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# ALTERNATIVE DISPUTE RESOLUTION

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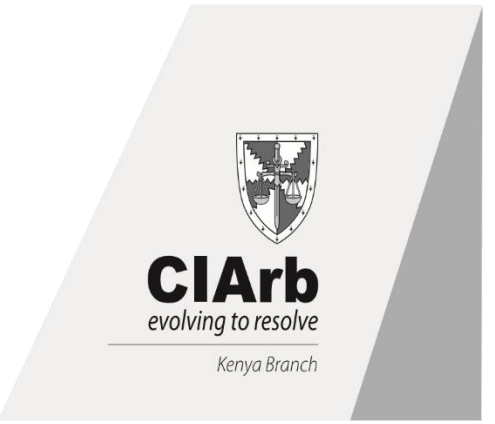


# ALTERNATIVE DISPUTE RESOLUTION

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## Editor's Note

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume 12, No.1.

The Journal is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators Kenya (CIArb-K), engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms.

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.

This volume contains papers on salient themes in ADR including *(Re)Examining the Doctrine of Emergency Arbitration; Promoting International Arbitration in Kenya Through Third-Party Funding: Prospects, Challenges & Lessons – A Call for Reform; Pre-Litigation Mediation as a Means to Enhance Judicial Economy in Kenya's Criminal Justice System; Traditional Dispute Resolution Mechanisms: The Antiquity; Sociological Orientation; Integration into the Kenyan Judicial System; and Approaches by Kenyan Courts; Maritime Arbitration in Africa: Reflecting on the Current Status and Future Development; Arbitration in the Age of Artificial Intelligence (AI); Inaugurating South Africa as a Hub for International Commercial Arbitration in Africa: The International Arbitration Act 2017; Technology And The Arbitral Seat: New Considerations For Procedural Law; Integrating Alternative Dispute Resolution Mechanisms into Kenya's Criminal Justice System: Some Reform Proposals; Mediation as an Alternative Dispute Resolution (ADR) Mechanism For Construction Disputes In Kenya; Public Private Partnerships in Kenya: Navigating The Legal Pitfalls in Infrastructure Projects Tendering and Contracting; The Pros and Cons of Third Party Funding in International Arbitration : Balancing Risks And Opportunities; An examination of Kenya's divergent approach to the meaning of 'delivery' of an arbitral award in contrast to other Model Law jurisdictions; The Viability of Plea Bargaining as Alternative Dispute Resolution in Kenya's Criminal Justice System;* and *Alternative Dispute Resolution (ADR) Mechanism for Engineering Contracts, opportunities and challenges for Engineers.* It also contains a review of *the Journal of Conflict Management and Sustainable Development Volume 10 Issue 5.*

The Editorial Board welcomes feedback from our readers across the globe to enable us continue improving the Journal.

The Editorial Board also welcomes and encourages submission of articles on emerging and pertinent issues in ADR for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article received but does not guarantee publication. Submissions should be sent to the editor through editor@ciarbkenya.org and adrjournal@ciarbkenya.org and copied to admin@kmco.co.ke. 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.

CIArb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to continue publishing this Journal that continues to shape the discourse on ADR in Kenya and across the globe.

The Journal is available online at https://ciarbkenya.org/journals/

**Dr. Kariuki Muigua, Ph.D; FCIArb; C.Arb**
**Editor.**
**Nairobi, November 2023.**

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He became the first winner of the Inaugural CIArb (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 CIArb Kenya. He was also awarded the ADR Practitioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

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# Alternative Dispute Resolution – Volume 12 Issue 1

# (Re) Examining the Doctrine of Emergency Arbitration

*By:* ***Kariuki Muigua****

***Abstract***

*The doctrine of emergency arbitration has emerged as of the tools of enhancing the efficacy of international commercial arbitration. This paper critically examines the doctrine of emergency arbitration. It defines emergency arbitration. The paper further explores how the idea of emergency arbitration has been embraced in international commercial arbitration. It also discusses problems in emergency arbitration and suggests recommendation towards enhancing the efficiency of emergency arbitration.*

## 1.0 Introduction

Arbitration is among processes that are commonly referred to as Alternative Dispute Resolution(ADR)[1]. ADR refers to a set of mechanisms that are applied to manage disputes without resort to adversarial litigation[2]. These mechanisms include negotiation, mediation, arbitration, conciliation, adjudication and Traditional Dispute Resolution Mechanisms (TDRMs) among others[3]. ADR mechanisms are recognized at the global level under the *Charter of the United Nations* which stipulates that parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their

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[1] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022
[2] Ibid
[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

own choice[4]. These mechanisms have also been upheld in Kenya under the Constitution, which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[5]. ADR mechanisms have been hailed as viable in enhancing access to justice due to their attributes that include privacy, confidentiality, flexibility, informality, promoting party autonomy and the ability to foster expeditious and cost effective management of disputes[6].

Arbitration is a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute[7]. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution[8]. Arbitration has emerged as the preferred mode of management of disputes especially those that are transnational in nature[9]. In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable[10]. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by

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[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

[5] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

[6] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 29/08/2023)

[7] World Intellectual Property Organization., 'What is Arbitration' Available at *https://www.wipo.int/amc/en/arbitration/what-is-arb.html* (Accessed on 29/08/2023)

[8] Khan. F., 'Alternative Dispute Resolution.' A paper presented at the Chartered Institute of Arbitrators Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.'

[9] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf* (Accessed on 29/08/2023)

[10] Ibid

addressing differences that may arise because of multiple legal systems[11]. It also guarantees enforcement of decisions through the *New York Convention* that provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration[12]. International Commercial Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes.

In addition to the presence of an elaborate enforcement mechanism, various processes have been adopted towards enhancing the efficiency of international commercial arbitration[13]. Among them is the practice of emergency arbitration[14]. This paper critically examines the doctrine of emergency arbitration. It defines emergency arbitration. The paper further explores how the idea of emergency arbitration has been embraced in international commercial arbitration. It also discusses problems in emergency arbitration and suggests recommendation towards enhancing the efficiency of emergency arbitration.

**2.0 Defining Emergency Arbitration**

Emergency arbitration is a special procedure whereby an arbitrator is appointed to hear applications for urgent interim relief(s) prior to the constitution of the Tribunal[15]. Emergency arbitration or expedited measures of protection provide a framework for a party to an arbitration to request immediate though short-term reliefs before the process of appointment of an arbitral tribunal is

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[11] Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

[12] United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

[13] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' *Arbitration International*, Volume 35, Issue 4 (2019)

[14] Ibid

[15] Singapore International Arbitration Centre., 'Emergency Arbitration.' Available at https://siac.org.sg/emergency-*arbitration#:~:text=The%20Emergency%20Arbitrator%20procedure%20is,the%20constitution%20of%20the%20Tribunal* (Accessed on 29/08/2023)

completed[16]. Under this process, emergency reliefs are sought upon the filing of the arbitration demand and may be compared to motions for injunctive relief or a temporary restraining order in court proceedings[17]. Under emergency arbitration, an emergency arbitrator is appointed to hear and decide applications for emergency interim relief filed by parties before the constitution of the tribunal[18]. Under this process, the person appointed as emergency arbitrator does not go on to become a member of the arbitral tribunal[19]. The powers of the emergency arbitrator lapse as soon as the tribunal is constituted[20].

Emergency arbitration has emerged as a very important doctrine in enhancing the efficacy of arbitration proceedings. It has been argued that in some cases, the nature of a dispute requires immediate action to avoid irreparable harm[21]. In traditional litigation, a party might seek a temporary restraining order or a preliminary injunction from a court to prevent another party from taking certain action[22]. Further, it has been observed that until recently, parties to international arbitration agreements had no recourse to arbitration to preserve the status quo, conserve assets or evidence, or seek other provisional relief until a tribunal had been established in a particular case-a process that in the best of circumstances, took weeks after submission of a 'request for arbitration' or 'notice of

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[16] American Arbitration Association., 'ADR: What's Your Emergency?' Available at https://www.adr.org/blog/ADR-Whats-Your-Emergency (Accessed on 29/08/2023)
[17] Ibid
[18] Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Available at *https://www.nortonrosefulbright.com/en/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore* (Accessed on 29/08/2023)
[19] Ibid
[20] Ibid
[21] Thrasher. A., 'Emergency Arbitration Proceedings and How they Relate to Construction Disputes.' Available at *https://www.bradley.com/insights/publications/2023/05/emergency-arbitration*-proceedings-and-how-they-relate-to-construction-disputes#:~:text=Rule%20R%2D39%20under%20the,the%20application%20for%20emergency%20relief (Accessed on 29/08/2023)
[22] Ibid

arbitration[23].' To obtain provisional measures in such circumstances, parties were required to resort to national courts[24]. Emergency arbitration has therefore emerged in order to ensure that the grant of interim measures of protection is conducted within the confines of arbitration and not by national courts[25]. It has been argued that some of the attributes of arbitration such as privacy, confidentiality and efficiency may be lost if a party is forced to pursue provisional reliefs in open court[26]. Some parties therefore prefer to seek interim measures within the arbitral process[27]. Emergency arbitration is therefore vital in realizing the agreement of parties' to arbitrate disputes[28].

Emergency arbitration is important as parties (typically Claimants) may find themselves in a factual situation where they are in need of urgent interim relief, but the tribunal has not yet been appointed[29]. Recourse to emergency arbitration is particularly important when considering the amount of time the process of constituting a tribunal can take[30]. This timeline may be substantially lengthened by an uncooperative Respondent who is determined to delay the proceedings to the Claimant's detriment[31]. Under emergency arbitration, any emergency measure granted takes the form of an order[32]. The order may be later revisited by the arbitral tribunal once constituted[33].

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[23] Hanessian. G, & Dosman. A., ' Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Available at *http://arbitrationlaw.com/sites/default/files/free_pdfs/aria_-_songs_of_access.pdf* (Accessed on 29/08/2023)
[24] Ibid
[25] Ibid
[26] American Arbitration Association., 'ADR: What's Your Emergency?' Op Cit
[27] Ibid
[28] Ibid
[29] Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Op Cit
[30] Ibid
[31] Ibid
[32] International Chamber of Commerce., 'Emergency Arbitrator.' Available at *https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/emergency-arbitrator/* (Accessed on 29/08/2023)
[33] Ibid

Emergency arbitration has been adopted by various arbitral institutions to address the need for emergency interim reliefs at the pre-arbitral stage[34]. Under the *International Chamber of Commerce* (ICC) Arbitration Rules, 2021[35], a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures[36]. The Rules envisage the appointment of an emergency arbitrator within two days of receipt of the application[37]. The rules further provide that the emergency arbitrator's decision shall take the form of an order and that parties shall comply with any order made by the emergency arbitrator[38]. The emergency arbitrator is required to make the order not later than 15 days from the date on which the file was transmitted to him/her[39]. In addition, the Rules provide that the emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order and that the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator[40]. The Rules also give powers to the arbitral tribunal to decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or noncompliance with the order[41]. The Rules also provide that an emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the application[42].

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[34] Burbeza. Z., 'LCIA Emergency Arbitrations: Brief Outline.' Available at https://imdcorporate.co.uk/dispute-resolution/lcia-emergency-arbitrations-brief-outline/ (Accessed on 29/08/2023)

[35] International Chamber of Commerce., 'Arbitration Rules, 2021' Available at *https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf* (Accessed on 29/08/2023)

[36] Ibid, Article 29 (1)

[37] ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 2 (1)

[38] ICC Arbitration Rules 2021, Article 29 (2)

[39] ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 6 (4)

[40] ICC Arbitration Rules 2021, Article 29 (3)

[41] Ibid, Article 29 (4)

[42] ICC Arbitration Rules, Appendix V, Emergency Arbitrator Rules, Article 2 (6)

Emergency arbitration is also provided for under the *London Court of International Arbitration (LCIA) Arbitration Rules*[43]. The Rules provide that in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal, any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the "Emergency Arbitrator")[44]. The rules envisage appointment of an emergency arbitrator within three days of receipt of the application[45]. The rules require the emergency arbitrator to decide the claim for emergency relief as soon as possible, but no later than 14 days following the appointment[46]. An emergency arbitrator is required to make an order in writing, with reasons[47]. Such an order may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative[48].

The *Chartered Institute of Arbitrators (CIArb) Arbitration Rules*[49] also enshrine the doctrine of emergency arbitration. Under the Rules, any party in need of conservatory or urgent interim measures prior to the constitution of the arbitral tribunal may file an application with the CIArb seeking the appointment of an emergency arbitrator[50]. The Rules stipulate that an application for the appointment of an emergency arbitrator may seek orders, including, but not limited to: maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process

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[43] London Court of International Arbitration., 'Arbitration Rules.' Available at *https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx* (Accessed on 29/08/2023)
[44] Ibid, Article 9.4
[45] Ibid, Article 9.6
[46] Ibid, Article 9.8
[47] Ibid, Article 9.9
[48] Ibid, Article 9.11
[49] Chartered Institute of Arbitrators Arbitration Rules, 2015., Available at *https://www.ciarb.org/media/2729/ciarb-arbitration-rules.pdf* (Accessed on 29/08/2023)
[50] Ibid, Article 26 (1)

itself; providing a means of preserving assets out of which a subsequent award may be satisfied; or preserving evidence that may be relevant and material to the resolution of the dispute[51]. The Rules require an emergency arbitrator to be appointed within two days of receipt of the application[52]. Further, under the Rules, no emergency arbitrator may be appointed after the arbitral tribunal has been constituted[53]. The Rules also require the emergency arbitrator to decide the issues raised in the application as soon as possible and preferably no later than 15 days following the appointment, taking due care to ensure that all parties are afforded notice and a reasonable opportunity to be heard[54]. The Rules further state that any order or award issued by the emergency arbitrator, including an award of costs, may be modified or confirmed by the arbitral tribunal, and, in the absence of such a modification or confirmation, shall automatically expire and no longer be in effect 15 days following the constitution of the arbitral tribunal[55].

In addition, the *Arbitration Rules of the Common Market for Eastern and Southern Africa (COMESA) Court of Justice*[56] also provide for emergency arbitration. Under the rules, a party may apply for conservatory or urgent interim measures prior to the constitution of an arbitral tribunal by making a request to the Assigning Authority for the appointment of an emergency arbitrator[57]. Under the emergency arbitration procedure, a request for the appointment of an emergency arbitrator may seek orders, including, but not limited to maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; providing a

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[51] Ibid, Appendix I, Emergency Arbitrator Rules, Article 1 (2)
[52] Ibid, Article 2 (2)
[53] Ibid, Article 2 (3)
[54] Ibid, Article 6 (1)
[55] Ibid, Article 6 (9)
[56] Arbitration Rules of the COMESA Court of Justice (2018)., Available at *https://comesacourt.org/wp-content/uploads/2019/11/COMESA-COURT-ARBITRATION-RULES-2018.pdf* (Accessed on 29/08/2023)
[57] Ibid, Rule 24 (1)

means of preserving assets out of which a subsequent award may be satisfied; or preserving evidence that may be relevant and material to the resolution of the dispute[58]. The Rules require an emergency arbitrator to be appointed within two days of receipt of the application[59]. Further, the rules provide that no emergency arbitrator shall be appointed after the arbitral tribunal has been constituted[60]. In addition, they stipulate that the emergency arbitrator shall not serve as a member of the arbitral tribunal unless the parties otherwise agree[61]. The Rules further require the emergency arbitrator to decide the issues raised in the application no later than fifteen (15) days following the appointment, taking due care to ensure that all Parties are afforded notice and a reasonable opportunity to be heard[62]. Further, under the rules, any order or award issued by the emergency arbitrator, including an award of costs may be modified or confirmed by the emergency arbitrator or the arbitral tribunal, and, in the absence of such a modification or confirmation, shall automatically expire and no longer be in effect fifteen (15) days following the constitution of the arbitral tribunal[63]. In addition, the Rules also stipulate that the emergency arbitral order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order[64]. The rules also give powers to the arbitral tribunal to modify, terminate or annul the order or any modification thereto made by the emergency arbitrator[65].

The doctrine of emergency arbitration is also upheld under the *Kigali International Arbitration Centre Arbitration Rules*[66]. Under the Rules, a party that needs urgent interim or conservatory measures that cannot await the

[58] Ibid, Schedule 1, Section 1 (3)
[59] Ibid, S 2 (2)
[60] Ibid, S 2 (3)
[61] Ibid, S 2 (4)
[62] Ibid, S 6 (1) (a)
[63] Ibid, S 6 (9) (a)
[64] Ibid, S 6 (10)
[65] Ibid, S 6 (11)
[66] Kigali International Arbitration Centre Arbitration Rules, 2012., Available at *https://africaarbitration.org/resources/rules/Kigali%20International%20Arbitration%20Centre%20Rules.pdf* (Accessed on 29/08/2023)

constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures to the Secretariat[67]. The Rules require the Centre to appoint an emergency arbitrator within two days of receipt of the application[68]. The Rules further provide that the emergency arbitrator's decision shall take the form of an order and parties are required to comply such an order[69]. The Rules require the emergency arbitrator to make an order within fifteen days from the date on which the file was transmitted to him/her[70]. Further, under the Rules, the emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order[71]. In addition, the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator[72].

Finally, emergency arbitration has also been encapsulated under the *Arbitration Rules of the Nairobi Centre for International Arbitration*[73]. Under the Rules, a party who intends to make an application for an emergency arbitration shall submit a written request to the Registrar[74]. The Registrar is required to appoint an emergency arbitrator within two days of receipt of the application[75]. The Rules further stipulate that an emergency arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless the parties consent[76]. In addition, the Rules state that emergency arbitrator shall have the same powers vested in the Arbitral Tribunal under these Rules, including the power to rule on his own jurisdiction and any objection to the application[77]. Further, the Rules

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[67] Ibid, Article 34
[68] Ibid, Annex 2, Emergency Arbitration Rules, Article 2
[69] Ibid
[70] Ibid, Annex 2, Emergency Arbitration Rules, Article 6
[71] Ibid
[72] Ibid
[73] Nairobi Centre for International Arbitration., Arbitration Rules, 2015., Available at *https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf* (Accessed on 29/08/2023)
[74] Ibid, Second Schedule, Emergency Arbitration Rules, Rule 1
[75] Ibid, Rule 3
[76] Ibid, Rule 6
[77] Ibid, Rule 13

provide that the emergency arbitrator shall make an order or award within fifteen days from the date of appointment, which period may be extended by agreement of the parties[78].

From the foregoing, it is evident that emergency arbitration has been adopted by various arbitral institutions to address the need for emergency interim reliefs before appointment of arbitral tribunals. The practice of emergency arbitration raises several prospects and problems.

**3.0 Prospects and Problems in Emergency Arbitration**

Emergency arbitration has been hailed for its efficacy in international commercial arbitration[79]. It is very efficient in instances where parties may need an urgent interim relief even before the constitution of an arbitral tribunal so that the very purpose of parties opting for the arbitration does not get defeated[80]. It is very vital in preserving the status quo pending the outcome of the parties' dispute[81]. Emergency arbitration can also cure the jurisdictional problems that may arise in international commercial arbitration in instances where parties have to approach courts for interim reliefs[82]. In such cases, courts in different jurisdictions may pass varied orders in respect of the matter in question[83]. Emergency arbitration ensures that grant of interim orders is made vide arbitral proceedings thus ensuring uniformity of decisions[84].

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[78] Ibid, Rule 14

[79] Kumar. S., 'Emergency Arbitration-Its Advantages, Challenges and Legal Status in India.' Available at *https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/* (Accessed on 30/08/2023)

[80] Ibid

[81] Hanessian. G, & Dosman. A., ' Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Op Cit

[82] Ghaffari. A, & Walters. E., 'The Emergency Arbitrator: The Dawn of a New Age?.' Available at *https://search.informit.org/doi/abs/10.3316/agispt.20210902052802* (Accessed on 30/08/2023)

[83] Ibid

[84] Ibid

Emergency arbitration is also useful in preserving the essential attributes of arbitration such as privacy, confidentiality, efficiency and the ability to foster expeditious and cost effective management of disputes[85]. These attributes may be lost if parties are forced to seek interim reliefs through courts due to the open nature of court proceedings and instances of delays and costs that are prevalent in court processes in many jurisdictions[86]. Emergency arbitration is therefore important in promoting the features of arbitration.

Further, emergency arbitration helps parties to gain invaluable early insight into how an ensuing arbitral tribunal would perceive the merits of their dispute[87]. Often, parties can use that insight to quickly resolve their entire dispute, either because the party seeking an emergency relief realized it had no realistic possibility to obtain an effective remedy should it ultimately prevail in the ensuing arbitration, or was persuaded that the tribunal would skeptically view its success of prevailing on the merits of its underlying claims[88]. Such early resolution eliminates further arbitration, thus yielding considerable savings in both time and cost[89].

Emergency arbitration is therefore essential in enhancing the effectiveness and efficiency of arbitration proceedings. However, several problems may hinder the efficacy of emergency arbitration. Among the key concerns is the recognition and enforceability of emergency orders[90]. Many jurisdictions require an award to be 'final and binding' on the substance of the dispute between the parties before it may be recognised and enforced[91]. However, an order by an emergency arbitrator is intended to deal only with the application for interim relief thus not

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[85] American Arbitration Association., 'ADR: What's Your Emergency?' Op Cit
[86] Ibid
[87] Michaelson. P., 'Emergency Arbitration: Fast, Effective and Economical.' Available at *https://www.ccarbitrators.org/wp-content/uploads/2021/06/PLMichaelson-Emerg-ArbABA-JustResolutions-03-2016final-complete.pdf* (Accessed on 30/08/2023)
[88] Ibid
[89] Ibid
[90] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit
[91] Ibid

'final and binding' as envisaged in most jurisdictions[92]. Indeed, most institutional arbitration rules provide that an order by an emergency arbitrator is not binding on the arbitral tribunal, which may modify, terminate or annul such an order[93]. This has resulted in doubts as to whether an order by an emergency arbitrator is enforceable in most jurisdictions[94]. It has been observed that while an emergency arbitrator order is legally enforceable in certain jurisdictions, it does not enjoy the status and near global enforceability of an arbitral award under the New York Convention[95].

In addition, it has been pointed out that emergency arbitration may not be appropriate or sufficient in all cases[96]. The process is not efficient especially where ex parte action is required or assets or evidence are in the hands of third parties[97]. Therefore, unlike the court process, emergency arbitration does not envisage ex parte processes and grant of orders against third parties to the arbitration agreement[98]. This is a potential drawback to the efficacy of emergency arbitration[99]. Consequently, many institutional arbitral rules allow parties to seek interim reliefs before courts in addition to emergency arbitration proceedings[100]. This may result in the risk of concurrent jurisdiction between an emergency arbitrator and national courts in granting interim measures prior to the constitution of the arbitral tribunal[101]. It is therefore evident that while

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[92] Ibid
[93] See for example the International Chamber of Commerce., Arbitration Rules, 2021, Op Cit; the London Court of International Arbitration., Arbitration Rules, Op Cit and the Kigali International Arbitration Centre Arbitration Rules, 2012, Op Cit.
[94] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit
[95] Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Op Cit
[96] Hanessian. G, & Dosman. A., 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Op Cit
[97] Ibid
[98] Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Op Cit
[99] Ibid
[100] Such rules include the International Chamber of Commerce., Arbitration Rules, 2021, Op Cit; the London Court of International Arbitration., Arbitration Rules, Op Cit; Chartered Institute of Arbitrators Arbitration Rules, 2015 Op Cit and the Kigali International Arbitration Centre Arbitration Rules, 2012, Op Cit
[101] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit

emergency arbitration is useful in granting interim reliefs and maintaining the status quo before commencement of the arbitration proceedings, its efficacy may be hindered by several problems including recognition and enforceability of orders and unsuitability in certain cases such as where ex parte processes are required. It is imperative to address these problems in order to enhance the viability of emergency arbitration.

**4.0 Way Forward**

Emergency arbitration procedures are becoming increasingly popular in international commercial arbitration[102]. The effectiveness of emergency arbitration is however disputed, there being uncertainty as to both the proper status of the subject granting emergency relief--so called emergency arbitrator--and the enforceability of his/her decisions[103]. To address this challenge, it has been suggested that there is need for an international instrument on recognition and enforcement of arbitral interim measures, including emergency decisions[104]. Adopting an international instrument for enforcing emergency reliefs will be the best solution to the challenge of recognition and enforceability of orders in emergency arbitration by ensuring that such orders are recognized and enforced across jurisdictions[105]. This will enhance the effectiveness of emergency arbitration.

Further, there is need for countries to consider amending their arbitration laws to provide for the recognition and enforcement of emergency arbitration orders[106]. It has been observed that some jurisdictions including Singapore and Hong Kong have adopted legislative amendments to enforce emergency arbitral

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[102] Santacroce. F., 'The Emergency Arbitrator: A Full-fledged Arbitrator Rendering an Enforceable Decision?' *Arbitration International*., Volume 31, Issue 2 (2015)
[103] Ibid
[104] Ibid
[105] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit
[106] Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4512857* (Accessed on 30/08/2023)

awards and orders[107]. Other jurisdictions can follow this example in order to foster emergency arbitration.

In addition, in order to avoid any duplication of fora, courts are encouraged to respect emergency arbitrator's jurisdiction and only intervene in instances where an emergency arbitrator is not capable of granting a relief[108]. Courts also have an important role to play in fostering emergency arbitration through recognition and enforcement of orders[109]. It is thus imperative for courts to further this role in order to promote emergency arbitration.

Finally, there is need to encourage parties in international commercial arbitration to embrace emergency arbitration. Parties should adopt this practice in seeking urgent interim reliefs and only pursue the court process in exceptional cases such as ex parte proceedings or where assets or evidence are in the hands of third parties.[110] Arbitral institutions can also streamline their rules on emergency arbitration and make the process more flexible, efficient, expeditious and cost effective with the ability to foster enforcement of outcomes[111]. This will make emergency arbitration more popular than applying to the courts for interim reliefs[112].

Although certain amendments are needed to enhance the effectiveness of this relatively new mechanism, the future of emergency arbitrator is still optimistic. Emergency arbitration should therefore continue being embraced.

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[107] Hanessian. G, & Dosman. A., ' Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Op Cit
[108] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit
[109] Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Op Cit
[110] Norton Rose Fulbright., 'Emergency Arbitrators in Singapore.' Op Cit
[111] Umeh. O., 'The Emergence of Emergency Arbitration in International Arbitration.' Op Cit
[112] Ibid

## 5.0 Conclusion

Emergency arbitration is very useful in accessing urgent interim relief(s) prior to the constitution of the Tribunal[113]. Emergency arbitration is important in enhancing the efficacy of arbitration proceedings by preserving the status quo pending the final outcome of the arbitration proceedings[114]. However, while emergency arbitration is useful in granting interim reliefs and maintaining the status quo before commencement of the arbitration proceedings, its efficacy may be hindered by several problems including challenges of recognition and enforceability of orders and unsuitability in certain cases such as where ex parte processes are required[115]. Measures that can be adopted towards enhancing emergency arbitration include adopting an international instrument for enforcing emergency arbitration orders, amending national arbitration laws to provide for the recognition and enforcement of emergency arbitration orders, encouraging national courts to uphold emergency arbitration, advising parties in international commercial arbitration to embrace emergency arbitration and streamlining rules by arbitral institutions on emergency arbitration in order to make the process more flexible, efficient, expeditious and cost effective with the ability to foster enforcement of outcomes[116]. Emergency arbitration is a viable mechanism that should be widely embraced in order to enhance the efficacy of arbitration proceedings especially in the context of international commercial arbitration.

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[113] Singapore International Arbitration Centre., 'Emergency Arbitration.' Op Cit
[114] Hanessian. G, & Dosman. A., 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration.' Op Cit
[115] Ibid
[116] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Op Cit

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Singapore International Arbitration Centre., 'Emergency Arbitration.' Available at *https://siac.org.sg/emergency-arbitration#:~:text=The%20Emergency%20Arbitrator%20procedure%20is,the%20constitution%20of%20the%20Tribunal*

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# Promoting International Arbitration in Kenya Through Third-Party Funding: Prospects, Challenges & Lessons – A Call for Reform

*By:* ***Mogesi Joel****

***Abstract***

*The issue of Third-Party Funding has been one of the most widely discussed topics in international arbitration in recent decades. Indeed, the ability of a party to bring their dispute to arbitration heavily depends on the availability of funds to cover the attendant costs and any other risks. The availability of funding arrangements or lack thereof may determine the number of claims brought as well as the choice of an arbitration seat. In Kenya, the position on legality of TPF is uncertain as a result of the application of the common law doctrines of champerty and maintenance. This article examines the impact of this uncertainty on the attractiveness of Kenya as a seat of arbitration. The article identifies scope for reform in the law and makes suggestions to create a more liberal legislative and judicial framework in this respect in order to promote Kenya as a preferred seat for arbitration.*

## Introduction

The general advantage that Alternative Dispute Resolution methods have traditionally enjoyed is that they are cost-effective and expeditious as opposed to litigation which is time-consuming and can prove expensive.[1] However, arbitration, as an ADR method, invariably involves costs and expenses usually broadly classified into; cost of the award and cost of reference e.g. arbitrator's fees, costs of hiring the venue of arbitration, advocates fees, *et cetera.*[2] The issue of costs inhibiting the realization of one's right to access to justice was brought to light in the case of *Anne Wangui Ngugi & 2,222 others v CEO Retirement Benefits Authority* where the petitioners contended that the costs of arbitration violated

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[1] Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited, Nairobi, 4th Edition 2022) 252

[2] Peter Mwangi Muriithi, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (2022) 10(1) ADR 193

their right to access to justice under Article 48 of the Constitution. Given the nature of international arbitration and the value of the matter involved, the costs are likely to be astronomical.[3] Parties with meritorious claims may be discouraged from pursuing them for lack of funds to fund the process.[4]

Section 3(3) of the Arbitration Act defines international arbitration as one where:

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

The above definition affirms that international arbitration takes place within a complex and vitally important legal frameworks which include *inter alia* contemporary international legislation, national arbitration legislation and institutional arbitration rules.[5] The legal regimes for international arbitration have been established, and progressively refined with the express goal of facilitating international trade and investment by providing a stable, predictable, and effective legal framework in which these commercial activities

[3] *Anne Wangui Ngugi & 2,222 Other v Edward* Odundo, CEO Retirement Benefits Authority [2015] eKLR

[4] Muhammed Tawfiq Ladan, *'Access to justice as a human right under the ECOWAS Community Law'* A Paper Presented at the Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja Nigeria, 8th to 11th April, 2010

[5] Kariuki Muigua, Nurturing International Commercial Arbitration in Kenya (2021) 9(4) ADR 20

may be conducted.[6] It therefore against this backdrop that states around the world have been working on their domestic legal and institutional frameworks geared towards enhancing the practice of international arbitration within their jurisdictions.[7]

Andrew McDougall *et al* note that there is a 'Battle of the Seats' as jurisdictions worldwide strive to compete to attract international arbitration not only as a means to attract business but also as a means to build prestige.[8] They further argue that hosting international arbitrations is a way to build a jurisdiction's reputation as a modern, neutral and reliable place to do business, promoting commerce and respecting the rule of law.[9] Efficient ways of resolving commercial and investment disputes as well as predictable enforcement of resulting decisions are key in promoting investor confidence and creating a better investment climate.[10]

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[6] Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya' (2021) 9(4) ADR 20

[7] Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited, Nairobi, 4th Edition 2022) 252

[8] Andrew McDougall, Tuuli Timonen & Nika Larkimo 'Attracting International Arbitration with a Predictable and Transparent National Law' (*White and Case* August 2018) <*https://www.whitecase.com/sites/whitecase/files/files/download/publications/attracting-international-arbitration-predictable-transparent-national-law.pdf* > Accessed 25th October, 2023

[9]Andrew McDougall, Tuuli Timonen, Nika Larkimo 'Attracting International Arbitration with a Predictable and Transparent National Law'

[10] Tamlyn Mills & Mrithula Shanker, 'Promoting Investment Through Arbitration – Recent Developments in the South Pacific' 17 International Arbitration Report (December 2021) < *https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-17.pdf?revision=dec8da6f-3ddb-4345-bd3b-fb8fe87a3e3c&revision=5249426534347387904* > Accessed 25th October, 2023

Kenya as a developing country aims to put measures in place to attract and retain foreign investment in order to grow its economy.[11] Financial services as well as dispute resolution services remain central to the realization of this aim. The establishment of the Nairobi International Financial Centre is one of those competitive measures taken in order to attract investment and provide conditions for businesses to flourish and make Nairobi the financial hub of Africa.[12] On the other hand, the establishment and continued operation of the NCIA is in line with the aim of repositioning and making Kenya a hub for international dispute resolution.[13]

Given the attributes of international arbitration in creating a friendly investment climate and boosting investor confidence as well as the facilitation of other service-related industries, competition among jurisdictions to become the most preferred or appealing seat is not likely to stop any time soon.[14] A certain and predictable legal framework in enforcing arbitration agreements as well as the recognition and enforcement of arbitral awards without legal hindrances has been cited as one the key attributes of an attractive arbitration hub.[15]

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[11] James Anyanzwa, 'Kenya moves to avert potential foreign direct investment crisis' *The East African* (November 1, 2022) < *https://www.theeastafrican.co.ke/tea/business/kenya-seeks-to-avert-potential-investor-crisis-4004466* > Accessed 25th October, 2023

[12] Nicholas Norbrook, 'Kenya hopes a new financial centre will pull in global investors' *The Africa Report* (October 18, 2021) < *https://www.theafricareport.com/136616/kenya-hopes-a-new-financial-centre-will-pull-in-global-investors/* > Accessed 25th October, 2023, 2

[13] Hellen Mwangi & Irene Mwangi, 'Centre For International Arbitration Starts 2022-2027 Strategic Plan' *Kenyan News Agency* (November 17, 2022) < *https://www.kenyanews.go.ke/centre-for-international-arbitration-starts-2022-2027-strategic-plan/* > Accessed August, 2023

[14] Elizabeth Olson, 'Cities Compete to Be the Arena for Global Legal Disputes' *The New York Times* (New York, 11 September, 2014) < *https://archive.nytimes.com/dealbook.nytimes.com/2014/09/11/cities-compete-to-be-the-arena-for-global-legal-disputes/?_php=true&_type=blogs&_r=0* > Accessed 25th October, 2023

[15] Stavros Brekoulakis and Paul Friedland, 'International Arbitration Survey: The Evolution of International Arbitration' QMU & White Case (2018) <*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---TheEvolution-of-International-Arbitration-(2).PDF* > Accessed 25th October, 2023

Third-party funding as a construct of access to justice inherently plays a part in promoting jurisdictions as appealing seats of international arbitration. However, Colombo and Yokomizo hold that the view that TPF is a construct of access to justice is rather flawed and does not bring out the clearer picture that TPF is a means through which parties to an arbitration diversify risks associated with disputes.[16]

Kariuki Muigua posits that the perceived finality of awards, and enforcement regimes in international arbitration has led to the growth of TPF in international arbitration.[17] TPF, therefore, encourages arbitration as more disputes are capable of submission to international arbitration. Fernando Dias has argued that in the quest to succeed in the 'Battle of the Seats', legal reforms play a major role in enhancing the attractiveness of a seat even though other factors come into play.[18] In this regard, he argues that parties consider keenly the law of available seats of arbitration before determining the most suitable one for their needs.[19]

The central thesis of this paper is that there is need for legal reforms in Kenya to allow for Third-Party Funding in international arbitration and arbitration generally as this will play a part in making Kenya a more attractive seat of international arbitration. Therefore, this paper will explore the concept of TPF through available literature, identify the types of TPF existing, discuss the legal position of Kenya towards TPF and draw lessons from jurisdictions that have

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[16] Giorgio Colombo and Dai Yokomizo, 'A Short Theoretical Assessment on Third Party Funding in International Commercial Arbitration'

[17]Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited, Nairobi, 4th Edition 2022) 256

[18] Fernando Dias Simoes, 'Is Legal Reform Enough to Succeed in the 'Battle of the Seats'?' (*Kluwer Arbitration Blog* 30 September, 2014) < *https://arbitrationblog.kluwerarbitration.com/2014/09/30/is-legal-reform-enough-to-succeed-in-the-battle-of-the-seats/* > Accessed 25th October, 2023

[19] Fernando Dias Simoes, 'Is Legal Reform Enough to Succeed in the 'Battle of the Seats'?' (*Kluwer Arbitration Blog* 30 September, 2014)

allowed the use of TPF in arbitration. Finally, this paper will discuss the key areas that need regulation through legal reforms and suggest best practices.

