---

<sup>39</sup> *Tanzania National Roads Agency v Kundan Singh Construction Limited*, Misc. Civil Application No. 171 of 2012, (2013) eKLR

<sup>40</sup> *Cape Holdings Limited -vs- Synergy Industrial Credit Limited* (2016) eKLR

was based on several grounds including public policy on the basis that the arbitrator allowed payment of outrageous sums of money without any evidence which payments were illegal and against the public policy of Kenya. The Court found that the Tribunal violated provisions of sections 19 and 27 of the Arbitration Act by admitting an expert report through at the submissions stage which report was used in computation of the claim of interest in favour of the Respondent. On this basis, the court found the award to be contrary to public policy and held that an award that is inconsistent with the Constitution or the law is said to be against public policy and the same will be set aside under section 35 of the Arbitration Act. The court thus set aside the award.

Further, in *Evangelical Mission for Africa & another v Kimani Gachuhi & another*<sup>41</sup> the applicants applied to court to set aside an arbitral award on grounds that it violated the socio-economic values of Kenya and that it violated the national values and principles of governance enshrined under article 10 of the Constitution of Kenya. The tribunal had ordered the demolition of a school constructed on the suit property. The court found that the arbitrators ignored the economic and social benefits of the school to the claimants, the students, the government and the people of Kenya. It further found that the tribunal ignored the public policy of Kenya towards social economic developments. On this basis, the court decided that a decision so devoid of justice to the extent that it cannot be explained in any rational manner can only be set aside on grounds of failure to satisfy public policy considerations. It held that the award failed to pass the threshold under article 10 of the Constitution that required the tribunal to apply the national ethos and values of the country and thus the award was against the public policy of Kenya. The court set aside the award under section 35 (2) (b) (ii) for being contrary to the public policy of Kenya and the Constitution.

---

<sup>41</sup> *Evangelical Mission for Africa & another v Kimani Gachuhi & another*, Misc Civil Application No.479 of 2014, (2015) eKLR

Finally, in *Teejay Estates Limited v Vihar Construction Limited*<sup>42</sup> the applicant sought the setting aside of an award on the grounds of public policy on the basis that it violated mandatory provisions of the law since the arbitrator ordered the applicant to refund withheld tax to the respondent contrary to the Income Tax (Withholding Tax) Rules 2001, the applicable law which provided that a refund should be made to the Kenya Revenue Authority. The Court held that the arbitrator could not order taxes due to the tax authorities be refunded to the respondent. On this basis, the court found the award to be against the law and the public policy of Kenya. The court also found the award to be against public policy on the basis of unfair enrichment due to the fact that in the award on costs, the arbitrator ordered the applicant to reimburse costs including a share it had already paid. The court thus found the award to be against public policy since it was an affront to the principle of equality of arms, breached the rules of natural justice and resulted in unjust enrichment. It thus set aside the award.

#### **4.2 An Analysis of Decisions Where Courts Have Dismissed Applications to Set Aside Arbitral Awards on Grounds of Public Policy**

In *Sandhoe Investments Kenya Limited v Seven Twenty Investments Limited*<sup>43</sup>, the applicant applied to set aside an award on grounds that the award was in conflict with the public policy of Kenya on the basis that the tribunal made an erroneous decision when it implied that the acceptance of money by the applicant's bankers was equivalent to an acceptance by the applicant. The court decided that an error by an arbitrator of fact or law or mixed fact and law or in relation to construction of a statute or contract cannot be said to be inconsistent with the public policy of Kenya. The court further decided that public policy leans towards finality of arbitration awards.

The court further decided that each if each mistake by a tribunal was deemed to be against public policy on the basis that it was inconsistent with the

---

<sup>42</sup> *Teejay Estates Limited v Vihar Construction Limited*, Miscellaneous Civil Application No. E 184 of 2021, (2022) eKLR

<sup>43</sup> *Sandhoe Investments Kenya Limited v Seven Twenty Investments Limited*, Miscellaneous case no. 373 of 2014, (2015) eKLR



Constitution or other laws, many awards would be condemned on the basis of re-evaluations pegged upon the unruly horse that is public policy.

In *Rwama Farmers Cooperative Society Limited –vs- Thika Coffee Mills Limited*,<sup>44</sup> the Defendant applied to set aside an award made in favour of the Plaintiff on grounds of public policy on the basis that the award sought to wrongfully enrich the Plaintiff and that the Defendant was not accorded a fair hearing contrary to article 50 of the Constitution of Kenya, 2010. It contended that the claim was introduced at the submissions stage thus not giving it an opportunity to defend the claim. In its decision the court noted that the term ‘conflict with the public policy’ as used under the Arbitration Act connotes that which is injurious to the public, offensive, is tainted with illegality or an act that violates the basic norms of a society.

The court found that the Defendant was given enough opportunity to present its case and even allowed to file its pleadings and documents out of time and thus the award was not against public policy on this ground. The court further found that the claim of unjust enrichment could not be sustained and on that basis it decided that there was nothing in the award which was injurious to the public, offensive, tainted with illegality or that which was unacceptable to the society. Based on this analysis, the court found that the award was not contrary to the public policy of Kenya. It dismissed the Defendant’s application to set aside the award.

In *Comroad Construction & Equipment Limited v Iberdrola Engineering & Construction Company*<sup>45</sup>, the Plaintiff applied to set aside an award on grounds of public policy on the basis of misapprehension of evidence or an error in law by the arbitrator. The Plaintiff raised several grounds in support of its application including alleged inconsistencies with established principles of the law regarding unpleaded issues, proof of special damages, award of general

---

<sup>44</sup> *Rwama Farmers Cooperative Society Limited –vs- Thika Coffee Mills Limited*, (2012) eKLR

<sup>45</sup> *Comroad Construction & Equipment Limited v Iberdrola Engineering & Construction Company*, HCCC No.579 of 2014

damages in respect of breach of contracts and the legal effect of certificates of compliance. The issue of unjust enrichment was also raised in support of the application to set aside the award on grounds of public policy. The Court decided that for an award to be said to be in conflict with public policy, at the very least it must be shown to be tainted with illegality or where its enforcement would be injurious to the public good or offensive to the public. The court upheld the principle of finality of arbitration and decided that by choosing arbitration where the award is final, parties choose to live with errors of fact and law that the tribunal may commit. The court noted that such errors do not amount to an affront to public policy. The court further decided that arbitrators are masters of facts in dispute they determine and it cannot be said that misapprehension of facts by arbitrators is against public policy. The Court noted that misapprehension of facts or error in law in an award can only be contrary to public policy if it results in an outcome that is unconstitutional or illegal or whose enforcement is injurious, offensive, repugnant or inimical to the national interests of Kenya. On this basis, the court dismissed the application to set aside the award on grounds of public policy.

Further, in *Manara Limited v Britania Foods Limited*<sup>46</sup>, the applicant applied to set aside an award made in favour of the Respondent in relation to a dispute that arose as a result of cancellation of a distributorship agreement between the parties. The applicant argued that the award was contrary to public policy and that the arbitrator dealt with matters beyond the scope of reference to arbitration. The applicant argued that the arbitrator demonstrated bias in awarding the Respondent most of the prayers it sought despite finding that the Respondent had illegally terminated the distributorship agreement between the parties.

The Court in its decision reiterated the position that in application to set aside an award on grounds of public policy, a court should not consider the merits of an award. The court observed that:

---

<sup>46</sup> *Manara Limited v Britania Foods Limited*, Miscellaneous Application No. E 007 of 2021, (2021) eKLR

*'Public policy, as a ground for setting aside an arbitral award, must be narrow in scope and an assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then demonstrate which part of the award conflicts with that public policy.'*

The court further decided that public policy must connote a national interest and thus a party relying on this defence must demonstrate how the decision of an arbitrator would negatively impact, infringe or affect the rights of third parties. The court noted that in application to set aside an award on grounds of public policy, it does not matter whether it finds the findings of fact by an arbitrator to be right or wrong. Further, it does not matter how obvious there is a mistake by an arbitrator on issues of fact or the magnitude of the financial consequences of such mistake of fact might be. According to the court, the only consideration was whether the award went against the Constitution, national legislation or national interest. On this basis, the court found the application to set aside the award on grounds of public policy unmerited and went ahead to dismiss the said application.

The Court also dismissed also dismissed an application to set aside an award in *Mahan Limited v Villa Care Limited*<sup>47</sup>. The applicant applied to set aside the award on various grounds including the award went against the law of contract; the award was oppressive and designed to unjustly enrich the Respondent; the arbitrator went beyond the scope of jurisdiction and purported to rewrite the contract between the parties; the arbitrator acted contrary to established principles of law and considered extraneous matters that were not pleaded and that the arbitrator demonstrated bias against the applicant.

The Court in its decision found that to the extent that the applicant was arguing that the arbitrator misconstrued the evidence and law before her, such an argument would be typically that made on appeal. The court decided that a

---

<sup>47</sup> *Mahan Limited v Villa Care Limited*, Miscellaneous Civil Application No. 216 of 2018, (2019) eKLR

misunderstanding or misspeak of the law by an arbitrator does not make an award contrary to public policy. The court further noted that despite the fact that the conclusion reached by an arbitrator may not be sustainable in law, parties to an arbitration process bind themselves to the risks involved in a final and binding award and to live with the outcomes save for the narrow confines of the grounds set in section 35 of the Arbitration Act. On this basis, the court found that the application had not met the threshold for setting aside an award under section 35 of the Arbitration Act and dismissed the said application.

The foregoing discussion demonstrates the judicial philosophy towards public policy in arbitration in Kenya. Courts have underscored that public policy in Kenya leans towards finality of arbitration. Courts have thus been reluctant to entertain the public policy defence in application to set aside or refusal of recognition and enforcement of awards except within very narrow confines. Further, public policy arguments have a slightly higher chance of success when properly grounded in the Constitution, statutes and regulation<sup>48</sup>.

However, courts have set aside or failed to recognize and enforce arbitral awards where such awards have been found to be inconsistent with the laws of Kenya, inimical to the national interest of Kenya or where they are contrary to justice and morality. Consequently awards whose outcome is likely to result in health concerns, awards arrived at in breach of the express agreement of the parties, awards which violate express statutory provisions, awards which violate the national values and principles of governance espoused under article 10 of the Constitution and socio-economic aspirations of Kenya and awards that result in unjust enrichment of one of the parties have been found to be against public policy and thus set aside or failed to be recognized and enforced. The next part of the paper discusses how this two oriented approach towards public policy has impacted the growth of international commercial arbitration in Kenya.

---

<sup>48</sup> Abwunza. A., 'Taxonomy of the Public Policy Defence in the Recognition and Enforcement of Arbitral Awards' *Alternative Dispute Resolution*, (2018) 6 (3)

## **5.0 Impact of Public Policy in International Commercial Arbitration**

It has been argued that the enforcement of foreign awards has continued to be problematic due to the approach by some national courts to refuse to recognize or enforce awards on the grounds of public policy.<sup>49</sup> Subjecting foreign awards to public policy considerations curtails efforts to expand international trade.<sup>50</sup> To this extent, it has been argued that court interference in arbitration on the grounds of public policy intimidates investors since they are unsure of the reasoning a national court will adopt when called upon to consider the issue of recognition or enforcement of an award.<sup>51</sup> Thus public policy can be an impediment on fostering regional integration through international commercial arbitration.<sup>52</sup>

Public policy can have both positive and negative impacts in international commercial arbitration. This has seen the concept being compared to a double edged sword. On the positive side, it acts as a shield against the enforcement of awards that may violate a state's fundamental political, legal, economic, social and religious standards and principles.<sup>53</sup> However, it can also be used as a sword by those who want to curtail the finality and mobility of international arbitral awards<sup>54</sup>. However, the major drawback with the concept of public policy is the lack of uniformity in its application in international commercial arbitration. Consequently, one state may not enforce an award that is enforceable in another state due to differences in public policy.<sup>55</sup>

---

<sup>49</sup> Bansal. C., & Aggarwal. S., 'Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS

countries: A comparative analysis of legislative and judicial approach' *Supra* note 12

<sup>50</sup> *Ibid*

<sup>51</sup> Muigua.K., 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration' available at

<http://kmco.co.ke/wp-content/uploads/2018/08/Building-Legal-Bridges-Fostering-Eastern-Africa-Integration-Through-Commercial-Arbitration-April-2015.pdf> (accessed on 24/07/2022)

<sup>52</sup> *Ibid*

<sup>53</sup> Hagos Bahta.T., 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia'

<sup>54</sup> *Ibid*

<sup>55</sup> *Ibid*

It can thus be argued that unwarranted interference by courts in arbitration on grounds of public policy may defeat the object of the Arbitration Act and discourage the growth of arbitration.<sup>56</sup> Thus, a court's role should be limited to facilitative processes since excessive interference with awards may curtail the healthy functioning of arbitration in Kenya. It is thus essential to promote the pro enforcement policy of the New York Convention and promote the doctrine of finality of arbitration. Public policy should only be called upon in very rare circumstances in cases where an award is inconsistent with the laws of a state; is inimical to the national interest of a state; or where it is contrary to justice and morality<sup>57</sup>.

## **6.0 Conclusion**

The doctrine of public policy occupies a central place in international commercial arbitration. It is recognised both under the New York Convention and the Arbitration Act of Kenya as a ground for setting aside and refusal of recognition or enforcement of arbitral awards. However, there is ambiguity over the definition, nature and scope of public policy in international commercial arbitration. This ambiguity has resulted in conflicting interpretations of public both by national courts. This has affected the growth of international trade and international commercial arbitration. There is need to promote the pro enforcement policy of the New York Convention and the doctrine of finality of arbitration. Public policy should only be called upon to guard against awards that flout well established principles of the law and national interests. With proper interpretation, public policy can be a useful resource in international commercial arbitration.