**PART A: Third-Party Funding**

Third-party funding is a system whereby a third-party funder, who has no previous interest in the claim, finances, partly or fully, one of the parties' arbitration costs and recovers a previously agreed percentage on the award in case of a favourable award as a return on their investment.[20] This is TPF *sensu stricto.* In case of an unfavourable award, the funder's investment is lost. Third-party funders will therefore often assess the claim and determine the merits of pursuing the claim from a commercial perspective to reduce the chance of making losses.[21] Swargodeep argues that this mechanism of financing is very much lucrative to clients because it allows them to move forward with a claim while shifting the burden of cost and risk of loss to the third-party funder entirely.[22]

The growth of TPF is indeed attributed to its ability to shift burden and risks. Furthermore, it is argued that the high cost of bringing claims to arbitration, and progressing them, can be prohibitive and therefore external funding can facilitate claims that have merit, but would otherwise not be pursued simply because of the significant cost.[23] This access to justice perspective is credited as the major reason for the growth of TPF in international arbitration. Although

[20] Burcu Osmanoglu, 'Third Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32(3) Journal of International Arbitration 325

[21] Frank Bannon, 'The Rise of Third Party Funding in International Arbitration' *Financier Worldwide Magazine* (October, 2016) < *https://www.financierworldwide.com/the-rise-of-third-party-funding-in-international-arbitration#.Y5HDNXZBy00* > Accessed 25th October, 2023

[22] Swargodeep Sarkar, Third Party Funding in International Arbitration: New Challenges and Global Trends (2020) 2(3) International Journal of Legal Science and Innovation 270

[23] Frank Bannon and Nick Boyce, The Rise of Third-Party Funding in international Arbitration *Financier World Magazine* (October 2016) < *https://www.financierworldwide.com/the-rise-of-third-party-funding-in-international-arbitration* > Accessed 25th October, 2023

TPF has been around in one way or another for a long time, it is argued that the globalization of international commerce has been a major reason for its recent popularity.[24]

**Forms of TPF**

This paper has adopted a *sensu stricto* approach to defining TPF. However, while scholars differ on whether different forms of litigation and arbitration financing may qualify as TPF in the strict sense, it is herein argued that any financing by a party that has no legal interest in the dispute is a form of TPF but only in *sensu lato.* This is necessary in order to give the multifaceted nature and character of TPF and a proper view of practical approach in Kenya. This is so as Bogart concedes that 'financing of arbitration claims by third parties is neither new nor capable of being characterised in the rather black and white manner so often employed by press and academic writing. In reality, the practice is complex and multi-faceted.'[25]

Different forms of TPF or funding exist or are practised both in and outside Kenya. The most common include: - Contingency fee arrangements, Litigation expenses insurance, Donations and free financial assistance and specialized institutional financing from funding firms, hedge funds or banks.

*i. Contingency Fee Arrangements*

Contingency fee arrangements are a form of attorney financing where the advocate works on the case a contingency basis and his/her fees is dependent in part or wholly on the success of the case.[26] More often the attorneys and law firms use their own funds to prosecute the client's claim in this particular type

[24] Khaldoun Qtaishat and Ali Qtaishat, Third Party Funding in Arbitration: Questions and Justifications (2021) 34 *International Journal for the Semiotics of Law* 341-356

[25]Cristopher Bogart, "Third party funding in international arbitration", *Burford Capital* (22 January 2013) *www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#*. Accessed 25th October, 2023

[26]Jennifer Trusz, 'Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 Geo. L. J. 1655

of arrangement and where the claim is not won, the lawyer may end up offering their services *pro bono*.[27] Sekou Owino argues that even though frowned upon in Kenya and other jurisdictions, this form of litigation funding is gaining ground and popularity, especially in personal injury claims, and product liability among other cases that involve financial awards.[28] In this sense, the law firm or attorney is a third-party funder.

Section 46 of the Advocates Act prohibits agreements in respect of advocates' fees that is dependent on the outcome of the case or whose rate of payment may fluctuate depending on the outcome of the case. Essentially, the Act makes contingency agreements which are a form TPF illegal in Kenya. Code 72 & 73 of the Code of Conduct also affirms the position that contingency fee agreements are champertous in nature and thus illegal in Kenya because they may inhibit the advocates' ability to render objective advice and service to the client. This too extends to agreements guaranteeing an advocate interest in the suit property of proceedings as prohibited under Section 46(a) of the Act.

Justice Ang'awa while reiterating that contingency fee arrangements are illegal in Kenya however noted that the practice is prevalent owing to the fact that most litigants are poor and therefore advocates work with the hope that the award amount shall be used to offset their fees and expenses.[29] The Court of Appeal has further buttressed the position that an advocate who enters into an agreement with regards to payment of fees that offends the law cannot recover the same through a Bill of Costs to be taxed under the Advocates Remuneration Order. The court held that:

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[27] Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004) 258 - 259

[28] Sekou Owino, 'How Legal Fees are Charged by Lawyers Across the World' *The Nation* (July 31, 2022) < *https://nation.africa/kenya/blogs-opinion/opinion/how-legal-fees-are-charged-by-lawyers-across-the-world-3897208* > Accessed 25th October, 2023

[29] *J M M v Mohammed Ismael Jin & 2 others* [2005] eKLR

> *'In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention. We find no merit in this appeal as the appellant's bill of costs was properly struck out. Accordingly, the appeal is dismissed with costs.'*[30]

In essence then, contingency fee arrangements even though a form of TPF in the wide sense of the definition are illegal and any arrangement or agreement is rendered unenforceable.

*ii. Legal Expenses Insurance*

The International Bar Association (IBA) defines legal expenses insurance as a 'purchasable product through which individuals can obtain legal assistance from a private provider with some or all of the expenses covered by an insurer, thereby enabling the individual to access legal advice or representation (and consequently access justice)'.[31] The legal expenses insurance cover supports lawsuits by covering the representations' costs including the arbitral institution's fees, lawyer's fees and any award or judgment against the insured party.[32]

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[30] *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR

[31] International Bar Association, *Legal Expenses Insurance and Access to Justice* (August 2019) < *https://www.ibanet.org/MediaHandler?id=98236046-737B-4F05-A964-B7F438F04CD8* > Accessed 25th October, 2023

[32] Purvis Keith, *English Insurance Texts: Words for the Week, Karlsruhe* (Verlag Versicherungswirtsch 2010) 96

Marco De Morpurgo argues that there are types of specialized insurance covers that can be purchased either before or after the occurrence of an incident giving rise to a dispute.[33] These include Before-the-Event (BTE) insurance and After-the-Event (ATE) insurance. BTE and ATE insurance are taken out before or after an event has occurred, such as an accident or a contractual dispute, to protect the insured party against the risk of having to pay the other parties' costs, such as legal fees, expert's fees, arbitrator's fees, in the event that party loses in subsequent litigation or arbitration or to cover the policyholder's own out-of-pocket disbursements, or both.[34]

Scholars agree that while Legal expenses insurance covers can be classified as TPF, they are not TPF *sensu stricto* given a number of differences. Ines Nasr posits that while TPF *sensu stricto* is an investment, legal expense insurance covers are not investments.[35] Further, she argues that while a funder will only make a profit if the claim succeeds the insurer will be indemnified regardless of the outcome of the claim.[36] Finally, it is her position that the nature of their returns is also different given that the funder's return is either computed on two times or three times of the investment or a percentage of the recovery, while in insurance the insurer is paid through a premium.[37]

*iii. Specialized Institutional Funding (TPF Sensu Stricto)*

Kalicki, Endicott and Giraldo-Carrillo consider TPF in its strict sense as a financing method which involves the funding of litigation or arbitration by bona fide specialized providers who are neither parties to the dispute nor closely

[33] Marco De Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding' (2011) 19 Cardozo J Int'l & Comp L, 353

[34] Thibaut De Boulle, 'Third Party Funding in International commercial Arbitration' (Master of Laws, Ghent University 2014)

[35] Ines Nasr, 'Third Part Funding in International Arbitration' (Master of Laws, University of Carthage 2015)

[36] Ines Nasr, 'Third Part Funding in International Arbitration' (Master of Laws, University of Carthage 2015)

[37] Ines Nasr, 'Third Part Funding in International Arbitration' (Master of Laws, University of Carthage 2015)

connected with it, and whose sole interest is potential profit in return for providing financing.[38] It is therefore non-recourse financing where the funder loses their investment if the funded party loses the claim.[39]

TPF in this paper has been considered in its *sensu stricto* form. However, since TPF *sensu stricto* is too narrow to capture the full range of all available relevant TPF arrangements, other forms of TPF have been considered.

**PART B: Challenges to Legality of TPF in Kenya**

i. Champerty and Maintenance

Kenya is a common law jurisdiction and it is therefore not lost that the doctrines of champerty and maintenance apply as a matter of public policy. Moreover, the existing legal framework in Kenya gives a wide berth to TPF *sensu stricto* not only in litigation but also in arbitration.[40]

The doctrines of Champerty and Maintenance pose the greatest challenge to TPF in Kenya.[41] While other jurisdictions have relaxed the application of the same either through judicial decisions or statutes, champerty and maintenance are alive and well in Kenya.[42] Courts have considered that champertous agreements are illegal and against public policy and cannot therefore confer any benefit and

[38] Jean Kalicki, Amy Endicott and Natalia Giraldo-Carrillo, 'Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)' (*Kluwer Arbitration Blog* 12 March, 2013) < *https://arbitrationblog.kluwerarbitration.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/* > Accessed 25th October, 2023

[39] Bernado Cremades, 'Third Party Litigation Funding: Investing in Arbitration' (2011) 8(4) TDM 11

[40] Peter Mwangi Muriithi, 'Champerty and Maintenance: The Legality of Third-Party Funding in Common Law Jurisdictions' (2022) 10(1) Alternative Dispute Resolution 193

[41] Rachael Mulheron, 'Champerty and Maintenance in Other Jurisdictions', *The Modern Doctrines of Champerty and Maintenance* (Oxford, 2023; online edn, Oxford Academic, 24 Aug. 2023) <*https://doi.org/10.1093/oso/9780192898739.003.0003,*> Accessed 21st November, 2023.

[42] Ibid

any action arising thereof is illegal and unenforceable at law.[43] In *Hatima Limited v Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocates* the court found that where a Service Level Agreement expressly guaranteed another party who had no interest in the suit, would provide the plaintiff with legal services in consideration of fees, agreed as an amount equal to the total costs of providing the service(s) plus a mark-up of 8% or in accordance with the provider's transfer pricing policy was champertous.[44] In particular, the other party in the case was an incorporated company. To this end, champerty and maintenance represent the greatest challenge to the enforcement of TPF agreements as well awards that might arise out of funded claims on grounds of public policy.

The term maintenance refers to the act of an outside individual or entity contributing money to finance someone else's lawsuit, while the term champerty refers to an act of maintenance with the expectation of receiving some of the proceeds from the winning lawsuit, either as reimbursement or profit.[45] These doctrines evolved through common law as explained by Jonathan Rose. In his book, *Maintenance in Medieval England* he explains that actions for maintenance and cognate offences were brought before the court of Common Pleas and King's Bench between 1272 and 1485.[46] He explains that maintenance emerged as a corollary of that universal medieval value: lordship and that at its core it entailed support which was improper involvement in one's case and in circumstances where power and wealth played an advantage, justice would be denied.[47] In fact complains and petitions were submitted to the King and parliament with the common grievance that most petitioners were unable to exercise their rights or obtain remedies for the violation of their rights by virtue

[43] *Njogu & Co. Advocates vs. National Bank of Kenya Limited* [2007] 1EA 297
[44] *Hatima Limited v Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocates* (Civil Suit E061 of 2021) [2021] KEHC 373 (KLR)
[45] Victoria Shannon Sahani, 'Reshaping Third-Party Funding' (2017) 91 Tulane Law Review 405
[46] Jonathan Rose, *Maintenance in Medieval England* (Cambridge University Press, 2017)
[47] Jonathan Rose, *Maintenance in Medieval England*

of maintenance occasioned by power of the lords.[48] In order to safeguard the administration of justice, instances of champerty and maintenance were made subject to criminal and tortious liability and a common law rule was developed, striking down champertous agreements and contracts of maintenance as being unenforceable on the grounds of public policy.[49]

In arbitration however, two schools of thought emerge. First, as Peter Muriithi notes, all arbitration legislations give a wide berth to TPF and given that these doctrines only developed and applied to litigation, it is safe to conclude that TPF is legal in arbitration in common law jurisdictions including Kenya.[50] On the other hand, the Singapore Court of Appeal in *Otech Pakistan v. Clough Engineering* was of the finding that its unnecessary to differentiate between litigation and arbitration noting that 'it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not the other because it is conducted in private'.[51] Singapore is a common law jurisdiction. These among other arguments by scholars permeate the discussion on whether champerty and maintenance outlaw TPF in common law jurisdictions. The position in Kenya still remains indeterminate and uncertain.

ii. Enforcement of funded arbitral awards

The New York Convention underscores the importance of the mandatory law of the seat of arbitration as disregarding the same can be a ground for annulment of the award.[52] Public policy to which the doctrines of champerty and maintenance belong forms part of this law of the seat of arbitration. It is posited that that only mandatory procedural law of the seat of arbitration should be

[48] Jonathan Rose, *Maintenance in Medieval England* p56

[49] Jern-Fei Ng, 'UK: The Role of the Doctrines of Champerty and Maintenance in Arbitration'

[50] Peter Mwangi Muriithi, 'Champerty and Maintenance: The Legality of Third-Party Funding in Common Law Jurisdictions' (2022) 10(1) Alternative Dispute Resolution 193

[51] *Otech Pakistan Pvt. Ltd. v. Clough Eng'g Ltd*. [2006] SGCA 46.

[52] Art. V(d) of the New York Convention

regarded as a ground for annulling an award and not mandatory substantive law to which the doctrines of champerty and maintenance belong.[53] Furthermore, it is argued that that the doctrines of champerty and maintenance are not public with regard to arbitration since they are aimed at the parties to the funding agreement and not at the outcome of the funded dispute.[54] Given that parties to the funding agreements are usually not locals, any application of champerty and maintenance to the funding agreement would be an extraterritorial application of the law of the seat of arbitration.[55] On the contrary, it is considered that public policy in the sense of champerty and maintenance would still affect the recognition and enforcement of arbitral awards in jurisdictions that prohibit them.[56] Therefore whether or not arbitral awards are enforced at the seat of arbitration or anywhere else, the issue of TPF as affected by the doctrines of champerty and maintenance may still be an issue to be grappled with either as a procedural issue or as an issue of substantive law.

From the foregoing, it is unclear to what extent arbitration may be affected by the doctrines of champerty and maintenance or the legal position of TPF in Kenya. Furthermore, the 'wild horse' nature of public policy may hinder enforcement of funded arbitral awards in Kenya hence creating uncertainty which does very little to bolster confidence in arbitration.

**PART C: Lessons from Other Jurisdictions**

Given the changing terrain of international arbitration, jurisdictions all over the world strive to keep up as well as maintain a competitive edge in attracting

[53] Thibaut De Boulle, 'Third Party Funding" in International Commercial Arbitration' (Master of Laws, Ghent University 2014)

[54] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014)

[55] Catherine A. Rogers, *Ethics in International Arbitration*

[56] Jern-Fei Ng, 'The Role of the Doctrines of Champerty and Maintenance in Arbitration', (2010) 76(2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 208-213

arbitrations.[57] Furthermore, the challenges posed by TPF has been addressed by different jurisdictions in form of regulation.[58] While others choose to regulate through legislative measures, other jurisdictions have chosen to let the industry to self-regulate.[59]

Hong Kong, Singapore, Nigeria and Sierra Leone remain the only countries in the world that have provided for TPF through legislative texts.[60] Hong Kong and Singapore remain the best examples of how a good local legal system is key in attracting international arbitration.[61] On the other hand, the recent amendments by Nigeria and Sierra Leone to their Arbitration legislations demonstrate that African states are taking up the challenge.[62] Kenya should not be left behind.

**Hong Kong**

Gary Benton observes that there is a constant competition between Singapore and Hong Kong on which jurisdiction is the better seat for arbitrations and notes that this is the reason behind the constant legal reforms in the two cities to

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[57] QMUL and White & Case, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' < *https://arbitration.qmul.ac.uk/media/arbitration/docs/2021-International-Arbitration-Survey-Adapting-arbitration-to-a-changing-world.pdf* > Accessed 21st November, 2023

[58] Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti, 'Third-Party Funding in International Arbitration" *Global Arbitration Review* (30th December, 2022) < *https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration* > Accessed 21st November, 2023

[59] Ibid

[60] Elizabeth Oger-Gross, Tolu Obamuroh and Tania Singla, " New Arbitration Regime Comes into Force in Nigeria" *White and Case* (21st June, 2023) < *https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria* > Accessed 21st November, 2023

[61] Piyush Prasad, "Arbitration in Singapore and Hong Kong" (2017) *International Immersion Program Papers* 57 <*http://chicagounbound.uchicago.edu/international_immersion_program_papers/57* > Accessed 21st November, 2023

[62] Elizabeth Oger-Gross, Tolu Obamuroh and Tania Singla, " New Arbitration Regime Comes into Force in Nigeria" *White and Case* (21st June, 2023)

position themselves as more attractive and competitive.[63] Sapna Jhangiani and Rupert Coldwell too observe that adopting competitive and innovative arbitration laws to promote themselves as leading seats of arbitration has been a strategy for both Singapore and Hong Kong and the developments in the liberalization of legal positions with regard to champerty and maintenance and third party funding in arbitration in both jurisdictions is one of these efforts to enhance competitiveness for arbitrations.[64]

Indeed, the Law Reform Commission noted that permitting TPF in Hong would 'preserve and promote Hong Kong's competitiveness as an arbitration centre as well as promote the use of arbitration within Hong Kong.[65] While it is noted that access to justice was a huge consideration for the adoption of TPF in Hong Kong, Beibei Zhang considers that the collective interest of maintaining Hong Kong as a competitive arbitration centre took centre stage.[66] The statistics show that there has been increased arbitration in Hong Kong and the number of funded claims steadily rises. For instance, HKIAC, Hong Kong's leading arbitral institution, saw a rise in arbitration cases registered with it to a record number of 515 cases

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[63] Gary L. Benton, 'The Whispered Conversation: Hong Kong v. Singapore' *Kluwer Arbitration Blog* (2nd January, 2019) < *https://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore/* > Accessed 25th October, 2023

[64] Sapna Jhangiani & Rupert Coldwell, 'Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?' *Kluwer Arbitration Blog* (30th November, 2016) < *https://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/* > Accessed 25th October, 2023

[65] The Law Reform Commission of Hong Kong 'Report' available at *http://www.hkreform.gov.hk/en/publications/rtpf.htm* > Accessed 25th October, 2023

[66] Beibei Zhang, 'Third party funding for dispute resolution A comparative study of England, Hong Kong, Singapore, the Netherlands and Mainland China' (LLM, University of Groningen 2019) < *https://doi.org/10.33612/diss.102275228* > Accessed 25th October, 2023

in 2022 from 277 in 2021.[67] Further it is shown that 74 of the cases were funded by a third-party funder which is an increase from 5 cases disclosed in 2021 and the number is projected to rise.[68]

**Nigeria**

Nigeria's Arbitration and Mediation Act, 2023 has been hailed as a ushering a new era for arbitration in the country with new and innovative provisions such as recognition and enforcement of interim measures issued by arbitral tribunals, award review tribunal, consolidation of arbitrations and joinder of parties, and third-party funding among others.[69] With particular attention to TPF, the Act has introduced several important lessons and insights into the regulation of third-party funding in arbitration.

The Act expressly allows for third-party funding in arbitration in Nigeria by outlawing the torts of champerty and maintenance.[70] This is a significant development as it provides clarity and certainty regarding the permissibility of third-party funding in arbitration proceedings. The act outlines the conditions under which third-party funding is permissible, ensuring transparency and fairness in the process.

Furthermore, the Act reduces instances of potential conflicts of interest arising from third-party funding arrangements by requiring disclosure of such funding

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[67] Morrison Foerster, 'HKIAC's Arbitration Caseload Hits Record High In 2022' (30th January, 2023) < *https://www.mofo.com/resources/insights/230130-hkiacs-arbitration-caseload-hits-record-high-in-2022* > Accessed 25th October, 2023

[68] HKIAC, '2022 Statistics' (2023) < *https://www.hkiac.org/about-us* > Accessed 25th October, 2023

[69] Abayomi Okubote, "A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023" *Afronomicslaw Blog* (24th July, 2023) < *https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023#:~:text=On%2026th%20May%202023%2C%20the,and%20mediation%20proceedings%20in%20Nigeria.* > Accessed 27th October, 2023

[70] Arbitration and Mediation Act, 2023 Laws of the Federation of Nigeria, Section 61

arrangements by the funded party, ensuring that all parties involved are aware of any third-party involvement.[71] This promotes transparency and helps mitigate potential conflicts that may arise from undisclosed third-party funding. The Act moreover allows the arbitrator to consider the funding arrangement when considering an application for an order for security of costs.

Nigeria's approach to regulating third-party funding in arbitration serves as a model for other jurisdictions seeking to strike a balance between promoting access to justice and maintaining ethical standards within arbitration. By allowing third-party funding under certain conditions and implementing safeguards to address potential issues, Nigeria's Arbitration and Mediation Act provides valuable insights into effective regulation of third-party funding in arbitration.

**PART D: Taming The Wildwest – Way Forward for TPF in Kenya**

With its recent popularity, jurisdictions have grappled with TPF and the challenges it invariably causes.[72] Despite obvious advantages associated with TPF, it brings with it ethical issues affecting advocate-client privilege including erosion of advocate-client privilege where confidential information has to be disclosed with the funder, intermeddling by the funder in the advocate-client relationship especially where divergent views emerge regarding settlement or proceeding to the final award and control of key aspects of the arbitral proceedings.[73] On the other hand, there exists a conflict on whether the common law doctrines of champerty and maintenance ought to apply to arbitration hence limiting the application of TPF. These debates and more bring about the issue of whether TPF is a right candidate for legislative regulation in order to curb the disadvantages and maximize the benefits.

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[71] Ibid Section 62

[72] Robert Weal and Oliver Dean, The Growth Of Third Party funding: A Global Perspective *White & Case* (17th July, 2023) < *https://www.whitecase.com/insight-alert/growth-third-party-funding-global-perspective* >

[73] Jacqueline Waihenya, 'Third Party Funding and Investment Arbitration – The Ménage À Trois of International Arbitration?' (2021) 9(1) ADR 163

There is a case to be made for the regulation of TPF as opposed to outright prohibition through champerty and maintenance given that the unique nature and benefits of TPF will ensure that arbitration maintains its attraction as a mode of dispute resolution.[74] In any event it is argued that the arbitration is different from litigation and therefore the common law doctrines of champerty and maintenance should not apply since there isn't any express prohibition of TPF in arbitration.[75]

On the other hand, it is argued that national regulation of TPF is not the best way forward given that domestic rules and regulations are likely to be inconsistent among jurisdictions may open the door for forum-shopping.[76] Furthermore, that there is a risk of over-regulating, thereby effectively restricting the use and application of third-party funding more than is necessary is another reason why domestic regulation may prove problematic.[77] It is further opined that the rush to regulate or accommodate TPF may in the long run be injurious to international arbitration and therefore only time and careful monitoring will reveal the ways in which the current arbitral system may need to adapt to accommodate third-party funding.[78]

Lessons from jurisdictions such as Hong Kong, Singapore and Nigeria provide an insight into the approaches with regards to regulation of TPF. This paper draws such lessons to make suggestions on the correct approach for Kenya going forward.

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[74] Hu Haifan, Regulation of Third-Party Funding in International Commercial Arbitration-Perspective from Hong Kong (2017) < *http://dx.doi.org/10.2139/ssrn.3007036* >

[75] Peter Mwangi Muriithi, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (2022) 10(1) ADR 193

[76] Marc Krestin & Rebecca Mulder, 'Third Party Funding in International Arbitration: To Regulate or Not to Regulate?' *Kluwer Arbitration Blog*

[77] Marc Krestin & Rebecca Mulder, 'Third Party Funding in International Arbitration: To Regulate or Not to Regulate?' *Kluwer Arbitration Blog*

[78] Vienna Messina, 'Third Party Funding: The Road to Compatibility in International Arbitration' (2019) 45(1) Brook. J. Int'l L. 433

*i. Legal recognition of TPF/outlawing the application of the doctrines of champerty and maintenance in arbitration*

As demonstrated above, the common law doctrines of champerty and maintenance pose the greatest challenge to the application of TPF. To legalize third party funding in arbitration while outlawing champerty and maintenance, legislative reforms or judicial decisions may be necessary. This could involve enacting specific legislation that expressly permits third party funding in arbitration while imposing regulatory safeguards to prevent abuse. Such safeguards may include disclosure requirements, ethical standards for funders and lawyers, and mechanisms to address conflicts of interest.

Additionally, it is crucial to define permissible funding arrangements clearly and distinguish them from champertous agreements. This can be achieved by setting out criteria for permissible funding arrangements, such as ensuring that funders do not unduly influence the funded party's decisions or control the proceedings.

*ii. Providing for disclosure of funding arrangements*

While the issue of whether funding arrangements/agreements should be disclosed is widely debated upon, it is generally agreed that funding arrangements may give rise to situations of conflict of interest.[79] Imposing a duty to disclose funding arrangements as procedural requirement through legislation will offer much needed clarity and avoid unnecessary chaos in the administration of arbitrations. Early disclosure is key for many reasons.

One of the primary reasons for requiring disclosure of third-party funding arrangements through legislation is to promote transparency and fairness in arbitration. Transparency is essential for maintaining the integrity of the arbitral

[79] Jennifer A Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 *The Georgetown Law Journal* 1649

process and ensuring that all parties have access to relevant information about the funding arrangements of their counterparts. Without mandatory disclosure, there is a risk that parties may conceal their funding arrangements, leading to asymmetry of information and potentially unfair advantages for those with undisclosed funding support. By enacting legislation that mandates disclosure, arbitrators and opposing parties can make informed decisions and assess any potential conflicts of interest or biases that may arise from third-party funding. Secondly, it is necessary to mitigate conflicts of interest and uphold the impartiality of arbitrators. When a party is funded by a third party, there is a possibility that the funder may exert influence over strategic decisions or settlement discussions, potentially compromising the independence and neutrality of the arbitral tribunal. Mandatory disclosure requirements enable arbitrators to identify any potential conflicts arising from third-party funding and take appropriate measures to ensure that their impartiality is not compromised. Additionally, such legislation can help prevent situations where arbitrators unknowingly have relationships with funders that could impact their decision-making.

Another important reason for legislating disclosure of third-party funding arrangements in arbitration is to protect against potential abuse of the system. Without clear regulations mandating disclosure, there is a risk that unscrupulous parties may exploit third-party funding to pursue frivolous claims or engage in unethical practices without accountability. Legislation can establish guidelines for responsible use of third-party funding, including requirements for full disclosure of funding terms, obligations, and potential conflicts of interest. This serves as a safeguard against abuse and helps maintain the credibility and legitimacy of arbitration as a dispute resolution mechanism. Finally, full disclosure helps preserve confidentiality while promoting transparency. By setting clear parameters for what information must be disclosed regarding funding arrangements, legislation can strike a balance between transparency and protecting sensitive commercial or strategic details. This ensures that parties are not unduly burdened with disclosing proprietary

information while still providing sufficient transparency regarding the existence and terms of third-party funding.

iii. *Resolution of Third-Party Funding Disputes*

Third-Party funding in itself constitutes a commercial transaction like any other.[80] As such, the existence of disputes between the funder and the funded party is inevitable given the nature of third-party funding as a financial product. Providing for resolution of such disputes especially through arbitration given their commercial nature not promotes arbitration but also promotes the use of third-party funding and investment thereof.

Third-party funding arrangements often involve sensitive financial and strategic information that parties may prefer to keep confidential. However, without legal protections, there is a risk that such information could be disclosed during the arbitration process. Legislation can provide mechanisms for protecting the confidentiality of third-party funding arrangements while balancing the need for transparency and fairness in arbitration proceedings.

Furthermore, there is need to ensure consistency and predictability in resolving third-party funding disputes in arbitration. In the absence of uniform legal standards, parties may face uncertainty about the legal framework governing their funded arbitrations. Through legislation, Kenya can establish clear rules that promote consistency in addressing issues related to third-party funding across different arbitral proceedings.

*iv. Education & Awareness*

There is a need for increased awareness and education about the benefits and risks of third-party funding in Kenya. This could be achieved through public education campaigns, training programs for legal practitioners and arbitration

[80]Sahani Shannon, *Third-Party Funding in International Arbitration*, (Kluwer Law International 2nd Ed, 2017) p. 6.

institutions, and the development of guidelines and best practices for third-party funding.

There is need therefore, for a robust framework that not only allows for the use of TPF but also conclusively addresses any issues and implications that may be associated with TPF in international arbitration. The foregoing suggestions provide hints on the possible way of regulating TPF in a productive manner that promotes and arbitration and TPF.

**Conclusion**

Africa remains a frontier for investments owing to its huge demand for development projects and abundance of raw materials. Furthermore, with a population of 1.4 Billion people and growing, Africa has a huge market for goods and services. With the coming of the Africa Continental Free Trade Agreement, the potential for growth is only upwards and as such international commerce will be key. Dispute resolution remains pertinent to the realization of Africa's international commercial potential.[81]

Remarkably, it has been observed that jurisdictions around the world are keen on improving their legal structures to attract international arbitrations for its other benefits to the prestige of the country as well as attracting investments. This race to the top has seen key changes and improvements in arbitration laws in jurisdictions such as Singapore and Hong Kong that has led to their popularity. They have become among the most preferred seats of arbitration.

Kenya's place as a most preferred destination for arbitration in Africa can be assured by modernizing its legal regime and adopting innovative ways to promote international arbitration. Parliament's decision to enact the

[81] Kariuki Muigua, "Promoting International Commercial Arbitration in Africa" Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi <*https://kmco.co.ke/wp-content/uploads/2018/08/Promoting-International-Commercial-Arbitration-In-Africa-Eaia-Conference-Presentation.pdf* > Accessed on 21st November, 2023

amendments to the Arbitration Act in 2009 in light of the UNCITRAL Model law as well as the introduction of Article 159(2)(d) in the Constitution saw a rapid growth of the arbitration industry. Indeed, this is proof that innovative legislative amendments have the ability to promote arbitration.[82] Even though the possibility of a wider permission of TPF for litigation has not been sufficiently debated, permitting TPF for arbitration may offer some optimism for future consideration of the same.

By enhancing access to justice, TPF offers good prospects for promoting arbitration in Kenya. In many cases where claimants lack the financial resources to pursue arbitration proceedings, especially when dealing with complex and high-value disputes, Third-party funding allows such claimants to access the necessary financial resources to initiate and sustain arbitration proceedings.

Secondly, Third-party funding also serves as a risk mitigation tool for claimants. By securing funding from external sources, claimants can mitigate the financial risks associated with arbitration proceedings. This is particularly relevant in cases where the outcome of the arbitration is uncertain, and the costs of pursuing the dispute are substantial. The availability of third-party funding can make Kenya more appealing as it provides an avenue for claimants to mitigate their financial exposure and proceed with arbitration with reduced risk while continuing to carry out their business and ensuring profitability.

Third-party funding can also ensure that Kenya attracts more complex and high-value disputes. When potential claimants know that third-party funding is available within a jurisdiction, they may be more inclined to choose that jurisdiction as the seat of arbitration for their disputes. This is particularly relevant in cases involving significant financial stakes or where claimants require substantial financial support to pursue their claims effectively.

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[82] Andrew Mizner, 'Arbitration Rising' *Africa Law & Business* (8th February, 2016) < *https://www.africanlawbusiness.com/news/6143-arbitration-rising* > Accessed 21st November, 2023

In conclusion, Third-party funding among other innovative legal solutions can play a major role in enhancing Kenya's attractiveness as a leading arbitration centre in the world. The discussions herein not only proof this fact but also demonstrate how Kenya can go about the changes.

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# Pre-Litigation Mediation as a Means to Enhance Judicial Economy in Kenya's Criminal Justice System

*By:* ***Michael Sang*** [*]

***Abstract***

*This comprehensive discussion explores the transformative potential of pre-litigation mediation within Kenya's criminal justice system. Pre-litigation mediation, a concept encompassing scenarios where individuals have not yet been charged but face investigative files or pending trials, is examined within the framework of international and domestic legal foundations. Drawing inspiration from international instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the discourse underscores Kenya's constitutional imperative to consider alternative dispute resolution, including mediation.*

*Crucially, legislative action, epitomized by Kenya's Mediation Bill of 2020, is central to harnessing the true potential of pre-litigation mediation. Additionally, Kenya's Office of the Director of Public Prosecutions (ODPP) has introduced diversion guidelines, aligning with constitutional directives. The judiciary's recognition of alternative justice systems is highlighted through emblematic cases that promote reconciliation in accordance with the Constitution.*

*Yet, challenges persist, including statutory restrictions on alternative dispute resolution (ADR) in criminal matters and contested roles for ADR in these cases. The path forward entails comprehensive statutory regulation, clear categorization of suitable cases, well-elaborated mediation procedures, and flexible mechanisms for opting-in.*

*In a nutshell, this discourse illuminates how pre-litigation mediation can reshape Kenya's criminal justice system. By embracing international principles, aligning with constitutional imperatives, and enacting comprehensive legislation, Kenya has the*

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*potential to usher in a new era of justice – one that prioritizes victims' rights, empowers offenders to reintegrate into society, and enhances judicial efficiency.*

***Key Words****: Pre-Litigation-Mediation, Judicial-Economy, Kenya, Criminal-Justice, Mediation-Bill, Article 159-Constitution of Kenya.*

## 1. Introduction

Within the intricate fabric of Kenya's criminal justice system, a transformative approach is taking root—one that seeks to resolve disputes and promote reconciliation before they escalate into formal legal battles.[1] This approach, known as pre-litigation mediation, encompasses scenarios where individuals find themselves in the liminal space between being accused and facing trial.[2] This discussion delves into the multifaceted dimensions of pre-litigation mediation in Kenya, shedding light on its potential to enhance judicial economy, foster restorative justice, and provide individuals with a second chance at reintegration.

As I embark on this exploration, it's crucial to clarify the concept of pre-litigation mediation. In essence, pre-litigation mediation encompasses situations where individuals have not yet been charged but find their fate hanging in the balance as investigative files reside at the office of the Director of Public Prosecutions (DPP).[3] It also extends to cases where charges have been filed but the trial has not yet commenced. This distinct approach recognizes that justice can be served through alternative means, emphasizing resolution, rehabilitation, and reconciliation.[4]

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[1] J.K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011, 219-241 at page 219.

[2] Ibid

[3] Ibid

[4] Ibid

At the heart of Kenya's evolving criminal justice landscape lie international and domestic legal frameworks that shape the contours of pre-litigation mediation.[5] Drawing inspiration from the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, this discussion underscores the global imperative of safeguarding victim rights and advancing the principles of restorative justice. These international principles serve as guideposts for Kenya's efforts to infuse its criminal justice system with more empathetic, victim-cantered approaches.

Within Kenya's borders, the Constitution of 2010 acts as a lodestar, guiding the judiciary to consider alternative forms of dispute resolution, including mediation.[6] I delve into the constitutional bedrock that empowers the courts to seek reconciliation and foster an environment where justice is not solely defined by punitive measures.

To harness the true potential of pre-litigation mediation, legislative action is paramount. I meticulously scrutinize Kenya's Mediation Bill of 2020, a ground-breaking piece of legislation designed to facilitate amicable dispute resolution, enhance access to justice, and engage communities in resolving civil disputes. While the bill predominantly focuses on civil matters, it sets a pioneering precedent and underscores the intrinsic value of mediation within Kenya's legal landscape.

Additionally, Kenya's Office of the Director of Public Prosecutions (ODPP) has taken substantial steps forward by introducing diversion guidelines.[7] These guidelines enable cases to be settled out of court, offering offenders an avenue to redemption and alleviating the burden on an overburdened judiciary. These guidelines mirror the constitutional directive and serve as a tangible testament

[5] Ibid
[6] Constitution of Kenya, 2010 art 159. This will be discussed later in detail.
[7] These guidelines will be discussed later in detail

to the practical application of pre-litigation mediation in reducing case backlog and fostering reconciliation.[8]

As I traverse the landscape of prospects and challenges inherent in pre-litigation mediation within Kenya's criminal justice system, I illuminate the judiciary's recognition of alternative justice systems as a promising avenue. I draw inspiration from cases such as *Republic v. Juliana Mwikali Kiteme* and *Republic v. Mohamed Abdow Mohamed*, where the courts actively promoted reconciliation in alignment with the Constitution, providing brief commentaries on their significance.[9]

However, challenges persist, including statutory restrictions on alternative dispute resolution (ADR) in criminal matters and the contested roles of ADR in these cases. I scrutinize these challenges while also unearthing potential avenues for resolution, drawing from international experiences and domestic imperatives.

This comprehensive discussion casts a spotlight on pre-litigation mediation and its transformative potential within Kenya's criminal justice arena. By examining international and domestic legal foundations, legislative trends, and lessons from across the globe, I embark on a journey to enhance judicial economy, prioritize victim needs, and champion a more holistic approach to justice in Kenya's ever-evolving legal landscape.

[8] J.K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011, 219-241 at page 219.
[9] These cases are discussed later in detail

## 2. The Basis of Using Mediation in Criminal Proceedings: International and Domestic Legal Framework

### 2.1 Mediation as a key concept of ADR

Mediation is a voluntary and confidential process in which a neutral third party, known as the mediator, assists disputing parties in reaching a mutually acceptable resolution to their conflict.[10] This form of ADR is designed to promote communication, understanding, and collaboration between the parties involved, with the aim of resolving their disputes amicably, rather than resorting to formal litigation.[11]

Mediation is a consensual process, meaning that parties choose to participate willingly. They can enter or exit the process at any time. The mediator is impartial and does not take sides in the dispute. Their role is to facilitate communication and guide the parties toward a resolution.[12] Mediation proceedings are typically confidential. This encourages parties to speak openly and honestly without fear of their statements being used against them in future legal proceedings. It often takes place in an informal and private setting, such as a mediator's office or a neutral location chosen by the parties.[13]

Mediation allows for creative and customized solutions to disputes, as opposed to rigid legal judgments. Parties can explore various options and outcomes. Mediation is generally quicker and more cost-effective than traditional litigation, making it an attractive option for resolving disputes.[14]

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[10] J.K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011, 219-241 at page 219.

[11] Ibid

[12] Ibid

[13] Ibid

[14] Ibid

Kenya has recognized the value of ADR, including mediation, in its legal system. While mediation is often associated with civil disputes, it can also be employed in criminal cases as a pre-litigation tool or as part of restorative justice initiatives.[15] Kenya has embraced restorative justice principles, which emphasize repairing harm caused by the offender to the victim and the community. Mediation is seen as a means to achieve this by allowing victims and offenders to engage in dialogue and potentially reach a resolution that benefits all parties.[16]

Mediation can be used as a means to address criminal disputes before they proceed to formal court proceedings. This can help alleviate the burden on the court system and reduce case backlog, thereby enhancing judicial economy.[17]Kenya's Constitution, specifically in Article 159, encourages the use of ADR mechanisms like mediation in the administration of justice. Additionally, the Penal Code and other relevant statutes may provide for specific provisions regarding mediation in criminal cases.[18]

## 2.2 International Legal Framework

### 2.2.1 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, often referred to as the "Victims' Declaration," was adopted by the UN General Assembly in 1985. It is a landmark document that outlines fundamental principles and rights for victims of crime and abuse of power.[19] The declaration is a comprehensive international framework designed

[15] K. Muigua, 2017 "Resolving Conflicts Through Mediation in Kenya", (2nd ed., Glenwood Publishers Ltd).
[16] Ibid
[17] Ibid
[18] Ibid
[19] UN Declaration of Basic Principles of Justice for victims of crime and abuse of power. Adopted

to ensure that the rights and needs of victims are recognized, respected, and protected within the criminal justice system.[20]

The declaration recognizes the rights of victims to access justice, receive fair treatment, and be protected from further harm or intimidation. It acknowledges that victims should not suffer additional trauma as a result of their participation in the criminal justice process.[21]

It emphasizes the importance of protecting the physical, mental, and emotional well-being of victims throughout the criminal justice process. This includes protection from retaliation, intimidation, and any form of discrimination.[22]

Victims have the right to be informed about their rights and the progress of the criminal proceedings. They also have the right to participate in the process, including providing input on decisions such as plea bargains and sentencing.[23] The declaration also highlights the importance of restitution to victims for the harm they have suffered. It also calls for compensation from the state or other sources where restitution is not possible.[24] Victims should have access to support services such as counselling, medical assistance, and legal aid. These services should be available to help victims recover from the effects of the crime.[25]The declaration stresses the need for a fair, efficient, and responsive criminal justice system that takes into account the rights and interests of both victims and accused persons.[26]

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29 November 1985. General Assembly resolution 40/34 available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse* accessed 9 September 2023

[20] Ibid

[21] Ibid

[22] Ibid

[23] Ibid

[24] Ibid

[25] Ibid

[26] Ibid

The Declaration is significant within the international legal framework for several reasons.

The declaration underscores the importance of protecting and upholding the human rights of individuals who have been victimized by crime or abuse of power. It aligns with the broader human rights framework of the United Nations.[27]

The declaration promotes the principles of restorative justice by emphasizing victim participation, restitution, and compensation. This aligns with efforts to move beyond punitive measures and consider the needs of victims in the criminal justice process.[28]

It serves as a global standard for the treatment of victims within the criminal justice system, providing a common framework that countries can reference when developing their own laws and policies.[29]

Furthermore, many countries have integrated the principles of the Victims' Declaration into their domestic legislation, shaping how victims are treated within their criminal justice systems.[30]

### 2.2.2 ECOSOC Basic Principles on the use of Restorative Justice Programmes in Criminal Matters

The ECOSOC Basic Principles on the Use of Restorative Justice Programs in Criminal Matters are a set of guidelines developed by the United Nations Economic and Social Council (ECOSOC) to promote and guide the use of

[27] K. Muigua, 2017 "Resolving Conflicts Through Mediation in Kenya", (2nd ed., Glenwood Publishers Ltd).
[28] Ibid
[29] Ibid
[30] Ibid

restorative justice principles and programs within the criminal justice system.[31] These principles emphasize the importance of restorative justice as a complement to, and in some cases, an alternative to traditional punitive approaches to criminal justice.[32]

One of the fundamental principles is that participation in restorative justice programs should be voluntary for both victims and offenders. No one should be coerced into participating, and informed consent should be obtained.[33]Restorative justice programs should be designed to include all relevant stakeholders, including victims, offenders, their families, and communities. The goal is to facilitate dialogue and understanding among these parties.[34]

The principles emphasize that restorative justice processes should fully respect the human rights and dignity of all participants. This includes ensuring that participants are treated fairly and without discrimination.[35]Restorative justice processes should be facilitated by trained and impartial professionals who guide the dialogue and ensure that the process remains focused on achieving positive outcomes, such as restitution, reconciliation, and reintegration.[36]

The safety and protection of all participants, particularly victims, should be a priority. Measures should be in place to prevent further harm or intimidation during the restorative justice process.[37]The principles recognize the importance

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[31] ECOSOC Basic Principles on the use of restorative justice programmes in criminal matters. ECOSOC Resolution 2002/12 available at *https://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf* accessed 9 September 2023

[32] Ibid

[33] Ibid

[34] Ibid

[35] Ibid

[36] Ibid

[37] Ibid

of maintaining confidentiality during restorative justice proceedings. This is to encourage open and honest dialogue among participants.[38]

Furthermore, restorative justice processes should promote accountability and responsibility on the part of the offender. Offenders should acknowledge the harm they have caused and work toward making amends. The principles stress the importance of restitution and compensation to victims, where appropriate. Offenders may be required to take actions or provide resources to address the harm they have caused.[39]

Restorative justice programs should involve the broader community in the process, as community support and reintegration are often key components of successful rehabilitation and reconciliation. There should be mechanisms in place to evaluate the effectiveness of restorative justice programs and ensure they meet their intended goals.[40]

Restorative justice should not replace traditional criminal justice proceedings. Legal safeguards and due process must be preserved, and restorative justice should be used in conjunction with, or as a part of, the criminal justice system.[41] Training and capacity-building programs for those involved in restorative justice processes, including facilitators and practitioners, are important to ensure the quality and effectiveness of these programs.[42]

These principles provide a framework for the use of restorative justice programs in criminal matters and emphasize their potential to promote healing, reconciliation, and reintegration within communities affected by crime. They recognize that restorative justice can be a valuable tool for achieving justice and addressing the needs of victims, offenders, and society as a whole.

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[38] Ibid
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid

### 2.2.3 The Council of Europe Comments on Recommendation No. R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters

These are a set of guidelines adopted by the Council of Europe in 1999[43]. These recommendations are designed to encourage the use of mediation in criminal cases as a means to resolve conflicts and promote restorative justice principles.[44] The recommendation applies to mediation in criminal matters, encompassing a wide range of offenses and situations, including juvenile justice, minor offenses, and more serious crimes.[45]

Like other restorative justice principles, the CoE recommendation emphasizes that participation in mediation should be voluntary for all parties involved, including victims and offenders. Informed consent is essential.[46] Mediation proceedings should be conducted in a confidential manner to promote open and honest communication between participants. Information disclosed during mediation should not be used against any party in subsequent legal proceedings.[47]

Ensuring the safety and protection of participants, particularly victims, is a priority. Measures should be in place to prevent any further harm or intimidation during the mediation process. The recommendation recognizes the importance of restitution and compensation to victims, where appropriate. Offenders may be required to take actions or provide resources to address the harm they have caused.[48]Victims should have access to support services,

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[43] The Council of Europe Comments on Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters available at *https://rm.coe.int/1680706970#:~:text=Mediation%20should%20be%20performed%20in,with%20respect%20towards%20each%20other.* Accessed 9 September 2023

[44] Ibid

[45] Ibid

[46] Ibid

[47] Ibid

[48] Ibid

including counselling and legal assistance, to help them cope with the aftermath of the crime.[49]

## 2.3 National Legal Framework

### 2.3.1 Constitution of Kenya 2010

It provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One is alternative forms of dispute resolution including mediation.[50]

By recognizing and promoting alternative dispute resolution mechanisms like mediation, I argue that the Constitution aims to enhance access to justice for all Kenyan citizens. Mediation can offer a quicker, more cost-effective, and less adversarial way of resolving disputes, making justice more accessible to a broader segment of the population. This can contribute to judicial economy by reducing the backlog of cases in the formal court system.

### 2.3.2 Mediation Bill, 2020

This bill was formulated to provide for the settlement of all civil disputes by mediation; to set out the principles applicable to mediation; to provide for the establishment of the Mediation Committee; to provide for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes.[51]

The object of the bill is to (a) provide an effective mechanism for amicable dispute resolution; (b) promote a conciliatory approach to dispute resolution; (c) facilitate timely resolution of disputes at a relatively affordable cost; (d) facilitate access to justice; and (e) enhance community and individual

[49] Ibid
[50] Constitution of Kenya 2010, art 159 (2)
[51] Mediation Bill, 2020, long title

involvement in dispute resolution.[52] The bill only applies to civil disputes.[53] The bill establishes a Mediation Committee[54] which shall; provide facilities for the settlement of disputes; exercise any power for dispute resolution conferred on it by parties to a dispute but shall not be involved in actual resolution of the dispute; advise on training of mediators; accredit and register mediators; keep a register of mediators; among other functions.[55] Part IV of the bill describes the mediation process.

The bill captures progressive provisions on mediation but unfortunately it has never been enacted. It is hoped that it will soon be enacted to provide a solid legal framework for mediation in Kenya.

### 2.3.3 ODPP Diversion Guidelines and Explanatory Notes, 2019

Diversion enables prosecutors to divert cases from the court process and allow matters to be settled out of court, on merit and through agreed structures.[56] Out of court settlements can include mediation. Diversion is meant to give offenders a second chance in life, assisting them to reintegrate into the community, and reduce the risks of re-offending. Diversion also ensures that individuals avoid a criminal record but nonetheless atone for their mistakes. [57] Through diversion, ODPP is better able to deal with the case backlog in Kenya's judicial system, reduce overcrowding in the prisons and enhance reconciliation by allowing victims and offenders to settle cases out of court. Thus, the Diversion Policy and its Guidelines and Explanatory Notes are important means of operationalizing Article 159 of the Constitution of Kenya 2010.[58] As captured hereinabove, mediation is one of the alternative forms of dispute resolution under Article 159 of the constitution. The guidelines provide that if a decision on diversion is

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[52] Ibid, clause 3
[53] Ibid, clause 4
[54] Ibid, clause 6
[55] Ibid, clause 7
[56] ODPP Diversion Guidelines and Explanatory Notes, 2019, foreword
[57] Ibid
[58] Ibid

made after the charge is filed in court, the Public Prosecutor will apply to defer the plea and seek a future date for mention.[59] The guidelines also provide that if a decision on diversion is made before a charge is filed in court, the Public Prosecutor will apply to the Court to extend time to defer the laying of the charge.[60]Furthermore, if the case is deferred and the parties do not agree on diversion, the matter should proceed to its logical conclusion through the courts.[61]

## 3. Prospects and Challenges of Using Pre-Litigation Mediation in the Kenyan Criminal Justice System

### 3.1 Prospects of Pre-Litigation Mediation

#### 3.1.1 Recognition of Alternative Justice Systems by the Judiciary

The recognition of alternative justice systems, including pre-litigation mediation, by the Judiciary in Kenya holds several promising prospects for the criminal justice system: Pre-litigation mediation can significantly reduce the caseload of the formal court system. By resolving cases before they enter the court process, the Judiciary can allocate resources more efficiently and ensure that cases that do proceed to court are addressed promptly.[62]

Recognizing and promoting pre-litigation mediation provides Kenyan citizens with additional options for accessing justice. This is particularly beneficial for individuals and communities who may find the formal court system intimidating, time-consuming, or costly.[63]

[59] ODPP Diversion Guidelines and Explanatory Notes, 2019 par 31
[60] Ibid, par 93
[61] Ibid, par 95
[62] Pauline Muhanda, "The Advocate: Access to Justice", *The LSK Magazine* | Volume 1, Issue 6 | March - June, 2016, page 24.
[63] Ibid

Mediation aligns with restorative justice principles, emphasizing the repair of harm and reconciliation between victims and offenders. By endorsing pre-litigation mediation, the Judiciary contributes to a more victim-cantered and community-oriented approach to justice.[64]

Pre-litigation mediation allows parties to preserve relationships that might otherwise be damaged through adversarial court proceedings. This is especially relevant in cases involving family, neighbourly, or community disputes.[65]

### 3.1.2 Judicial Acceptance of the role of ADR in Criminal Matters

**Republic v Juliana Mwikali Kiteme and 3 others. (2017) EKLR (*Juliana*)**

The four accused persons were brought to the court on a charge of murder contrary to section 203 as read with section 204 of the Penal Code.[66] The court relied on Article 159 of the Constitution and held that this was a matter where the court should promote reconciliation as envisaged in the Constitution. The court therefore allowed the request of the Prosecuting Counsel and ordered that the Criminal proceedings against all the accused persons be discontinued because the parties had arrived at a reconciliation.[67]

This case demonstrates the judicial acceptance of the role of Alternative Dispute Resolution (ADR), particularly reconciliation, in criminal matters in Kenya. I argue that this case highlights the judiciary's acknowledgment of the importance of ADR in the criminal justice system. In this specific instance, the court relied on Article 159 of the Constitution of Kenya, which promotes alternative forms of dispute resolution, to guide its decision-making process.

The court's decision to promote reconciliation in a murder case underscores the restorative justice principles embedded in Kenya's legal framework. By

[64] Ibid
[65] Ibid
[66] *Republic v Juliana Mwikali Kiteme and 3 others*. (2017) Eklr (*Juliana*), page 1
[67] Ibid, page 2

allowing the parties to reach a reconciliation and discontinuing the criminal proceedings, the court demonstrated a commitment to facilitating amicable solutions and healing within the community affected by the crime.

It's important to note that the court's decision to discontinue the criminal proceedings was based on the specific circumstances and the parties' agreement in this particular case. The acceptance of ADR in criminal matters does not mean that all criminal cases will result in reconciliation or discontinuation, but rather that ADR methods can be considered when they align with the principles of justice and the needs of the parties involved.

**Republic v Mohamed Abdow Mohamed (2013) eKLR (Abdow)**
Mohamed Abdow Mohamed was charged with the murder of Osman Ali Abdi.[68] The court allowed the charge to be withdrawn on account of a settlement reached between the families of the accused and the deceased through reconciliation and compensation.[69]

This case further illustrates the recognition and acceptance of reconciliation and compensation as alternative means of resolving criminal matters in Kenya's legal system. The acceptance of this settlement aligns with restorative justice principles, emphasizing the importance of repairing harm and fostering reconciliation between the parties involved. Rather than solely focusing on punitive measures, the court recognized the potential for healing and resolution through an amicable agreement.

I also argue that by allowing the families of the accused and the deceased to reach a settlement, the court indirectly involves the affected community in the resolution process. This approach acknowledges the broader social context of criminal offenses and the role of the community in seeking justice and resolution.

[68] *Republic v Mohamed Abdow Mohamed* (2013) eKLR (Abdow), page 1
[69] Ibid, page 2

**Republic v Leraas Lenchura (2012) eKLR (*Leraas*)**

The accused, Leraas Lenchura, was originally charged with murder contrary to Section 203 as read with Section 204 of the Penal Code, (Cap. 63, Laws of Kenya). Following a Plea Bargain Agreement duly executed by the State, and the accused, the accused was charged with the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, (Cap. 63, Laws of Kenya). He pleaded guilty to the lesser charge of manslaughter after the original charge of murder was withdrawn. The only question for the court was one of sentence.[70]

The court accepted the argument of both counsel that the accused at age 89 years, was a first offender. The court also accepted the argument by counsel that the competition for water in the arid and semi-arid north of the Country was a veritable life and death struggle, and there were many a tale, like in the present case, where such struggle had led not to the death of one person, but to calculated massacres of innocents and destruction of property.[71]

The court also averred that because of the accused's advanced age, he was to be fined to pay one female camel to the family of the deceased, and to five years suspended sentence during which time the accused would report once every 2 weeks to the area Chief. The court ordered the accused to be released from prison custody to serve the term in his home area.[72]

This case showcases the utilization of plea bargaining and a restorative justice approach in the Kenyan criminal justice system. The court's decision to accept the plea bargain and charge the accused with a lesser offense of manslaughter reflects restorative justice principles. Rather than pursuing the harshest penalty for the accused, the court took into account various factors, including the accused's age and the challenging circumstances in the arid and semi-arid

[70] *Republic v Leraas Lenchura* (2012) eKLR (*Leraas),* page 1
[71] Ibid, page 2
[72] Ibid

region of Kenya where competition for resources like water can lead to conflicts and violence.

I also aver that the court considered the accused's age (89 years) and his status as a first-time offender when determining the appropriate sentence. The court's decision to impose a fine in the form of one female camel to be paid to the family of the deceased, along with a suspended sentence and reporting to the area Chief, demonstrates a sentencing approach that takes into account the unique circumstances of the case.

The court's decision to allow the accused to serve the sentence in his home area and report to the area Chief adds a community-oriented dimension to the sentence. It recognizes the importance of community involvement in the rehabilitation and reintegration of the accused.

### 3.1.3 Legislative trends towards Mandatory Mediation

#### i) Court-Annexed Mediation

Kenya has been making efforts to promote and institutionalize court-annexed mediation as a means of resolving disputes more efficiently within the formal legal framework. Court-annexed mediation refers to the practice of integrating mediation services within the formal court system. It allows courts to refer cases to mediation or offer mediation as an alternative dispute resolution (ADR) mechanism to parties involved in litigation.[73]

Parties can choose to engage in mediation voluntarily, and in some cases, the court may recommend or require mediation as part of the legal process. Trained

[73] J.K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011, 219-241 at page 219.

and qualified mediators facilitate the mediation process. These mediators are often certified and adhere to professional standards.[74]

Court-annexed mediation aims to expedite the resolution of disputes by reducing the caseload in the formal court system. This can lead to faster outcomes and cost savings for all parties.[75]

While court-annexed mediation in Kenya is typically voluntary, there have been legislative trends globally where mandatory mediation has been considered or implemented in certain types of cases. Mandatory mediation may be considered for specific types of disputes, such as small claims, family matters, or disputes over specific subject matters like labour or landlord-tenant issues. The goal of mandatory mediation is often to relieve the burden on the formal court system and encourage parties to engage in a mediated process before resorting to litigation.[76]

The implementation of mandatory mediation requires careful consideration of factors such as access to justice, party autonomy, and the availability of qualified mediators. It is essential for any legislation promoting mandatory mediation to strike a balance between the benefits of alternative dispute resolution and the right of individuals to access the formal legal system when necessary[77].

**ii) Mediation Bill, 2020**

It provides that a court before which a dispute is filed or is pending may refer the dispute to mediation at any time before final judgment is made if (a) the dispute is with respect to a mediation agreement; (b) the court is of the view that mediation shall facilitate the resolution of the dispute or a part of the dispute;

[74] Ibid
[75] Ibid
[76] Ibid
[77] Ibid

or (c) a party to the dispute, with the consent of the other party, apply to the court to have the whole or part of the dispute referred to mediation.[78]

This provision represents a significant legislative trend toward encouraging and institutionalizing mediation as a means of dispute resolution in Kenya. Clause 35 provides courts with the authority to refer disputes to mediation at any time before final judgment is made. I argue that this broad scope allows for flexibility in determining when mediation is appropriate, recognizing that disputes may benefit from mediation at various stages of the legal process.

Notably, the provision acknowledges the importance of voluntary consent. Even when a court has the authority to refer a dispute to mediation, it explicitly includes the requirement that both parties must consent for mediation to proceed. This, I posit, reinforces the principle of party autonomy in mediation
By permitting courts to refer disputes to mediation, the legislation aims to enhance the efficiency of the legal system and manage caseloads more effectively. Mediation can lead to faster and cost-effective resolutions, allowing courts to focus their resources on more complex matters.

### 3.2 Challenges of Pre-Litigation Mediation

#### 3.2.1 Statutory Restrictions on ADR in Criminal Matters

The drafters of the Mediation Bill intended that it applies only to civil disputes.[79]This means that it does not apply to sexual offences and/or Genocide, war crimes and crimes against humanity. Statutory restrictions on ADR in criminal matters, raise important considerations and challenges.

One of the primary reasons for restricting the application of ADR, such as mediation, in certain criminal matters like sexual offenses and heinous crimes such as genocide, war crimes, and crimes against humanity, is to ensure the

[78] Mediation Bill, 2020, clause 35
[79] Mediation Bill, clause 4

protection of victims and uphold societal values. These crimes often involve severe harm to individuals and the broader community, and there is a need for the state to play a central role in investigating, prosecuting, and adjudicating such cases.[80]

In addition, some crimes are deemed to be of such public interest that they require a full and transparent legal process to ensure accountability and deterrence. Allowing mediation in such cases might raise concerns about transparency and justice being served in the public interest.[81]

### 3.2.2 Contested role of ADR in Criminal Matters

The contested role of ADR in criminal matters is a complex and multifaceted issue that arises from the tension between traditional adversarial criminal justice processes and the principles of ADR.[82]

ADR processes, including mediation, are rooted in principles such as collaboration, reconciliation, and finding mutually acceptable solutions. These principles may be at odds with the fundamental goals of the criminal justice system, which often prioritize justice, accountability, and punishment for wrongdoing. This contrast in values can lead to contention over the appropriate role of ADR in criminal cases.[83]

ADR tends to be victim-cantered, emphasizing the needs and interests of victims. In contrast, the criminal justice system primarily focuses on the state's prosecution of offenders. The contested role of ADR in criminal matters often revolves around whether it should prioritize the rights and well-being of victims or the rehabilitation and reintegration of offenders.[84]

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[80] Moore, Christopher W. The mediation process: Practical strategies for resolving conflict. John Wiley & Sons, 2014
[81] Ibid
[82] Ibid
[83] Ibid
[84] Ibid

The appropriateness of ADR in criminal matters varies depending on the nature and severity of the offense. While ADR may be suitable for resolving minor disputes and less serious criminal offenses, it is often considered inadequate or inappropriate for addressing serious crimes such as murder, sexual assault, or terrorism.[85]

In addition, a significant aspect of ADR is voluntariness—parties must willingly participate in the process. In criminal matters, particularly when an accused person is involved, questions may arise about the voluntariness of their participation in ADR processes, as they may feel pressured to cooperate to avoid a more severe punishment.[86]

Criminal defendants have certain legal rights, including the right to a fair trial, legal representation, and protection against self-incrimination. The contested role of ADR in criminal cases includes concerns about whether ADR processes adequately protect these rights and ensure due process.[87]

Some argue that ADR processes, if used extensively in criminal matters, could compromise the public interest in holding individuals accountable for their actions. Concerns about transparency, deterrence, and public confidence in the justice system may be raised.[88]

Lastly, the appropriateness of ADR in criminal matters can vary based on cultural and contextual factors. Some communities or regions may be more receptive to restorative justice approaches, while others may favour a more traditional punitive approach.