---

<sup>56</sup> Muigua, K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration' Supra note 10

<sup>57</sup> *Christ for All Nations –vs- Apollo Insurance Co. Ltd*, (2002) 2 EA 366

## References

Abwunza. A., 'Taxonomy of the Public Policy Defence in the Recognition and Enforcement of Arbitral Awards' *Alternative Dispute Resolution*, (2018) 6 (3) Arbitration Act, No.4 of 1995

Bansal. C., & Aggarwal. S., 'Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach' *International Journal of Law and Management*, (2017) 59 (6)

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

Cape Holdings Limited -vs- Synergy Industrial Credit Limited (2016) eKLR

Christ for All Nations -vs- Apollo Insurance Co. Ltd, (2002) 2 EA 366

Comroad Construction & Equipment Limited v Iberdrola Engineering & Construction Company, HCCC No.579 of 2014

Constitution of Kenya, 2010

Curtin. K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws' 64 *Def. Counsel J.* 271 (1997)

Evangelical Mission for Africa & another v Kimani Gachuhi & another, Misc Civil Application No.479 of 2014, (2015) eKLR

Fazilatfar. H., 'Public policy and mandatory rules of law: definition, distinction, and function' available at <https://www.elgaronline.com/view/9781788973847.00009.xml>

French Code of Civil Procedure

Glencore Grain Ltd -vs- TSS Grain Millers Ltd, Civil Suit No. 388 of 2000, (2002) eKLR

Hagos Bahta.T., 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia'

Kariuki. F., 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' *Alternative Dispute Resolution*, (2016) 4 (1)

Mahan Limited v Villa Care Limited, Miscellaneous Civil Application No. 216 of 2018, (2019) eKLR

Manara Limited v Britania Foods Limited, Miscellaneous Application No. E 007 of 2021, (2021) eKLR

Mayer. P & Sheppard. A., 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' *Arbitration International Volume 19 Number*

Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2<sup>nd</sup> Edition, 2017, Cambridge University Press

Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration' available at <http://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf>

Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>



Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 3<sup>rd</sup> Edition, 2017

Muigua.K., 'Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Building-Legal-Bridges-FOSTERING-EASTERN-AFRICA-INTEGRATION-THROUGH-COMMERCIAL-ARBITRATION-April-2015.pdf>

Mutubwa.W., 'Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute' *Alternative Dispute Resolution*, (2016) 4 (2)

Parsons vs Whittemore, (United States Court of Appeals, 1974).

Richardson v Mellish [1824] All England Law Reports 229 (Court of Common Pleas, and Other Courts).

Rwama Farmers Cooperative Society Limited -vs- Thika Coffee Mills Limited, (2012) eKLR

Sandhoe Investments Kenya Limited v Seven Twenty Investments Limited, Miscellaneous case no. 373 of 2014, (2015) eKLR

Tanzania National Roads Agency v Kundan Singh Construction Limited, Misc. Civil Application No. 171 of 2012, (2013) eKLR

Teejay Estates Limited v Vihar Construction Limited, Miscellaneous Civil Application No. E 184 of 2021, (2022) eKLR

United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958 "*New York Convention*"

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

## **Disciplined Dissent - Distinguishing Arbitral Awards from Judgments**

*By: Suzanne Rattray\**

### **1. Introduction**

Much has been said about the judicialization of arbitration over the years. The current day practice of international arbitration may bear little resemblance to historical practice of “commercial men”, deciding differences between traders or guildsmen or other men of commerce<sup>1</sup>. The exponential increase of international trade and commerce, since the mid nineteenth century, and the accelerating rate of change in the 20<sup>th</sup> and 21<sup>st</sup> centuries, have influenced not only the increase in popularity of arbitration as a dispute resolution mechanism, but also the development of an “arbitration industry”, replete with arbitral institutions, arbitration training providers, learned societies, “Courts” of Arbitration, and codes of conduct for arbitration practitioners and arbitration counsel<sup>2</sup>. The arbitration landscape is developed into a dynamic marketplace.

In an effort to build consistency across jurisdictions with regards to the legal framework for arbitration, the UNCITRAL Model Law of 1985, updated in 2006, has been widely recognized as a useful harmonizing template. Many jurisdictions have adopted the Model Law, with some adaptations to suit their particular circumstances. The similarity of arbitral practice around the world, whether or not a state can be called a “Model Law” state is striking, in a positive way. The practice of arbitration, as a specialised field of law, is another development which can also be called striking, perhaps with not quite the same positive enthusiasm. As much as disputants may wish to avoid the negative aspects of litigation practice, the influence of litigation practice on arbitral

---

\* *Master of Engineering, Bachelor of Engineering, PG Diploma in GIS, FCI Arb*

<sup>1</sup> Geoffrey Michael Beresford Hartwell, 'Who shall be the Arbitrators?', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, (© Chartered Institute of Arbitrators (CI Arb); Kluwer Law International 1990, Volume 56 Issue 4)

<sup>2</sup> Michael Mustill, 'Arbitration: History and Background', *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 1989, Volume 6 Issue 2)

practice is hard to deny. As arbitrators, we may have reduced scope to chart a distinctive bespoke efficient process if the parties and their representatives “otherwise agree”. But we have full control of the decision itself, and this paper discusses the concept of the dissenting opinion and its usefulness in arbitration.

## **2. Tracking the genesis of the dissenting opinion in international arbitration**

### **2.1 Model Law provisions**

Article 31 of the Model Law 1985, retained unchanged in 2006, deals with, among other things, the form of the award. Article 31(1) states:

*“The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall sufficient provided that the reasons for any omitted signature is stated.”*

Reading through the various drafts of the Model Law in the travaux préparatoires, it appears that the missing signature possibility was considered in the context of practicality. The record of the 328<sup>th</sup> meeting of the preparatory meeting of UNCITRAL on 18<sup>th</sup> June 1985, related the following with regards to Article 31 (1) of the proposed Model Law on International Commercial Arbitration:

“26. The CHAIRMAN said that paragraph (1) represented a compromise between two extreme positions: on the one hand, that the majority of the arbitrators could take any decision they wished; on the other, that all the arbitrators must sign an award. The latter position could lead to difficulties in the event of an arbitrator's death, illness, prolonged absence or refusal to sign. If the reason for an omitted signature was not given, the users of the arbitral award should request the reason from the arbitrators. He noted that a similar provision to paragraph (1) was found in article 32 (4) of the UNCITRAL Arbitration Rules. He suggested that the Commission should retain the existing wording.”

This reference to the rules is of course a reference to the 1976 UNCITRAL Rules. The text of Article 32 (4) of those rules states as follows:

*“4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.”*

The Travaux Préparatoires records, in advance of the rules, reveal a robust discussion related to the signing of the award. The question of dissenting opinion and the distinction between dissenting opinion and a dissenting arbitrator was raised. Opinion was expressed about the obligation of signing, even for a dissenting arbitrator. The possibility of dissenting opinions was very much in the minds of some of the deliberators, but, as the text reflects, no explicit mention was made of dissenting opinion, with the requirement only for the reason of absence of a signature, which could, as discussed above extend from illness to refusal.

The Model Law is just a model. The legislation of states in Africa has been examined to determine if, and to what extent, a dissenting opinion is provided for.

### **3. Dissenting opinions and current African legislation**

#### **3.1 Uniform Laws adopted by Regional Groups**

The Organization for the Harmonization in Africa of Business Law (OHADA) Uniform Arbitration Act (UAA) was adopted on 23 November 2017 and came into force on March 15, 2018<sup>3</sup>. The UAA constitutes the ordinary law of arbitration for all 16 OHADA Member States. Article 21 of the UAA deals with the signing of the award in the following way”

---

<sup>3</sup> Uniform Act on Arbitration, Organization for the Harmonization of Business Law in Africa, Conakry, 23 November 2017

*“The arbitral award shall be signed by the arbitrator or arbitrators. However, if a minority of them refuses to sign the award, mention shall be made of such refusal, and the award shall have the same effect as if all the arbitrators had signed it.”*

This Act solely mentions refusal as a possibility for a lack of signature, with no mention of illness or other possible intervening circumstances. While the Act recognizes the possibility that an arbitrator may have a strong objection, to the extent of refusing to sign the Award, it only goes as far as to say that the refusal shall be mentioned, without going further, for example, to require the reason for the refusal to be stated.

The 2017 Rules of the Common Court of Justice and Arbitration (CCJA) in Article 22 (3) contains the same terminology as the Act as concern the signing of the award.

It is noteworthy that the Act and the rules are mostly concerned with confirming the validity of an award under the rules which is not signed by a dissenting arbitrator.

### **3.2 National Laws**

Several African countries have adopted arbitration laws based on the UNCITRAL Model Law of 1985, and some with the 2006 updates. Some African jurisdictions have adopted arbitration laws which are not based on the UNCITRAL text and the sections below describe the provisions related to the form and content of the award from a sample of those latter jurisdictions.

#### **3.2.1 Angola - Voluntary Arbitration LAW NO. 16/03 OF 25 July 2003<sup>4</sup>**

The relevant article of the Angolan law is Article 27 (4) which states:

*“The number of signatures shall be at least equal to that of the majority of the arbitrators, and the reason why the others have not signed, as well as those who voted against the award, must always be indicated.”*

---

<sup>4</sup> The English translation was © 2003 Miranda, Correia, Amendoeira & Associados

This law is quite clear that reasons of the minority must always be given. Dissenting opinions are therefore prescribed by law. How an arbitrator expresses the dissent is the object of the current enquiry.

### **3.2.2 Ethiopia - Arbitration and Conciliation Working Procedure Proclamation No. 1237 /2021**

The Arbitration Act in Ethiopia was promulgated in 2021. It specifically envisions the possibility of dissenting opinions and requires that these be recorded, as quoted below from Article 42:

*“42. Arbitral Award Rendered by More Than One Arbitrator*

*1/ Unless the contracting parties agree otherwise, decision shall be rendered by majority vote where the number of arbitrators is more than one. Dissenting opinion shall be recorded.”*

The possibility of not even being prepared to vote on a decision is provided for in Article 42.2:

*“2/ Unless the contracting parties agree otherwise, where one of the arbitrators is not willing to cast his vote on the decision, he shall notify the contracting parties and the rest of the arbitrators shall render decision.”*

The circumstances on which an arbitrator is not even willing to vote would theoretically be quite extreme. It is observed that this recent enactment may be reflective of current arbitral practice in the international community, of arbitrators providing dissenting opinions.

In Article 44 dealing with the form and content of the Award, it states, that a majority of signatures is sufficient. However, the reasoning of the arbitrator who has not signed shall be given. Note that this does not say, “the reason for a missing signature”, which could be provided by the other arbitrators who have signed, but the “reasoning” of the arbitrator who has not signed. This suggests that the physical possibility of signing was present, but the arbitrator has consciously decided not to sign based on some, presumably compelling reason. And that reasoning of the non-signatory must be provided.

*“1/ The arbitral award shall be in writing and signed by the arbitrator or arbitrators. Where an arbitral award is rendered by a tribunal with more than two arbitrators, the signature of the majority shall suffice and the arbitrator who has not signed on the arbitral shall state his reasoning.”*

### **3.2.3 Ghana - ADR Act 2010**

Section 49 of the Ghana ADR Act gives default provisions on the form and content of the award, in the event that the parties have not agreed otherwise. With regards to signature of the award, S 49(4) provides as follows:

*“(4) Where there is more than one arbitrator the signatures of the majority of the arbitrators shall be sufficient where the reason for the omission of the signatures of some of the arbitrators is stated.”*

This provision is similar to the Model Law, with the exception of the permissive nature of 49 (1) which states *“The parties are free to agree on the form of the award and in the absence of such an agreement this section shall apply.”*

The parties are therefore free to agree that the reason for omission of signatures need not be stated.

However, if the ADR Centre rules are included in the arbitration agreement, then the provision of Rule 37(5) will apply, which states:

*“(5) Where there are three arbitrators and any of them fails to sign, the award shall state the reason for the absence of the signature.”*

This is the same as the UNCITRAL Model Law provision, and therefore could be considered as not excluding dissenting opinions.

### **3.2.5 Tanzania - The Tanzania Arbitration Act 2021**

This Act has many features in common with the English Arbitration Act of 1996. As regards the Award, however, section 54 states:

*“(1) The parties may agree on the form of an award. (2) Where there is no such agreement the award shall-*

*(a) be in writing signed by all the arbitrators or all those assenting to the award;”*

It would appear that dissent was considered, as referenced by its opposite, “assent”. The anticipated form of dissent therefore appears to be a lack of signature. There is no reference to reasons required for a lack of signature. It is therefore suggested that a *dissenting opinion* is not envisioned.

### **3.2.8 Morocco - Law No. 05-08 Relating to Arbitration and Mediation Agreement**

Article 327-22 of this Law states:

*“The arbitral award is given by a majority decision after the deliberations of the arbitral tribunal. All the arbitrators shall vote for or against the draft award subject to provisions of paragraph two of article 327-16.”*

The second paragraph of this article continues to state: *“The deliberations between the arbitrators shall be confidential”*.

Article 327-25 continues to provide:

*“The award shall be signed by each arbitrator.*

*In case of several arbitrators, if the minority refuses to sign the award, the other arbitrators shall mention such refusal with an indication of the grounds thereof and the award shall have the same effect as if it was signed by each of the arbitrators.”*

These provisions suggest that a dissenting opinion is not provided for under the arbitration law of Morocco, although it anticipates that there may be a refusal of a minority to sign an award. If a minority refuses to sign a majority decision arrived at from a confidential deliberation, the majority arbitrators are the ones to indicate the grounds on which the minority refused to sign.