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[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid

## 4. Advancing the Case for the Use of Pre-Litigation Mediation in Kenya's Criminal Justice System

### 4.1 Current Gaps Impeding Pre-Litigation Mediation in Criminal Matters

#### 4.1.1 Absence of Statutory Regulation

The absence of statutory regulation for pre-litigation mediation in criminal matters in Kenya, particularly the non-enactment of the Mediation Bill, represents a significant gap that impedes the advancement of pre-litigation mediation.[89]

Without statutory regulation, there may be ambiguity regarding the legal status and enforceability of mediated agreements in criminal matters. The absence of a Mediation Bill means that stakeholders, including mediators, parties, and legal professionals, may operate in a legal gray area. This uncertainty can deter potential mediators and parties from engaging in pre-litigation mediation, as they may be unsure about the legal consequences and protections available.[90]

Statutory regulation typically includes provisions for the accreditation and oversight of mediators, ensuring that they meet certain professional standards. The lack of statutory regulation can result in variations in mediator qualifications and practices, potentially impacting the quality and effectiveness of the mediation process.[91]

Without a clear legal framework, the implementation of pre-litigation mediation in criminal matters may vary across different jurisdictions and among different judicial officers. This lack of consistency can lead to unequal access to mediation services and differing outcomes for similar cases.[92]

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[89] Makau, J. A. (2014). Factors affecting Management of Case Backlog in Judiciary in Kenya; A case study of Courts within Meru and Tharaka Nithi.:

[90] Ibid

[91] Ibid

[92] Ibid

### 4.1.2 Lack of a Unified Judicial Position

Another significant challenge impeding the advancement of pre-litigation mediation in Kenya's criminal justice system is the lack of a unified judicial position on the role and application of mediation in criminal matters.

Different judges and judicial officers may have varying perspectives on the appropriateness of mediation in criminal cases. This inconsistency can lead to unequal access to mediation services and result in disparities in how similar cases are handled.[93]

The absence of clear guidelines or directives from the judiciary regarding the use of mediation in criminal matters can leave judges and magistrates with limited guidance on when, how, and under what circumstances to refer cases to mediation. This can lead to ad-hoc decisions and may not promote consistent practice.[94]

Parties and legal practitioners may face uncertainty regarding the criteria for determining which cases are suitable for mediation and which are not. Without a unified judicial position, there may be confusion about the types of criminal cases that can benefit from pre-litigation mediation.[95]

In the absence of a consistent judicial approach, there may be limited precedent for parties and legal professionals to rely on when advocating for or opposing the use of pre-litigation mediation in criminal cases.[96]

### 4.1.3 Piecemeal Institutional Policy Documents

"Piecemeal institutional policy documents" refer to a lack of comprehensive, cohesive, and standardized policies across different institutions within the

[93] Ibid
[94] Ibid
[95] Ibid
[96] Ibid

Kenyan criminal justice system regarding the use of pre-litigation mediation. This fragmentation in institutional approaches can create significant challenges for the advancement of pre-litigation mediation.[97]

Different institutions, such as police departments, prosecutors' offices, and courts, may have their own internal policies and guidelines regarding the use of pre-litigation mediation. The absence of a unified approach can lead to inconsistencies in how cases are handled and whether mediation is considered as an option.[98]

Parties involved in criminal matters, including victims, accused individuals, and legal professionals, may be uncertain about the availability and suitability of pre-litigation mediation due to varying institutional policies. This confusion can hinder the voluntary participation of parties in the mediation process.[99]

When institutions lack clear policies or guidelines on pre-litigation mediation, the process of implementing mediation as a standard practice in criminal cases may be slow and fragmented. Delays in implementation can prolong the adoption of mediation as a mainstream option within the criminal justice system.[100]

In addition, standardization of mediation practices, mediator qualifications, and procedural protocols is essential for ensuring the quality and consistency of mediation outcomes. Without standardized policies, the quality of mediation services may vary widely.[101]

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[97] Muigua, K. (2015). *Court Sanctioned mediation in Kenya- An Appraisal*.
[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid

## 4.2 Comparative Experiences on Pre-Litigation Mediation in Criminal Matters

### 4.2.1 India

India has made significant strides in the use of pre-litigation mediation in criminal matters, demonstrating the potential benefits and challenges associated with this approach. India has a robust framework for mediation, encompassing both civil and criminal cases. Mediation in criminal matters primarily focuses on offenses that are compoundable, meaning that the parties involved can reach a compromise or settlement without a formal trial. These offenses are typically of a less serious nature.[102]

India's legal framework for mediation includes provisions in the Code of Criminal Procedure (CrPC) and the Code of Civil Procedure (CPC). Section 89 of the CPC and Section 265B of the CrPC allow courts to refer disputes, including criminal cases, to mediation. These provisions emphasize the court's role in facilitating settlements through mediation.[103]

Pre-litigation mediation in India is primarily used for non-heinous offenses, including cases related to minor assaults, defamation, check bouncing, and property disputes. Serious crimes like murder, rape, and offenses against the state are typically not amenable to mediation and are excluded from the mediation process.[104]

Mediators in India's criminal mediation cases often include trained and certified mediators who work under the guidance of the court. They facilitate communication between the parties, assist in identifying common ground, and help draft settlement agreements.[105]

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[102] Nadja Alexander & Sabrina Bellucci (2019) "Mediation: Principles and Regulation in Comparative Perspective"
[103] Ibid
[104] Ibid
[105] Ibid

India's criminal mediation process places a significant emphasis on the needs and interests of the victims. The victim's consent is crucial for resolving the case through mediation. If the victim agrees to a settlement, the court can dispose of the case accordingly.[106]

The use of pre-litigation mediation in India has contributed to the reduction of court backlogs, particularly for minor criminal offenses. By resolving cases outside of formal litigation, the courts can focus on more serious matters.

In addition, India's diverse cultural and social landscape plays a role in shaping the acceptance and effectiveness of pre-litigation mediation. In some communities, mediation has a long history of resolving disputes, while in others, there may be resistance to the idea of settling criminal matters through mediation.[107]

### 4.2.2 United States of America

In the United States, the use of pre-litigation mediation in criminal matters, often referred to as "restorative justice" or "victim-offender mediation," has been implemented in various jurisdictions with varying degrees of success and prevalence.[108]

Pre-litigation mediation in criminal cases in the United States is not a uniform practice but rather a diverse set of approaches and programs. These programs can vary significantly from one jurisdiction to another, with different states and localities adopting their own models.[109]

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[106] Ibid
[107] Ibid
[108] Dheka, G. (2016). *A Comparative Analysis of Community Mediation as a tool of transformation in the litigation systems of South Africa and the United States of America*. The University of the Western Cape.
[109] Ibid

Restorative justice principles underpin many pre-litigation mediation programs in the United States. These principles emphasize accountability, victim empowerment, and the active involvement of both victims and offenders in the resolution process.[110]

Pre-litigation mediation in the U.S. is commonly used in cases involving minor to moderate offenses, such as property crimes, vandalism, theft, and certain types of assault. Serious crimes like homicide or sexual assault are generally excluded from restorative justice programs.[111]

Victim-offender mediation in the United States places a strong emphasis on the needs and rights of crime victims. Victims are given the opportunity to share their perspectives, express their feelings, and have a say in the outcome of the case.[112]

In most cases, participation in pre-litigation mediation is voluntary for both the victim and the offender. Both parties must agree to engage in the process, and they typically meet with a trained mediator to facilitate communication and negotiation.[113]

Furthermore, the use of pre-litigation mediation in criminal cases in the United States has several potential benefits, including reduced recidivism rates, increased victim satisfaction, cost savings by diverting cases from the formal court system, and the potential for personal transformation and healing for both victims and offenders.[114]

Various restorative justice programs and models exist throughout the United States, including victim-offender mediation, family group conferencing, and

[110] Ibid
[111] Ibid
[112] Ibid
[113] Ibid
[114] Ibid

community-based restitution programs. Some programs are run by non-profit organizations, while others are initiated by law enforcement agencies or the courts.[115]

### 4.2.3 United Kingdom

The United Kingdom has implemented various forms of pre-litigation mediation in its criminal justice system, primarily under the umbrella of restorative justice. Restorative justice programs in the UK aim to facilitate communication and reconciliation between victims and offenders, focusing on addressing the harm caused by the offense.[116]

Restorative justice principles are central to pre-litigation mediation in criminal matters in the UK. These principles emphasize accountability, victim participation, and offender responsibility in addressing the harm and repairing the relationship between the parties[117].

Pre-litigation mediation programs in the UK are typically used for a range of criminal offenses, including less serious offenses such as property crimes, theft, vandalism, and some types of assault. Serious crimes like murder and sexual offenses are generally excluded from restorative justice programs.[118]

The UK places a strong emphasis on the needs and rights of victims in the restorative justice process. Victims are given the opportunity to express their feelings, ask questions, and influence the resolution of the case.[119]

Participation in pre-litigation mediation is generally voluntary for both the victim and the offender. Both parties must willingly agree to participate in the

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[115] Ibid
[116] McFadden, D. (n.a). Development in International Commercial Mediation: USA, UK, Asia, India and the European Union.
[117] Ibid
[118] Ibid
[119] Ibid

process, and they meet with a trained mediator or facilitator to guide the conversation.[120]

In addition, pre-litigation mediation in the UK has shown several potential benefits, including increased victim satisfaction, reduced reoffending rates, cost savings by diverting cases from the formal court system, and the potential for personal growth and rehabilitation for offenders.[121]

The UK has various models of restorative justice programs, including victim-offender conferencing, community-based panels, and facilitated dialogues between victims and offenders. These programs may be operated by police forces, local authorities, or non-profit organizations.[122]

While restorative justice programs in the UK are not governed by a single piece of legislation, there is a legal framework that supports and encourages their use. The Criminal Justice Act 2003, for example, introduced provisions that enable courts to consider restorative justice processes during sentencing[123].

## 4.3 Lessons for Kenya from Comparative Experiences

### 4.3.1 Comprehensive Statutory Regulation

One important lesson for Kenya from comparative experiences in countries like the United States and the United Kingdom is the need for comprehensive statutory regulation governing pre-litigation mediation in criminal matters.
I aver that comprehensive statutory regulation provides clarity regarding the scope, applicability, and processes involved in pre-litigation mediation in criminal cases. It ensures uniformity in the implementation of mediation programs across different jurisdictions and among various stakeholders.

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[120] Ibid
[121] Ibid
[122] Ibid
[123] Ibid

A well-designed legal framework offers legitimacy to pre-litigation mediation. It clearly defines the legal status of mediated agreements, the role of mediators, and the rights and responsibilities of participants, including victims and offenders.

Statutory regulation should also include provisions to protect the rights of all parties involved, especially victims and offenders. This includes safeguards to ensure that participation in mediation is voluntary and that no one is coerced into reaching an agreement.

The regulation should also establish qualifications and standards for mediators, ensuring that they are properly trained, certified, and adhere to ethical guidelines. This promotes the quality and professionalism of the mediation process.

Furthermore, clear criteria for determining which cases are suitable for pre-litigation mediation and which are not should be outlined in the statutory framework. This helps ensure that only appropriate cases are referred to mediation.

Statutory regulation can include provisions for victim support services, including counselling and legal assistance. This ensures that victims have the necessary support throughout the mediation process.

In addition, a comprehensive regulatory framework should establish mechanisms for oversight and accountability, including monitoring of mediation programs, data collection, and evaluation of outcomes. This helps ensure that mediation programs operate effectively and meet their intended goals.

**4.3.2 Categorization of Cases Suitable for Pre-Litigation Mediation**

Another valuable lesson for Kenya from comparative experiences is the categorization of cases suitable for pre-litigation mediation. Effective

categorization helps identify which criminal cases are most appropriate for mediation and ensures that the right cases are referred to the mediation process. Perhaps, less serious offenses, such as minor assaults, property crimes, and theft, should be considered suitable for mediation, while more serious offenses like murder and sexual assault should be excluded.

Victim-cantered approaches are crucial in categorization. Cases where the victim desires an opportunity to communicate with the offender, seek restitution, or express their feelings are often prioritized for mediation.

The categorization of cases can be guided by specific program guidelines and criteria developed within the statutory or regulatory framework. These guidelines can help professionals involved in the criminal justice system identify appropriate cases for mediation.

While categorization provides general guidance, it's important to maintain flexibility. Some cases may not fit neatly into predefined categories, and decisions regarding suitability should take into account the unique circumstances of each case.

**4.3.3 Elaboration of the Procedure for Pre-Litigation Mediation**

Another crucial lesson for Kenya from comparative experiences is the elaboration of clear and comprehensive procedures for pre-litigation mediation in criminal matters. Well-defined procedures ensure that the mediation process is structured, fair, and efficient.

We should establish standardized mediation procedures that outline the step-by-step process for conducting pre-litigation mediation in criminal cases. These procedures should be detailed and cover every aspect of the mediation process. We should develop a standard mediation agreement that outlines the terms and conditions of the mediation, including confidentiality, voluntariness, and the commitment to reach a mutually acceptable resolution.

We should also define a clear process for referring cases to mediation, including how cases are identified, who can make referrals, and the criteria for determining suitability. This entails establishing an intake process to collect necessary information from both victims and offenders.

In addition, we should specify the qualifications and selection process for mediators, ensuring that they are trained, impartial, and competent to facilitate the mediation process. Guidelines for mediator conduct and ethics should also be included.

We should also address the provision of support services for victims, such as counselling, legal assistance, and safety measures to ensure their well-being throughout the mediation process.

We should ensure that all professionals involved in the mediation process, including mediators, legal professionals, and support staff, receive adequate training and opportunities for continuing education.

Finally, we should promote public awareness of the availability and benefits of pre-litigation mediation in criminal cases through outreach and educational initiatives.

**4.3.4 Flexible Mechanisms for Opting-In**

Flexible mechanisms for opting-in to pre-litigation mediation are a crucial lesson that Kenya can learn from comparative experiences. These mechanisms provide individuals involved in criminal cases with the choice to participate in mediation voluntarily.

This entails emphasizing the voluntary nature of pre-litigation mediation. Ensure that victims, offenders, and other stakeholders have the freedom to choose whether or not to participate in the mediation process.

We should prioritize informed decision-making by providing clear and accessible information about the mediation process, its benefits, and potential outcomes. This entails making sure participants understand what mediation entails.

We should also allow individuals to opt-in at different stages of the criminal justice process. They should be able to express their interest in mediation early on, during or after the investigation, and even after charges have been filed.
In addition, we should recognize that participants' willingness to engage in mediation may change over time. We should offer flexibility for participants to revisit and revise their decision to opt-in or opt-out as their circumstances or perspectives evolve.

We should also ensure that participants have the right to withdraw from the mediation process at any time, without adverse consequences. This reinforces the voluntary nature of participation. Mediators should remain neutral and not exert pressure on participants to opt-in or opt-out. Their role is to facilitate communication and decision-making, not to influence choices.

## 5. Conclusion

In navigating the landscape of pre-litigation mediation within Kenya's criminal justice system, I have uncovered a promising path toward enhancing judicial economy, fostering restorative justice, and creating a more empathetic and victim-cantered approach to resolving disputes. This transformative approach embraces situations where individuals, whether they stand accused or find themselves in the shadow of pending investigations, can engage in mediation as an alternative to formal legal proceedings.

Drawing upon international and domestic legal frameworks, it becomes evident that the global imperative to safeguard victim rights and advance restorative justice principles, as exemplified by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, resonates within Kenya's constitutional framework. Kenya's Constitution of 2010 serves as a guiding

light, urging the judiciary to explore alternative forms of dispute resolution, including mediation.

Crucially, legislative action is imperative to harness the true potential of pre-litigation mediation. Kenya's Mediation Bill of 2020, though primarily focused on civil matters, sets a pioneering precedent and underscores the intrinsic value of mediation in resolving disputes. The ODPP has also taken significant strides by introducing diversion guidelines, aligning with the constitutional directive to seek reconciliation and reduce case backlog.

In this journey, I have explored the judiciary's recognition of alternative justice systems as a promising avenue. Cases such as *Republic v. Juliana Mwikali Kiteme* and *Republic v. Mohamed Abdow Mohamed* have demonstrated the court's active promotion of reconciliation, aligning with the constitutional spirit of justice.

However, challenges loom on the horizon, including statutory restrictions on ADR in criminal matters and contested roles for ADR in these cases. These challenges must be addressed through careful consideration, drawing from international experiences and domestic imperatives.

To advance pre-litigation mediation within Kenya's criminal justice system, comprehensive statutory regulation must be established, offering clarity, uniformity, and legal backing. Clear categorization of suitable cases, well-elaborated mediation procedures, and flexible mechanisms for opting-in are essential components of this transformative process.

Pre-litigation mediation represents a beacon of hope for Kenya's criminal justice system, offering an avenue where resolution, rehabilitation, and reconciliation can thrive. By embracing international principles, aligning with constitutional imperatives, and enacting comprehensive legislation, Kenya has the potential to usher in a new era of justice—a system that prioritizes victims' rights, empowers offenders to reintegrate into society, and enhances the efficiency of the judicial

process. The journey toward a more compassionate and holistic approach to justice continues, guided by the principles of pre-litigation mediation.

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*Republic v Mohamed Abdow Mohamed* (2013) eKLR

The Council of Europe Comments on Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters available at *https://rm.coe.int/1680706970#:~:text=Mediation%20should%20be%20performed%20in,with%20respect%20towards%20each%20other.*

UN Declaration of Basic Principles of Justice for victims of crime and abuse of power. Adopted 29 November 1985. General Assembly resolution 40/34 available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse*

# Traditional Dispute Resolution Mechanisms: The Antiquity; Sociological Orientation; Integration into the Kenyan Judicial System; and Approaches by Kenyan Courts

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***Abstract***

*Traditional Dispute Resolution Mechanisms have since time immemorial been utilized in Traditional Justice Systems in conflict management. These dispute resolution mechanisms have by a larger extent been appreciated due to their primary component which is fostering bonds and ties between disputing parties. In contemporary Kenya, the role played by TDRMs in dispute resolution is still recognized and appreciated. For instance, Traditional Dispute Resolution Mechanisms are recognized in the Kenyan constitution hence legal backing of their application and implementation in dispute resolution. The formal legal system and traditional justice system are seen to supplement and complement each other to fulfil access to justice as shall be seen in this paper. This paper looks at the crucial role TDRMs play in dispute resolution and how they complement and supplement the formal justice system. Furthermore, this paper discusses the opinion of the courts with regards to utility of TDRMs in dispute resolution as well as the restorative justice and retributive justice contention between TDRMs and the Formal Justice System.*

## 1.0 Introduction

In an African society, the autonomous practice of Traditional Dispute Resolution Methods (TDRMs) plays an integral role in ensuring the maintenance of its socio-cultural roots.[1] There are no 'modern disputes', only

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[1] Igwe Onyebuchi Igwe, Kevin Onwuka Udude and Ogah Chinyere Constance, 'A Review of Continuous Relevance of the Traditional Methods of Dispute Resolution

disputes.[2] In African societies, the settlement of conflicts may require intervention that possibly only traditional methods of dispute resolution have, over centuries, been tailored to specifically address.[3] Indeed, societal structures and norms are intertwined.[4] Human behaviour is moulded and guided by normative frameworks that are ever-morphing and are part of Customary Law.[5] As much as the formal legal system may predominate the legal field, many communities use TDRMs, which are a part of these frameworks, to practice self-governance.[6]

Restorative and transformative conflict resolution principles are greatly manifested in traditional justice systems.[7] Furthermore, since they are ingrained in the culture and traditions of communities, particularly those

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Mechanism in Southeast of Nigeria' (2020) 11(01) Beijing Law Review 34 <*http://dx.doi.org/10.4236/blr.2020.111003*> accessed 22 October 2023.

[2] Ibid.

[3] Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya, 2010' [2018] <*https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf*> accessed 22 October 2023.

[4] FM Anayet Hossain and Md Korban Ali, 'Relation Between Individual and Society' (2014) 02(08) Open Journal of Social Sciences 130 <*http://dx.doi.org/10.4236/jss.2014.28019*> accessed 22 October 2023.

[5] Buluma Bwire, 'Integration of African Customary Legal Concepts Into Modern Law: Restorative Justice: A Kenyan Example' (2019) 9(1) Societies 17 <*http://dx.doi.org/10.3390/soc9010017*> accessed 22 October 2023.

[6] Leila Chirayath, Caroline Sage and Michael Woolcock, 'Customary Law and Policy Reform : Engaging with the Plurality of Justice Systems' [2005] World Development Report Background Papers <*https://openknowledge.worldbank.org/handle/10986/9075*> accessed 12 November 2022.

[7] Elechi Oko, 'Human Rights and the African Indigenous Justice System' [2004] A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8-12, Montreal, Quebec, Canada. <*https://restorativejustice.org/rj-archive/human-rights-and-the-african-indigenous-justice-system/*> accessed 12 November 2022.

located in rural areas, TDRMs vary from community to community.[8] With the aim of creating and maintaining harmony in the society, TDRMs ensure that disputing parties come to a resolution whose output is a win-win situation unlike adversarial mechanisms. For harmony to be effectively realized, the disputing parties ought to be satisfied that justice has been done.[9] Nevertheless, because they are locally developed, culturally suitable, and resource-efficient, TDRMs are readily accepted by the communities they serve.[10]

### 1.1 Mediation

Mediation entails the non-coercive engagement of the mediator, also known as the third party, to lessen, transcend, or bring about a peaceful resolution of conflict.[11] According to several accounts, mediation was a crucial technique of resolving disputes in native culture.[12] At whichever level of mediation, the mediators typically worked to ensure that unity and peace ruled dominant in community. Additionally, this is frequently supported by the aphorism "No victor, no vanquished."[13] The communities or groups of the parties involved were searched for mediators.[14] Because of their acquired knowledge and experience, elders were generally regarded as reliable mediators throughout

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[8] Penal Reform International, *Access to justice in sub - Saharan Africa: The Role of Traditional and Informal Justice Systems* (Penal Reform International 2000) <*www.gsdrc.org/docs/open/ssaj4.pdf*> accessed 12 November 2022.

[9] A Allot, *An Introduction to Legal Systems* (Sweet & Maxwell 1968).

[10] David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32(2) Harvard International Review; Cambridge 32 <*www.proquest.com/scholarly-journals/can-indigenous-justice-survive-legal-pluralism/docview/752003322/se-2*> accessed 12 November 2022.

[11] V Isurmona, *Problems of Peacemaking and Peace Keeping. Perspective on Peace and Conflict in Africa* (John Archers Publishers 2005).

[12] Ibid.

[13] Ibid.

[14] Ajayi Adeyinka and Buhari Lateef, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) African Research Review 138 <*http://dx.doi.org/10.4314/afrrev.v8i2.9*> accessed 21 October 2023.

Africa.[15] As in Western systems, the mediators in some African ethnic groups, such as the Pokot and Marakwet in Kenya, are family or community elders who are freely chosen by the parties.[16]

### 1.2 Reconciliation

The most essential component of dispute resolution was reconciliation.[17] It is the direct outcome of the adjudication process.[18] Giving and receiving in equal measure has always been the cornerstone of this process of restoring peace and harmony.[19] This approach supports the disputing parties' proposal to make concessions. A celebration was typically prepared to affirm whether the disputing parties were open to negotiating a settlement.[20] Reconciliation is a distinctive aspect of traditional African dispute procedures, occurring not only between the parties but also between the parties and their communities.[21] An authoritative figure would normally perform the reconciliatory role by settling disputes between disputing parties while also having the power to render

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[15] Birgit Brock-Utne, 'Indigenous conflict resolution in Africa' [2001] A draft presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February, 2001 <*https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=074d27730290f3210a8410dc8145e596b997aeb6*> accessed 13 November 2022.

[16] Patience Sone, 'Relevance of Traditional Methods of Conflict Resolution in the Justice Systems in Africa' (2016) 46(3) African Journals Online <*www.ajol.info/index.php/ai/article/view/154169*> accessed 13 November 2022.

[17] Elisabetta Grande, 'Alternative Dispute Resolution, Africa, and the Structure of Law and Power: The Horn in Context' (1999) 43(1) Journal of African Law 63 <*http://dx.doi.org/10.1017/s002185530000872x*> accessed 22 October 2023.

[18] Margaret Panighel, 'Transitional Justice and Reconciliation After Violent Conflict: Learning From African Experiences' (2009) 19(3) Development in Practice 433 <*http://dx.doi.org/10.1080/09614520902808431*> accessed 22 October 2023.

[19] Ibid.

[20] Olufemi Olaoba, 'Ancestral Focus and the process of conflict resolution in Traditional African societies', *In Perspectives on Peace and Conflict in Africa in Essays in Honour of General (Dr) Abdul Salam A, Abubakar* (John Archers Ltd. 2005).

[21] Juan Obarrio, 'Traditional justice as rule of law in Africa: An Anthropological perspective', *Peacebuilding and rule of law in Africa-Just Peace* (2011).

binding decisions. The objective is not to make a legal determination, but rather to bring the opposing parties and their expectations into harmony.[22]

### 1.3 Adjudication

Adjudication was never thought of as a formality-restricted way of resolving disputes.[23] The technique was widely employed because it is straightforward, clear, adaptable, well-liked, quick, affordable, and available.[24] Under adjudication, Africans relied on their local leaders' judgment and wisdom to settle disputes for ages.[25] Adjudication meant convening a meeting of all parties engaged in the dispute, typically in the chambers or compounds of family heads, quarter leaders, or the royal court, as the situation may have required.[26]

In traditional dispute resolution, individuals involved in a dispute make an effort to reach a resolution of the dispute through direct negotiations or mediation.[27] If the dispute cannot be resolved through informal means, the dispute may be referred to a third party for adjudication.[28] An adjudicator is a neutral party appointed by the parties to a dispute to determine the merits of

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[22] Ibid.

[23] David McQuoid-Mason, 'Could Traditional Dispute Resolution Mechanisms Be the Solution to Reducing the Volume of Litigation in Post-Colonial Developing Countries – Particularly in Africa?' [2020] Oñati Socio-legal Series XXXX <*http://dx.doi.org/10.35295/osls.iisl/0000-0000-0000-1145*> accessed 22 October 2023.

[24] Adenike Aiyedun and Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 African Journals Online <*https://doi.org/10.4314/ldd.v20i1.8*> accessed 13 November 2022.

[25] Cappelletti Mauro, *Access to Justice Vol. I: A world survey (Book I & II)* (Garth Bryant ed, Giuffrè Editore/Sijthoff/Noordhoff [European University Institute] 1978) <*http://hdl.handle.net/1814/18559*> accessed 13 November 2022.

[26] Ibid.

[27] Joseph Sergon and Prof Albert Mumma, 'The Efficacy of Traditional Dispute Resolution Mechanisms (TDRMS) in Achieving Access to Justice for Marginalised: A Focus on the Kipsigis Community in Kenya' (2020) 8(1) Africa Nazarene University Law Journal 149 <*http://dx.doi.org/10.47348/anulj/v8/i1a7*> accessed 22 October 2023.

[28] Ibid.

the dispute.[29] The adjudicator will use the law to decide the dispute and will not bias either party.[30] Adjudication is an important part of traditional dispute resolution because it provides a way for disputes to be resolved without the need for violence or judicial intervention.[31]

### 1.4 Negotiation

The most prominent traditional method of resolving disputes is said to be through negotiation and is considered to frequently incorporate the ideals of tolerance and cooperation.[32] Traditional customary law negotiation processes in African societies are associated to efforts to reunify the parties into the community in order to restore the equilibrium rather than simply to solve the problems of the affected parties.[33] In order to manage the issue in a way that benefits the interests of both sides, it was equally possible to view the recovery of a dissident member as the reinstatement of the community's harmony and integrity, as well as an expression of shared values and social cohesiveness.[34]

## 2.0 The Historical Background of TDRMs

Traditional dispute resolution mechanisms developed in Africa as a result of the necessity for a way to resolve conflict as soon as they emerged while also ensuring that the unity of a particular people or community was not permanently harmed.[35] African societies had well-established procedures for

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[29] Diego M Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) (28) Revus 3352 <*http://dx.doi.org/10.4000/revus.3546*> accessed 22 October 2023.

[30] Ibid.

[31] Joseph Blocher, 'Order Without Judges: Customary Adjudication' (2012) 62(3) Duke Law Journal <*www.jstor.org/stable/23364952*> accessed 22 October 2023.

[32] Ibid.

[33] Ibid.

[34] William Zartman, *Traditional cures for modern conflicts: African conflict "medicine"* (Lynne Rienner Publishers 2000).

[35] Kaderi Noagah Bukari, 'Exploring Indigenous Approaches to Conflict Resolution: The Case of the Bawku Conflict in Ghana' (2013) 4(2) Journal of Sociological Research 86 <*http://dx.doi.org/10.5296/jsr.v4i2.3707*> accessed 14 November 2022.

managing conflicts, bringing about peace, maintaining peace, monitoring conflicts, and preventing conflicts before the advent of slave trade and colonialism.[36] These institutions and procedures worked effectively and all parties had to abide by their rulings. Owing to the reason that the techniques were relatively informal, they were viewed as being less intimidating.[37] As a result, members of the African communities were more receptive to TDRMs as they enjoyed a sense of ownership towards them.[38]

Thus, it stands to reason to classify these systems under the heading of TDRMs. They do not adhere to the individuality and pursuit of justice standards that are prevalent in the West.[39] Western legal philosophy is predicated on the assumption that a person obtains his rights due to his humanity rather than because he belongs to a group.[40] The significance of TDRMs lies in their goal to, invariably, restore a balance, to settle conflict and eliminate disputes.[41] In traditional African societies, the mechanisms of resolving disputes included the use techniques such as cross examination. It was a method of weighing the evidence by verifying and corroborating the conflict's facts.[42]

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[36] Fatherrahman Mohamed, 'African Communities Dispute Settlement's Methods Before the Advent of Colonization' (2018) 6(3) Research Journal of English Language and Literature (RJELAL) 2321 <*www.rjelal.com/6.3.18/59-65%20FATHERRAHMAN%20MOHAMED%20YOUSIF%20MOHAMED.pdf*> accessed 14 November 2022.

[37] Ibid.

[38] Ibid.

[39] George Oiye, 'Traditional Dispute Resolution Mechanisms and their Significance in Resolving Disputes in Kenya' (Undergraduate Dissertation, Riara University 2019) <*http://repository.riarauniversity.ac.ke/xmlui/bitstream/handle/123456789/755/George%20Oiye.pdf?sequence=1&isAllowed=y*> accessed 14 November 2022.

[40] RBG Choudree, 'Traditions of conflict resolution in South Africa' (1999) 1(1) African Journal on Conflict Resolution <www.ajol.info/index.php/ajcr/article/view/136106> accessed 14 November 2022.

[41] Ibid.

[42] Adeyinka Ajayi and Lateef Buhari, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) African Research Review 138 <*http://dx.doi.org/10.4314/afrrev.v8i2.9*> accessed 15 November 2022.

**2.1 The Place of African Culture and Religion in the Development of TDRMs**

When examining how disputes were settled within the community and beyond, it is, many a time the all-encompassing culture if not religion that provided the tools for resolving disputes and the rituals that go along with them.[43] In traditional African communities, elders played a significant role in problem solving, developing strategies, and forming local visions based on knowledge and experience.[44] The elders' accumulated wisdom is indigenous knowledge that was developed from the community.[45] The archetypal African did not find meaning in his individualism but rather in his community, and it was through his participation in the roles that his society had dictated that he was able to discover himself.[46] The community's daily operations were impacted by culture in every conceivable way. It would specify the manner in which a community would be run and give procedures for reaching choices that might have an impact on it, such as conflict resolution. Therefore, the community's members cherished and honoured traditions, conventions, and customs very highly.[47] Since disobeying some of these beliefs could result in divine wrath, public scorn, and social rebuke, people avoided engaging in conflict-instigating behaviour.[48]

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[43] Tasew Tafese, 'Conflict Management through African Indigenous Institutions: A Study of the Anyuaa Community' (2016) 3(1) World Journal of Social Science <*http://dx.doi.org/10.5430/wjss.v3n1p22*> accessed 15 November 2022.

[44] Ibid.

[45] Ibid.

[46] John S Mbiti, *African religions & philosophy.* (2nd edn, Heinemann 1990)

[47] Kariuki Muigua, 'Traditional Conflict Resolution Mechanisms and Institutions' [2017] <*http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf*> accessed 16 November 2022.

[48] Gabriel E Idang, 'African Culture and Values' (2015) 16(2) University of South Africa Phronimon 97 <*www.scielo.org.za/pdf/phronimon/v16n2/06.pdf*> accessed 16 November 2022.

In African communities, resolving conflicts has a therapeutic effect.[49] It offers the chance to consider alternate, constructive decisions in order to settle disputes.[50] Failure to resolve access dispute has a significant risk of developing into genocide or fratricide, as it did with the Ife-Modakeke in Yorubaland, the Tis-Jumen in Nigeria, the Hutu-Tusi in Burundi and Rwanda, and other groups with different perspectives on socio-political conditions.[51] Conflict was viewed by the African civilization as an impediment to brotherhood that needed to be resolved as soon as it appeared. In African tradition, the spirit realm was an active component of society, and any strife within the community offended them.[52] As a result, paranormal forces were included in the negotiation process that it established since it was thought that they might directly influence the conflicting parties to reach a peaceful resolution.[53]

It was believed that no member would be permitted to comfortably move on with normal livelihood if a disagreement was not settled. This made sure that there was no way to avoid going through all of the steps of the conventional dispute resolution processes because doing so would be equivalent to infuriating the gods.[54] Other cultures also held the belief that if more blood was shed as a consequence of the battle, god would chastise.[55] This therefore accentuated the conflict resolution process of reconciliation, which was

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[49] Maureen Ogwari, 'The Role of Traditional Leaders in Conflict Management in Africa: A Case Study of the Somalia National Reconciliation Conference (Snrc) 2000-2010' (Master's Thesis, University of Nairobi 2015) <*http://erepository.uonbi.ac.ke/bitstream/handle/11295/93138/Ogwari_The%20Role%20Of%20Traditional%20Leaders%20In%20Conflict%20Management%20In%20Africa.pdf*> accessed 22 October 2023.

[50] Ibid.

[51] Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press 1997).

[52] Ibid n. 18

[53] Ibid n. 21

[54] Ibid.

[55] Ibid n. 17

frequently the last obstacle to be overcome in the return to peace.[56] Indeed, the diverse cultures of Kenya's various communities are acknowledged as the basis for the country and the combined civilization of the Kenyan people and nation.[57] Article 11 of the Constitution of Kenya further recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan People.[58]

**2.1 Are Traditional Dispute Resolution Mechanisms Really 'Traditional'?**

A trend can always be established that when most aspects originate from pre-colonial Africa, then they are deemed 'traditional'; whereas, from the West, they are termed as 'modern' and 'civilized'. From our way of life, dispute resolution methods, garments, medicine, etc., all are preceded by the term 'traditional'. This is not done in good faith but rather serves as an effective way to put across a message that these are outdated forms of life, and inferior at this day and age. TDRMs aren't the traditional ways of dispute resolution; they are the African ways; ways tailored for Africa, by Africa and it's a matter of time Africa owns them. In light of the dynamic nature of disputes, local norms, and an ethnocentric conceptualization of disputes and conflict resolution, the nomenclature used to describe dispute resolution methods in Africa is greatly flawed.[59]

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[56] Ibid.

[57] Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya, *2010'* <*http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf*> accessed 17 November 2022.

[58] Constitution of Kenya, 2010, Article 11

[59] Luc Huyse, 'Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies', *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International Institute for Democracy and Electoral Assistance 2008) <*www.idea.int/sites/default/files/publications/traditional-justice-and-reconciliation-after-violent-conflict-learning-from-african-experiences_0.pdf*> accessed 17 November 2022.

## 3.0Integration of TDRMs into the Kenyan Judicial System

In order to examine the different Traditional, Informal, and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems), the Taskforce on Alternative Justice Systems was established on March 4, 2016. In order to carry out the Judiciary's constitutional mandate under Article 159(2)(c),[60] which requires the Judiciary to promote alternative forms of dispute resolution, including traditional dispute resolution mechanisms, the Taskforce's primary goal was to examine the legal, policy, and institutional framework for AJS. The Taskforce's objective was to create a strategy to support strong collaboration and concord between alternative justice systems and the judicial system as well as to improve access to and the prompt administration of justice.[61]

### 3.1Nexus Between Traditional Dispute Resolution Mechanisms and Access to Justice

The provision of conflict resolution methods that are accessible, affordable, guarantee swift justice, and whose processes and procedures are comprehensible by users has been claimed to be a requirement for access to justice.[62] Along this broader perspective, issues with access to justice include those relating to court accessibility, court fees, the language of court proceedings, including interpretation services, accessibility for people with disabilities, and the availability of information.[63]

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[60] Constitution of Kenya, 2010, Article 159(2)(c)

[61] Judiciary of Kenya, *Alternative Justice Systems Framework Policy: Traditional, Informal and other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)* (Judiciary of Kenya 2020) <*www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf*> accessed 18 November 2022.

[62] Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms under the Constitution' <*http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf*> accessed 18 November 2022.

[63] Ibid.

Compared to courts, TDRMs are more convenient for the poor and disadvantaged and generally more accessible. They also offer some swift, affordable, and culturally appropriate remedies. In the majority of the nations where these procedures have been used, they serve as the cornerstone for managing conflicts and ensuring that the weak, oppressed, and destitute have access to justice. They focus on resolving conflicts and restoring social harmony; they are based on a process of consultation; they involve a high level of public involvement; the rules of evidence and procedure are adaptable; there is no legal representation; the process is voluntary; the decision is based on agreement; and they have a high level of acceptance, among other characteristics.[64]

Therefore, in order to render justice more accessible to the public and more modestly priced, access to justice could also involve the use of informal dispute resolution processes, such as traditional dispute resolution mechanisms.[65] Justice ought to be dispensed impartially and without undue regard to procedural technicalities, regardless of a person's rank, and judicial authority must be used to secure these objectives. TDRMs promote unity and reconciliation, resulting in the administration of justice to all. Additionally, they guarantee that conflicts are quickly resolved.[66] The process must provide the parties autonomy in the resolution of their disagreement if TDRMs are to be integrated in the judicial system. However, in this scenario, the court would need to decide whether the alleged tradition is repugnant to justice and morality, or goes against the Bill of Rights. The court must take the constitution into account in its entirety in order to determine whether the constitutional bar has been reached.[67]

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[64] Ibid.

[65] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' [2014] <*http://kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf*> accessed 18 November 2022.

[66] Ibid.

[67] Ibid.

### 3.2 Integration of TDRMs with the Formal Justice System

The vagueness in the current laws and the conflicting jurisprudence on the subject of criminal jurisdiction have made the subject matter jurisdiction of TDRMs in Kenya a contentious issue.[68] The key document establishing the norm for the use of TDRMs in Kenya is the Constitution of Kenya, 2010.[69] TDRMs ought to be used in line with the Constitution as they're a manifestation of customary law.[70] The national values and governing principles, in particular the rule of law, human dignity, inclusion, equality, respect for human rights, non-discrimination, transparency, and accountability, must serve as TDRMs' primary guiding principles.[71] Additionally, the Judicature Act,[72] mandates that formal courts be guided by African customary law in civil disputes as long as it is not repugnant to justice and morality or inconsistent with any written law.[73] However, a limitation is contained therein; that courts should use customary law only as a guide rather than a binding source of authority.[74]

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[68] Joseph K Sergon, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya' (Doctoral Dissertation, University of Nairobi 2021) <*http://erepository.uonbi.ac.ke/bitstream/handle/11295/155682/Sergon%20J_Integrating%20Traditional%20Dispute%20Resolution%20Mechanisms%20With%20the%20Formal%20Justice%20System%20in%20Kenya%20a%20Case%20Study%20of%20the%20Kipsigis%20Community.pdf?sequence=1*> accessed 19 November 2022.

[69] John O Ambani and Ochieng' Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) Strathmore Law Journal <*https://doi.org/10.52907/slj.v1i1.4*> accessed 19 November 2022.

[70] Ibid n. 48

[71] Constitution of Kenya, 2010, Article 10(2)

[72] Judicature Act Cap. 8, Laws of Kenya

[73] Ibid, s. 3.

[74] Ibid n. 48

Courts are required to answer the fundamental question of jurisdiction whenever TDRMs appear in a matter they are hearing.[75] For TDRMs to be effective, the issues that are lawfully brought before them must be resolved.[76]

### 3.3 Application of Traditional Dispute Resolution Mechanisms in Kenya

In Kenya, TDRMs often apply to conflicts that are recognized by customary law.[77] Customary law naturally incorporates TDRMs. Both this law and the institutions it is accompanied by, like TDRMs, are dynamic and constantly changing. As a result, at the request of the parties, TDRMs may be applied to a claim based on customary law. According to the Magistrates' Courts Act,[78] this type of claim is only permitted in civil matters, such as intestate succession and administration of intestate estates not subject to statutory law, marriage, maintenance, or dowry, seduction or pregnancy of unmarried women or girls, adultery, and land held under customary tenure.[79]

The key channel for encouraging the usage of and integration of TDRMs with the formal court system is the judiciary. Courts and tribunals should take the lead in promoting ADR, and TDRMs in particular, in accordance with the notion that justice should be administered to all people without delay and undue consideration for technicalities. The primary goal is to make it easier to settle civil disputes in a fair, timely, reasonable, and inexpensive manner in accordance with the Civil Procedure Act.[80]

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[75] Ibid.

[76] David A Castleman, 'Personal Jurisdiction in Tribal Courts' (2006) 154(5) University of Pennsylvania Law Review <*https://scholarship.law.upenn.edu/penn_law_review/vol154/iss5/5/*> accessed 19 November 2022.

[77] Ibid.

[78] Magistrates' Court Act No. 26 of 2015, s. 7(3)

[79] Ibid n. 48

[80] Civil Procedure Act Cap. 21, Laws of Kenya, s. 1A

The Laws of Kenya explicitly identify some courts that ought to support the use of TDRMs and the rules that apply thereto. For example, in order to ensure a fair, accessible, prompt, and proportionate resolution of disputes,[81] the Environment and Land Court is specifically obligated to develop adequate dispute resolution procedures, including TDRMs.[82] In addition, the High Court is encouraged under the High Court (Organization and Administration) Act to foster resolution between the parties to civil litigation.[83] The Act also permits the High Court to adopt any further relevant alternative dispute resolution forms, such as reconciliation, mediation, and TDRMs. The Court may decide to halt the case until the ADR requirement is satisfied where it is a condition precedent.[84]

**4.0 Traditional Dispute Resolution Mechanisms & Courts in Kenya**

The constitution of Kenya 2010 plays the primary role in championing for Traditional Dispute Resolution Mechanisms in Kenya. Article 159 envisages inter alia, Traditional Dispute Resolution Mechanisms and recognizes them as an apparatus to be utilized in dispute resolution.[85] Where Traditional Dispute Resolution Mechanisms have proven to be efficient and effective in conflict management, the government has recognized and appreciated their application. The Modogashe peace agreement entered to by districts of the Northern Frontier for example, helped to resolve disputes revolving around banditry, unauthorized grazing, trafficking of arms and other socio-economic problems.[86] From the foregoing, it is perspicuous that Traditional Dispute Resolution Mechanisms are culture based and vary from one community to another. Viding by the provisions of the constitution, Article 11 acknowledges the dynamic cultures and societal organizations by asserting that they form the foundation

[81] Environment and Land Court Act No. 19 of 2011, s. 3
[82] Environment and Land Court Act No. 19 of 2011, s. 20
[83] High Court (Organization and Administration) Act No. 27 of 2015, s. 26(1)
[84] High Court (Organization and Administration) Act No. 27 of 2015, s. 26(4)
[85] Article 159 (3), Constitution of Kenya, 2010
[86] CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, <www.cewarn.org> accessed on 21st November 2022

of the people and contribute to the cumulative civilization of the Kenyan people and the nation as a whole.[87] The Constitution of Kenya Review Commission in its report postulated that Kenya consists of more than 70 ethnic communities clustered into 42 groups exhibiting diverse cultures, traditions, practices, languages and religion.[88]

Culture is fashioned from the traditions, customs and history of the people.[89] Since Traditional Dispute Resolution Mechanisms are moulded by the cultures and traditions of various communities, the effectiveness and efficiency of these Traditional Justice Systems is dependent on the acknowledgement and appreciation of African Customary Law.[90]

The legal framework promoting the utilization of Traditional Dispute Resolution Mechanisms, has made it possible for these tools to supplement and complement the formal justice system; complement in that it can be fully utilized in settling disputes without exploring other options such as courts and tribunals, and supplement in that it can be used alongside other dispute resolution avenues such as courts. This section seeks to analyze Kenyan jurisprudence from the court concerning Traditional Dispute Resolution Mechanisms. Does the Kenyan judicial system promote or depress the use of Traditional Dispute Resolution Mechanisms?

### 4.1 Application of TDRMs to Criminal Cases in Kenya

The court fosters Traditional Dispute Resolution Mechanisms in ***Republic v Mohamed Abdow Mohamed***.[91] From this case, the accused had been charged

[87] Article 11, Constitution of Kenya, 2010
[88] Constitution of Kenya Review Commission (CKRK), Final Draft, 2005, p.58
[89] Macharia Munene, 'Culture and Religion in Conflict Management,' (1997) Page 27
[90] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR,' Alternative Dispute Resolution Journal Vol.2 Issue 1 (2014)
[91] Republic v Mohamed Abdow Mohamed (2013) eKLR

with the murder of one Osman Ali Abdi at Eastleigh in Nairobi. The accused had been arraigned in court in November 2011 to take plea and denied the charges against him. As such the trial was set to begin in March 2012. On the day set for the court to hear the case, the court was informed by the counsel for the deceased that the family of the deceased had written to the Office of the Director of Public Prosecutions to have the case against the accused withdrawn. Counsel for the deceased's family attributed this decision to an agreement between the families of the deceased and the accused to have this matter settled out of court. The State Counsel, citing article 159 of the constitution, also made an oral application to the court requesting that the case to be considered settled because the parties had agreed to utilization of traditional dispute resolution mechanisms as well as Islamic laws to reconcile.

The court allowed the application citing the powers of the Director of Public Prosecutions as envisaged in article 157 of the constitution, affirming that the DPP had authority to discontinue criminal proceedings against any person. Most importantly, the court allowed the application with the assertion that denial of the application or action contrary to the wish of both the prosecution and the deceased's family would not achieve justice since the involved parties had consented to a dispute resolution avenue that would be convenient to them. Application of Traditional Dispute Resolution Mechanisms ensures that the outcome of the resolution is enduring, non-coercive, mutually satisfying to all parties, addresses the root cause of the conflict and rejects power based outcomes.[92]

This case fosters Traditional Dispute Resolution Mechanisms in that it considered the social conditions existing among the Somali and paid more consideration to restorative justice as opposed to retributive justice. The case

[92] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", Journal of Peace Research, Vol. 32, No. 2 (May, 1995), p. 153

highlighted that adjudication if used in tandem with rigid application of formal laws, would not really achieve justice,[93] where the parties were willing to resolve their discord using Traditional Dispute Resolution Mechanisms. In these circumstances, application of Traditional Dispute Resolution Mechanisms as manifested in article 159(2) would not only achieve justice to the aggrieved party but also cultivate relations between the disputants post-resolution. However, this case can be contrasted to the case of ***Stephen Kipruto Cheboi (2014)*** and ***Abdullahi Noor Mohamed (2016)*** as hereinafter discussed in this paper.

The application by the parties in this case was allowed because the Traditional Dispute Mechanisms that were to be employed were in accordance to the traditions and customs of the parties. The parties felt that the dispute could be amicably resolved through application of their customary law. The essence of this case to Traditional Dispute Resolution Mechanisms is that it highlights the need to look beyond the existing formal laws, and explore other existing avenues such as Traditional Dispute Resolution Mechanisms to ensure that justice is achieved. The reliance on one form of justice in dispute resolution can impede access to justice.[94] Most parties consent to Traditional Dispute Resolution Mechanisms due to less complexity associated with it. Majanja J in ***Kenya Bus Service LTD & Another v Minister for Transport & 2 Others***[95] agrees to the aforementioned averment by pointing out that legal formalism and dogmatism should be mitigated to ensure the right to access to justice[96] as envisaged in the constitution is fulfilled.

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[93] Joy Marima, 'Justice v Settlement: A Case for Alternative Dispute Resolution Measures' (2020) < *https://sdrcentre.wordpress.com/2020/05/29/justice-v-settlement-a-case-for-alternative-dispute-resolution-measures/* > accessed 17th November 2022

[94] Kinama E, 'Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010' (2015) at 22-23

[95] Kenya Bus Service LTD & Another v Minister for Transport & 2 Others (2012) eKLR

[96] Article 48, Constitution of Kenya, 2010

Due to the inference that African Customary Law is inferior and primitive as opposed the current letter laws, the courts have subjected African Customary Law to critical scrutiny to ensure they do not fail the repugnancy and consistency tests.[97] Emeritus Chief Justice Dr. Willy Mutunga in his keynote address during the judicial marches week in 2012 gave voice to the vitality of utilization of Traditional Dispute Resolution Mechanisms as long as they do not offend the constitution.[98] The question of utilization of Traditional Dispute Resolution Mechanisms, as long as they do not contravene the repugnancy clauses under Articles 2(4) and 159 (3) have been brought before the court. Lesiit J sought to harmonize Section 176 of the Criminal Procedure Code, Section 3 (2) of the Judicature Act and Article 159 (3) of the constitution in ***Republic v Abdullahi Noor Mohamed***.[99] In this case, the accused had been charged with murder but the involved parties in this case wished to have an out of court settlement in accordance to the Somali law, religion and culture. Lesiit J asserted that in as much as Traditional Dispute Resolution Mechanisms were encapsulated in the constitution, the Judicature Act allowed use of African Customary Law in civil cases pertaining particular customary law. In criminal cases, the court averred that Traditional Dispute Resolution Mechanisms were limited to misdemeanors and not felonies. Lesiit J also highlighted the prohibition of reconciliation under section 176 of the Criminal Procedure Code as a form of justice. This case followed the precedent set by ***Juma Faraji Serenge alias Juma Hamisi v Republic***[100] where Maraga J dismissed application of Traditional Dispute Resolution Mechanisms to felonies.

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[97] Kariuki Muigua, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (2015)

[98] Keynote Speech by The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement of 'the Judicial Marches Week' Countrywide On August 21, 2012 < *http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/* > accessed 19 November 2022

[99] Republic v Abdullahi Noor Mohamed (2016) eKLR

[100] Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR

A similar decision concerning selective application of Traditional Dispute Resolution Mechanisms in criminal matters is expressed in ***Stephen Kipruto Cheboi & 2 others v Republic***.[101] In this case, five persons had appealed to the High Court challenging their convictions and sentences. The five had been charged with offences involving assaulting three complainants. From the evidence adduced in court all the accused persons and complainants were brothers. The learned judge had acquitted two of the appellants on the grounds that alternative dispute resolution mechanisms had been invoked in reaching an amicable solution between them and the complainants. In light of the same, evidence was presented in court showing minutes of reconciliatory meetings held between the accused persons and the complainants. The remaining three were not acquitted on grounds that quashing of convictions would only apply to misdemeanors and not felonies. Ochieng J asserted that encouraging reconciliation or any other dispute resolution mechanisms for felonies would not only be unjust but also compromise public interest.

The position of the court on Traditional Dispute Resolution Mechanisms in ***Abdullahi Noor Mohamed (2016), Juma Faraji Serenge (2007)*** and ***Stephen Kipruto Cheboi (2014)*** exhibit disparity from ***Mohamed Abdow Mohamed (2013)***. Looking into the constitutional provisions on Traditional Dispute Resolution Mechanisms, African Customary Law can be applied to a wide array of civil and criminal disputes insofar as they do not contravene the constitution as set out in article 2 (4) and article 159 (3). There is need to determine a threshold or circumstances under which a case can be referred to, or limited from Traditional Dispute Resolution Mechanisms. This is seen in the discussed cases of *Mohamed (2013)* and *Stephen Kipruto Cheboi (2014), Juma Faraji Serenge (2007) & Abdullahi Noor Mohamed (2016)* where in the former, the accused was acquitted of the felony of murder owing to employment of Traditional Dispute Resolution mechanisms, while in the latter cases, the court affirms that TDRMs are limited to misdemeanors and not felonies.

[101] Stephen Kipruto Cheboi & 2 others v Republic (2014) eKLR

Article 259 of the constitution asserts that it must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.[102] Traditional Dispute Resolution Mechanisms are upheld in the constitution as a medium of achieving justice.[103] In my opinion, application of TDRMS should not be limited to certain cases, but should be legally permissible to any dispute as long as conflict resolution is achieved. In ***Stephen Kipruto Cheboi (2014)*** for example, upholding conviction after Traditional Dispute Resolution Mechanisms were employed is detrimental to the goal of TDRMs which is to foster cohesiveness and relations of the disputants. Traditional Dispute Resolution Mechanisms are also more effective and efficient as opposed to formal justice systems in handling conflicts that are communal in nature and not rule oriented.[104]

In the application of Traditional Dispute Resolution Mechanisms in civil cases, section 2 of the repealed Magistrates Court Act[105] (Cap. 10), particularized civil cases to which African Customary Law would apply. These included matters concerning marriage, divorce, maintenance, dowry, land under customary tenure, adultery, intestate succession not governed by any written law, seduction or pregnancy of an unmarried woman or girl and matters affecting status, particularly the status of women, widows and children, including guardian-ship, custody, adoption and legitimacy. This limitation of application of Traditional Dispute Resolution Mechanisms was upheld by the court in ***Kamanza Chiwaya v Tsuma***[106] where the court affirmed that the enumeration under section 2 of the Magistrates' Courts Act was comprehensive but was limited to claims in contract and tort.

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[102] Article 259 (1), Constitution of Kenya, 2010

[103] This is subject to Article 2(4) and 159 (3) of the Constitution of Kenya, 2010.

[104] ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya', (International Commission of Jurists 2011)

[105] Repealed by Magistrates' Court Act (No. 26 of 2015)

[106] Kamanza Chiwaya Vs. Tsuma (unreported High Court Civil Appeal No. 6 of 1970)

**4.2 The role of Council of Elders in Traditional Dispute Resolution**

The role of Traditional Dispute Resolution Mechanisms in restoring ties post conflict can also be attributed to the prowess exercised by Council of Elders in dispute resolution. In majority of these councils varying from one community to another, the composition comprises of the elite persons in terms of the traditions, customs, practices and history of the community. Traditional arbitrators for example are chosen on the basis of social status or lineage.[107] The Council of elders is an efficacious apparatus in dispute resolution, improving cohesion and restoring relations.[108] The Council of elders also builds trust in Traditional Dispute Resolution Mechanisms from the disputants and the different communities.[109] In South Africa for example, the Black Administration Act gives powers to traditional leaders to handle certain customary, statutory or common law offences and give punishments for the same.[110] In Kenya the court has recognized the vital role Councils of elders play in traditional legal systems. This is exhibited in ***Lubaru M'Imanyara v Daniel Murungi***[111] where the court acknowledged the role played by the Njuri Ncheke Council of Elders among the Ameru.

This case involved a land dispute between the plaintiff and the respondent. However, the parties to this suit filed a consent joint agreement seeking to have the dispute resolved outside court. The parties wanted the matter to be referred to the Njuri Ncheke Council for resolution. They cited article 159 (2) (c) of the constitution that upholds and recognizes Traditional Dispute resolution mechanisms such as reconciliation, mediation and arbitration as a means of dispute resolution. The court allowed the application considering Article 60 (g)

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[107] J. Gerry, Restorative Justice: Ideas, Values, Debates, (Willan Publishing, 2002)

[108] Oricho Dennis, 'African Sub-Regional Bodies in Armed Conflict resolution: The case of IGAD in Sudan Conflict, in Peace Weavers', (2007)

[109] Oricho Dennis, 'Understanding the traditional Council of Elders and restorative justice in conflict transformation', (2009)

[110] F Kariuki, 'Conflict Resolution by elders; Successes, Challenges and Opportunities', (2015) at 7

[111] Lubaru M'Imanyara v Daniel Murungi (2013) eKLR

of the constitution that postulates on the need for communities to settle land disputes through recognized local community initiatives that are consistent to the constitution.[112] As such, the court gave orders for the matter to be referred to the Njuri Ncheke for arbitration and determination.

The court in ***Erastus Gitonga Mutuma v Mutia Kanuno & 3 others***[113] also affirms the role of Njuri Ncheke. Makau J in his judgement recognized that the council had the function of receiving disputes and summon disputants before it, after the parties had consented to utilizing the council as a medium of dispute resolution. If consent was not mutual, the council was supposed to refer the matter to a court of law. The learned judge also reiterated that in implementation of Traditional Dispute Resolution Mechanisms by Njuri Ncheke, Article 159 (3) of the constitution should not be disregarded. As such, procedures and processes of Njuri Ncheke should not transgress the Bill of rights, should not be repugnant to justice and morality and that they should not be inconsistent with the constitution. The case of ***Seth Michael Kaseme v Selina K. Ade***[114] also recognizes the role of the Gasa elders among the Pokomo community in utilization of Traditional Dispute Resolution Mechanisms.

**4.3 Attainment of justice by Traditional Dispute Resolution Mechanisms**

Dulu J in ***Republic v Juliana Mwikali Kiteme & 3 Others***[115] highlighted the import of Traditional Dispute Resolution Mechanisms in attainment of justice. From this case, the accused persons had been charged with the murder of one Musyoki. The accused pleaded not guilty. The prosecution failed to prove the case beyond reasonable doubt leading to the accused being released on bond. The prosecutor later on made an application to the court to withdraw proceedings against the accused. This is because the deceased's mother and

[112]Article 60 (g), Constitution of Kenya, 2010

[113] Erastus Gitonga Mutuma v Mutia Kanuno & 3 others (2012) eKLR

[114] Seth Michael Kaseme v Selina K. Ade (2013) eKLR

[115] R v Juliana Mwikali Kiteme & 3 Others (2017) eKLR

brother presented an agreement in court that the accused had paid cows to them. This was in accordance to Kamba Customary Law.

The learned judge in his reasoning affirmed that it was the role of the court to promote reconciliation as provided for in article 159 (2) (c) of the constitution. The court held the view that it was its position to promote and ensure justice was accomplished but also being cognizant of the limitations to application of Traditional Dispute Resolution Mechanisms as set out in article 159 (3) of the constitution.

**4.4 Participation of the Court in Traditional Dispute Resolution Mechanisms**

The court has also opined on its role in Traditional Dispute Resolution mechanisms. The question on participation or supervision of TDRMs manifests in ***Ndeto Kimomo v Kavoi Musomba***.[116]

This case involved a piece of land whose boundaries were in dispute. This suit had begun in the District Magistrate's Court at Kangundo. The plaintiff had gone to court seeking determination of boundaries of the land. The other disputants to the land, the first and second respondent asserted that there were already set boundaries. Upon submission of evidence for their affirmations, the apprehension was that the plaintiff's cause of action was in trespass. The plaintiff alleged that the defendants had encroached his piece of land with blatant disregard to the common boundaries. Upon the magistrate visiting the land parcel in the company of the disputants, he arrived to a conclusion that the boundaries were clear. He gave a judgement affirming that, the plaintiff's right to the piece of land was against the first defendant and as such, gave judgement for the plaintiff. He dismissed the claim against the second defendant.

Aggrieved by this decision, the first defendant lodged an appeal to the High Court. However, prior to the hearing, a consent order signed by the disputants

[116] Ndeto Kimomo v Kavoi Musomba (1977) KLR 170

and their advocates was submitted to Miller J and approved by him. The consent order required that the plaintiff's elder brother, Paul Kimomo take the Kithitu oath that was to be presented to him by the defendant, and whose administration would be supervised by the chief. Another condition in the consent order was that if the plaintiff's brother took the oath, the appeal would be dismissed with costs. If the oath was not taken, then the appeal would be allowed with costs. Fast forward to the day of oath taking that was slated to be on the 8th day of January, 1974, the plaintiff's brother declined taking the oath, citing a faulty procedure in the oath administration as well as duress in that as a consequence for not taking the oath, he would be handcuffed. The court had to determine inter alia, the implication of oath taking as in the consent order, to the appeal lodged before it.

The court held the view that the parties were entitled to resolve their dispute in whichever means they agreed to consensually. Law VP in the decision asserted that at the first instance where the parties decided to settle the dispute via other mechanisms such as oath taking as in the case herein, they were withdrawing the appeal from the jurisdiction of the High Court and invoking another jurisdiction whose procedures and terms of implementation were beyond control of the High Court. As such, if the parties wished to invoke Traditional Dispute Resolution Mechanisms, they would first withdraw the appeal. Law VP also gave a case scenario where parties to an appeal case would want their case settled by toss of a coin. The judge would request withdrawal of the appeal first or a consent order to allow or disallow the appeal. Law VP averred that the question on whether the process of tossing the coin to decide the appeal was done correctly or not, would not be justiciable.

Wambuzi P averred that the intention of the consent order by the parties was to record an agreement reached by the disputants and not give a final judgement. The agreement arrived at by the disputants would then be scrutinized by the court to enable it give a judgement to give effect to the agreement. The court also held the view that it should not participate in Traditional Dispute

Resolution Mechanisms or dispose a case without a clear agreement as per the consent order.

From the foregoing, the aim of Traditional Dispute Resolution Mechanisms can be inferred to be fostering relationships and cohesion between disputing parties. Christie argues that disputed belong to individuals. As such, these individuals should be given the opportunity to resolve the conflicts themselves without interference from third players such as legal professionals and institutions.[117] This justifies why Traditional Justice systems tend to promote restorative justice as opposed to retributive justice in westernized legal systems in that the parties own the dispute and strive to unearth issues of contention in a dispute with an aim of strengthening their relations post-resolution.

Since Traditional Dispute Resolution Mechanisms are culture based and strongly connected to customs, traditions, practices and unwritten laws,[118] they may be most appropriate in dealing with certain matters including those of criminal nature. This is as long as they do not violate the bill of rights; they are not inconsistent with the constitution or any other written law; and are not repugnant to justice and morality.[119] The constitution also affirms that judicial authority emanates from the people, and as such they should be allowed to resolve their conflicts via mediums of their preference.

[117] Christie, N, 'Conflicts as property. British Journal of Criminology', (1977), 17, 1–15

[118] ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," P.32

[119] Article 159 (3), Constitution of Kenya, 2010

## 5.0 Restorative & Retributive Justice vis a vis Traditional & Formal Legal Systems

Disputes in the community not only contravene laws and rules of conduct, but also to a great extent affect relationships in the society.[120] Traditional Justice Systems are mainly inclined towards fostering coherence among disputants. This is restorative justice. Traditional Dispute Resolution Mechanisms seek to build peace and parties' interests which consequently restores relationships between disputants and promotes cohesiveness between them.[121] African Justice Systems apply restorative and transformative principles in dispute resolution. Apart from disputants, other stakeholders such as the rest of the community are involved in pointing out mishaps and arrival to an amicable solution that is satisfactory to everyone.[122] Interests of the parties are also prioritized by restorative justice[123]. In the inception and application of restorative justice, less severe conflicts were the main matters that would be addressed. The import of jurisprudence from courts, and particularly ***Mohamed (2013)*** is that, the scope of application of Traditional Dispute Resolution Mechanisms in contemporary Kenya can be seen to be making advanced strides. From this case, application of Traditional Dispute Resolution Mechanisms in promotion of restorative justice may be expanded to resolution of contentions involving severe forms of capital offences. Efforts are also being made for African Justice Systems to handle matters and situations of mass violence.[124]

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[120] Lijalem E. E, 'A Move Towards Restorative Justice in Ethiopia: Accommodating Customary Dispute Resolution Mechanisms with The Criminal Justice System, Master's Thesis in Peace and Conflict Transformation', University of Tromso (2013) at 1

[121] Kariuki F, 'Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: A case Study of Republic v Mohamed Abdow Mohamed (2013) eKLR', Alternative Dispute resolution (2014) Vol 1 at 204

[122] O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada

[123] Sone, P.M. (2016) 'Relevance of Traditional Methods of Conflict Resolution in Justice Systems in Africa. *Africa Insight* [online], 46(3), p. 59. < *https://www.ajol.info/...hp/ai/article/view/154169* > Accessed 21 November 2022

[124] Zehr H & Gohar A, 'The little book of restorative justice', (2015) at 3.