#### **4. Provisions of Institutional Rules commonly used in arbitrations in Africa**

A perusal of a variety of international arbitration rules commonly used in Africa indicate that there is nothing specifically excluding dissenting opinions.

The ICC Rules of Arbitration (2021) are silent in the rule related to the Award about providing for dissenting opinions, but in the Appendices, in particular Article 5 of the Statutes of the Court of Arbitration of the ICC, there is provision for special committees who would, among other things, “*scrutinise draft awards in the presence of dissenting opinions*”<sup>5</sup>. This provision does not appear in the previous version of the Rules (2017). It is assumed that the practice of dissenting opinions issued by arbitrators has been a phenomenon of increased concern in ICC arbitrations at least since 2017<sup>6</sup>.

The Nairobi Centre for International Arbitration (NCIA )2019 Rules in Rule 29(7) state: “*If an arbitrator refuses or fails to sign the award, the signatures of the majority or if there is no majority, of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award.*” This provision reflects the broad provision of the UNCITRAL Model Law text.

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) 2011 Rules in Article 34 (4) state: “*An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.*” Article 40 (2) on confidentiality

---

<sup>5</sup> “Article 5: Special Committees

1 The Court may conduct its work in Special Committees:

- a) to decide on matters under Articles 14 and 15(2) of the Rules;
- b) to scrutinise draft awards in the presence of dissenting opinions;
- c) to scrutinise draft awards in cases where one or more of the parties is a state or may be considered to be a state entity;
- d) to decide on matters transferred to a Special Committee by a Committee which did not reach a decision or deemed it preferable to abstain, having made any suggestions it deemed appropriate; or
- e) upon request of the President.”

<sup>6</sup> The previous version of the rules of the ICC date from 2017. There is no reference to dissenting opinions in the 2017 rules.

states: *“The deliberations of the arbitral tribunal are likewise confidential, save and to the extent that a disclosure may be required by a court decision.”*

The Mauritius International Arbitration Centre (MIAC) Rules in Article 34 (4) states: *“An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.”*

The Arbitration Foundation of Southern Africa (AfSA) International Arbitration Rules 2021 in Article 33 (4) state” *“An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.”* Confidentiality of the deliberations are provided for in Article 36 (2): *“The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 13 and 14<sup>7</sup> of the Rules.”*

How these rules are applied in practice, particularly with regards to the dissenting opinions, may become apparent in time as statistical evaluations of awards are made available.

## **5. The Debate on Dissents in Commercial Arbitration and Investment Arbitration in Practice**

The use of dissenting opinions in investor state dispute settlement system is well established. The 2006 amendments of the ICSID Convention<sup>8</sup>, for example, in Article 48(4)states” *“ Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.”*

---

<sup>7</sup> Article 13 refers to Challenges to an Arbitrator and Article 14 to Replacement of an Arbitrator

<sup>8</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The ICSID Arbitration Rules also expressly provide for this. It is therefore not surprising that many ICSID Awards include individual opinions and dissents. In 1999, Mosk and Ginsberg argued in favour of dissenting opinions in international arbitration, positing that they can result in better quality awards and can help to build confidence in the arbitral process<sup>9</sup>. While arguments against dissenting opinions were considered, including the risk of violating the secrecy of the deliberations of the Tribunal, risk of party-appointed arbitrators appearing to favour the position of the appointing party, incivility within the Tribunal, increased costs, less majority decision making and increased likelihood of challenges to the award, they concluded that: "They are here to stay. It therefore makes sense for arbitral institutions to address them directly through the inclusion of provisions for dissenting opinions in procedural rules and codes of ethics." Most of the examples given in supporting their arguments were from state to state arbitrations.

In his 2003 Freshfield's lecture, Alan Redfern categorised dissenting opinions in international commercial arbitration as "the good, the bad and the ugly", and described how these categories may apply<sup>10</sup>. Mr. Redfern states that "Dissenting opinions have come to international commercial arbitration as a gift of the common law.....It is doubtful, however, whether the dissenting opinion has added much, if anything, of value to the arbitral process<sup>11</sup>." In providing reasons why dissenting opinions should not be rendered, Mr. Redfern made three points. Firstly, he argued, "a dissenting opinion may lay an award open to attack<sup>12</sup>." The second reason, which he dealt with more delicately in the form of a question, "when a dissenting arbitrator disagrees with the majority, and does so in terms which are likely to find favour with the party which appointed him or her, does not that cause some concern", brings into question, rightly or

---

<sup>9</sup> 'Dissenting Opinions in International Arbitration' in Liber Amicorum Bengt Broms (Finnish Branch of the International Law Association, Helsinki, 1999)

<sup>10</sup> 'The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', in William W. Park (ed), *Arbitration International* (© The Author(s); Oxford University Press 2004, Volume 20 Issue 3) pp. 223 -242

<sup>11</sup> *Ibid*, p. 225

<sup>12</sup> *Ibid*, p. 233

wrongly, whether the award is influenced by lack of impartiality and independence of the dissenting arbitrator<sup>13</sup>. The third and most compelling argument against dissenting options was expressed thus:

“The purpose of an arbitration is to arrive at a decision. It is the decision which matters; and it matters not as a guide to the opinions of a particular arbitrator, or as an indication of the future development of the law, but because it resolves the particular dispute that divides the parties; and it resolves that dispute as part of a private, not public, dispute resolution process that the parties themselves have chosen<sup>14</sup>.”

Rees and Rohn , in a 2009 article on dissenting opinions, taking the view that “Dissenting opinions are and will remain a reality” opine that “any attempt to prohibit them could well transform the form of expression of dissent into something much less acceptable”, and provide suggested guidance for the publication so dissenting opinions “in a way which minimises the negative effects which dissenting opinions might have”<sup>15</sup>.

In summary, they suggest four guidelines paraphrased as follows:

1. No dissenting opinion should be issued if the arguments of the minority are set out in the award
2. The subject-matter of a dissenting opinion should concern relevant issues of fact, law and/or procedure
3. The dissent should be circulated to the majority prior to the adoption of the award
4. The dissenting opinion should be short, polite and restrained in its form and style<sup>16</sup>.

---

<sup>13</sup> Ibid, p. 234

<sup>14</sup> Ibid, p.236

<sup>15</sup> 'Dissenting Opinions: Can they Fulfil a Beneficial Role?', in William W. Park(ed), *Arbitration International*, (© The Author(s); Oxford University Press 2009, Volume 25 Issue 3), pp.330 -331

<sup>16</sup> Ibid, pp. 341 - 345

## **6. Current practice of dissenting opinions in commercial arbitration in Africa**

As commercial arbitration is a private dispute resolution practice, arbitrations which are not administered by institutions are not available for scrutiny. Some African arbitral institutions have begun to publish redacted awards with the consent of the parties although the numbers of such published awards is quite small. Anecdotal evidence has therefore been gathered from practitioners in the jurisdictions above to determine their impression of whether or not dissenting opinions are used in commercial arbitrations and in what manner.

In most jurisdictions, it appears that commercial arbitration is most commonly carried out by sole arbitrators. Information from a small sample of active arbitral institutions on the continent, including CRCICA and NCIA, reveal that dissenting opinions are not a common occurrence in awards rendered by three-person tribunals.

## **7. Suggestions for practitioners**

I would agree with Rees and Rohn that their first guideline, to include the minority arguments in the text of the award is the most preferred option. I would go further to add that the names of the supporting and dissenting arguers should not be apparent from the text of the award. This would certainly address the unpleasant concern that party-appointed arbitrators may be trying to please their appointers. It is noted that from the 2020 ICC statistics, of the 46 awards rendered by majority, all of which were accompanied by a dissenting opinion, in 5 cases, the dissenting arbitrator remained unidentified. It will be interesting to see if this becomes an increasingly common practice.

Rees and Rohn also reference the ICC Working Group report on whether to provide the dissenting opinion with the award, noting that it should not be suppressed if the dissent raises “genuine cause for concern on jurisdiction questions, or on the requirements of procedural due process.” This would seem to suggest that a dissenting opinion is an appropriate way to ensure that an award is capable of being set aside, if that is the dictate of the conscience of the dissenter. This “nuclear option” is hopefully avoidable from a practical perspective. The parties’ representatives should normally be alive to jurisdictional and procedural problems and would be the ones to argue this in

a setting-aside application. It is hard to visualize that these issues would not have been fully discussed with the parties during the arbitral process and records maintained in the form of orders or other decisions of the tribunal. Those records, it is suggested, would provide the evidence to substantiate any application, rather than a dissenting opinion. Even if the jurisdictional issue has been joined to the merits, the deliberations will interrogate the submissions of the parties and whichever way the jurisdictional question is answered, it is those arguments and not the “opinion” of a dissenting arbitrator which would form the basis of a challenge. As regards a procedural irregularity during the deliberation stage, hidden from the view of the parties’ representatives, such a possibility can unfortunately not be ruled out.

In 2017, Sheppard and Kapeliuk-Klinger wrote about the dynamics of tribunal deliberations and conclude that “dissents can have a profound effect on the dynamic within the tribunal and must be handled by both the dissenter and the majority with diplomacy.”<sup>17</sup> In the practice of deliberations, the clash of differing opinions can bring forth sparks of truth. Moderation, tact and wisdom are essential qualities for human speech to have a positive effect. Arbitrators who appreciate the value of these qualities and are deliberate in putting them into practice may be well placed to ensure that dissents are appropriately communicated, and can, as remarked by Redfern, be classified as “good” dissents.

## **8. Suggestions for Arbitral Institutions in Africa**

There has been a convergence in rules of arbitral institutions worldwide as the issues being faced in international arbitration are truly international. Approaches to third-party funding, remote hearings, and emergency arbitrators are some of the topics that have been added in recent years to the rules. African arbitral institutions have also kept pace with these industry concerns. As administered arbitrations grow on the continent, the issue of whether dissenting opinions should be allowed and, if so, how the institution will deal with them,

---

<sup>17</sup> ‘Dissents in International Arbitration’, in Tony Cole, *The Roles of Psychology in International Arbitration*, International Arbitration Law Library, Volume 40 (© Kluwer Law International; Kluwer Law International 2017) p. 336

is a question that sooner or later will need to be discussed in these African institutions. In the quest of ensuring that arbitration, as a practice, is inclusive to a wide variety of practicing professionals, and is distinguishable from litigation, it is important that features of court judgments that may not be necessary for the award to achieve its purpose, should be of concern to arbitral institutions.

Guidance to practitioners should be provided. The following suggestions come to mind in terms of guidance notes that could be prepared by African institutions for arbitrators conducting arbitrations under their institutional rules:

- Reasons for omitted signature are expected to relate to practical problems such as illness or other unavailability of an arbitrator to sign.
- Arbitrators who do not agree with the majority decision are expected to sign the award.
- Differences of opinion are expected to be dealt with in the text of the award.
- The identity of individual arbitrators holding minority opinions should not be apparent from the text of the award.
- In exceptional circumstances where a minority arbitrator is of the view that a procedural irregularity has occurred, which has not previously been dealt with by a party application and decision of the Tribunal, a separate dissenting opinion may be issued.

## **9. Conclusions**

The purpose of an arbitral award is to bring a dispute to a final binding resolution. Arbitrators have a duty to ensure that their award is enforceable. This requires ensuring, in general, that the mandatory rules have been complied with and that there has been procedural fairness. Errors of fact and law, in most African jurisdictions, will not imperil the enforceability of an arbitral award. No arbitral tribunal attempts to be wrong on the facts and the law. In those jurisdictions where the possibility of challenging an award on the facts and the law exists, it is the parties' representatives who bear the responsibility to mount

the challenge. The arbitral tribunal is obliged to provide its reasoning in the award. For those arbitrators in the minority who consider that the majority have not been correct on the facts and the law, the analysis portion of the award is the place to provide their position. The identity of the minority arbitrator, if submitted, may be important to that arbitrator but is not relevant to the validity of the award or any subsequent process on the award. In the unfortunate situation of a procedural irregularity internal to the Tribunal and not argued by the parties, a separate dissent may be appropriate. Arbitral awards can be distinguishable in this manner and ensure the continued inclusiveness of this dispute resolution process.



## References

Alan Redfern, 'The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly', in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 2004, Volume 20 Issue 3) pp. 223 -242.

Albert Jan Van den Berg, 'Chapter 41: The Role of Dissenting Opinions', in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, (© Kluwer Law International; Kluwer Law International 2015) pp. 585 - 592.

Albert Jan Van den Berg, 'Charles Brower's problem with 100 per cent – dissenting opinions by party-appointed arbitrators in investment arbitration', in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 2015, Volume 31 Issue 3) pp. 381 - 39.

Audley William Sheppard and Daphna Kapeliuk-Klinger, 'Chapter 13: Dissents in International Arbitration', in Tony Cole, *The Roles of Psychology in International Arbitration*, *International Arbitration Law Library*, Volume 40 (© Kluwer Law International; Kluwer Law International 2017) pp. 313 - 336.

Charles N. Brower and Charles B. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded', in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 2013, Volume 29 Issue 1) pp. 7 - 44.

Geoffrey Michael Beresford Hartwell, 'Who shall be the Arbitrators?', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, (© Chartered Institute of Arbitrators (CI Arb); Kluwer Law International 1990, Volume 56 Issue 4) pp. 235

240

John Miles, Tunde Fagbohunlu et al, 'Arbitration in Africa - A Review of Key Jurisdictions', Sweet and Maxwell, 2016.

Judge Richard Mosk and Tom Ginsberg, 'Dissenting Opinions in International Arbitration' in *Liber Amicorum Bengt Broms* (Finnish Branch of the International Law Association, Helsinki, 1999), pp. 259 - 284.