On the other hand, formal justice systems advocate for a proportionate relationship between the act and the response and that proportionate pain to the act will vindicate and serve justice.[125] It focuses on allocation of rights between disputing parties. This is retributive justice. In civil matters in the formal justice system, the reward for breach of laws is compensation while in criminal matters, the offender receives punishment for their actions.[126] Formal justice systems emphasize on interpretation and application of the law with strict adherence to its provisions on procedures, processes and course of actions. In the Kenyan legal provisions concerning criminal conduct for example, the laws such as the Penal Code describe offences and provide for the punitive measures to be meted to the offender.[127]

Restorative and retributive justice can be a departing point in pinpointing the contrast between Traditional Dispute Resolution Mechanisms and Traditional Justice Systems wholistically, and formal justice systems. Traditional Justice Systems endeavor to use a reconciliatory approach in conflict management as opposed to the win-lose right based approach by formal justice systems.[128] As such, the status of the relations between the disputants is not considered by formal legal systems. Unlike Traditional Dispute Resolution Mechanisms that seek to bring the parties to a conflict together, formal legal systems do not aim at building cohesion between adversaries.

In application of retributive justice by formal justice systems, there is strict adherence to procedures and dictates of the law. In African Justice Systems,

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[125] Ibid at 59

[126] Kinama E, 'Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010', (2015) at 28

[127] See Long Title of the Penal Code (CAP. 63). This is an act of parliament to establish a code of criminal law.

[128] Aiyedun A and Ordor A, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 African Journals Online <*https://doi.org/10.4314/ldd.v20i1.8*> accessed 22 November 2022

procedures and processes are flexible and less complex.[129] Complexity in formal legal systems also extends to language where unlike in Traditional Dispute Resolution Mechanisms where stakeholders have the discretion to choose a language of their choice, formal legal systems have set language(s) of usage.[130] As such, restorative justice is attained in that the disputants can modify the process of conflict resolution to achieve a solution that they are mutually contented with.[131]

In summary, retributive justice as in the formal justice systems tend to be more inclined to punitive measures as per the law than advancement of relations and repair of bonds by restorative justice in Traditional Dispute Resolution Mechanisms.

**6.0 Conclusion**

The traditions, norms, and practices of local communities serve as an anchor for traditional justice systems. Therefore, the preservation and acceptance of African customary law is crucial to their success in advancing access to justice. This is consistent with the theory held by institutional anthropologists that the judicial systems in any given country are determined by patterns of social arrangement.[132] In essence, the fact that traditional conflict resolution techniques like negotiation, reconciliation, mediation, and others exist shows that these

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[129] Ibid p. 4

[130] Hinz, M.O., 'Legal pluralism in jurisprudential perspective'. *In:* M.O. Hinz (with H.K. Patemann), '*the Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective*' (2006), p. 39

[131] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR,' Alternative Dispute Resolution Journal Vol.2 Issue 1 (2014)

[132] Koriow Mohammed and Peter Muriithi, 'A Critical Analysis of Maslaha as a Traditional Dispute Resolution Mechanism North Eastern Kenya' (2020) 5(1) Journal of CMSD <*https://journalofcmsd.net/wp-content/uploads/2020/10/A-Critical-Analysis-of-Maslaha-as-a-Traditional-Dispute-Resolution-Mechanismin-North-Eastern-Kenya.pdf*> accessed 20 November 2022.

concepts are not novel in Kenya.[133] Contrary to Western-based approaches, most TDRMs focus on mending relationships, promoting peace, and protecting parties' interests rather than disaggregating rights between disputants.[134] These benefits, which are unique and valuable, call for the highest level of protection, continued development, and use of TDRMs in Kenya. Even while some may consider TDRMs to be a thing of the past, they constitute the only way to guarantee peaceful coexistence among African tribes in the future, and that future is here and now.

[133] Ibid n. 24

[134] ICJ-Kenya Report, *Interface between Formal and Informal Justice Systems in Kenya* (International Commission of Jurists 2011).

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# Maritime Arbitration in Africa: Reflecting on the Current Status and Future Development

*By:* ***Kariuki Muigua****

***Abstract***

*The paper critically reflects on the status and future development of maritime arbitration in Africa. It examines the progress made towards embracing maritime arbitration in Africa. The paper further appraises the current practice of maritime arbitration in Africa and highlights its prospects and pitfalls. Further, the paper proposes reforms towards strengthening the future development of maritime arbitration in Africa.*

## 1.0 Introduction

The maritime industry is responsible for the transportation of goods, products, and people by sea[1]. This includes everything from container ships, and oil tankers, to cruise ships and passenger ferries to smaller vessels like fishing boats[2]. The maritime industry is a complex industrial sector encompassing various players involved in transport, logistics, regulatory, engineering, finance and insurance activities which are vertically and horizontally intertwined[3]. In addition to transportation, the maritime industry also encompasses activities like shipbuilding, repair and maintenance, port operations, and marine engineering[4]. It is a crucial part of the global economy and without it,

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[1] Chiltern., 'Why is the Maritime Industry so Important.' Available at *https://www.chilternmaritime.com/why-is-the-maritime-industry-so-important/* (Accessed on 05/09/2023)

[2] Ibid

[3] Ghaderi. H., 'Wider Implications of Autonomous Vessels for the Maritime Industry: Mapping the Unprecedented Challenges.' *Advances in Transport Policy and Planning*, Volume 5, 2020, pp 263-289

[4] Chiltern., 'Why is the Maritime Industry so Important.' Op Cit

international trade would come to a standstill[5]. Shipping has for many centuries been the major form of transportation, as well as an essential communication link connecting coastal cities, countries and continents[6]. Since the dawn of humanity, the sea has been a source of sustenance, providing food and avenues of trade[7]. The earliest civilizations used the sea as an avenue to search for wealth in the form of spices, minerals, and other natural resources[8]. The search for natural resources and wealth resulted in the establishment of the maritime industry that would continue in some form or another until its present form[9].
It has been observed that next to rail transportation, water transportation is economically and environmentally the most efficient way to travel or transport merchandise; and, currently, around 90% of world trade is carried by the international shipping industry[10]. The Organisation for Economic Co-operation and Development (OECD) estimates that 90% of globally traded goods are carried by sea[11]. Due to its importance, the efficient running of the maritime industry is crucial to the safe running of global trade[12].

One of the most pertinent concerns in the maritime industry is the management of disputes. The long history of the maritime industry is dotted with both

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[5] Ibid
[6] Maritime Sector., Available at *https://www.windrosenetwork.com/Maritime-Sector* (Accessed on 05/09/2023)
[7] Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Available at *https://core.ac.uk/download/pdf/234109331.pdf* (Accessed on 05/09/2023)
[8] Ibid
[9] Ibid
[10] Maritime Sector., Op Cit
[11] Organization for Economic Co-operation and Development., 'Ocean Economy and Innovation.' Available at *https://www.oecd.org/ocean/topics/ocean-economy/* (Accessed on 05/09/2023)
[12] Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Available at *https://www.ciarb.org/news/hot-topics-for-international-maritime-arbitration-in-2023/#:~:text=Maritime%20arbitration%20is%20particularly%20suited,option%20compared%20to%20court%20proceedings* (Accessed on 05/09/2023)

success and disputes[13]. It has been observed that globalization, climate change, the imperative to move toward net zero, and shifting economic landscapes are all factors in the increase of maritime disputes[14]. The twin priorities of energy independence and energy security, set against the background of the climate crisis, are driving the formation of new supply chains and construction projects with a direct impact on maritime disputes[15]. Efficient management of maritime disputes is vital for the success of the maritime industry.

In the maritime industry, arbitration has served as a common tool for the settlement of disputes for several decades[16]. It has been argued that maritime arbitration remains a popular way to manage maritime disputes due to the often lower costs involved and the ability to mold the process to the needs of the parties involved[17]. As a result, arbitration is widely used among international shipping operators to solve almost every kind of dispute and, consequently, arbitral clauses are included in many maritime contract forms[18]. This has been attributed to its remarkable advantages over litigation including flexibility, specialization, confidentiality and, more generally, possibility for the parties to determine every aspect of the procedure according to their specific needs[19]. Arbitration is therefore the number one choice for the management of maritime disputes around the world and over the past few years, there has been an increase in international maritime arbitrations as a result of a protracted period

[13] Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit
[14] Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit
[15] Ibid
[16] Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit
[17] Ibid
[18] Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Available at https://www.researchgate.net/publication/324953844_Maritime_Arbitration_Among_Past_Present_and_Future (Accessed on 05/09/2023)
[19] Ibid

of unforeseen challenges throughout the sector[20]. These include the COVID-19 pandemic, international geopolitics, and the economic crisis[21]. Maritime arbitration is generally classified under international commercial arbitration but it differs from the general model for a number of reasons, which make it somehow 'special' from the sources of law, to the kind of arbitrated disputes, to the characteristics of the maritime arbitral proceedings[22].

The paper critically reflects on the status and future development of maritime arbitration in Africa. It examines the progress made towards embracing maritime arbitration in Africa. The paper further appraises the current practice of maritime arbitration in Africa and highlights its prospects and pitfalls. Further, the paper proposes reforms towards strengthening the future development of maritime arbitration in Africa.

## 2.0 Maritime Arbitration in Africa: Promises and Pitfalls

Africa continent boasts of an abundance of natural resources, in particular aquatic and marine resources, with a potential that has not yet been fully tapped in the context of economic growth and Sustainable Development including transportation and trade[23]. The continent is surrounded by two of the largest three oceans in the world being the Atlantic Ocean and the Indian Ocean while the African Great Lakes constitute the largest proportion of surface freshwater in the world (27%), with Lake Victoria being the third largest fresh water lake in the world by area, and Lake Tanganyika being the second largest in volume and depth in the world[24]. The maritime industry plays a crucial role in economic development in Africa. It has been observed that African countries are highly dependent on exports of raw materials and imports of food, manufactured

[20] Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit
[21] Ibid
[22] Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit
[23] Africa Union., 'Maritime Transport: Increasing African Ports Capacity and Efficiency for Economic Growth.' Available at *https://au.int/sites/default/files/documents/32186-doc-maritime_transport_increasing_african_ports_capacity_and_efficiency_for_economic_growth-e.pdf* (Accessed on 05/09/2023)
[24] Ibid

goods and fuel with more than 90 percent of Africa's total trade (including imports and exports) pass through seaports[25].

In addition, initiatives have been undertaken at the regional level towards strengthening the maritime industry in Africa. The *Africa's Integrated Maritime Strategy*[26] aims to strengthen Africa's maritime capability and capacity. In addition, the *African Maritime Transport Charter*[27] seeks to strengthen the African maritime industry through measures such as implementing harmonized maritime transport policies capable of promoting sustained growth and development of African merchant fleets and to foster closer cooperation among the States Parties of the same region and between the regions and facilitating and encouraging regular consultations for determining African common positions on issues of international maritime policy. Such initiatives are expected to strengthen the maritime industry in Africa with the continent having the potential to become a maritime hub for global trade[28]. The growth of the maritime industry in Africa provides an opportunity for the use of arbitration to manage disputes arising in the sector[29]. It has been asserted that maritime arbitration in Africa has the potential to become an effective tool in resolving cross border shipping disputes in sub-Saharan Africa[30].

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[25] Ibid

[26] Africa Union., 'Africa's Integrated Maritime Strategy (2050 AIM Strategy).' Available at *https://au.int/sites/default/files/newsevents/workingdocuments/33832-wd-african_union_3-1.pdf* (Accessed on 06/09/2023)

[27] African Union., 'Revised African Maritime Transport Charter.' Available at *https://www.peaceau.org/uploads/revised-african-maritime-transport-charter-en.pd*f (Accessed on 06/09/2023)

[28] Toesland. F., 'Africa can Become a Maritime Hub for Global Trade.' Available at *https://www.un.org/africarenewal/magazine/september-2021/africa-can-become-maritime-hub-global-trade* (Accessed on 06/09/2023)

[29] Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Available at *https://bowmanslaw.com/insights/shipping-aviation-and-logistics/maritime-arbitration-resolve-cross-border-shipping-disputes-sub-saharan-africa/* (Accessed on 06/09/2023)

[30] Ibid

The African Maritime Transport Charter envisages the use of arbitration to manage maritime disputes in Africa[31]. It provides that states parties shall undertake to settle their disputes regarding the interpretation or the application of the provisions of the Charter by negotiations or any other peaceful means agreed upon by them, which may include enquiry, mediation, conciliation, arbitration, and judicial settlement[32]. The Charter is therefore vital in fostering maritime arbitration in Africa.

It has further been asserted that the African Continental Free Trade Area Agreement presents an opportunity for growth of arbitration in Africa including maritime arbitration[33]. The Agreement seeks, amongst other things, to create the world's largest free trade area covering the entire African continent[34]. The Agreement further includes dispute settlement mechanisms for any disputes that arise between member States and envisages the use of arbitration in management of disputes[35]. It stipulates that parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings[36]. The African Continental Free Trade Area Agreement can therefore promote the use of arbitration to manage disputes arising in the maritime sector pursuant to its provisions.

In addition, Africa has been identified as a thriving market for arbitration which provides an opportunity for the adoption and growth of maritime arbitration in

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[31] African Union., 'Revised African Maritime Transport Charter.' Op Cit

[32] Ibid

[33] Hartwell. M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Available at *https://www.nortonrosefulbright.com/en-pg/knowledge/publications/558921ae/arbitration-in-africa* (Accessed on 06/09/2023)

[34] African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at *https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf* (Accessed on 06/09/2023)

[35] Ibid, Protocol on Rules and Procedures on the Settlement of Disputes.

[36] Ibid, Article 27

the continent[37]. It has been observed that there is increasing confidence by African practitioners in selecting African laws to govern commercial contracts and African seats for Africa-related arbitrations[38]. In addition, the Pan-African agenda is fostering efforts towards establishing a standing African International Commercial Court to deal with disputes expected to arise in connection with the nascent Africa Continental Free Trade Area Agreement[39]. There has also been an increase in regional and international arbitration centres in Africa providing a platform for management of disputes in Africa through arbitration[40]. To this end, it has been observed that the importance of international commercial arbitration as the most viable approach to international disputes including maritime disputes is being recognized and basic structures and institutions for arbitration are being established across the continent[41]. There are also effort towards promoting maritime arbitration in Africa through the establishment of maritime law arbitration centres by some arbitral institutions[42]. These efforts are essential in fostering maritime arbitration in Africa by attracting domestic maritime disputes and international maritime disputes that occur in Africa's massive commodity export and transport sectors[43].

From the foregoing, it is evident that there is huge potential for maritime arbitration in Africa. However, it has been observed that in maritime

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[37] Ripley-Evans. J, & De Sousa. M., '2022 SOAS Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at *https://hsfnotes.com/africa/2022/11/25/2022-soas-arbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/#:~:text=The%20Arbitration%20Foundation%20of%20South,centres%20in%20the%202020%20survey* (Accessed on 06/09/2023)

[38] Ibid

[39] Ibid

[40] Hartwell. M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Op Cit

[41] 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-EAIA-Conference-Presentation.pdf* (Accessed on 06/09/2023)

[42] Hartwell. M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Op Cit

[43] Ibid

arbitration, English law remains by far the most popular choice of law with London being the most popular choice of seat for arbitrations with the laws and arbitration seats of Singapore and New York also being preferred over Africa[44]. The suitability of London as a seat for maritime arbitration has been attributed to factors such as the availability of experienced specialist counsel, and experts, availability of experienced specialist arbitrators (particularly in the maritime field),the experience of the English Commercial Court in exercising its supervisory jurisdiction and in ordering "interim measures" such as injunctions and document or property preservation orders, relative cost and speed and the wealth of English commercial and maritime case law[45]. Associations such as the London Maritime Arbitrators Association have enhanced the appropriateness of London as a seat for maritime arbitration by advancing and encouraging the professional knowledge of London maritime arbitrators and, by recommendation and advice, assisting the expeditious procedure and disposal of maritime disputes[46].

Other centres such as Dubai have also enhanced their efforts to foster maritime arbitration through the consolidation of arbitration centres in order to reinforce Dubai's status as an international arbitration hub for Africa and the Middle East and at attracting foreign investments[47]. In support of this move, it has been argued that maritime arbitration centres can provide top quality services only when they have a consolidated practice and everyday experience, which are a great added value in the shipping industry[48]. India is also enhancing its capacity for maritime arbitration through measures such as the setting up of an

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[44] Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit

[45] Marine Strategy., 'Ian Gaunt Explains the Benefits of London Arbitration.' Available at *https://maritime-executive.com/features/ian-gaunt-explains-the-benefits-of-london-arbitration* (Accessed on 06/09/2023)

[46] The London Maritime Arbitrators Association., Available at https://lmaa.london/about-lmaa/ (Accessed on 06/09/2023)

[47] Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Available at *https://www.globallegalpost.com/news/a-new-landscape-for-commercial-and-maritime-arbitration-in-dubai-429998383* (Accessed on 06/09/2023)

[48] Ibid

arbitration and conciliation center with an emphasis on shipping disputes that is aimed at providing time-bound and cost-effective management of disputes by concentrating on all aspects of shipping under one framework[49]. The centre is aimed at fostering maritime arbitration by focusing on leading ship owners, ship brokers, ship charterers, ship recyclers, regulatory bodies and maritime consultants[50].

Africa can follow the foregoing examples in order to build its capacity as a hub for maritime arbitration. It has been asserted that the continent has a vibrant maritime sector that has not yet been fully tapped in the context of economic growth and Sustainable Development including transportation, trade and dispute management[51]. There has always been concern about African cities not being chosen as international arbitration venues and African arbitrators not having commensurate international appointments[52]. There is need for an effective strategy and development of an attractive arbitration environment in Africa in the field of maritime arbitration[53].

**3.0 Way Forward**

It has been observed that in order to promote maritime arbitration, there is need for an arbitration-friendly legal system[54]. Therefore, unless disputants see a marked difference between arbitration and litigation within a legal system, that country will hardly be a venue of choice[55]. It is thus evident that encouraging parties to arbitrate their shipping disputes in Africa may require changes to the legislative framework of those countries seeking to host more international

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[49] Khurana. G., 'India -The Future Destination of Maritime Arbitration.' Available at *https://irglobal.com/article/india-the-future-destination-of-maritime-arbitration/* (Accessed on 06/09/2023)

[50] Ibid

[51] Africa Union., 'Maritime Transport: Increasing African Ports Capacity and Efficiency for Economic Growth.' Op Cit

[52] Oleghe. F., 'Africanisation of International Dispute Resolution: A Myth, a Fact, or a Movement.' Available at *https://afaa.ngo/page-18097/13023496* (Accessed on 06/09/2023)

[53] Ibid

[54] Ibid

[55] Ibid

arbitrations[56]. It is therefore important for African countries to enact arbitration friendly laws and policies including those on maritime arbitration in order to foster the appropriateness of African countries as venues and seats of maritime arbitration[57].

Further, the suitability of maritime arbitration in Africa may be further bolstered by the establishment of maritime arbitration centres and institutions in the continent with their own set of bespoke maritime arbitration rules[58]. Maritime arbitration has developed in other parts of the world due to the establishment of specialized centres and institutions which have their own governing rules and qualified personnel[59]. African countries can follow this example and establish maritime arbitration institutions and centres with the requisite institutional and technical capacity and personnel in order to promote maritime arbitration. It has been asserted that there is something special about maritime law that sets it apart in terms of legal principles and activity and as such maritime arbitration calls for its own seats[60]. It is therefore imperative to establish centres and institutions for maritime arbitration in Africa having the requisite capacity to handle maritime arbitrations. It has been observed that arbitral institutions are playing an important role in developing regional centres, which will be key to meeting the growing need for dispute resolution services on the continent[61].

It is also imperative for arbitrators, litigators, policy makers, judicial officers and everyone involved in the maritime industry to enhance their capacity and

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[56] Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit

[57] Ibid

[58] Ibid

[59] Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit

[60] Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Op Cit

[61] Ripley-Evans. J, & De Sousa. M., '2022 SOAS Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

expertise in maritime arbitration in order to enhance its quality[62]. The scale, diverse range and complexity of maritime arbitrations coupled with an increase in arbitral systems means that it is essential to have the right knowledge and skills to navigate the field[63]. It has been argued that having arbitrators qualified and experienced in the intricacies of the matters of law, fact and technology commonly involved in shipping arbitration is far more important (and much safer) than having general practitioners in the field of arbitration[64]. To this extent, reaching a quick and sound decision might well avoid disrupting big projects, such as offshore and renewable energy plants, which inevitably overlap with the shipping industry[65]. It is therefore vital for arbitrators and other stakeholders in the maritime industry in Africa to enhance their capacity and expertise in maritime arbitration through education, training and capacity building[66]. These measures will cement the place of Africa as a hub for maritime arbitration.

## 4.0 Conclusion

Maritime arbitration has emerged as the preferred mechanism for managing disputes in the maritime industry[67]. Maritime arbitration offers certain advantages in managing disputes in the maritime industry including flexibility, specialization, confidentiality and, more generally, possibility for the parties to determine every aspect of the procedure according to their specific needs[68]. It has been observed that the maritime industry in Africa is growing, a situation which provides an opportunity for the use of arbitration to manage disputes

[62] Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit
[63] Ibid
[64] Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Op Cit
[65] Ibid
[66] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit
[67] Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit
[68] Ibid

arising in the sector[69]. Maritime arbitration in Africa has the potential to become an effective tool in resolving cross border shipping disputes in sub-Saharan Africa[70]. However, the potential of maritime arbitration in the Continent is yet to be realized with English law remaining by far the most popular choice of law with London being the most popular choice of seat for arbitrations with the laws and arbitration seats of Singapore and New York also being preferred over Africa.[71] There is need to enhance the appropriateness of Africa as an ideal environment for maritime arbitration through formulation of arbitration friendly laws and policies on maritime arbitration, establishment of maritime arbitration centres and institutions and enhancing the capacity and expertise of African arbitrators and practitioners in maritime arbitration[72]. The future of maritime arbitration in Africa looks promising and there is need to embrace it.

[69] Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit
[70] Ibid
[71] Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit
[72] Ibid

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Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Available at *https://www.globallegalpost.com/news/a-new-landscape-for-commercial-and-maritime-arbitration-in-dubai-429998383*

# Arbitration in the Age of Artificial Intelligence (AI)

*By:* ***Juvenalis Ngowi****

***Abstract***

*Science and technology are fast developing with the inversion of different devices and software used to simplify human work. Currently, the level of development has reached a stage where a machine using a sensor or software can perform functions that traditionally were capable of being done by human beings only. Artificial Intelligence (AI) has made the existence of "artificial beings" capable of mimicking not only the actions of human beings but also human behaviour.[1] These machines can learn and make decisions independently without an express command from human beings. These developments have broad social impacts and affect nearly all spheres and disciplines, including law, and consequently, arbitration is also affected positively or negatively by the development of AI. This paper attempts to identify some challenges associated with the use of AI in arbitration and tries to provoke a debate on how stakeholders in arbitration should deal with the use of technology generally and AI in particular. The challenges include a variation of certain contractual aspects, such as fundamental principles for a valid contract, moral and ethical issues and confidentiality in arbitral proceedings.*

## 1. The Definition of Artificial Intelligence

Artificial Intelligence ("AI") is a branch of computer science that focuses on creating machines and software that can think and act like human beings. [2] AI is also defined as machines performing cognitive functions that we typically associate with humans, including perceiving, reasoning, learning, and

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[1] Alyssa Schroer, What Is Artificial Intelligence? *https://builtin.com/artificial-intelligence*
[2]Accessed *on www.ask.com/news/comprehensive-guide-basics-artificial-intelligence*

interacting with others.[3] With the fast growth of technology in this era of the fourth industrial revolution, AI is likely to affect different disciplines in life. The legal industry, in general, and arbitration, in particular, cannot avoid the effect of AI in this era of the fourth industrial revolution.[4]

## 2. The Effect of AI in Litigation

The effect of technology has already been experienced in litigation generally, and it includes how to admit electronic evidence, virtual proceedings and the conduct of parties generally.[5] Technology has affected the dispute resolution process both negatively and positively.

Much as AI appears advantageous in many disciplines, it also comes with challenges that must be addressed to ensure AI is not creating more problems than the solutions it brings. It is argued that safeguards are needed to ensure that AI is safe to use in society, that it does not negatively affect humanity and that morality and ethics are maintained. AI is supposed to align with the values of society. The purpose of AI should be to make the world a better place to live and assist people in meeting their needs and desires. [6]This being the case, AI in arbitration should also be used in a manner that will help the traditional aim of arbitration which is to resolve disputes is met.[7] AI should not create new conflicts in an attempt to resolve the existing disputes.

Inevitably, AI will have an impact on Arbitrators, legal counsel, and parties as individuals and as institutions as well. It is a fact that with the rapid

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[3] Berente N, Gu B, Recker J, Santhanam R (2019) Managing AI. Call for papers. MIS Quarterly, pp 1–5
Presidential address delivered at the 17th International

[4] Steven R, Smith, The Fourth Industrial Revolution and Legal Education, Georgia State University Law Review, Volume 39, Issue 2, Winter 2023

[5] Conference on Artificial Intelligence and Law (ICAIL 2019) in Montreal, Canada (Cyberjustice Lab,
University of Montreal, June 19, 2019). Published online: 14 May 2020

[6]Aligning artificial intelligence with human values: reflections from a phenomenological perspective *https://link.springer.com/article/10.1007/s00146-021-01247-4*

[7] International Arbitration in East Africa, Law and Practice, , Lex Law Publishing & Dispute Resolution, Dr. Julius Clement Mashamba

development of AI, which, in essence, has the effect of automating some functions, some of the roles played by human beings will be performed by machines. If we are in agreement that the use of AI will affect some functions of human beings in the arbitration process, then the question may be to what extent and how the functions of stakeholders in arbitration, such as arbitrators, attorneys and even witnesses will be affected by the use of AI in the arbitration process. It is unlikely that AI will replace human beings altogether. Still, it will change the role of human beings in the process by some of the said roles being played by machines and software and also, human beings may be required to have another function of assessing what has been done by AI. One can quickly think of the role of an expert witness who uses his professional to analyse facts, for example, examining blood samples or DNA and then determining an issue of evidence as to whether a particular individual was involved in an act subject to the proceedings. With AI, machines can perform such analysis in perfection and draw conclusions regarding certain pieces of evidence and can proceed to recognise particular facts such as the use of biodata, identifying signatures, handwriting etc. AI may become an acceptable tool to replace the role of an expert witness in certain aspects, such as the example given of recognising certain aspects which otherwise would have been performed by a human being as an expert witness. The issue here may be whether it will be possible to exclude completely the role of the human being as an expert witness or whether the role will change and probably be that of clarifying the position obtained by the use of AI.

**3. The use of AI and the need for change of some Legal Concepts.**

With the use of AI, it is necessary to change some legal concepts, such as those concepts in relation to contract formation, intellectual properties, and non-disclosure of information. All this will affect how the Arbitral Tribunal will conduct its proceedings and may also significantly affect the substantive outcome of the arbitral proceedings.

Traditionally, contracts would be signed by individuals after what has been agreed by parties has been printed on hard copy, commonly on paper. With

technology development, the use of electronic signatures on unprinted documents is becoming more popular. This development may be different from the known concept of an Agreement under the common law. Electronic Signature has become commonly used among different stakeholders, and a contract can be concluded without any printing of a hard copy document. Parties can agree on the terms and conditions of the contract without ever meeting physically and proceed to express their mutual understanding electronically. Traditionally, under the common law, one of the necessary requisites of creating an agreement is that parties should have reached a common understanding of what has been agreed.[8] An agreement is made when one party accepts an offer made by the other party.[9] With the development of AI as discussed, contracts may be generated with machines' automation or virtual meetings without any physical discussion of the parties. With AI in place, there is a need to clearly understand what amounts to "parties". In most common law jurisdictions, parties' agreement is interpreted to mean the meeting of the parties' minds. [10]Can one legally say that AI-generated contracts qualify as a meeting of the parties' minds? When parties intend to contract, the essential terms of the bargain must be agreed upon, and parties must possess a sufficient understanding of what is agreed upon before a binding agreement can be established legally. [11]

The legal question that arises when the contract is auto-generated by machines would be what amounts to the meeting of artificial minds in this situation where human beings are not involved in negotiating and analysis of terms and conditions? Can a party claim *"non-est factum"?* This question is essential because initially, "meeting of the mind" contemplated two human beings or artificial persons acting through human beings agreeing on the terms and

[8] Internet Encyclopaedia of Philosophy, Peer Reviewed Academic Resource, *https://iep.utm.edu/ethics-of-artificial-intelligence/*

[9] G. H. Treitel, The Law of Contract, Eleventh Edition, Sweet & Maxwell, 2003

[10] Ibid

[11] Bawitko Investments Ltd. v. Kernels Popcorn Ltd., [1991] O.J. No. 495

conditions of a contract.[12] With AI, computers can be programmed to "negotiate" details such as price, quantity, and delivery dates and payment and decide whether to make or accept an offer without reference to any human trader. [13] To resolve the problem of AI-generated contracts, the learned author proposes a solution for the contract law to recognise computers as legal persons just as it recognises corporations and ships as legal persons. [14] However, this proposition has faced criticism from some people from a moral point of view who think that one cannot be bound by obligations that such a person has not chosen for himself. [15]

**4. AI and Confidentiality**

Apart from issues of contract formation by AI, which may make it necessary to have different ways of interpreting certain concepts of contract as discussed in this paper above, the use of AI will definitely bring challenges to the issues of confidentiality in Arbitration proceedings. Arbitration is a private process that enjoys much confidentiality.[16] Information technology, which cannot be separated from AI, is characterised by the collection and transmission of data. [17]As AI evolves, it magnifies the ability to use personal information in ways that can intrude on privacy interests by raising the analysis of personal information to new levels of power and speed.[18] It is not uncommon nowadays to have arbitration proceedings conducted virtually. This process obviously involves data transmission, and there is always a possibility of an unintended party

[12] Janos Szekely, Lawyers and the Machine. Contemplating the future of Litigation in the Age of AI, *https://heinonline.org/HOL/License*

[13] Tom Allen and Robin Widdison, Can Computer Make Contracts? Harvard Journal of Law & Technology, Volume 9, Number 1 Winter 1996.

[14] Ibid

[15] Ibid

[16] Kariuki Muigua, Settling Dispute Through Arbitration in Kenya, Glenwood Publishers Limited, Nairobi, Kenya.

[17] *https://www.techtarget.com/searchdatacenter/definition/IT*

[18] Cameron F. Kerry, Protecting privacy in an AI-driven world February 10, 2020 *https://www.brookings.edu/articles/protecting-privacy-in-an-ai-driven-world/*

intruding on the proceedings, thereby interfering with the parties' privacy. Also, when arbitration is conducted remotely, there is no strict control over who can hear what is discussed during the proceedings, even if cameras are on. Rules of Arbitration should be developed to capture these technological developments and see how privacy can be maintained in arbitral proceedings even when AI is used.

With the development of technology and the outbreak of COVID-19, it has become a practice for parties to prefer filing documents by way of e-filing in arbitration proceedings and even in some court systems in some jurisdictions. Scanned documents are sent to the Arbitrator and copies to the other parties by e-mail or some arbitral institutions or other stakeholders in dispute resolution have developed a platform where parties can upload and download the documents online. Some of the e-mails used are office e-mails, which more than one person can access, and still, there is a risk of hacking by a third party. Also, IT personnel may increase the number of people who can access arbitral information, increasing the possibility of divulsion of information to unintended people.

Confidentiality in the era of fast-growing technology and AI should not be expected to be the same as when arbitration evolved or when operating manually. Confidentiality should be given a broader definition to suit the age at which we are operating, and the rules of procedures must consider different possibilities of divulsion of information. Nevertheless, in arbitration proceedings, confidentiality should not be abandoned altogether. When using AI or IT technology generally, parties must also be aware of the possibility of sending data to unintended third parties during transmission. This will mean that parties and their counsel must be cautious in determining which information should be shared electronically with the tribunal and other parties and which should not be shared electronically. There is still a possibility of using a hybrid procedure during the arbitration proceedings. One should ask himself, what is the effect of the document such as bank statement, company financial records or any other document landing to an intended party?

It should be noted that it takes much work to enact laws and rules to limit the use and transmission of data through AI and technology generally because limiting such use may mean restricting the functions of the AI. AI cannot operate without collecting data and analysing them.[19] The question that can be posed is how safe the data collected by the systems is from accessibility by unintended parties. The challenge is to pass privacy legislation that protects individuals against any adverse effects of using personal information in AI, without unduly restricting AI development or ensnaring privacy legislation in complex social and political thickets.[20] The need to ensure privacy and the unavoidable use of technology appears to me as two needs contradict each other and yet are needed simultaneously! Tribunals, parties and their counsel should balance these two contradictory needs. Probably, one way of resolving this is to have legislation that will impose penalties on those who use the data obtained from third parties without permission. However, this may only work when a person uses such data actively. One may passively use the available data; for example, pricing information, market strategy, and other information can be used passively by the competitor without being able to establish that the data were used unauthorised.

**5 The AI and Ethics**

The use of AI also faces the challenge of ethics and morality.[21] AI is a creation of human beings but cannot necessarily be fully controlled by human beings. It is well known that AI mimics human beings, so the issue of ethics and morality may arise. Humans have moral and ethical limitations on what can be done, what should not be done and how to do things. This raises the question of what should be allowed to be performed by AI, how should human beings use AI and what control we have in AI. It is important to differentiate two types of AI

[19] Nicolas Lozada-Pimiento, 'AI Systems and Technology in Dispute Resolution' (2019) 24(2) Uniform Law Review 348

[20] Ibid

[21] AI for Lawyers: AI and Law: What are the Ethical Considerations? *https://www.clio.com/resources/ai-for-lawyers/ethics-ai-law/*

models. One is an automated system, and the second is an autonomous one.[22] Autonomous systems can make decisions themselves without being explicitly programmed, whereas automated systems must follow a pre-determined set of instructions with no discretion as to how they are to be followed[23] . Regarding what should be allowed to do using AI in arbitration, including whether an arbitrator should be ethically allowed to prepare the Award using AI. Others may question if one can use information obtained or analysed by the AI system as evidence and what weight should be given, particularly if the other party disputes it. This is important because AI is considered biased depending on the data fed. Also, as we have seen in the issue of contract formation by AI system automatically, the system may create terms and conditions on its own, and even acceptance is done automatically by the corresponding system.[24] Is it morally proper for the parties to be bound by such terms and conditions? What if it is found that the terms are unreasonable? The concept that an arbitrator and court cannot create terms and conditions for the parties may need to be modified to allow the Arbitrator or Courts to adjust some terms and conditions if the same is automatically produced by AI and is found to be unreasonable. It should be a matter of debate on how to deal with contracts created by AI and found unreasonable by the tribunal. The most crucial issue when dealing with AI in arbitration should be how the original legal values of Arbitration can be persevered in the era of AI. Arbitration has its ethics. Arbitration, as a dispute resolution method, should ensure that justice is not jeopardised because of AI.
Another issue associated with morality in applying AI is the manipulation of data to target an individual or small minority group. With sufficient prior data, algorithms can target individuals or small groups with just the kind of input likely to influence these particular individuals.[25] Although there are several

[22] Suresh Mathew, How Autonomous Systems Differ from Automated Systems, and Why SREs Should Care, *https://www.sedai.io/blog/how-autonomous-systems-differ-from-automated-systems-and-why-sres-should-care*
[23] Mahnoor Waqar, THE USE OF Al IN ARBITRAL PROCEEDINGS, OHIO STATE JOURNAL ON DISPUTE RESOLUTION, [Vol. 37.4: 20221
[24] Tom Allen and Robin Widdison, op cite
[25] Ethics of Artificial Intelligence and Robotics Stanford Encyclopedia of Philosophy, *https://plato.stanford.edu/entries/ethics-ai/*

connotations of the term "data manipulation," the most basic definition refers to how artificial intelligence machines read incoming data and translate it into usable information for people to leverage.[26] Data manipulation is a serious risk There are several types of data manipulation, including deepfakes, which is a type of data manipulation in which an image can replace a real person.[27] AI uses trained algorithms to analyse vast amounts of data. These algorithms can collect biased historical information, meaning the AI system may also inadvertently produce biased results. [28] If the system can manipulate data intentionally or otherwise, then it is morally questionable whether we should use such a system as human beings. The solution for this may be to ensure there is a mechanism to ascertain the correctness of the information given. Will this mean a need for evidence to validate other evidence? In some jurisdictions, laws have been enacted to govern the admission of electronic evidence and one of the purposes of these provisions is to ensure authenticity of the electronic evidence intended to be admitted.[29] Probably it is also high time for arbitration proceedings to have such safeguards when admitting evidence produced electronically and by AI.

Another moral issue that may arise in the use of AI is the attribution of liability when the AI system has occasioned an error. Anna Becker and Gunter Teubner, in their book *Three Liability Regimes for Artificial Intelligence, Algorithmic Actants, Hybrid, Crowds* provide for three types of liabilities in AI.[30] The learned authors provide that actants raise the risk of digital autonomy, hybrids the risk of double contingency and crowd the risk of opaque interconnections. The book demonstrates that the law needs to respond to these specific risks by recognising personified algorithms as vicarious agents, human-machine associations as

[26] How AI Manipulates Data, *https://www.aipartnershipscorp.com/post/how-ai-manipulates-data*

[27] Everything You Need to Know About How to Use Deepfake Technology, *https://www.discoverdatascience.org/articles/everything-you-need-to-know-about-how-to-use-deepfake/*

[28] AI and Law: What are the Ethical Considerations? *https://www.clio.com/resources/ai-for-lawyers/ethics-ai-law/*

[29] The Electronic Transactions Act, 2015

[30] Anna Becker and Gunter Teubner in their book Three Liability Regimes for Artificial Intelligence, Algorithmic Actants, Hybrid, Crowds

collective enterprises, and interconnected systems as risk pools – and by developing corresponding liability rules.[31] The use of AI, particularly when the same is automated in the sense that it can make its own reasoning and act accordingly without any express command from a human being, brings a new type of liability which was not envisaged.in law and torts. Should the vicarious principle apply to damages which AI may cause? The notion of vicarious liability is based on the fact that someone is responsible for controlling the act of another person. In AI, there is no such control of a machine that uses AI and makes decisions from historical data collected. Should the device's owner or the manufacturer of this "artificial human" be liable for the acts and omissions done by the machine? Arbitrators, like any other dispute resolvers, must be able to see the liability gap caused by AI and come up with a way to fill the void. Who should be liable for autonomous software agents? What about where one cannot separate the act of a human being working together with AI? And lastly, what about interconnected AI systems? AI has brought a "new human" who cannot be fully liable for its own actions and, at the same time, raises the question of whether morally a human being can be attributed entirely to the acts and/or omission of this new creature, which is manmade. It should be noted that we are talking of machines and software that mimic human behaviour in AI. Despite human behaviour attributed to AI, a consultancy done for the European Union refused to recognise AI as a person and insisted AI is an object and not a subject.[32] Since AI-based applications are to be deemed objects and products, with respect to the EU legal framework, they primarily fall under two different bodies of legislation: (i) product safety regulation and (ii) product liability directive (PLD).[33] While the first set of rules imposes essential safety requirements for products to be certified and thus distributed onto the market, the latter aims at compensating victims for the harm suffered from the use of defective goods, namely, a product that lacks the level of safety that it would be

[31]Anna Becker and Gunter Teubner, Three Liability Regimes for Artificial Intelligence, Algorithmic Actants, Hybrid, Crowds, Hart Publishing, Oxford, London, New York, New Delhi, Sydney, 2022

[32] 1. Artificial Intelligence and Civil Liability, STUDY Requested by the JURI committee of the EU Parliament published in July 2020.

[33] Ibid

reasonable to expect.[34] In Africa, I am unaware of any legal regulation that expressly provides for the liability gap brought by AI. Even in Europe, the claim that there is no liability gap because it is always possible to identify a human being who might be deemed responsible for damages arising from the production, operation and use of a machine or AI system, based on different legal criteria is not always the case given the fact that technology grows so fast. There is a need to develop the principle of vicarious liability to cover even acts of which a person has no control.

**6. Conclusion**

After noting the challenges that come with the development of AI, albeit briefly, the question is what the stakeholders in arbitration should do. One of the important actions of arbitrators is to update themselves with AI development. It is not expected that all arbitrators will be experts in AI, but they should be aware of what is happening in the AI space. This is possible by reading journals, books and other articles, most of which are available online. Arbitrators, arbitral institutions, and counsel should also equip their offices and institutions with equipment and software capable of using fast-growing technology. It is normal practice now to have virtual arbitration proceedings in which parties can share electronically different documents, ask questions and present their cases generally. It is an obvious truth that old technology cannot accommodate transactions in this fourth industrial revolution.

Creating friendly rules that will accommodate the use of AI and other electronic machines and programs in Arbitration is a must for arbitration to flourish in this era of AI. Most existing rules of procedures, particularly in African jurisdiction, were coined with little consideration of the fast-growing technology. Much as it is argued that technology grows so fast that it is not possible to have updated rules for each new stage of technology, at least there should be a general framework that should have general rules to guide arbitrators on specific aspects, such as how to conduct arbitration online, what to do and what not

[34] Artificial Intelligence and Civil Liability, STUDY Requested by the JURI committee of the EU Parliament published in July 2020.

when conducting a virtual hearing, management of confidentiality when using AI or electronic platform etc.

It might also be necessary in some instances to have strategic litigation in courts of law to see how courts will interpret certain aspects related to AI, such as contracts produced without the involvement of human beings or liability caused by AI, which operates without the command of a human being, etc.

Also, lobbying certain authorities to introduce policies which may assist in giving guidance to the issues related to AI. This may involve researching the negative effect of AI in arbitration in particular and dispute resolution in general. This will assist in looking for solutions to combat different identified challenges. Lawyers will have to work closely with other disciplines because the effect of AI and technology generally cuts across society.

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The Electronic Transactions Act, 2015

# Inaugurating South Africa as a Hub for International Commercial Arbitration in Africa: The International Arbitration Act 2017

*By:* ***Prince Kanokanga****

***Abstract***

*This article traces the history and development of arbitration in South Africa, and the public consultations, debates and discussions which lasted for more than two decades, which lead to the promulgation of the International Arbitration Act 2017 on the 20th December 2017 (IAA). In South Africa, the courts not only have a legal, but they also have a social – economic and political duty to encourage the selection of South Africa as a venue for international arbitration. It is on this basis, that this article, highlights the adoption of the Model Law for use in international commercial disputes in South Africa, and how the country, has now become a hub for international commercial arbitration within the African continent.*

## Introduction

South Africa on the 20th December 2017 became the eleventh country in Africa[1] to implement the Model Law on International Commercial Arbitration ('Model

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[1] In chronological order, the following African countries adopted the UNCITRAL Model Law on International Commercial Arbitration: **Nigeria** (Arbitration and Conciliation Act 1990), **Tunisia** (Code of Arbitration 1993), **Egypt** (Law Concerning Arbitration in Civil and Commercial Matters 1994), **Kenya** (Arbitration Act 1995), **Zimbabwe** (Arbitration Act 1996), **Madagascar** (Code of Civil Procedure, Articles 439 – 464, 1998), **Uganda** (Arbitration and Conciliation Act 2000), **Zambia** (Arbitration Act 2000), **Rwanda** (Law on Arbitration and Conciliation in Commercial Matters Act 2008), **Mauritius** (International Arbitration Act 2008) and **South Africa** (International Arbitration Act 2017).

law')[2] which was adopted by the United Nations Commission on International Trade Law[3] ('UNCITRAL')[4] on the 21 June, 1985 thereby making South Africa one of the relatively few African countries to adopt the Model Law within the continent.[5]

Not only did South Africa adopt the 1985 Model Law through the International Arbitration Act, 2017 ('IAA'): a remarkable and noteworthy achievement, but it also adopted the revised 2006 Model Law,[6] with some modifications to the text of the Model Law,[7] but has kept the essence of the Model Law in its original.

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[2] For a discussion and related matters on the Model Law on International Commercial Arbitration, see: G Herrmann 'The UNCITRAL Model Law – its background, salient features and purposes' (1985) 1 *Arbitration International* 6 – 39; M Kerr *Arbitration and the Court: The UNCITRAL Model Law* (1985) 34 *International and Comparative Quarterly* 1 – 24; ABroches 'The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation' (1987) 18 *Netherlands Yearbook of International Law* 3 – 67; B Davenport 'The UNCITRAL Model Law on International Commercial Arbitration: The User's Choice' (1988) 4 *Arbitration International* 69 – 74.

[3] PE O'Malley 'A New 'UNCITRAL Model Law on International Commercial Adjudication': How Beneficial Could It Really Be?' (2022) 88 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 34 at 34.

[4] HM Holtzmann & JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) is an authoritative text based on *travaux préparatoires* of the Conference which adopted the Model Law.

[5] Davison Kanokanga & Prince Kanokanga *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15]* (2022) 2.

[6] HM Holtzmann et al *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (2015).

[7] On the African continent, only three countries have adopted the 2006 UNCITRAL Model Law, namely: **Mauritius**, **Rwanda** and **South Africa**. The 2006 amendments to the Model Law have made some useful improvements. Some of the amendments relate to Article 2 (the addition of general interpretative principles); Article 7 (the definition and written form of an arbitration agreement); Article 17 (the power of arbitral tribunals to order interim measures) and Article 35 (recognition and enforcement). The modifications and amendments which South Africa introduced can be found in Article 2A, Article 7, Article 17A, Article 17D, Article 17E, Article 17F, Article 17G, Article 17H, Article 17I and Article 17J of the Model Law.

## 1 A Brief History of the Law and Practice of Arbitration in South Africa

For more than a century, arbitration tribunals have been part of the legal system in South Africa.[8] It is for this reason, that South Africa may be regarded as having the longest 'codified' history of arbitration in Africa.[9] The country inherited the legal system of both England and Holland, which recognised the importance of arbitration[10] as an alternative dispute resolution mechanism (ADRM).[11]

The legal system in South Africa has evolved, and continues to evolve.[12] In fact, it is regarded as one of the most advanced and sophisticated legal systems on the continent[13]and as a result, the South African courts and legislation, favour the resolution of disputes though arbitration,[14] and respect party autonomy.[15] Prior to 14 April 1965, the practice of arbitration in the country was regulated by three different enactments in three different provinces; namely, Cape Town, KwaZulu-Natal and Transvaal.[16] Although the practice of arbitration was

[8] Kanokanga & Kanokanga op cit note 5 at 4.

[9] For detailed information about the law and practice of arbitration in South Africa, see generally: G Davis, *Law and Practice of Arbitration in South Africa* (1966); M Jacobs, *The Law of Arbitration in South Africa* (1977); DW Butler & E Finsen *Arbitration in South Africa, law and practice* (1993); L Bosman 'Chapter 1.10: South Africa' in LBosman (ed) *Arbitration in Africa: A Practitioner's Guide* (2013) 77 – 82; DP Rantsane, 'The Origin of Arbitration Law in South Africa' (2020) 23 *Potchefstroom Electronic Law Journal* 1 – 27.

[10] E Finsen, 'Arbitration and mediation in the construction industry' in P Pretorius (ed), *Dispute Resolution* (1993) 177

[11] J Brand, 'Amicable Dispute Resolution in South Africa' in A Ingen-Housz (ed) *ADR in Business: Practice and Issues across Countries and Cultures* (2011) 591 – 600.

[12] For a detailed discussion on the history and development of the South African judiciary, see generally: C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014).

[13] PN Levenberg, 'Arbitration and Choice of Law in Sub-Saharan Africa' (2016) 28 *Florida Journal of International Law* 241 at 242.

[14] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) 585C-D.

[15] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

[16] The Arbitration Act 29 of 1898 which was applied in the Cape of Good Hope, in the Transvaal by the Arbitration Ordinance 24 of 1904 and in Natal by the Arbitration Act 24 of 1898.

conducted by different provinces, the arbitral enactments in all three provinces closely resembled each other.[17]

However, it was only on 14 April 1965 that a singular Act, the Arbitration Act 42 of 1965 ('AA') was enacted into law in South Africa, thereby creating a singular arbitration law in the country. The AA was enacted into law in South Africa to deal primarily with domestic arbitration,[18] and not with international arbitration.[19] Thus, a significant feature of the current arbitration law in South Africa is that it now gives effect to both domestic and international arbitration under different enactments.[20]

The AA is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by the IAA.[21] The term 'domestic' in respect to arbitration is used to indicate arbitration which is purely domestic. Leading commentators Butler and Finsen observed that:

> *"The term 'international' is used to indicate the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries, thereby assuming an international or transnational character."*[22]

Owing to the fact that domestic and international arbitration in South Africa are regulated by two separate enactments, the AA is not applicable to 'any disputes'

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[17] JF Coaker & WP Shutz, *Willie and Millin's Mercantile Law of South Africa* 17 ed (1975) 522.
[18] H Booysen, International Transactions & The International Law Merchant (1995) 372.
[19] South Africa Law Commission (SALC) *Arbitration: An International Arbitration Act for South Africa Report: Project 94* (1998) 23.
[20] Domestic arbitration in South Africa is regulated by the Arbitration Act 42 of 1965 whilst international arbitration is regulated by the International Arbitration Act, 2017.
[21] Section 2 of the Arbitration Act 1965, however applies for only purposes of Chapter 3 of the International Arbitration Act 2017 i.e. Recognition and enforcement of arbitration agreements and foreign arbitral awards.
[22] Butler & Finsen op cit note 9 at 296.

which are covered by the IAA.[23] The courts and leading jurists,[24] prior to the enactment of the IAA, had long lamented the fact that the AA was outdated[25] for international arbitration and bemoaned the fact that the country, had still not acted upon the call for reform and the adoption of a new enactment dealing with international arbitration.[26]

## 2 The Scope of the Law Reform On International Commercial Arbitration in South Africa

With the growth of global commerce, and 'internationalization of goods and services',[27] international commercial arbitration has increased in recent decades, and continues to grow. This was not always the case in South Africa.[28]

The growth of international commercial arbitration in South Africa, traces its roots to the call for the adoption of the UNCITRAL Model law as far back as 01 August 1994, when the Association of Arbitrators (Southern Africa) NPC addressed a letter to the Secretary of the then South African Law Commission (SALC), submitting a draft bill for the revision of the existing arbitration enactment.[29]

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[23] International Arbitration Act 2017, s 4(1).

[24] S Wilske 'Why South Africa Should Update Its International Arbitration Legislation - An Appeal from the International Arbitration Community for Legal Reform in South Africa' (2011) 28 *Journal of International Arbitration* 1 – 13; WG Schulze 'Of arbitration, politics and the price of neglect – South African international arbitration legislation continues to lag behind: Bidoli v Bidoli' (2011) 23 *South African Mercantile Law Journal* 291- 99.

[25] A Burrow 'Telcordia Technologies Inc. v. Telkom SA Ltd: A Fresh Start for International Arbitration in South Africa?' (2008) 24 *Arbitration International* 337 – 344.

[26] *Bidoli v Bidoli & Another* 2011 (5) SA 247 (SCA).

[27] SKB Asante 'Foreword' in AA Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (2001) xiii.

[28] D Butler, 'The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress' (2004) 21 *Journal of International Arbitration* 169 – 203.

[29] SALC op cit note 19 at 29.

The Model Law was established to promote harmonisation and uniformity of national laws pertaining to international commercial arbitration.[30] Owing to the fact that the Model Law had been adopted on 21 June 1985, the SALC considered the draft bill submitted by the Association of Arbitrators (Southern Africa) NPC for domestic arbitration,[31] and saw it sensible to investigate on the need for reform of the country's arbitration legislation,[32] and the adoption of the Model Law.[33]

Sometime in 2012, the Department of Justice and Correctional Services tasked the South African Law Reform Commission (SARLC) with the responsibility of updating the Draft International Arbitration Bill which was contained in the 1998 report. One of the notably tasks which the SARCL had to deal with were the amendments of the Model Law of 2006.

In 2013, the SARLC conducted its investigations on the adoption of the Model Law, which culminated in the SARCL compiling a summary of amendments to the 1998 report.[34] In 2015, there was an announcement by the then Deputy Minister of Justice and Constitutional Development, that the International Arbitration Bill would be passed in the near future.[35]

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[30] For discussion on the UNCITRAL Model Law, see generally: I Bantekas et al *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020).

[31] D Butler 'A new domestic arbitration Act for South Africa: What happens after the adoption of the UNCITRAL Model Law for International Arbitration?' (1998) 9 *Stellenbosch Law Review* 3 – 20.

[32] D Butler 'South African arbitration legislation - the need for reform' (1994) 27 (1) *The Comparative and International Journal of Southern Africa* 118 -163

[33] See generally: South African Law Reform Commission Working Paper 59 (Project 94) *Alternative Dispute Resolution* (1995).

[34] South African Law Reform Commission (SALRC) *Summary of Amendments to The Commission's Draft International Bill of July 1998* (2013).

[35] J Ripley-Evans, 'South Africa' in JH Carter (ed) *The International Arbitration Review* (7 ed) (Law Business Research, London, 2016) 477

On 13 April 2016, Cabinet endorsed the International Arbitration Bill, with a few minor amendments.[36] However, it was only on 01 March 2017, that the Cabinet approved that the International Arbitration Bill (IAB) be submitted to Parliament.[37]

Cabinet sought to introduce the IAB with an aim of improving access to justice, and to ensuring the realisation of the National Development Plan (NDP) of expanding trade and investment, and positioning South Africa in the world.[38] On 21 April 2017, the International Arbitration Bill [B10B-2017] (IABB10B-2017) was tabled before Parliament.[39] Subsequent to the IABB10B -2017 being tabled before Parliament, public meetings were held by the Portfolio Committee on Justice and Correction Services on 12 September 2017,[40] and amendments were effected to the International Arbitration Bill from the public submissions, which were received by the Portfolio Committee on Justice and Correction Services on 20 October 2017.[41]

After twenty three years of consultations, debates and discussions on the urgent need for reform to the arbitral regime in South Africa, the President on the 20

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[36] Ibid.

[37] *T Chidede, 'South Africa's International Arbitration Bill 2016*: *Stepping-stone* for *increasing trade* and *investment'* <*https://www.tralac.org/discussions/article/11475-south-africa-sinternationalarbitrationbill-2016-stepping-stone-for-increasing-trade-and-investment.html*> (accessed 05 September 2023)

[38] Statement on the Cabinet Meeting of 1 March 2017 <*http://www.dirco.gov.za/docs/2017/cabinet0301.htm*> (accessed on 05 September 2023).

[39] The objectives of the International Arbitration Bill [B10B – 2017] were to facilitate the use of arbitration to resolve international commercial disputes, adoption of the Model Law in South Africa, to facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards and to give effect to South Africa's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 (the New York Convention).

[40] Parliament of the Republic of South Africa (Portfolio Committee Amendments to the International Arbitration Bill [B10B – 2017] (27 October 2017) 2.

[41] Ibid at 3.

December 2017 promulgated the IAA, giving effect to the New York Convention and the Model Law, which has force of law in the republic.[42]

## 3 The Objectives and Arrangement of the IAA

The specific objectives of the IAA are set out in section 3 which are:[43] to facilitate the use of arbitration as a means of resolving international commercial disputes,[44] adopt the Model Law for use in international commercial disputes,[45] facilitating the recognition and enforcement of certain arbitration agreements and arbitral awards;[46] and giving effect to the obligations of South Africa under the New York Convention.[47]

The IAA consists of four chapters. The first chapter deals with the general provisions of the Act.[48] The second chapter, deals with international commercial arbitration.[49] The third chapter deals with recognition and enforcement of arbitration agreements and foreign arbitral awards[50] and the fourth chapter deals with transitional and other provisions.[51]

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[42] International Arbitration Act 2017, sec 6.
[43] *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd & Another* [2022] ZASCA 68 para 29.
[44] International Arbitration Act 2017, sec 3(a).
[45] International Arbitration Act 2017, sec 3(b).
[46] International Arbitration Act 2017, sec 3(c). see also, *Government of the United Republic of Tanzania v Steyn & Others* [2019] ZAGPJHC 312 para 11.
[47] International Arbitration Act 2017, sec 3(d). see also, M Wethmar-Lemmer, 'The Recognition and Enforcement of Foreign Arbitral Awards under the International Arbitration Act 15 of 2017' (2019) 31 (3) South African Mercantile Law Journal 378 – 398.
[48] Chapter 1 deals with the General Provisions, see International Arbitration Act 2017, sec 1 – 5.
[49] Chapter 2 deals with International Commercial Arbitration in South Africa, see International Arbitration Act 2017, sec 6 – 13.
[50] Chapter 3 deals with Recognition and Enforcement of Arbitration Agreements and Awards, see International Arbitration Act 2017, sec 14 – 19.
[51] Chapter 4 deals with Transitional and other Provisions, see International Arbitration Act 2017, sec 20 – 22.

There are also four schedules annexed to the IAA. The first schedule deals with the UNCITRAL Model Law on International Commercial Arbitration.[52] The second schedule deals with the UNCITRAL Conciliation Rules.[53] The third schedule deals with the New York Convention[54] and the fourth schedule deals with the laws which have either been repealed or amended.[55]

## 4 South Africa as A Hub for International Arbitration

Following the promulgation of the IAA in 2017 the development and practice of international commercial arbitration has increased.[56] This includes a growth in the number of arbitration institutions in the country.[57] This tremendous growth since 2017 has also resulted in South Africa being regarded as both a safe seat (legal place)[58] and a venue (geographical place) for arbitration.[59]

In Africa, jurisdictions such as Cairo, Kigali, Lagos, Nairobi and Port Louis are considered to as jurisdictions adequately equipped to handle international arbitration disputes. Apart from those listed above, internationally, the following South Africa cities are recognised as arbitration friendly venues for

[52] International Arbitration Act 2017, Schedule 1.
[53] International Arbitration Act 2017, Schedule 2.
[54] International Arbitration Act 2017, Schedule 3.
[55] International Arbitration Act 2017, Schedule 4.
[56] J Miles, T Fagbohunlu & K Shah *An Introduction to Arbitration in Africa: A Review of Key Jurisdictions* (2016) 28.
[57] Some of the arbitration institutions include, Africa Alternative Dispute Resolution (Africa ADR); Arbitration Foundation of South Africa (AFSA); Association of Arbitrators (Southern Africa) NPC; China – Africa Joint Arbitration Centre (CAJAC); Equillore Group; Tokiso Dispute Settlement. For a discussion of the growth of international arbitration in Africa and the proliferation of arbitral instructions, see: Prince Kanokanga 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern African Culture of Arbitration' (2022) 1 *Young Lawyers Association of Zimbabwe Law Journal* 1 – 8.
[58] The seat of arbitration is also known as the place of arbitration or the locale; it is the juridical seat of the arbitration, the legal place or domicile of the arbitration.
[59] Davison Kanokanga *Commercial Arbitration in Zimbabwe* (2020) 49 – 50.

international arbitration: Cape Town, Durban, Johannesburg and Sandton for both *ad hoc*[60] and institutional arbitration[61] on the African continent.[62]

In order for a particular jurisdiction to be considered a safe seat or an arbitration friendly venue for international commercial arbitration,[63] permanent factors include:[64] the neutrality of the forum, adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements,[65] immunity for arbitrators from civil liability for anything done or omitted to be done in good faith in the course of their arbitral duties,[66] an arbitral regime providing a good

[60] Ad hoc arbitration is conducted the rules and procedures of arbitral institutions. In this type of arbitration, the parties determine the number of arbitrators who will determine their dispute, how the arbitrators will be appointed, the seat and venue of the arbitration, the language to be used and the rules and procedures to be used in the arbitral process. In *ad hoc* arbitration, the parties are free to seek the assistance of an arbitral institution in appointing arbitrator without referring their dispute to that arbitral institution. See also: Kanokanga op cit note 59 at 17.

[61] Institutional arbitration, is conducted under the rules and procedures of a particular arbitral institution. In this type of arbitration, an arbitral institution is appointed to administer the arbitration. The parties refer their disputes to an arbitral institution, which will conduct the arbitration in accordance with its rules and procedures. The arbitral institution does not itself arbitrate the dispute, however, it appoints arbitrators and supervises the conduct of the arbitral process in accordance with the institution's rules and procedures. Thus, the parties, through the arbitration agreement, refer disputes to an arbitral institution. See also: Kanokanga op cit note 59 at 16.

[62] SOAS University London, *2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats* (2020).

[63] J Walker 'The London Principles and The Impact on Law Reform' (2018) 8 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 174 – 181.

[64] N Blackaby & C Partasides with A Redfern & M Hunter, Redfern and Hunter on International Commercial Arbitration (2009) 3.

[65] JK Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 *International Journal of Humanities and Social Science* 225.

[66] Walker op cit note 63.

framework for the process,[67] limiting court intervention,[68] and striking the right balance between confidentiality[69] and transparency are required.[70]

Other factors include, a sound legal educational system and the right to choose one's legal representatives, either local or foreign, professional norms embracing a diversity of legal and cultural traditions and ethical principles governing arbitrators and counsel, good logistical support, including hearing rooms and transcription, document handling and translation services are necessary.[71]

South Africa is considered to be an arbitration friendly jurisdiction, which has in place a favourable international arbitral regime, which respects the rule of law, which is a foundational value of the South African constitution.[72] The country is therefore well equipped and has good infrastructural support from an independent, competent and efficient judiciary.[73]

The judicial support for international commercial arbitration in South Africa was highlighted by the Supreme Court of Appeal in *Zhongi Development Construction Engineering Company Ltd v Kamoto Copper Company Sarl* wherein, it held that '[t]he South Africa courts not only have a legal but a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitration.'[74]

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[67] DS Aswani, 'Building Kenya's Future as A Global Hub for International Commercial Arbitration' (2016) 4 (2) *Alternative Dispute Resolution* 147 at 158.
[68] Walker op cit note 63.
[69] Ibid.
[70] Kanokanga op cit note 59 at 52.
[71] Ibid 52.
[72] *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) para 1 – 2.
[73] SOAS University London *SOAS Arbitration in Africa Survey Report: Africa – connected Arbitration Perspectives on Major Global Issues* (2022) 12.
[74] 2015 (1) SA 345 (SCA) para 30.

## 5 Arbitral Proceedings in South Africa Over the Past 5 Years

Not only for political and social – economic reasons, have the South African courts given great care to the need for ensuring that the country is a safe seat for international commercial arbitration,[75] but the courts have also indicated that legal practitioners also have a legal obligation to encourage the selection of South Africa as a venue for international commercial arbitration, as this helps foster international commercial arbitration jurisprudence.

An additional factor for arbitration practitioners, business persons, and legal practitioners for nominating South Africa as a venue for international commercial arbitration is that it promotes cross border trade and markets the country,[76] and helps to develop 'arbitration tourism' which has the potential to bring an influx of spending into the country though the supply of goods and services, direct sales of goods and services and the establishment of 'arbitral tourist destinations' which may create employment opportunities.

As a result, in the last 5 years, the South African courts have encouraged international commercial arbitration, and encouraged minimum judicial intervention, party autonomy and equal treatment of the parties in international commercial arbitration.

For instance, as at 23 January 2023 the courts in South Africa have made pronouncements on sections 4,[77] 6,[78] and 20[79] of the IAA. More so, the courts as at 04 April 2022, have made pronouncements both reported and unreported, on

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[75] *Zhongi Development Construction Engineering Company Ltd* supra note 74 para 30.

[76] M Wethmar-Lemmer & E Schoeman 'The International Arbitration Act 15 of 2017: impetus for developments on the cross-border commercial front' (2019) 1 *Journal of South African Law* 127 – 137; PER Kurasha 'South Africa's jurisdictional challenge with the under-development of cross-border commercial litigation: Litigation v Arbitration' (2022) *De Jure Law Journal* 1-27.

[77] *Vodacom International Ltd & Another v Mabanga* [2019] ZAGPJHC 551.

[78] *Vedanta Resources Holdings Ltd v ZCCM Investments PLC & Another* [2019] ZAGPJHC.

[79] *Atakas Ticaret Ve Nakliyat AS v Glencore International AG & Others* [2018] ZAKZDHC 32.

at least 10 of the 36 articles contained in the Model Law, namely: Article 1,[80] Article 2,[81] Article 5,[82] Article 6,[83] Article 8,[84] Article 12,[85] Article 16,[86] Article 17J,[87] Article 23[88], Article 34[89], and Article 35.[90]

## 6 Conclusion

Prior to the enactment of the IAA which adopted the Model Law on International Commercial Arbitration, arbitration had long been recognised as an efficient method for resolving disputes[91] in South Africa.[92] Following the enactment of the IAA on the 20 December 2017 the country has been positioned to become an arbitral tourist destination for international commercial arbitration as well as a legal powerhouse as a result of various decisions which the courts are going to deal with.

One commentator observed that:

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[80] *Atakas Ticaret VE Nakliyat AS v Glencore International AG* 2019 (5) SA 379 (SCA).

[81] *Vedanta Resources Holdings Ltd v ZCCM Investments PLC & Another* [2019] ZAGPJHC.

[82] *Industrious D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* [2021] ZAGPJHC 350.

[83] *Vedanta Resources Holdings Ltd v ZCCM Investments PLC & Another* [2019] ZAGPJHC.