Michael Mustill, 'Arbitration: History and Background', *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 1989, Volume 6 Issue 2)

Nigel Blackaby and Constantine Partasides et al, 'Redfern and Hunter on International Arbitration', Oxford University Press, Sixth Edition 2015.

Peter J. Rees and Patrick Rohn, 'Dissenting Opinions: Can they Fulfil a Beneficial Role?', in William W. Park(ed), *Arbitration International*, (© The Author(s); Oxford University Press 2009, Volume 25 Issue 3) pp. 329 - 346.

## **Traditional Dispute Resolution Mechanisms in the Kenyan Justice System: Which Way Forward?**

**Mwangi Patience\* & Kibet Brian\*\***

*Mwacha mila ni mtumwa*<sup>1</sup>

### **Abstract**

*Traditional Dispute Resolution Mechanisms (TDRMs) have been recognized by the Constitution of Kenya, 2010 as one of the alternative forms of dispute resolution that courts in Kenya are obliged to promote. Courts in Kenya have adopted and encouraged the use of this mechanism in the resolution of disputes including criminal ones as demonstrated in the decisions in R. V Abdow Mohammed and R. V Leeras Lenchura. The nub of this paper will be to explore the sustainability of TDRMs in Kenya. It will seek to examine the policies and innovations that courts have set in a bid to develop TDRMs as the go to form of dispute resolution. This information will be analyzed with the aim of advancing the need to formalize, limit interference and mainstream TDRMs so that they may compliment the formal courts systems. It will also highlight the need for an appellate process for TDRMs and attempt to devise one. The paper contends that if access to justice is to be attained in a diverse Republic like Kenya, a multi door approach to access justice must be availed. One of these doors is the TDRM that an individual may choose to adopt.*

### **1. Introduction**

Ever since the decision of Justice Hamilton in *Rex V Amkeyo*, that marriages that Africans practiced were mere “wife purchase” and would not be considered formal marriages by the courts, African customs and practices have continued

---

\* Mwangi Patience is a final year LLB student at The University of Nairobi and is currently a Legal Intern at NCBA Bank.

\*\*Kibet Brian is a final year LLB student at the University of Nairobi and is currently an intern with the IFRA-LSE Settlements Schemes Inventory Project.

<sup>1</sup>Swahili Proverb which translates to “one who abandons their culture is a slave”. It is used in this context to push for the recognition and promotion of the African Traditional Dispute Resolution Mechanisms in the mainstream dispute resolution framework.

to be treated as alien in the application of the law.<sup>2</sup> The alien nature of the formal court's systems presented itself in the case of *Kimani Wa Kibato V Kioi Wa Nagi* where Maxwell J. commented that the handicap of the plaintiff and the respondent in understanding the court process was so big that it was almost impossible for him to preside and effectively hand a judgment that would be considered fair.<sup>3</sup> He, therefore, conceded that courts were not the best forum for the determination of the matter, however, in a tone of resignation, he proceeded to hold that since the matter was before him, he had to adjudicate over it. Suppose Traditional Dispute Resolution Mechanisms (TDRMs) had been operational in such an instance alongside the court process? Wouldn't justice have been severed in a far more effective manner?

Kenya's Autochthonous Constitution, 2010 seeks to correct the same and recognizes Traditional Dispute Resolution Mechanisms as a method of dispute resolution that is supposed to be promoted by the courts.<sup>4</sup> Article 2 (4) provides that any laws including customary laws that are inconstant with the constitution are invalid. Culture, which is considered the bedrock of TDRMs is recognized as the foundation of the nation in Article 11. The preamble of the constitution also notes that the people of Kenya are proud of their cultural diversity. It is from these diverse cultures that TDRMs arise and develop and therefore, this pride can be expressed through their application if and when these communities desire as long as they are not in conflict with the Kenyan laws.<sup>5</sup>

The Judicature Act in Section 3(2) provides that customary laws shall be deemed valid as long as it is not repugnant to justice and morality, not inconsistent with the constitution or any written law, and do not contravene the bill of rights. By formally recognizing TDRMs as methods of dispute resolution in the country,

---

<sup>2</sup> R. v. AMKEYO (1917) 7 EALR 14

<sup>3</sup> *Kimani Wa Kibato V Kioi Wa Nagi* (C.C 132 of 1920)

<sup>4</sup> Article 159 of Constitution of Kenya, 2010

<sup>5</sup> Article 2(4) of the Constitution of Kenya, 2010 provides that any laws including customary laws that are inconsistent with its provisions are void.

this legal framework appreciates the role they can play in ensuring the right to access justice as encapsulated in Article 48 of the Constitution.<sup>6</sup>

This paper contextualizes TDRMs in the justice system in Kenya. It begins by offering a basis for the promotion of TDRMs as well as highlighting its downsides. It proceeds to examine the extent of the adoption of TDRMs in criminal cases in Kenya and how courts have treated the outcomes of these processes. It then critically examines the safeguards that courts have put in place in the application of TDRMs in criminal cases. Subsequently, it highlights the ways of enhancing the sustainability of TDRMs in the resolution of disputes in Kenya. It then concludes.

## **2. TDRMs and Access to Justice: The Ligature**

With the advent of colonialism in Africa, TDRMs were replaced by the western rule of law and court system.<sup>7</sup> Decades later, this formal system has been clogged with issues that affect the administration of justice case in point being case backlog.<sup>8</sup> The ideal timelines for the filing of cases in courts to the issuance of a judgment should ideally be twelve months, however, in the 2018/2019 judicial reporting year, 39,428 cases had been in the courts for more than five years.<sup>9</sup> This presents a serious concern in the sense that it creates a fertile ground for disaffection and from it, a separate system of administering justice in the communities may emerge.<sup>10</sup> It is noteworthy that vigilante justice arises in states

---

<sup>6</sup> Kariuki F., Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems, Available at <https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf>  
Accessed on 14/06/2022

<sup>7</sup> Greco Anthony P., ADR and a Smile: Neocolonialism and the West's Newest Export in Africa, 10 PEPP. DISP. RESOL. L.J. 649, 661 (2010)

<sup>8</sup> The Judiciary, The 2018/2019 Performance Management and Measurement Understandings Evaluation Report, (2020) p. 46.

<sup>9</sup> The Judiciary, The 2018/2019 State of the Judiciary and Administration of Justice Report, (2020) p. 13

<sup>10</sup>Uwazie Ernest E., *Alternative Dispute Resolution In Africa: Preventing Conflict And Enhancing Stability*, Africa Security Brief No. 16, Available at <https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/> Accessed on 25/06/2022

where the conflict resolution processes are not accessible, affordable, and cannot be trusted.<sup>11</sup> It is against this backdrop that TDRMs can be relied on and applied in order to open a door to access justice in these communities.<sup>12</sup>

Traditional Dispute Resolution Mechanisms have been defined as the methods of conflict resolution that are based on the customs, practices, and traditions of various communities some of which have been passed down from one generation to another.<sup>13</sup> It is noteworthy that these practices are not static but also progressively change with time and therefore so do the TDRMs. Therefore, TDRMs must always be viewed as a dynamic dispute resolution process that evolves with the practices of the community and is always up to date to meet the needs of the community in which it is applied.<sup>14</sup> TDRMs thereby provide an avenue for the application of customary law in a more direct and commercial manner in the modern world thus resulting in stronger relationships, particularly in the rural villages.<sup>15</sup>

Access to Justice connotes the ability of a person to seek and obtain a remedy through formal or informal institutions of justice for grievances.<sup>16</sup> In Kenya, high cost of litigation, delays in hearing and determination of cases, the problem of backlog of cases, perceptions of corruption, lack of legal awareness, and

---

<sup>11</sup>Price Catherine, *Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution*, 18 PEPP. Disp. Resol. L.J. 393 (2018)

<sup>12</sup> Kamungi, P. M., Oketch, J. O., & Huggins, C. (2004). *Land access and the return and resettlement of IDPs and refugees in Burundi*. Nairobi, Kenya: African Centre for Technology Studies.

<sup>13</sup> Kariuki F. , *A critique of Alternative Justice Systems Policy Framework in Kenya* in (2021 9(4) *Alternative Dispute Resolution* ISBN 978-9966-046-14-7.

<sup>14</sup> Ibid

<sup>15</sup> Dickerson Jasmine, *Overview of Commercial Alternative Dispute Resolution in Africa*, BUSINESS CONFLICT MGMT., LLC (June 21, 2012). Available at <https://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/> Accessed on 20/06/2022

<sup>16</sup> United Nations Development Programme, "Access to Justice," 2004 Available at [https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) Accessed on 28/06/2022

understanding of the judicial processes including the right to appeal, and geographical distance to court stations have been identified as some of the issues that hamper access to justice in Kenya.<sup>17</sup> TDRMs present an alternative door to access justice by persons to whom these challenges are insurmountable in their quest for justice.<sup>18</sup>

Despite the academic and policy interest in TDRMs in the recent past, it has been hard to pinpoint the exact reasons why they have withstood the colonial and postcolonial legal reforms in African states and remain, in most instances, the most accessible method of accessing justice and one whose decisions in most instances results in the perception of justice to the concerned parties.<sup>19</sup> To some, it is its consensus based character that gives it legitimacy in the people and therefore all parties see that justice has been done in their specific cases.<sup>20</sup> Still, there have been arguments that its justice principles have evolved over time to meet the specific needs of the people particularly with regards to conflicts on resource sharing and therefore they are most appropriate for arising from the scarcity of resources that seem to be the main cause of conflicts in African communities today.<sup>21</sup>

---

<sup>17</sup> Social Transformation Through Access to Justice (STAJ) 2022- 2032. Available at <https://www.judiciary.go.ke/download/social-transformation-through-access-to-justice/accessed> Accessed on 20/06/2022

<sup>18</sup>Kariuki F., Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems, Available at <https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf> Accessed on 13/06/2022

<sup>19</sup>De Juan Alexander, 'Traditional' Resolution of Land Conflicts: The Survival of Precolonial Dispute Settlement in Burundi, 50 COMP. POL. Stud. 1835 (2017)

<sup>20</sup> Zartman, W. (2000). Introduction: African traditional conflict "medicine." In W. Zartman (Ed.), *Traditional cures for modern conflicts. African conflict "medicine "* (pp. 1-11). Boulder, CO: Lynne Rienner

<sup>21</sup> Boege, V. (2006). *Traditional approaches to conflict Transformation-Potentials and limits*. Berlin, Germany: Berghof Research Center for Constructive Conflict Management

TDRMs have also been praised for their ability to preserve relationships between the related parties.<sup>22</sup> Unlike courts which will result in only one party winning the case, TDRMs adopt a restorative justice approach that would result in a win-win scenario that builds the relationships in the community. Through its informal nature, it is non-adversarial and each party states their case in an open place in the presence of the community thus enhancing the fairness of the process.<sup>23</sup>

TDRMs also enhance the legitimacy of the state within communities since it is through promotion of traditional courts that persons can believe that the state actually exists to support their practices and not replace them altogether.<sup>24</sup> Therefore the “intruder” conception of the state and its power fades out.<sup>25</sup> Further, unlike the formal courts where both the substantive and procedural rules are codified in writings and some members of the community may not be aware of their intricacies, TDRMs apply the rules that are known to the community.<sup>26</sup> Therefore, even before raising approaching the TRDM mechanisms an individual can predict the outcomes of the disputes since justice is administered using rules well known to them. Thus, the perception of justice upon the rendering of the decisions is higher compared to formal courts.

In TDRM proceedings, the formalities that are present in the court process are absent. TDRMs are therefore exercised with no requirements of the formal courts such as the form of pleadings and methods of approaching the courts. In its most original way, it takes place in a setting within the areas of living of the disputants and therefore saves on travel costs.<sup>27</sup> The disputants present their

---

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020) p. 25

<sup>25</sup> Ibid

<sup>26</sup> Kariuki F. ,‘Traditional dispute resolution mechanisms in the administration of justice in Kenya’ in ES. Nwauche (ed.) Citizenship and Customary Law in Africa, Centre for African Legal Studies, 2020, pp. 33-68.

<sup>27</sup> Crook Richard C., *Alternative Dispute Resolution and the Magistrate's Courts in Ghana : A Case of*



cases in languages of their choosing and call witnesses who in most cases are also from the same community hence there is no need for interpretation services as the case with formal courts. As such, all the disputants are in a position to follow the proceedings seamlessly.

Against this backdrop, TDRMs present the most suitable solution to the case backlog in Kenya courts and in the resolution of disputes in Kenya generally. Its enhancement will go a long way in enhancing access to justice in Kenya. In Rwanda, the adoption and mainstreaming of Gacaca courts, which are traditional courts, resulted in the fast and expeditious resolution of disputes arising from the 1994 genocide.<sup>28</sup> The formal courts had been decimated during the genocide and it would take it an estimated 200 years to determine the cases it was supposed to handle.<sup>29</sup> By 2001, there were around 120,000 remandees awaiting trials for their roles in the genocide.<sup>30</sup> The International Criminal Court for Rwanda had worked for seven years and only delivered eight convictions and one acquittal.<sup>31</sup> The local courts had only handled 6,000 cases to conclusion hence there was a need to look beyond the formal court processes if justice was to be served.<sup>32</sup>

Through Organic Law No. 40/2000 in 2001, Gacaca Courts were operationalized. In these courts, elders of proven integrity were selected to hear the cases on an ad hoc basis, and the community was encouraged to take part in the hearings.<sup>33</sup> By its winding up in 2012, the 12,000 community courts had

---

*Practical Hybridity*, 3 (Afr. Power & Pol., Working Paper No. 25, 2012), Available at <https://assets.publishing.service.gov.uk/media/57a08a8340f0b64974000630/WP25-alternative-dispute-resolution-and-the-magistrate-s-courts-in-ghana.pdf> Accessed on 22/06/2022

<sup>28</sup> Powers Shanon E. Rwanda's Gacaca Court: Implication for International Criminal Law and Transitional Justice. *Insights*. Vol 15 Issue 17 2011 Available at <https://www.asil.org/insights/volume/15/issue/17/rwanda%E2%80%99s-gacaca-courts-implications-international-criminal-law-and> Accessed on 28/06/2022

<sup>29</sup> Ibid

<sup>30</sup> Chakravarty Anuradha, Gacaca Courts in Rwanda: Explaining Divisions within the Human Rights Community, *YALE J. INT'L AFF.* 134 (2006).

<sup>31</sup> Ibid note 23

<sup>32</sup> Ibid

<sup>33</sup> Ibid

handled approximately 1.2 million cases and applied restorative justice in their determinations.<sup>34</sup> This shows the positive role the application of TDRMs can yield. Alongside the advantages given in this part, it is argued that TDRMs have an active role to play in the future realization of the right to access justice in Kenya hence the need for its entrenchment.<sup>35</sup>

### **3. Concerns on the application of TDRMs and Restorative Justice: Settlement or Rehabilitation?**

The determinations that come up from the Traditional Dispute Resolution process have been criticized as unpredictable and sporadic when compared to the formal justice system<sup>36</sup>. This means that a person may not be in a position to predict how their case may be determined. The same can be demonstrated by the lenience of some of the sentences such as the one raised in the cases above. The voluntariness of the process makes it rely on the goodwill of parties which may not be available in all cases.<sup>37</sup> Thus, in instances where the process collapses the dispute will not be resolved. The issue of power imbalances also arises since decision-making is in a rural setting where the parties are known to each other.

---

<sup>34</sup> Powers Shanon E. Rwandan's Gacaca Court: Implication for International Criminal Law and Transitional Justice. Insights. Vol 15 Issue 17 2011 Available at <https://www.asil.org/insights/volume/15/issue/17/rwanda%E2%80%99s-gacaca-courts-implications-international-criminal-law-and> Accessed on 28/06/2022. See also Chika Ezeanya-Esiobu @ TEDGlobal 2017 How Africa can use its traditional knowledge to make progress. Available at [https://www.ted.com/talks/chika\\_ezeanya\\_esiobu\\_how\\_africa\\_can\\_use\\_its\\_traditional\\_knowledge\\_to\\_make\\_progress?language=en](https://www.ted.com/talks/chika_ezeanya_esiobu_how_africa_can_use_its_traditional_knowledge_to_make_progress?language=en) Accessed on 29/06/2022

<sup>35</sup> Article 48 of Constitution of Kenya, 2010 provides for the right to access justice to all Kenyans.

<sup>36</sup> Brett L Shadle, „Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60“ (1999) 40 The Journal of African History 412

<sup>37</sup> Sergon J. and Omondi S., “An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya.” in IOSR Journal of Humanities And Social Science (IOSR-JHSS) Volume 24, Issue 9, Series. 9 (September. 2019) 01-07 Available at <https://www.iosrjournals.org/iosr-jhss/papers/Vol.%2024%20Issue9/Series-9/A2409090107.pdf> Accessed on 01/08/2022

Their wealth and status are known as well as their power which may tilt the scales of justice in their favor.

The enforcement mechanisms heavily rely on an individual's conscience and the traditional way of life where an individual could only live within the community which provided security of the person.<sup>38</sup> The mechanisms therefore, which include ostracism and ridicule are not alive to the current trends where people are not very concerned with how the persons they live alongside think of them.

Traditional Dispute Resolution Mechanisms are lauded for bringing peace and restoring relationships between victims and offenders in a simple and less time cautious way. On the other hand, these types of dispute resolution mechanisms do not touch on the heart of criminal cases, correcting the offender through punishment which may involve putting away the offender from the community or a stricter form of retribution.<sup>39</sup>

The absence of retribution can be construed to border an element of settlement within the victims as unequal power between the parties comes into play. The presence of imbalance affects the bargaining power of the victims as most traditional punishments are geared towards mending broken relationships instead of retribution without due regard to the gravity of the offense. This can be seen in the case of *R v Abdow Mohammed* where the offender paid 'blood money' which signified the resolution of the dispute.<sup>40</sup> However, the offense committed, murder, is considered a felony and the punishment given to the

---

<sup>38</sup> RutoPkalya, Mohamud Adan and Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar& Martin Kirimi, Intermediate Technology Development Group-Eastern Africa 2004) 89-95

<sup>39</sup> RutoPkalya, Mohamud Adan and Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar& Martin Kirimi, Intermediate Technology Development Group-Eastern Africa 2004) 89-95

<sup>40</sup> Republic V Mohamed Abdow Mohamed [2013] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/88947/> Accessed on 29/06/2022

accused did not match the gravity of the offense which then brings into question, does applying traditional dispute resolution mechanisms in criminal cases match the gravity of an offence or does compromise overpower the delivery of justice in such cases?

The case of *R v Leraas Lenchura* brings a new outlook into the application of TDRM where the justice delivered to the victims (deceased family) was both retributive and restorative. Not only was the offender ordered to give the deceased's family one female cow based on Samburu customary laws but he was also sentenced to five years suspended sentence during which time he was to report once every 2 weeks to the area Chief.<sup>41</sup> This judgment demonstrates the ability the application of customary laws to solve criminal cases has in mending relationships while punishing the offender and delineating them from society.

Although the *Leraas* and *Abdow* cases bring positive perspectives to the application of TDRMs in criminal cases, courts and statutory provisions have gone ahead to attempt to oust the jurisdiction of traditional justice systems as an avenue for resolving criminal cases. Section 176 of the Criminal Procedure Code provides for the application of alternative dispute resolution mechanisms in criminal cases but only in misdemeanors and not felonies or capital offences. As encapsulated under the Criminal Procedure Code, misdemeanors are offences that attract a one-year jail term or less while felonies draw a graver sentence and include but are not limited to murder, arson, kidnap and treason. This section gives the Court the power to stay or disapprove any awards meted out to the victims of the offence with the objective of settling the matter out of Court. Backing the CPC, section 3(2) of the Judicature Act specifies that Courts should only embrace alternative dispute resolution mechanisms which include TDRMs in civil cases as long as the avenue used is not repugnant to justice and morality.

---

<sup>41</sup> REPUBLIC V LERAAS LENCHURA [2012] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/81686/> Accessed on 29/06/2022

This position was upheld in the case of *Juma Faraji Serenge alias Juma Hamisi v Republic* where Maraga J (as he then was) in disallowing the application to settle the matter out of Court stated as follows:

*“To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176... of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case, the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or for any other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code or enter a nolle prosequi when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn”<sup>42</sup>*

The above ruling offers more critique on the validity of TDRMs in fully settling criminal cases by upholding that the State is the complainant in any criminal offense and adopting awards offered by traditional justice systems would fly in the face of the existing legislature and judicial precedent.

As a direct result of TDRMs not being Court annexed, questions arise on the most suitable avenue an aggrieved party who is dissatisfied with the awards or decisions reached by traditional systems can contest the awards granted. The lack of a well-defined resolution process brings uncertainty to the ability of TDRMs in upholding justice as the right of appeal is a critical element in ensuring the right to a fair hearing of any citizen is respected. It is therefore important that TDRM process are aligned to international human right standards and the lack of a clear appeal structure impairs this.

The criticisms surrounding the adoption and legitimacy of TDRMs are viable as they address the very core of natural justice and regard to the rule of law.

---

<sup>42</sup> JUMA FARAJI SERENGE alias JUMA HAMISI v REPUBLIC [2007] eKLR , Available at <http://kenyalaw.org/caselaw/cases/view/36920> Accessed on 29/06/2022

Consequently, for TDRMs to be fully regarded as alternative dispute resolution mechanisms structures such as policies need to be put in place to give more light to the path a party to a suit or a litigant can take in applying TDRMs in a criminal case.

#### **4. Crafting the Most Appropriate Approach to Concerns raised by the Courts on TDRMs**

Although crimes are considered to be an act against the State hence the state has to find the most suitable punishment proportionate to the crime committed, a balance needs to be found between retribution and restoration of harmony between parties. The existing formal legal systems majorly place emphasis on meting out punishment to the offenders and separating them from the community. This focus, however good it might be to society, adversely affects the offenders as they are unable to be fully integrated back into the community after they complete their sentences because society views them as outcasts.

On the other hand, traditional dispute resolution mechanisms tend to ensure there is a dialogue between the parties in dispute which leads to the admission of guilt on the side of the offender, and restoration of harmony between the parties while allotting justice to the victims.<sup>43</sup> Considering that TDRMs are based on a community's values, beliefs, and systems, there is a better chance of compliance with the judgment reached by the decision makers as both parties consent to be subjected to the dispute resolution mechanisms.

The guidelines highlighted in the case of *R v Abdulahi Noor Mohamed (alias Arab)* on the extent of the adoption of TDRMs in settling a criminal matter are a huge stepping stone in providing light to the criticisms on the application of TDRMs in criminal cases.<sup>44</sup> In this case, the accused was charged with the murder of one Abdifatah Sharif Mohamed contrary to section 203 read with section 204 of the Penal Code. In the course of litigation, the accused filed an application stating that the parties to the dispute had negotiated and reached a settlement based on

---

<sup>43</sup> M Johnston 'Giriama Reconciliation' (1978) 16 African Legal Studies 92-131

<sup>44</sup> Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR , Available at <http://kenyalaw.org/caselaw/cases/view/125467/> Accessed on 29/06/2022

Somali law and culture and that the deceased's family was ready to forgive the accused. However, Lesiit J in delivering judgment stated that the prosecution is the only party that enjoys party autonomy thus they are the only ones who have the power to prosecute or withdraw a case. The court further emphasized that the application has been made late when the case has been heard to its completion and that although TDRMs are considered as modes of enhancing access to justice, reconciliation of the dispute that late into the suit was prohibited. The application was therefore disallowed.

The above ruling establishes a good precedent that courts can use in determining the withdrawal of a criminal case due to a settlement reached through TDRM. These guidelines include: Firstly; an application for withdrawal must be made prior to any hearing of the dispute and secondly; the application must be made in collaboration with the prosecution as the DPP pursuant to Article 157(6) as read with Article 157 (8) of the Constitution is the only party with the power to discontinue a case. This decision clearly addresses the criticisms raised in the application of TDRMs in criminal cases while giving light on the best route litigants, courts, and parties can use when seeking permission from the court to discontinue a case.

In addition to the above precedent, the Alternative Justice System Baseline Policy (AJS) launched by Emeritus Former Chief Justice David Maraga in 2020 clearly stipulates the efficacy of the adoption of TDRMs pursuant to Article 159(2) (c) of the Constitution of Kenya.<sup>45</sup> The AJS proposes an agency theory in determining the jurisdiction of TDRMs which emphasizes objectivity in determining whether the parties to the dispute, regardless of whether it is civil or criminal have consented to be subjected to the processes in traditional dispute resolution.<sup>46</sup> The policy goes ahead and provides that as long as the process is not repugnant to justice and is not ousted by any existing law, there should be no distinction in the type of matter before a court embraces TDRMs.<sup>47</sup>

---

<sup>45</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020)

<sup>46</sup> Ibid p.22

<sup>47</sup> Ibid p. 66

The legitimacy of Traditional Dispute Resolution Mechanisms is pegged on the communities' acceptance to subscribe to the mode of dispute resolution. This makes it easier to subject parties to traditional justice systems as they apply laws and values that are familiar to the parties and are less formal than other justice systems. The legitimacy of TDRMs ensures the preservation and promotion of the communities' cultures, a vital factor that enhances the authority of chiefs and elders who act as reconcilers.

## **5. The Sustainability and Future of Traditional Dispute Resolution Mechanisms in Kenya**

Regardless of the legal reforms that have come with time in colonial and post-colonial Kenya, TDRMs have remained resilient and consistent, always remaining available, accessible, and utilized by Kenyans in their quest to access justice.<sup>48</sup> They have not fizzled out and are an important avenue that Kenyans especially in the rural areas depend on to access justice.<sup>49</sup> Given the strides, the formal justice systems through the courts have grown in their reach with time, and given the controversies around the application of TDRMs in criminal cases as discussed in earlier parts of this paper, it is critical that the future and sustainability of TDRMs are examined with an aim of conceptualizing how the same would look like.

Whereas other forms of Alternative Dispute Resolution like mediation and arbitration have been formalized and are operating within the formal judicial system, TDRMs are still operating on the fringes with their decisions always at risk of being struck out completely by the courts thus occasioning the disputants an injustice.<sup>50</sup> The appeals processes for these forms of Alternative Dispute Resolution are well laid down in statutes and through rules formulated by the

---

<sup>48</sup> Price Catherine, *Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution*, 18 PEPP. Disp. Resol. L.J. 393 (2018)

<sup>49</sup> Hague Institute for Innovation of Law, *Justice Needs and Satisfaction in Kenya*, 2017: Legal Problems in Daily Life

<sup>50</sup> The practice of Arbitration in Kenya is adequately regulated and governed in Kenya through the Arbitration Act, 1996. Mediation has been formalized through The Mediation (Pilot Project) Rules, 2015



Chief Justice and so are the ways in which persons who adjudicate over disputes in these are selected and their qualifications. To this end, TDRMs appear to have been left behind.

The Alternative Justice Systems (AJS) Baseline Policy conceptualizes TDRMs as Autonomous AJS systems that are entirely run by the communities and devoid of any state regulatory mechanisms.<sup>51</sup> To this end, TDRMs connote the AJS systems in which third parties are selected to determine matters based on the rules and practices in that given community and render a binding decision.<sup>52</sup> The policy contemplated that since this method of accessing justice was well established and was dispensing justice properly; its mandate and jurisdiction ought not to be interfered with.<sup>53</sup> Indeed, it points out that if it is not broken, don't fix it.<sup>54</sup>

However, while providing for the duty of the courts to respect the autonomous AJS, the policy provides that the courts should “at regular intervals audit this province with the view of ensuring that due process standards are kept”. It proceeds to provide that “If it finds any incident of non-compliance, it must advise key personnel in this province on steps that should be taken to rectify them.”<sup>55</sup> This shows that the policy may have created an opportunity for courts to look into customary laws and practices which is a clear departure from the promise that it will not interfere with the procedures and procedures of TDRMs.<sup>56</sup>

It would appear that if the decisions rendered by the TDRMs are binding as cogitated by the policy statement, the absence of appeals mechanisms would result in significant injustice if the decisions cannot be looked at by the courts in

---

<sup>51</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), p. 51

<sup>52</sup> Ibid

<sup>53</sup> Ibid p. 66

<sup>54</sup> Ibid

<sup>55</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), p. 129

<sup>56</sup> Ibid note 36

instances where a party feels that their basic human rights that are provided for in the Constitution were violated in the process. Therefore, the courts may have the power to set aside such that arises from such an outcome.

It is critical that this supervisory power of the courts that this paper envisions ought to be exercised only to ensure the decisions and processes of TDRMs meet the human rights and morality tests as envisioned by Article 159 (3) (b) of the Constitution and not beyond the same.<sup>57</sup> This work argues so because the courts which are operating on the western conceptions of justice are faced with their own myriad of problems and that is why more than only ten percent of disputes end in the courts.<sup>58</sup> Therefore, the courts also have a lot to learn from the TDRMS and the other alternative justice systems in some aspects. This supervisory power of the courts which could be vested in the High Court will be would only determine appeals from TDRMs when the violation of human rights is litigated and the determination of the High Court ought to be final.

## **6. Conclusion**

This work has demonstrated that TDRMs play a key role in the actualization of the right to access justice in Kenya. First, the paper explored the advantages that TDRMs have over the formal courts and how courts have promoted in some cases and stifled in others the adoption of TDRMs in the resolution of conflicts in Kenya. To this end, it extensively discussed the decisions in discussed the cases of *Republic V Leeras Lenchura*, *Republic v Mohamed Abdow Mohamed* and *R v Juma Faraji Serenge V Republic*. Secondly, it has examined how the Alternative Justice Systems Baseline Policy Statement of 2020 has conceptualized TDRMS. The Pros of this policy have been lauded and the cons highlighted and possible solutions rendered. Finally, it has cogitated how an appeal process of decisions of TDRMs can look like and the limits of the interference of courts on the processes of TDRMs. It is its hope that one day, the Kenyan legal framework will be alive to the rich traditional dispute resolution mechanisms that exist in

---

<sup>57</sup> The AJS Policy speaks of courts coming in to remedy the gaps that exist within the AJS entities and processes in order to ensure “efficiency and effectiveness”.

<sup>58</sup> Hague Institute for Innovation of Law, *Justice Needs and Satisfaction in Kenya*, 2017: Legal Problems in Daily Life

the country and provide for the establishment of customary courts alongside the formal courts within its legal system

## **Bibliography**

Boege, V. (2006). *Traditional approaches to conflict transformation-Potentials and limits*. Berlin, Germany: Berghof Research Center for Constructive Conflict Management.

Chakravarty Anuradha, *Gacaca Courts in Rwanda: Explaining Divisions within the Human Rights Community*, YALE J. INT'L AFF. 134 (2006).

Constitution of Kenya, 2010

Crook Richard C., *Alternative Dispute Resolution and the Magistrate's Courts in Ghana : A Case of Practical Hybridity*, 3 (Afr. Power & Pol., Working Paper No. 25, 2012), Available at <https://assets.publishing.service.gov.uk/media/57a08a8340f0b64974000630/WVP25-alternative-dispute-resolution-and-the-magistrate-s-courts-in-ghana.pdf> Accessed on 22/06/2022

De Juan Alexander, 'Traditional' Resolution of Land Conflicts: The Survival of Precolonial Dispute Settlement in Burundi, 50 COMP. POL. Stud. 1835 (2017)

Dickerson Jasmine, *Overview of Commercial Alternative Dispute Resolution in Africa*, BUSINESS CONFLICT MGMT., LLC (June 21, 2012). Available at <https://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/> Accessed on 20/06/2022

Ezeanya-Esiobu Chika @ TEDGlobal 2017 How Africa can use its traditional knowledge to make progress. Available at [https://www.ted.com/talks/chika\\_ezeanya\\_esiobu\\_how\\_africa\\_can\\_use\\_its\\_traditional\\_knowledge\\_to\\_make\\_progress?language=en](https://www.ted.com/talks/chika_ezeanya_esiobu_how_africa_can_use_its_traditional_knowledge_to_make_progress?language=en) Accessed on 29/06/2022

Greco Anthony P., *ADR and a Smile: Neocolonialism and the West's Newest Export in Africa*, 10 PEPP. DISP. RESOL. L.J. 649, 661 (2010)

Hague Institute for Innovation of Law, Justice Needs and Satisfaction in Kenya, 2017: Legal Problems in Daily Life

Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020)

JUMA FARAJI SERENGE alias JUMA HAMISI v REPUBLIC [2007] eKLR , Available at <http://kenyalaw.org/caselaw/cases/view/36920> Accessed on 29/06/2022  
Kamungi, P. M., Oketch, J. O., & Huggins, C. (2004). Land access and the return and resettlement of IDPs and refugees in Burundi. Nairobi, Kenya: African Centre for Technology Studies.

Kariuki F. , A critique of Alternative Justice Systems Policy Framework in Kenya in (2021 9(4) *Alternative Dispute Resolution* ISBN 978-9966-046-14-7.

Kariuki F. , 'Traditional dispute resolution mechanisms in the administration of justice in Kenya' in ES. Nwauche (ed.) *Citizenship and Customary Law in Africa*, Centre for African Legal Studies, 2020, pp. 33-68.

Kariuki F., Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems, Available at <https://suplus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf> Accessed on 14/06/2022

Kimani Wa Kibato V Kioi Wa Nagi (C.C 132 of 1920)

M Johnston 'Giriama Reconciliation' (1978) 16 *African Legal Studies* 92-131

Powers Shanon E. Rwandan's Gacaca Court: Implication for International Criminal Law and Transitional Justice. *Insights*. Vol 15 Issue 17 2011 Available at <https://www.asil.org/insights/volume/15/issue/17/rwanda%E2%80%99s-gacaca-courts-implications-international-criminal-law-and> Accessed on 28/06/2022.

Price Catherine, *Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution*, 18 PEPP. Disp. Resol. L.J. 393 (2018)

R. v. Amkeyo (1917) 7 EALR 14

Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR , Available at <http://kenyalaw.org/caselaw/cases/view/125467/> Accessed on 29/06/2022

Republic V Leeras Lenchura [2012]eKLR Available at <http://kenyalaw.org/caselaw/cases/view/81686/> Accessed on 29/06/2022

Republic v Mohamed Abdow Mohamed [2013] eKLR Available at <http://kenyalaw.org/caselaw/cases/view/88947/> accessed on 29/06/2022

Ruto Pkalya, Mohamud Adan and Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet*(ed. Betty Rabar& Martin Kirimi, Intermediate Technology Development Group-Eastern Africa 2004) 89-95

Sergon J. and Omondi S., “An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya.” in IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 24, Issue 9, Series. 9 (September. 2019) 01-07 Available at <https://www.iosrjournals.org/iosr-jhss/papers/Vol.%2024%20Issue9/Series-9/A2409090107.pdf> Accessed on 01/08/2022

Shadle B., „Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60“ (1999) 40 *The Journal of African History* 412

*Social Transformation Through Access to Justice (STAJ) 2022- 2032*. Available at <https://www.judiciary.go.ke/download/social-transformation-through-access-to-justice/accessed> Accessed on 20/06/2022

The Judiciary, The 2018/2019 Performance Management and Measurement Understandings Evaluation Report, (2020) p. 46.

The Judiciary, The 2018/2019 State of the Judiciary and Administration of Justice Report, (2020) p. 13

United Nations Development Programme, "Access to Justice," 2004 Available at [https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) Accessed on 28/06/2022

Uwazie Ernest E., *Alternative Dispute Resolution In Africa: Preventing Conflict And Enhancing Stability*, Africa Security Brief No. 16, Available at <https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/> Accessed on 25/06/2022

Zartman, W. (2000). Introduction: African traditional conflict "medicine." In W.

Zartman (Ed.), *Traditional cures for modern conflicts. African conflict "medicine"* (pp. 1-11). Boulder, CO: Lynne Rienner

## **Mediating Workplace Conflicts**

*By: Maryanne Mburu\**

### **Abstract**

*Workplace conflicts are conflicts primarily occurring in a work environment between or among employees; between employers and employees or with suppliers and customers at the workplace. These conflicts need to be resolved and managed in an effective manner so as to arrest the negative effects that such conflicts may have on institutional and individual work performance. This article seeks to examine the sources of conflicts in the workplace as well as to analyse the use of workplace mediation to resolve these conflicts. In doing so, the article interrogates the use of mediation in addressing workplace disputes, suggests the appropriate procedures for facilitating workplace mediation and discusses the benefits and limitations of using mediation at the workplace.*

### **1.0. Introduction**

A workplace conflict is a type of conflict that emerges and subsists within an institution. Workplace conflict is inevitable when employees are brought together to achieve a common business objective when they come from different backgrounds and utilise different work styles.<sup>1</sup> While most disputes are one-time occurrences that are easily resolved, intervention is vital to prevent its escalation into a full-blown conflict.<sup>2</sup> It is an employer's duty to establish a clear

---

*\* Maryanne Mburu is an Advocate of the High Court of Kenya as well as a Certified Professional Mediator and an Associate Member of the Chartered Institute of Arbitrators (CIArb). Maryanne is currently a senior associate at the firm of Kihara & Wyne Advocates. She holds a Post Graduate Diploma in Law from the Kenya School of Law, an Undergraduate Degree in Law from the University of Nairobi and is currently finalising her Master of Development Studies degree from the same institution. Maryanne has a special interest in Alternative Dispute Resolution as an area of practice and has been involved in various ADR related research projects and consultancies.*

<sup>1</sup> Bolanle Ogungbamila, 'Relational Conflict Resolution Strategies (RCRS) and Workplace Frustration' (2006) 16 *Journal of Psychology in Africa* 59.

<sup>2</sup> '3 Types of Conflict and How to Address Them - PON - Program on Negotiation at Harvard Law School'

<<https://www.pon.harvard.edu/daily/conflict-resolution/types-conflict/>> accessed 1 August 2022.



written procedure for airing grievances and resolving workplace disputes to ensure the process is fair and the matter is resolved in an amicable manner. Workplace conflict can manifest in various ways such as: insults, non-cooperation, bullying and anger which result from personality clashes, miscommunication or organisational mismanagement.<sup>3</sup>

These conflicts can result in negative effects that can affect institutional and individual performance including employee turnover, work disruptions, decreased productivity, project failure, absenteeism and work termination.<sup>4</sup> To expound, a major issue that contributes to the low productivity in the workplace is conflict. Unresolved conflict in most organisations is certain to cause detrimental effects to the organisations. It may create a negative atmosphere even to those who are not affected by the conflict.<sup>5</sup> This in turn may lead to high labour turnover and absenteeism in the workplace amongst others. The negative emotions related to a conflict situation is certain to affect the work relationship and in cases where the aggrieved party leaves the workplace, the cost of employing another staff member is both unplanned for and unnecessary. Emphatically, emotional stress can be both a cause and an effect of workplace conflict. When conflict arises in the workplace, they should be managed and resolved in an efficient manner using appropriate mechanisms of resolution that are guaranteed to sustain good working relations among workmates. Dispute resolution and prevention is therefore an essential element that facilitates business success.<sup>6</sup>

---

<sup>3</sup> David Lipsky and Ariel Avgar, 'Toward A Strategic Theory of Workplace Conflict Management' (2008) 24 Ohio State Journal on Dispute Resolution 143.

<sup>4</sup> Neil H Katz and Linda T Flynn, 'Understanding Conflict Management Systems and Strategies in the Workplace: A Pilot Study' (2013) 30 Conflict Resolution Quarterly 393.

<sup>5</sup> Krista Krumina, 'Conflicts at Workplace Lower Productivity | DeskTime Blog' (21 July 2020)

<<https://deskttime.com/blog/workplace-conflicts-hurting-more-than-productivity>> accessed 1 August 2022.

<sup>6</sup> R Singleton and others, 'Workplace Conflict: A Strategic Leadership Imperative' (2011) 8 IJBPA 149.

## **2.0. Causes of Conflicts in the Workplace**

### **2.1. Toxic Working Environment**

One of the main reasons for conflict in most organisations is toxicity at the workplace.<sup>7</sup> In general terms, individuals would not want to be associated with an environment that does not seem to cater for their wellbeing. Employees need to feel that they are valued and be shown that their wellbeing is of top priority to the business. A healthy working environment improves staff morale and enhances engagement of workers in the workplace. Furthermore, it increases the performance of the company as workers only have to worry about how they are going to contribute to the success of the business.<sup>8</sup>

### **2.2. Poor Channels of Communication**

Good communication has a fundamental role to play in the running of businesses and enhancing good workplace relations.<sup>9</sup> Coordination of work within the organisation becomes impossible when there is lack of effective communication. In most instances, wrong assumptions will be made and thus result in misunderstandings that may create conflicts.<sup>10</sup> A typical example is when workers collaborate on a project and the project leader fails to communicate on the roles of each worker or fails to establish a clear deadline.<sup>11</sup> This may result in workers failing to assume responsibility, hence blaming each other due to lack of clear and concise communication.

---

<sup>7</sup> '6 Common Causes of Workplace Conflict and How to Avoid Them' <<https://www.vital-learning.com/blog/causes-of-workplace-conflict>> accessed 1 August 2022.

<sup>8</sup> 'The Importance Of Healthy Working Environment | Commercial Construction and Renovation' (5 January 2021) <<https://www.ccr-mag.com/the-importance-of-healthy-working-environment/>> accessed 1 August 2022.

<sup>9</sup> Ibid.

<sup>10</sup> 'What Causes Employee Conflict in the Workplace?' <<https://smallbusiness.chron.com/causes-employee-conflict-workplace-21264.html>> accessed 1 August 2022.

<sup>11</sup> '6 Common Causes of Workplace Conflict and How to Avoid Them' (n 7).

### **2.3. Personality Differences**

Many organisations accommodate people of different age, backgrounds, temperaments, and people from all walks of life. In consequence, this increases the risks of tensions or conflicts as there exists people in one place who hold different thinking styles and beliefs.<sup>12</sup> When employees fail to recognize their commonalities and accept their differences in perception, it undeniably results in conflicts.

### **2.4. Unhealthy Competition**

Competition in organisations is unavoidable because it provides a platform for employees to compete for recognition, bonuses and promotions. In order to increase productivity, some organisations motivate their workers through the output-based payment structure. This type of payment structure involves workers being paid based on the output they produce and at times it has led to unhealthy competition that is likely to trigger conflict between competing parties or conflicts between employees that feel short changed and the top management.<sup>13</sup>

### **2.5. Perceptions About Workplace Conflicts**

Perception about workplace conflicts can in itself be a cause of conflict and being able to understand how other people perceive conflict is important in managing conflict and readjusting our own reactions to the conflict event.<sup>14</sup> This is because conflicts are the mechanisms through which individuals involved perceive a threat to their needs, interests, or concerns. Therefore, such differences can be anticipated due to the “perceptual filters” that are created in an individual’s mind, which in turn influences the individual’s response to a given situation. The following are some of the factors in the workplace that influence different perceptions of conflict in the workplace.

---

<sup>12</sup> ‘What Causes Employee Conflict in the Workplace?’ (n 10).

<sup>13</sup> Ibid.

<sup>14</sup> ‘Perceptions of Conflict’

<https://www.talent.wisc.edu/home/HideATab/FullyPreparedtoManage/ConflictResolution/AboutConflict/PerceptionsofConflict/tabid/230/Default.aspx> accessed 1 August 2022.

### **2.5.1. Culture, Race and Ethnicity**

Persons in workplaces come from varying cultural backgrounds, which influence them into holding certain beliefs about workplace structure, role, and consequences of conflicts in the workplace. Due to the differences of culture, race, ethnicity, religion among other related aspects, different people value procedural, substantive, and psychological needs differently, which influence their willingness to engage in various modes of negotiations towards conflict resolution and management.<sup>15</sup>

### **2.5.2. Gender and Sexuality**

Men and women often perceive situations differently, which is substantively as a result of our different socialisation patterns which may affect how the two genders approach conflict situations as well as the suggested solutions.<sup>16</sup>

### **2.5.3. Knowledge (General and Situational)**

A party to a workplace conflict responds to a conflict based on the knowledge they have about the cause of the conflict. Such conflicts can be a situation-specific knowledge which deals with the question of whether a party understands the specific issue causing conflict, or general knowledge where you evaluate whether one has experienced the type of situation at hand before.<sup>17</sup> Such information can influence the party's willingness to engage in efforts to resolve the conflict at work.

### **2.5.4. Previous Experiences**

An experienced employee may have a different perception about workplace conflict compared to one who has never experienced a workplace conflict. The former may perceive a conflict as being resolved with the least amount of time and effort having experienced a similar situation in the previous workplace. Also, people who have experienced workplace conflict always avoid situations they perceive would bring about conflict. Previous experiences of workplace conflict may leave a bad taste in the mouth of an employee or employer to the

---

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

extent that instead of resolving it head-on, they prefer to ignore it and act like it does not exist until things explode.

### **3.0. Mediation of Workplace Disputes**

Workplace mediation refers to a structured process where an impartial third party assists parties in a workplace dispute to reach a consensus.<sup>18</sup> Workplace mediation is a voluntary and confidential discussion between parties to a conflict and is facilitated by an impartial mediator.<sup>19</sup> The end-goal of workplace mediation is for the disputants to resolve their issues in a manner that ensures they both leave the session mutually satisfied. The work of the mediator is to enable the disputants to gain as much information as possible from each other and understand each other's perspective. The mediator does not need to impose an outcome or resolution to the parties. Some of the common workplace disputes that can be resolved through mediation include; interpersonal conflicts, employee complaints, complaints about bullying and sexual harassment among others.

### **3.1. Procedure for Facilitating Workplace Mediation**

#### **3.1.1. Identifying the root of the conflict**

The first step into resolution of a workplace conflict is being able to identify its source.<sup>20</sup> The identification of the source enables a person to understand how the conflict started. This is when both parties and the mediator are present. This mediation process is of a voluntary nature and no one is coerced to take part, but it is highly recommended that the disputants take part or risk having a decision imposed on them by the management.<sup>21</sup> In resolving the dispute, the

---

<sup>18</sup> 'Workplace Mediation.' (*Restorative Justice*)

<<https://restorativejustice.org/rj-archive/workplace-mediation/>> accessed 1 August 2022.

<sup>19</sup> R Saundry, A Bennett and G Wibberley, 'Workplace Mediation: The Participant Experience' [2013] undefined <<https://www.semanticscholar.org/paper/Workplace-mediation%3A-the-participant-experience-Saundry-Bennett/b3c149aab4c0e82b92ea78dc977bfa99a56978ba>> accessed 1 August 2022.

<sup>20</sup> 'How Does The Mediation Process Work? - Mediate.Com'

<<https://www.mediate.com/how-does-the-mediation-process-work/>> accessed 1 August 2022.

<sup>21</sup> 'Resolving Workplace Conflict Through Mediation: Managing Disputes Informally' <<http://www.mindtools.com/pages/article/mediation.htm>> accessed 1 August 2022.

mediator has to provide an environment in which the disputants feel comfortable to give their narratives on what prompted the conflict to arise.

### **3.1.2. Disputants give their narratives**

In this process, the mediator gives each party a chance to give their point of view about the conflict without interruption by the other party. The mediator has to listen to the narratives of both parties and ask questions so as to verify if s/he has captured the real issues. The parties should be clear about the disagreement and conflicting views.<sup>22</sup> Secondly, the mediator should request each party to state the solutions which they deem fit to solve the matter at hand and what they would like to see the other party undertake in order to resolve their differences.

### **3.1.3. Continue the Meeting**

Having identified and agreed on the cause of conflict between the participants, the next phase is to commit to noticing that the other party to the conflict has made changes no matter how small. There is a need for disputants to continue treating each other with respect and dignity. The mediator makes it clear that it is okay to reasonably disagree over some issues, but it is not okay to have personality conflicts that evoke emotional reactions from the other party.<sup>23</sup>

### **3.1.4. Finish the Meeting**

Here, the mediator lets the disputants know that the mediator will not choose sides or impose any resolution on the parties.<sup>24</sup> The mediator should make it clear to the parties to resolve their conflicts proactively. In the event that the parties are unwilling to resolve the dispute, they are informed that the company they work for may take disciplinary action including probation and suspension depending on the respective regulations of a company. Whatever the case may be, the mediator assures both parties that he has good faith in their ability to resolve their differences and get on with their respective roles within your

---

<sup>22</sup> Ibid.

<sup>23</sup> 'Employee Mediation Process: Resolving Conflict in the Workplace | Lucidchart Blog' (28 March 2019) <<https://www.lucidchart.com/blog/employee-mediation-process>> accessed 1 August 2022.

<sup>24</sup> Ibid.

shared organisation and set a time to review progress of the parties in a bid to resolve the mediated conflict.<sup>25</sup>

### **3.2. Organisational Management: The Role of Human Resource in Mediation**

Organisational management refers to the art of getting people together on a common platform to make them work towards a common predefined goal.<sup>26</sup> It enables the optimum use of resources through planning and control at the workplace. It gives the employees in a company a sense of direction as their roles and responsibilities are clearly outlined. Human Resource (HR) is a key organisational management stakeholder that leads the employees in a company. Its leadership is critical in ensuring the realisation of interests of the company. Human resources play a significant role in dispute resolution at the workplace. It balances the interests of the employees, their inter relations and the stakeholders.<sup>27</sup>

Workplaces can be a high stress environment where people with different values are trying to meet deadlines, impress clients or get noticed for promotion. In this increasingly global environment, the workplace brings people of all different backgrounds and personalities together.<sup>28</sup> When tension arises, persons working together need someone to turn to for support, guidance, conflict resolution and reduction of stress and tension. In most instances, the Human Resource Department is the first point of contact when an employee is aggrieved.<sup>29</sup> The human resource officials need to understand when and how mediation can be applied to resolve disputes in the workplace. Mediation should always be at the back of the mind of the human resource team. This also applies to human resource advisors advising the organisation at large. The

---

<sup>25</sup> Ibid.

<sup>26</sup> Lawrence J Gitman, Carl McDaniel and Amit Shah, *Introduction to Business* (Rice University 2018).

<sup>27</sup> Ibid.

<sup>28</sup> David W Augsburger, *Conflict Mediation Across Cultures: Pathways and Patterns* (Westminster John Knox Press 1992).

<sup>29</sup> William K Roche, Paul Teague and Alexander JS Colvin, *The Oxford Handbook of Conflict Management in Organizations* (OUP Oxford 2014).

question will sometimes arise as to whether the HR advisor should conduct the mediation themselves or delegate the task to someone else.

There are many human resource professionals who are also trained mediators, and therefore this may be the most efficient and cost-effective way for the issue to be resolved.<sup>30</sup> However, such a situation does not always work for the better. Sometimes a party may not be entirely comfortable with the internal human resource staff or manager mediating a dispute they are party to. For instance, if an employee is aggrieved at management and believes that the human resource is likely to side with management's point of view, then it follows that someone independent from the organisation would be a better choice.<sup>31</sup>

From experience, parties to a dispute are more upfront and honest and demonstrate confidence and trust in a mediator appointed outside the organisation. All that the organisation and the parties to a dispute want is a resolution to the problem.<sup>32</sup> There will be cases in which mediation is not the best approach and end up implementing the company's internal mechanism. Where mediation is considered helpful, there will be cases where it can be efficiently dealt with by someone within the organisation, and other cases where someone from outside the organisation needs to assist.

### **3.3. Mediation, Natural Justice and the Employee**

Mediation is a means to an end or an end in itself, with regards to achievement of natural justice for the weaker party in most cases the employees. Stemming from the fact that every human being has inherent rights, the rights of the employee should at all times be guaranteed. Sometimes, the employer(s) steps on the toes of the employees, and in turn, the employees overlook the use of mediation to solve the dispute. A lot of times employees suffer in silence with

---

<sup>30</sup> Noopur Singh, 'Strategic Human Resource Practices for Innovation Performance: An Empirical Investigation' (2018) 25 *Benchmarking: An International Journal* 00.

<sup>31</sup> Rodney H Deyoe and Terry L Fox, 'Identifying Strategies to Minimize Workplace Conflict Due to Generational Differences' 27.

<sup>32</sup> Giles Woolfson, 'THE ROLE OF HR IN MEDIATION' (*Workplace Mediation*, 30 January 2017) <<https://www.workplacemediation-scotland.com/post/the-role-of-hr-in-mediation>> accessed 1 August 2022.



fear of being reprimanded, put on probation, or fired in the event they raise issues affecting them. Nevertheless, some employees after assessing the possibility of success of mediation may institute a claim in the court of law for violation of their rights. When the formal process of court proceedings is initiated, the relationship between employee and employer becomes dented by the legal battle. The pleasantries exchanged at the corridors of the workplace change into speaking only through their lawyers and oftentimes the results of the litigation process disadvantage one or both of the parties. It is for these reasons, as well as the apparent benefits of mediating workplace conflicts that parties are encouraged to attempt resolution at a workplace level before seeking formal court related redress.

### **3.4. Benefits of Mediation in the Workplace**

The most common reason for referring workplace conflict to mediation is to avoid the long formalities and unnecessary financial burden associated with court processes. The following are some of the key benefits of addressing workplace conflicts through mediation: First, mediation provides for confidentiality and privacy of the issues and persons mediating. Secondly, it provides for an early intervention of an issue and gives the participants a chance to address their issues before they escalate further. Thirdly, mediation processes offer a quicker, time and cost-efficient method of addressing disputes in comparison to traditional dispute resolution mechanisms like litigation. Moreover, it has been stated that mediation allows the participating individuals to be responsible for their own outcomes by expressing their perspectives in a non-hostile environment.<sup>33</sup> Lastly, the organisation uses mediation to pass a message to other individuals in the workplace that one of the most important goals in any dispute resolution processes should be to allow participants to restore their damaged relationships.

For any workplace mediation to succeed, there are main essentials that must be put into consideration. The first aspect is that participants need to be willing to

---

<sup>33</sup> 'The Benefits of Workplace Mediation | CiC Wellbeing Blog' (CiC Wellbeing, 15 December 2017) <<https://www.cicwellbeing.com/blog/the-benefits-of-workplace-mediation/>> accessed 1 August 2022.

listen to the other's perspective. Additionally, participants need to be open to resolving the conflict and must be willing to move beyond the dispute. There is also a need to ensure that individuals value the mediation process and treat the proceedings with the same level of seriousness they would in any other mode of dispute resolution.

There are many success stories where mediation has been useful in preventing what would otherwise have been explosive disputes. Given its importance, it is necessary to establish a framework that shall determine which dispute can be resolved through mediation and under what circumstances disputes should be escalated to resolution through court processes. Employers should come up with policies that shall ensure impartiality of the mediators appointed to mediate in disputes and create an environment that shall facilitate smooth mediation processes.

### **3.5. Limitations of Mediation at the Workplace and Methods of Minimising Conflicts**

There are instances where mediation is not necessarily the best option. For instance, where the participants have a deeply personal antipathy towards each other; where participants are disengaged, insensitive and not committed to understanding the other person's perspective. Also, where participants have serious allegations which are beyond mediation and requires formal response such sexual assault and extreme levels of sexual harassment. Sometimes the participants may view the mediation process as an event that involves mere ticking of boxes. It is important to balance the workplace dynamics and recognise when particular individuals use the mediation process to avoid more punitive processes which may be necessary to punish grossly unacceptable behaviour.

That's said, there are various means and methods that organisations can employ to minimise the instances of conflict within the organisation as discussed briefly below:

### **3.5.1. Define Acceptable Behaviour**

Assumption of the existence of unwritten code of conduct in the workplace can at times be very detrimental. Having a well outlined plan of what constitutes acceptable behaviour in a workplace is a positive step towards avoidance of conflicts.<sup>34</sup> The current system in the majority of companies is that they have created a framework for decision making, encouraging sound business practices, collaboration and team building, talent management, leadership development, using a published delegation of authority statement among others.<sup>35</sup> This has enabled them to avoid unnecessary conflicts that may result. Companies react by having clearly defined job descriptions so that people know what is expected of them, and a well-articulated chain of command to allow for effective communication which helps avoid conflicts. This tactic has been very efficient in containment of unacceptable behaviour in the workplace.

### **3.5.2. Dealing with Conflict Head on**

As the saying goes, “prevention is better than cure.” A majority of management in companies handle workplace conflicts by seeking out areas of potential conflict and proactively intervening in a decisive fashion to prevent the conflicts from ever arising.<sup>36</sup> However, if a conflict does arise, the management minimises its severity by dealing with it swiftly. Time spent identifying and understanding natural tensions will help to avoid unnecessary conflict. The positive effects of dealing a conflict head on are far greater than the detrimental effects that silence would have.

## **4.0. Conclusion**

Mediation has been established as an important tool for conflict resolution especially in the workplace that seeks to maintain good working relationships, save time and costs, avoid work related disruptions and encourages greater understating and collaboration among workmates. The first step in dispute resolution through mediation is having an understanding of the root cause of conflict. There is also a need to balance the rights of employees as guaranteed

---

<sup>34</sup> Krumina (n 5).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

by various legal instruments with the objectives of mediation in order to ensure that mediation is not used to avoid necessary punitive measures for gross unacceptable workplace behaviour. Used properly, mediation is an essential framework for workplace conflict. Employers ought to ensure that their institutions have clear cut frameworks and codes of conduct but where conflicts occur, mediation practice is likely to provide an effective, private and inexpensive mechanism for dispute resolution. That is good business.

## **References**

'3 Types of Conflict and How to Address Them - PON - Program on Negotiation at Harvard Law School' <<https://www.pon.harvard.edu/daily/conflict-resolution/types-conflict/>> accessed 1 August 2022

'6 Common Causes of Workplace Conflict and How to Avoid Them' <<https://www.vital-learning.com/blog/causes-of-workplace-conflict>> accessed 1 August 2022

Augsburger DW, *Conflict Mediation Across Cultures: Pathways and Patterns* (Westminster John Knox Press 1992)

Deyoe RH and Fox TL, 'Identifying Strategies to Minimize Workplace Conflict Due to Generational Differences' 27

'Employee Mediation Process: Resolving Conflict in the Workplace | Lucidchart Blog' (28 March 2019) <<https://www.lucidchart.com/blog/employee-mediation-process>> accessed 1 August 2022

Gitman LJ, McDaniel C and Shah A, *Introduction to Business* (Rice University 2018)

'How Does The Mediation Process Work? - Mediate.Com' <<https://www.mediate.com/how-does-the-mediation-process-work/>> accessed 1 August 2022

Katz NH and Flynn LT, 'Understanding Conflict Management Systems and Strategies in the Workplace: A Pilot Study' (2013) 30 *Conflict Resolution Quarterly* 393

Krumina K, 'Conflicts at Workplace Lower Productivity | DeskTime Blog' (21 July 2020) <<https://deskttime.com/blog/workplace-conflicts-hurting-more-than-productivity>> accessed 1 August 2022

Lipsky D and Avgar A, 'Toward A Strategic Theory of Workplace Conflict Management' (2008) 24 *Ohio State Journal on Dispute Resolution* 143

Ogungbamila B, 'Relational Conflict Resolution Strategies (RCRS) and Workplace Frustration' (2006) 16 *Journal of Psychology in Africa* 59

'Perceptions of Conflict'

<<https://www.talent.wisc.edu/home/HideATab/FullyPreparedtoManage/ConflictResolution/AboutConflict/PerceptionsofConflict/tabid/230/Default.aspx>> accessed 1 August 2022

'Resolving Workplace Conflict Through Mediation: Managing Disputes Informally' <<http://www.mindtools.com/pages/article/mediation.htm>> accessed 1 August 2022

Roche WK, Teague P and Colvin AJS, *The Oxford Handbook of Conflict Management in Organizations* (OUP Oxford 2014)

Saundry R, Bennett A and Wibberley G, 'Workplace Mediation: The Participant Experience' [2013] undefined <<https://www.semanticscholar.org/paper/Workplace-mediation%3A-the-participant-experience-Saundry-Bennett/b3c149aab4c0e82b92ea78dc977bfa99a56978ba>> accessed 1 August 2022

Singh N, 'Strategic Human Resource Practices for Innovation Performance: An Empirical Investigation' (2018) 25 *Benchmarking: An International Journal* 00

Singleton R and others, 'Workplace Conflict: A Strategic Leadership Imperative' (2011) 8 *IJBPA* 149

'The Benefits of Workplace Mediation | CiC Wellbeing Blog' (*CiC Wellbeing*, 15 December 2017) <<https://www.cicwellbeing.com/blog/the-benefits-of-workplace-mediation/>> accessed 1 August 2022

'The Importance Of Healthy Working Environment | Commercial Construction and Renovation' (5 January 2021) <<https://www.ccr-mag.com/the-importance-of-healthy-working-environment/>> accessed 1 August 2022

‘What Causes Employee Conflict in the Workplace?’  
<<https://smallbusiness.chron.com/causes-employee-conflict-workplace-21264.html>>  
accessed 1 August 2022

Woolfson G, ‘THE ROLE OF HR IN MEDIATION’ (*Workplace Mediation*, 30 January 2017) <<https://www.workplacemediation-scotland.com/post/the-role-of-hr-in-mediation/>> accessed 1 August 2022

‘Workplace Mediation.’ (*Restorative Justice*) <<https://restorativejustice.org/rj-archive/workplace-mediation/>> accessed 1 August 2022

‘Workplace Mediation: The Participant Experience’ (*The British Library*)  
<<https://www.bl.uk/collection-items/workplace-mediation-the-participant-experience>>  
accessed 1 August 2022

## **Call for Submissions**

Alternative Dispute Resolution is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution settlement mechanisms.

Articles should be sent as a word document, to the editor ([editor@ciarbkkenya.org](mailto:editor@ciarbkkenya.org)/ c.c.: [admin@kmco.co.ke](mailto:admin@kmco.co.ke)) and a copy to the editorial group ([adrjournal@ciarbkkenya.org](mailto:adrjournal@ciarbkkenya.org)). Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Saturday 15th October 2022. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor Board receives and considers each article but does not guarantee publication.



## **Guidelines for Submissions**

The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

Each submission: -

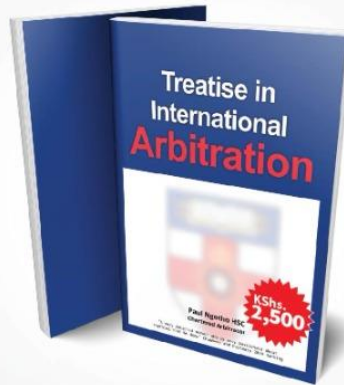
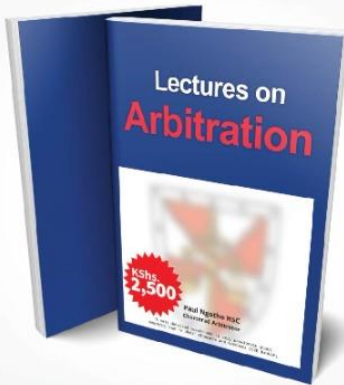
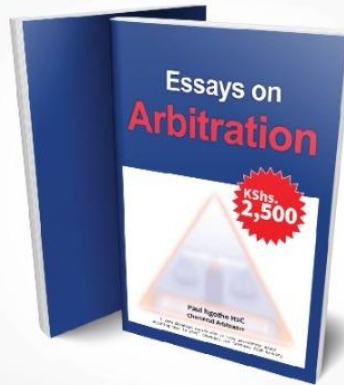
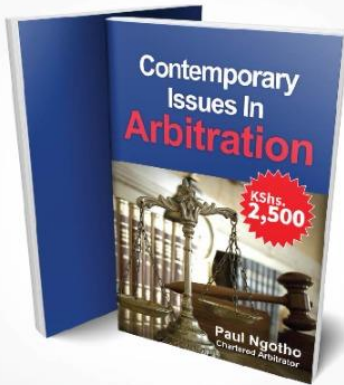
- should be written in English
- should conform to international standards and must be one's original Writing
- should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered
- should include the author'(s) name and contacts details
- should include footnotes numbered
- must be relevant and accurate
- should be on current issues and developments.

## Recent Arbitration Books by Kenyan Authors



**AVAILABLE**

Call: +254 728 130 925

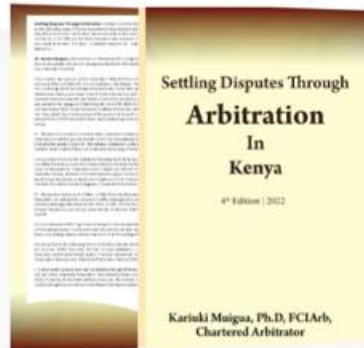


## Recent Arbitration Books by Kenyan Authors



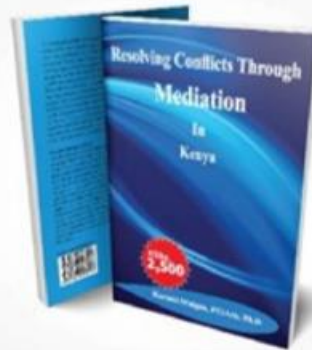
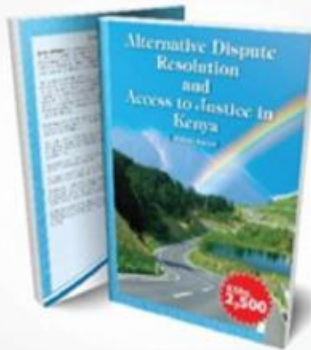
**AVAILABLE**

Call: +254 722 818 932



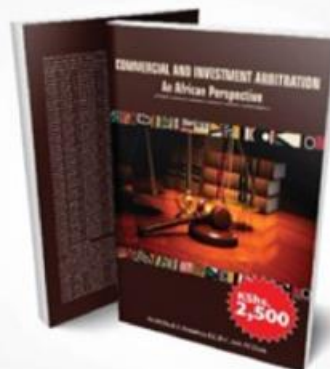
Download for free:

Visit <http://kmco.co.ke/wp-content/uploads/2022/03/4th-Edition-Settling-Disputes-Through-Arbitrat>



**AVAILABLE**

Call: +254 723 469 931





# ADR

ALTERNATIVE  
DISPUTE  
RESOLUTION

The Journal aims to provide original in-depth investigations of both theoretical and practical questions on international arbitration and ADR. The Journal welcomes scholarly articles aiming to contribute to and advance the academic debate, as well as articles aiming to provide analysis of developments in case law, legislation, and practice in the field of dispute resolution.

The Journal covers all areas of international dispute settlement, including commercial and investment arbitration and all other modes of ADR, such as negotiation, adjudication, expert determination, and mediation. The Journal covers topics relating to both private and public law, including public international law, and welcomes articles that take a variety of approaches, including doctrinal, historical, comparative, sociolegal, philosophical, political analysis and economic analysis of the law.

The Journal is essential reading for anyone involved in dispute resolution – whether as judge, international arbitrator, party representative, mediator, adjudicator, corporate advisor, government official, in-house counsel, academic, or graduate/post-graduate student.

For Marketing opportunities, Contact  
[marketing@ciarbkkenya.org](mailto:marketing@ciarbkkenya.org)

Chartered Institute of Arbitrators, Kenya  
Nicholson Drive, off Ngong Road between Bemuda Plaza and  
Central Church of Nazarene  
P.O. Box 50163-00200, Nairobi | Tel: 2712481, 2722724  
Fax: 2720912 | Mobile: 0734 652205 or 0722 200496  
Email: [info@ciarbkkenya.org](mailto:info@ciarbkkenya.org) | Website: [www.ciarbkkenya.org](http://www.ciarbkkenya.org)

ISBN 978-9966-046-14-7