[84] *Delta Beverages (Pvt) Ltd & Another v Blakey Investments Ltd & Others* [2020] ZAKZDHC 36; *Weissensee v Stone-Bird Investments (Pty) Ltd & Others* [2022] 4 All SA 905 (GJ) para 33 – 35.

[85] *AMR Mining (Pty) Ltd v Glencore International AG & Another; Glencore International AG v AMR Mining (Pty) Ltd* [2021] ZAGPJHC 561.

[86] *Delta Beverages (Pvt) Ltd & Another v Blakey Investments (Pty) Ltd & Others* [2020] ZAKZDHC 36.

[87] *Vedanta Resources Holdings Ltd v ZCCM Investments PLC & Another* [2019] ZAGPJHC.

[88] *JMH-Doctors SPV (RF) (Pty) Ltd v 3 Health Holdco Mauritius Ltd & Others* [2022] ZAGPJHC 266 para 38.

[89] *Vodacom International Ltd & Another v Mapanga* [2019] ZAGPJHC 551*; Ircon International Ltd v Tension Overhead Electrification (Pty) Ltd & Others* [2020] ZAGPJHC 345.

[90] *Industrious D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* [2021] ZAGPJHC 350; *Industrius D.O.O v IDS Industry Service & Another* [2021] ZAGPJHC 528

[91] *Parekh v Shah Jehan Cinemas (Pty) Ltd & Others* 1980 (1) SA 301 (D) 304 E – H.

[92] see generally: T Winship *Law and Practice of Arbitration in South Africa: Being Two Lectures Delivered at the Natal Technical College, Durban* (1925); LOP Pyemont *Arbitration in South Africa by Statute and Common Law* (1914).

> *"The enactment of the International Arbitration Act, 2017 coupled with the existence of a well-equipped judiciary to support arbitration establishes South Africa as a potential centre for international commercial arbitration. Owing to its sophisticated infrastructure and it being the second largest economy on the continent, the country undoubtedly has the potential to be the powerhouse of arbitration in Africa."*[93]

The promulgation of the South African International Arbitration Act 2017 coupled with the existence of a well – equipped judiciary within the African continent automatically placed South Africa and some of its cities which include, Cape Town, Durban and Johannesburg into the African hall of fame of major cities or hubs of ad hoc and institutional commercial arbitration within Africa.

[93] Rantsane op cite note at 19.

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# Technology and The Arbitral Seat: New Considerations for Procedural Law

*By:* ***David Onsare****

***Abstract***

*The arbitration landscape is undergoing a radical transformation, driven in large part by advancements in technology. The traditional role of the arbitral seat in determining procedural law is now subject to new considerations that challenge longstanding legal paradigms. This paper explores the evolving relationship between technology and the arbitral seat, examining how digital platforms and virtual environments are influencing the rules, regulations and legal frameworks that govern arbitration procedures. Drawing upon a diverse array of legal texts, case law and academic literature, this paper posits that the increasing digitization of arbitration necessitates a re-evaluation of how we conceptualize the arbitral seat. The paper concludes by offering strategic recommendations for legal practitioners, policymakers and academics to navigate this emerging intersection of technology and arbitration law.*

## Introduction

The arbitral seat, or the chosen jurisdiction for arbitration, has historically determined the procedural law that governs the arbitration process.[1] This choice significantly influences including the appointment of arbitrators, procedures and enforcement of awards.[2] In Kenya, as in many jurisdictions, seat selection significantly influences the rules, regulations and legal framework underpinning arbitration[3]. The arbitration agreement's location often governs

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[1] Adam Samuel, 'The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate' (1992) 8 Arbitration International 257, 280. <*https://doi.org/10.1093/ARBITRATION/8.3.257*> accessed 23 August 2023

[2] Stephen Choi, Jill E. Fisch and A. Pritchard, 'The Influence of Arbitrator Background and Representation on Arbitration Outcomes' [2014] SSRN Electronic Journal. <*https://doi.org/10.2139/SSRN.2109712*> accessed 23 August 2023

[3] The Arbitration Act, No. 4 of 1995 (Kenya)

the extent to which local courts can intervene in arbitration.[4] The jurisdiction's courts play a supervisory role, ensuring procedural fairness and supporting the arbitration process.[5] This traditional connection underscores the importance of seat selection in international arbitration.[6]

Advancements in technology are reshaping how arbitration is conducted and challenging the established link between the arbitral seat and procedural law.[7] This disruption necessitates a re-examination of the implications and considerations associated with seat selection.[8]

**The Traditional Arbitration Model**

The arbitral seat's role in determining procedural law and enforcing arbitration awards has been consistent in traditional arbitration. The implications of seat selection extend to issues such as the enforcement of interim measures and the final arbitral award. The seat's legal framework shapes the procedural rules that govern the arbitration process.[9]

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[4] Jonathan Mance, 'Arbitration: a Law unto itself?' (2016) 32 Arbitration International 223, 241. <*https://doi.org/10.1093/arbint/aiv072*> accessed 23 August 2023

[5] Jonathan M. D. Hill, 'DETERMINING THE SEAT OF AN INTERNATIONAL ARBITRATION: PARTY AUTONOMY AND THE INTERPRETATION OF ARBITRATION AGREEMENTS' (2014) 63 International and Comparative Law Quarterly 517, 534. <*https://doi.org/10.1017/S0020589314000293*> accessed 23 August 2023

[6] Adam Samuel, 'The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate' (1992) 8 Arbitration International 257, 280. <*https://doi.org/10.1093/ARBITRATION/8.3.257*> accessed 23 August 2023

[7] Robert L. Bonn, 'Arbitration: An Alternative System for Handling Contract Related Disputes' (1972) 17 Administrative Science Quarterly 254. <*https://doi.org/10.2307/2393959*> accessed 23 August 2023

[8] Markham Ball, 'The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration' (2006) 22 Arbitration International 73, 94. <*https://doi.org/10.1093/ARBITRATION/22.1.73*> accessed 23 August 2023

[9] Adam Samuel, 'The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate' (1992) 8 Arbitration International 257-280.<*https://doi.org/10.1093/ARBITRATION/8.3.257*> Accessed 23 August 2023

The traditional arbitration model in Kenya is based on the Arbitration Act, which was passed in 1996 and amended in 2009. The implications of the arbitral seat selection in Kenya are consistent with the traditional model. The seat's legal framework influences the procedural rules that govern arbitration proceedings, including matters such as evidence presentation, interim measures and final award enforcement.

***Legislation***: The Arbitration Act in Kenya is modelled on the UNCITRAL Model Law on International Commercial Arbitration. It provides the legal framework for arbitration proceedings in Kenya.[10]

***Alternative Dispute Resolution (ADR)***: The Constitution of Kenya recognizes and promotes alternative dispute resolution methods, including arbitration. This establishes Kenya as a pro-arbitration country.[11]

***Adoption of UNCITRAL Model Law:*** The Arbitration Act initially adopted the UNCITRAL Model Law in 1995. Subsequent amendments in 2010 filled in gaps in the law and included provisions on various aspects of arbitration, such as arbitrator immunity, costs, interest and the effect of an award.[12]

***Competence-Competence Principle:*** The Arbitration Act incorporates competence-competence meaning arbitral tribunals have the power to rule on their own jurisdiction.[13]

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[10] P. Landolt, 'Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements' (2007) 23 Arbitration International 63-92. <https://doi.org/10.1093/ARBITRATION/23.1.63> accessed 23 August 2023

[11] Constitution of Kenya (2010) art 159

[12] International Arbitration Laws and Regulations - Kenya' (ICLG, 2022) <*https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/kenya#:~:text=The%20Act%2C%20as%20amended%20in,duties%20for%20parties%20to*> accessed 23 October 2023

[13] Arbitration Act, No. 4 of 1995 (Kenya) s 17

***Recognition of Foreign Arbitral Awards:*** Kenya ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), providing for the recognition and enforcement of foreign arbitral awards in Kenya.[14]

***Specialist Arbitration Court:*** Kenya does not have a specialist arbitration court. However, the judiciary in Kenya is generally familiar with and supportive of the law and practice of international arbitration.

***Limitations:*** In practice, arbitration is not applicable to criminal, land or family matters in Kenya. However, there is growing recognition that arbitration may be a useful tool in family matters where parties are unable to reach agreement and seek a mediated settlement.[15]

On the other hand, technology affects various aspects of traditional arbitration, including those related to the arbitral seat.[16] Advancements in communication technology have led to the prevalence of virtual hearings in arbitration, enabling remote participation of parties, arbitrators and witnesses from different locations.[17] This shift raises questions about the arbitral seat's implications as

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[14] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention)

[15] Njeri Kariuki, 'Arbitration in Kenya' (Lexology, 13 October 2018) <*https://www.lexology.com/library/detail.aspx?g=65f704c5-d59b-4f5b-ba27-e060132bbf09*> accessed 23 October 2023

[16] Sang Jin Lee and Michael van Muelken, 'Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future' (Kluwer Arbitration Blog, 23 June 2021) <*https://arbitrationblog.kluwerarbitration.com/2021/06/23/virtual-hearing-guidelines-a-comparative-analysis-and-direction-for-the-future/*> accessed 23 October 2023

[17] Mohamed Hafez, 'Remote hearings and the use of technology in arbitration' (Global Arbitration Review, 29 April 2022)<*https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2022/article/remote-hearings-and-the-use-of-technology-in-arbitration*> accessed 23 October 2023

participants might not align with the physical seat.[18] Additionally, technology has streamlined arbitration through electronic document filing and management, although concerns over data security and authentication persist.[19]

**Technological Advancements in Arbitration**

Technological advancements are disrupting the traditional arbitration model. Virtual hearings via videoconferencing platforms, online dispute resolution (ODR) platforms and AI-driven tools for tasks like evidence review are some technological advancements transforming the arbitration process.[20]

In the evolving landscape of arbitration in Africa, the intersection of artificial intelligence (AI) and the arbitral process sparks a debate between the inevitable and the unachievable. As technology's reach extends across industries, the question emerges: Can AI truly find a place within the intricate realm of arbitration on the African continent? Sadaff Habib, an expert at Beale & Company Middle East, examines the prospects, challenges and potential implications of incorporating AI into arbitration practices in Africa.[21] Habib commences by highlighting a Price Waterhouse Coopers report, projecting AI's potential contribution of $15.7 trillion to the global economy by 2030.[22] This

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[18] Crowell & Moring LLP, 'Virtual Arbitral Hearings, COVID-19, and Award Enforcement' (Crowell & Moring LLP, 2020)<*https://www.crowell.com/en/insights/client-alerts/virtual-arbitral-hearings-covid-19-and-award-enforcement*> accessed 23 October 2023

[19] Sven Lange and Irina Samodelkina, 'Digital Case Management in International Arbitration' (Kluwer Arbitration Blog, 13 August 2019) <*https://arbitrationblog.kluwerarbitration.com/2019/08/13/digital-case-management-in-international-arbitration/*> accessed 23 October 2023

[20] Muigua, Kariuki, 'Disruption of Arbitration by Online Dispute Resolution (ODR)' (28 September 2023) <*https://thelawyer.africa/2023/09/28/arbitration-and-online-dispute-resolution-odr/*> accessed 23 October 2023

[21] Sadaff Habib, 'The Use of Artificial Intelligence in Arbitration in Africa – Inevitable or Unachievable?' (2022) <*https://www.ibanet.org/article/E62B06F6-7772-458A-A6E7-1474DB7136B5*> accessed 24 August 2023.

[22] PricewaterhouseCoopers, 'PwC's Global Artificial Intelligence Study: Sizing the Prize' (*PwC*, 2017) <*https://www.pwc.com/gx/en/issues/data-and-analytics/publications/artificial-intelligence-study.html*> accessed 25 August 2023

substantial figure brings into focus the transformative power of AI across sectors, including arbitration. However, the report also underscores that developing countries, including those in Africa, may experience a more modest GDP growth due to slower AI adaptation rates.

Oxford University's evaluation of AI's potential to undertake tasks traditionally associated with humans. The evaluation suggests that AI could extend its reach even to roles as significant as arbitrators.[23] The article by Habib addresses the practical benefits of AI in arbitration, citing examples such as eBay's online dispute resolution processes and China's 'No Court Room' internet courts, which have streamlined dispute resolution.[24] The Organization for the Harmonization of Business Law in Africa (OHADA) introduced reforms to attract investors and boost confidence in arbitration seated within its member countries. While acknowledging these promising changes, Habib underscores the need for clear integration of AI within the arbitration framework to mitigate uncertainties.

The legal framework poses intriguing challenges. The United States of America's Uniform Arbitration Act requires arbitrator duties to be fulfilled by natural persons, potentially impeding AI's role. Yet, the Lagos State Arbitration Law 2009 diverges, enabling parties to tailor dispute resolution methods, subject to safeguards protecting public interest. The interplay between these laws and established models like UNCITRAL raises queries about AI's possible inclusion as "arbitrators."[25]

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[23] Eidenmüller, 'What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator' (24 June 2020) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/06/what-arbitration-artificial-intelligence-and-vanishing-human> accessed 25 August 2023

[24] Cindy Shearrer, 'Library Guides: Online Dispute Resolution: Companies Implementing ODR' (2020) <*https://libraryguides.missouri.edu/c.php?g=557240&p=3832247*> accessed 25 August 2023

[25] Habib, Sadaff, 'The Use of Artificial Intelligence in Arbitration in Africa – Inevitable or Unachievable?' (Beale & Company Middle East, Dubai) <https://www.ibanet.org/article/E62B06F6-7772-458A-A6E7-1474DB7136B5> accessed 23 October 2023

For international arbitration enforcement, the pervasive issue of public policy emerges.[26] African nations' adherence to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") reinforces the attractiveness of foreign investments.[27] However, discrepancies in interpreting the Convention's public policy clause warrant attention, potentially extending to AI's utilization. Notably, arbitration laws like the Uniform Arbitration Act could constrain AI arbitrators' role, while fragmented adoption of the Convention among African nations could influence enforcement mechanisms.

***Virtual hearings via videoconferencing platforms***

Renowned arbitral institutions around the world have recognized the potential of virtual hearings and have introduced comprehensive services to support their conduct. Institutions such as the American Arbitration Association/International Centre for Dispute Resolution, Dubai International Arbitration Center, and London Court of International Arbitration offer tailored solutions for virtual arbitrations, further solidifying the legitimacy of this approach.[28]

Virtual hearings are made possible through an array of videoconferencing platforms, each designed to provide an immersive and efficient arbitration experience.[29] Platforms such as Zoom, BlueJeans, Microsoft Teams and

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[26] Adamuz, Maria and Ponsati, Clara, 'Arbitration Systems and Negotiations' (2009) 13 Review of Economic Design 279, <https://doi:10.1007/S10058-008-0057-4> accessed 23 August 2023

[27] Tannock, Quentin, 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards' (2005) 21 Arbitration International 71, <https://doi:10.1093/ARBITRATION/21.1.71> accessed 23 August 2023

[28] Emad Hussein, 'The COVID-19 Pandemic and Arbitration in the UAE: A Tale of Challenges and Opportunities' (2020) 7 SOAS LJ 102.

[29] Arbitration Hub, 'Virtual Arbitration Hearings: Top 10 Tips' (Arbitration Hub, 30 October 2020) <*https://www.arbitrationhub.com/insight/virtual-arbitration-hearings-top-10-tips*> accessed 23 October 2023

Immediation have risen to prominence due to their user-friendly interfaces and robust features tailored to the specific needs of arbitration proceedings.[30]

These platforms facilitate not only audio-visual access but also offer features that optimize hearing management.[31] Key features include digitalized hearing bundles, live transcripts and a collaborative 'hearing room.' This 'hearing room' serves as a shared workspace for all stakeholders, ensuring seamless document sharing and real-time interaction. Additionally, the provision of private break-out rooms empowers the tribunal and parties to engage in confidential discussions, replicating the private conferencing rooms commonly utilized in physical arbitration venues.[32]

A cornerstone of cross-border arbitrations, interpretation and translation services have seamlessly integrated into the virtual arbitration landscape.[33] Companies like Interprefy, Kudo, Morningside and TransPerfect provide real-time interpretation services, breaking language barriers and ensuring that all parties can effectively participate in virtual proceedings.

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[30] Stephenson Harwood LLP, 'Virtual Arbitration Hearings: Top 10 Tips' (Stephenson Harwood LLP, 30 October 2020) <*https://www.shlegal.com/news/virtual-arbitration-hearings-top-10-tips*> accessed 23 October 2023

[31] International Bar Association, 'Technology Resources for Arbitration Virtual Hearings' (IBANet) <*https://www.ibanet.org/technology-resources-for-arbitration-va*> accessed 23 October 2023

[32] Resolve onCord, 'Break Out Rooms to Enhance Team Dynamics in Virtual Hearings' (Resolve onCord, 2021) <https://resolveoncord.com/break-out-rooms-to-enhance-team-dynamics-in-virtual-hearings/> accessed 23 October 2023

[33] Troutman Pepper, 'Virtual International Arbitration and the COVID-19 Pandemic: One Institution's Approach' (Troutman Pepper, 15 April 2020) <*https://www.troutman.com/insights/virtual-internationalarbitration-and-the-covid-19-pandemic-one-institutions-approach.html*> accessed 23 October 2023

### *Online dispute resolution (ODR) platforms*

ODR platforms have been an emerging technology in arbitration procedures.[34] This development marks a significant development in the field of arbitration, promising to reshape the landscape of both domestic and international dispute resolution.[35] Among these platforms, the MODRON Spaces Dispute Resolution Platform stands as a prominent example of how technology is leveraged to provide efficient and accessible arbitration and mediation solutions.[36] The platform can be used for both online mediation and arbitration, and it can be deployed to resolve domestic and international disputes. MODRON Spaces is currently being used by ODRAFRICA to make available an online dispute resolution platform for both arbitration and mediation in Nigeria.[37] The platform is also used by other practitioners to prepare, conduct, facilitate, hear, manage and resolve disputes through online mediation and arbitration.

The MODRON Spaces platform offers a paradigm shift in dispute resolution, transcending geographical barriers and streamlining the process through its online interface.[38] This development is particularly relevant in a globalized world where parties involved in disputes may be situated across different jurisdictions, making traditional in-person hearings cumbersome and costly.[39]

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[34] Hibah Alessa, 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) 25(3) International Journal of Law and Information Technology 319

[35] O.M. Atoyebi, 'Online Dispute Resolution in Nigeria: Trends and Legal Prospects' (Omaplex, 2021) <https://omaplex.com.ng/online-dispute-resolution-in-nigeria-trends-and-legal-prospects/#:~:text=ONLINE%20DISPUTE%20RESOLUTION,in%20the%20Stanford%20Law> accessed 23 October 2023

[36] The Blended Audio and Video ODR Platform Showcasing MODRON' (ODR Africa, 3 November 2020) <*https://odrafrica.com/events/*> accessed 23 October 2023

[37] Morenike Obi-Farinde, 'ODR in Africa: The Emergent Face of Dispute Resolution Post COVID 19' (*Mediate.com*, 17 April 2020) <*https://mediate.com/odr-in-africa-the-emergent-face-of-dispute-resolution-post-covid-19/*> accessed 25 August 2023.

[38] Ayantayo Faith E, 'Online Dispute Resolution (ODR) in Africa: The Future of Justice or an Immaginative Castle in the Air' (2023) Obafemi Awolowo University.

[39] Ibid

By facilitating virtual proceedings, MODRON Spaces allows parties to engage in arbitration and mediation with ease, reducing the logistical challenges that often accompany cross-border disputes.

One of the platform's notable strengths is its ability to combine arbitration and mediation, providing parties with a multifaceted approach to resolving their conflicts.[40] Mediation, with its focus on collaborative problem-solving, can promote amicable settlements that may be more conducive to preserving long-term relationships between disputing parties. On the other hand, arbitration offers a structured adjudicative process, lending itself well to cases where a binding decision is essential.

Yet, the use of ODR platforms, including MODRON Spaces, raises complex considerations that warrant careful examination. While technology-driven solutions bring efficiency and accessibility, concerns about due process, confidentiality and the quality of decision-making must not be overlooked.[41] The implementation of such platforms should ensure that fundamental principles of fairness and procedural integrity are upheld and that parties have the opportunity to present their cases comprehensively.

***AI-driven tools for tasks like evidence review***

AI-driven tools can also be used to automate case management tasks, analyze legal documents using natural language processing, and improve legal bill review in corporate legal departments.[42] While AI can make the arbitration

[40] Obi-Farinde (n 6).

[41] Africa Research Institute, 'How alternative dispute resolution made a comeback in Nigeria's courts' (Africa Research Institute, 23 June 2017) <*https://www.africaresearchinstitute.org/newsite/publications/counterpoints/alternative-dispute-resolution-made-comeback-nigerias-courts/*> accessed 23 October 2023

[42] World Litigation Forum, 'Emerging Trends: AI in Arbitration, Redefining Fair and Fast Dispute Resolution' (World Litigation Forum, 29 September 2023) <*https://worldlitigationforum.org/news/emerging-trends-ai-arbitration-redefining-fair-and-fast-dispute-resolution/#:~:text=AI%20also%20plays%20a%20crucial,ultimately%20expediting%20the%20resolution%20process*> accessed 23 October 2023

process more efficient, there are concerns about using AI as a standalone decision-maker.[43] The resolution of complex arbitration disputes is far from straightforward and AI may not be able to take into account all the nuances of a dispute.

**Examples of these AI-driven tools include:**

***Arbitrator Intelligence:*** This AI-powered tool collects and analyzes data on arbitrators to help parties make informed decisions about who to appoint as an arbitrator. It can also help parties prepare for arbitration by providing information on arbitrators' decision-making tendencies.[44]

***Billy Bot:*** This AI tool can translate, transcribe, and summarize evidence, making the evidence review process more efficient.[45]

***AI contract tools:*** These tools can be trained to locate specialized contract terms by reviewing and learning from legal documents.[46]

***Rocketeer:*** This AI tool can predict the outcome of a conflict between trademarks, making it useful for resolving disputes over intellectual property.[47]

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[43] Layan Al Fatayri, 'The Impact of AI Tools on The Arbitration Process' (JOLT, 6 October 2023) <*https://jolt.law.harvard.edu/digest/the-impact-of-ai-tools-on-the-arbitration-process*> accessed 23 October 2023

[44] Hergüner Bilgen Üçer Attorney Partnership-S Aslı Budak, Seher Elif Köse Özgüç and Ada Atasoy, 'Artificial Intelligence in Arbitration- Current Uses and the Turkish Law Approach' (*Lexology*, 6 April 2021) <*https://www.lexology.com/library/detail.aspx?g=a38af5ee-2713-43b1-abb3-367955126604*> accessed 25 August 2023.

[45] <*https://www.billybot.co.uk/*> accessed 23 October 2023

[46] Thomson Reuters Legal Executive Institute, 'BUYER'S GUIDE: Artificial intelligence in contract review software' (Thomson Reuters Legal Executive Institute, 2022) <*https://legal.thomsonreuters.com/blog/buyers-guide-artificial-intelligence-in-contract-review-software/#:~:text=BUYER%E2%80%99S%20GUIDE%3A%20Artificial%20intelligence%20in,ubiquitous%20than%20it%20is%20today*> accessed 23 October 2023

[47] Trevor Little, 'Rocketeer prepares for take-off: exclusive first look at Simmons & Simmons' AI-driven conflict prediction tool' (World Trademark Review, 20 January 2020) <*https://www.worldtrademarkreview.com/index.php/article/rocketeer-prepares-take-*

Many companies expect a rise in legal disputes over the use and implementation of AI and other technologies.[48] Dispute resolution should change to meet the risks of new technologies, and arbitration is the most favored process, followed by litigation. However, negotiation without a mediator is the least favored process as noted by Neil Hodge in a 2022 study for the International Bar Association (IBA).[49]

**The Evolving Concept of the Arbitral Seat**

Virtual hearings complicate the physical relevance of the seat, as the parties can participate in the hearing from anywhere in the world.[50] ODR platforms transcend geographic constraints, allowing parties to resolve disputes online without the need for a physical location. There are also relevant cases where technology has disrupted seat considerations, such as the use of block chain protocols for dispute resolution.[51]

Virtual hearings and ODR platforms are transforming the traditional concept of the arbitral seat in Kenya and globally.[52] Virtual hearings complicate the physical relevance of the seat, as parties can participate in the hearing from

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*exclusive-first-look-simmons-simmons-ai-driven-conflict-prediction-tool#:~:text=WTR%20sat%20down%20with%20its,AI%20could%20change%20trademark%20practice*> accessed 23 October 2023

[48] Neil Hodge, 'Companies Prepare for Disputes as AI Use Increases' (2022) <*https://www.ibanet.org/disputes-AI-use-increases*> accessed 24 August 2023

[49] Hodge (n 9)

[50] Amina Afifi, Conducting Remote Hearings Against A Party's Wishes: Overview of Arbitration Laws of Main Arbitral Seats, in International Arbitration and the COVID-19 Revolution 331

[51] Concord Law School, 'A Look at the Use of Blockchain Technology in the Arbitration Process' (Concord Law School, 19 May 2023) <*https://www.concordlawschool.edu/blog/news/blockchain-arbitration/#:~:text=News%20and%20Commentary%20A%20Look,the%20growing%20use%20of%20technology*> accessed 23 October 2023

[52] Sang Jin Lee and Michael van Muelken, 'Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future' (Kluwer Arbitration Blog, 23 June 2021) <*https://arbitrationblog.kluwerarbitration.com/2021/06/23/virtual-hearing-guidelines-a-comparative-analysis-and-direction-for-the-future/*> accessed 23 October 2023

anywhere in the world. This raises questions about the jurisdiction of the arbitral tribunal and the applicable law.[53]

ODR platforms transcend geographic constraints, allowing parties to resolve disputes online without the need for a physical location. This makes it easier for parties to participate in the arbitration process.

Relevant cases where technology disrupted seat considerations include the use of AI in dispute resolution, the emergence of virtual dispute resolution and the adoption of technical notes and protocols for remote hearings.[54] These cases highlight the need for ongoing review and adaptation of procedural law in response to technological advancements.

**Re-Examining Procedural Law**

Technological advancements pose several challenges to procedural law, such as data privacy versus block chain evidence storage and ensuring procedural fairness with AI assistants. There are examples of relevant conflicts it poses to procedural fairness.[55]

*Challenges Posed by Technology:* Integrating technology challenges procedural law in Kenya. Balancing data privacy concerns with block chain evidence storage and ensuring fairness with AI assistants require careful consideration.[56]

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[53] Alex Lo, 'Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations' (2020) 13(1) Contemporary Asia Arbitration Journal 85

[54] Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' (2021) 12(4) Journal of International Dispute Settlement 558

[55] Glenn Gordon, 'The Use of Artificial Intelligence in the Legal Profession' (LexisNexis Practical Guidance Journal, 27 April 2023) <*https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-use-of-artificial-intelligence-in-the-legal-profession*> accessed 23 October 2023

[56] Matthew J Bacal, Pritesh P Shah, Matthias Berberich and Carolin Raspé, 'Blockchain: Data Privacy Issues and Mitigation Strategies' (Practical Law Journal 2021)

Guidelines that promote transparency and accountability should be established to ensure the fair and impartial use of technology in arbitration.[57] It is crucial for institutions like the Law Society of Kenya to enhance their capacity and that of lawyers in legal technology to navigate these challenges effectively. By embracing technological and procedural innovations, arbitration can adapt to the changing landscape and enhance efficiency while upholding procedural fairness.

*Data Privacy vs. Blockchain:* The use of blockchain for evidence storage necessitates a nuanced approach to data privacy regulations and authentication. [58] While blockchain is among most secure methods of storing information, data privacy is a major issue.[59] Furthermore, the General Data Protection Regulation (GDPR) does not fully cover the features of the decentralized functioning of blockchain. This makes it difficult to impose liability on the data handlers. It is important to consider the intricacies of data privacy regulations and authentication to ensure that the technology is used in a way that is compliant with regulatory requirements.[60]

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<*https://www.reuters.com/practical-law-the-journal/transactional/blockchain-data-privacy-issues-mitigation-strategies-2023-01-04/*> accessed 23 October 2023

[57] SMU City Perspectives team, 'How Technology Development Poses New Challenges to Commercial Law' (SMU City Perspectives, 23 December 2021) <*https://cityperspectives.smu.edu.sg/article/how-technology-development-poses-new-challenges-commercial-law#:~:text=In%20addressing%20these%20challenges%2C%20one,laws%20of%20cyberspace%20and%20technology*> accessed 23 October 2023

[58] Darshan Bhora and Aisiri Raj, 'Blockchain Arbitration – The Future of Dispute Resolution Mechanisms? – Cambridge International Law Journal' (2020) <*https://cilj.co.uk/2020/12/16/blockchain-arbitration-the-future-of-dispute-resolution-mechanisms/*> accessed 25 August 2023

[59] Fox Mandal-Sharath Mulia, 'Blockchain Arbitration: The Future of Dispute Resolution' (*Lexology*, 22 November 2021) <*https://www.lexology.com/library/detail.aspx?g=2a2f2cef-39a5-4551-a7df-4c9e408a5ccc*> accessed 25 August 2023

[60] Noah Walters, 'Privacy Law Issues in Blockchains: An Analysis of PIPEDA, the GDPR, and Proposals for Compliance' (2019) 17 Canadian Journal of Law and Technology 276

Kenya enacted the Data Protection Act No. 24 of 2019 (DPA) on November 25, 2019, which is considered among the most advanced data privacy laws in Africa.[61] The DPA of Kenya (2019) is closely modelled after the GDPR in provisions and requirements.[62] The DPA addresses processing of personal data by data controllers and processors within Kenya. The Office of the Data Commissioner is the data protection authority in Kenya.[63] The Data Protection (General) Regulations, 2021, provide for the general rules on data protection in Kenya, including the procedure for registration of data controllers and data processors. The regulations also provide for the procedure for handling and enforcement of complaints related to data protection. The DPA imposes various obligations including consent before processing of personal data, the obligation to ensure the accuracy of personal data, and the guidelines for appropriate measures for protection of personal data. The DPA applies to the processing of personal data in the course of arbitration proceedings in Kenya.[64] Therefore, it is important to consider the requirements of the DPA when using technology in arbitration in Kenya for data regulations compliance.

The NCIA has had consultation with the Office of the Data Protection Commissioner (ODPC) in the past. This collaboration gives hope to the clear application of technology in arbitration in the Kenyan context. The NCIA and the ODPC can collaborate to use technology to resolve data protection disputes in Kenya. DPA mandates the ODPC to grant powers to the data commissioner in facilitating dispute resolution including arbitration of disputes arising from the Act. The NCIA can train ADR facilitators in data protection law, while the ODPC can provide them with access to the ODPC's database of complaints. This

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[61] Data Protection Act, No. 24 of 2019

[62] Eliud Nduati, 'Comparing the Kenya Data Protection Act of 2019 to the GDPR' (Medium, 13 January 2021) https://3liud.medium.com/comparing-the-kenya-data-protection-act-of-2019-to-the-gdpr-7890b12d2988 accessed 23 October 2023

[63] Data Protection Act 2019 (Kenya) s 5

[64] AB Patel Advocates, 'Data Protection Act 2019 - Kenya' (AB Patel Advocates) <*https://abpateladvocates.com/data_protection_act_2019_kenya.php*> accessed 23 October 2023

will ensure that facilitators are equipped to handle data protection disputes in a fair and impartial manner.

*AI and Procedural Fairness:* Ensuring procedural fairness while utilizing AI-driven tools calls for guidelines that promote transparency and accountability.[65] The use of AI in arbitration also raises issues on bias and the potential for "outsourcing" the decision-making function to predictive algorithms.[66] Therefore, guidelines that promote transparency and accountability are necessary to ensure that AI is used in a way that is fair and impartial.[67] For example, AI arbitrator selection from a database of arbitrators may help to eliminate bias in selecting neutral parties.

There have been various cases, in Estonia, where an AI "judge" has been developed to adjudicate small claims disputes of less than €7,000.[68] However, concerns have been raised about the impartiality of AI as a decision-maker.[69] The AI is only as impartial as the training data that is fed into it. Estonia's

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[65] Martin Magal, Katrina Limond and Alexander Calthrop, 'Artificial Intelligence in Arbitration: Evidentiary Issues and Prospects' (Global Arbitration Review, 12 October 2023) <*https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/artificial-intelligence-in-arbitration-evidentiary-issues-and-prospects#:~:text=Apart%20from%20the%20few%20AI,arise%20for%20agreement%20between*> accessed 23 October 2023

[66] Andrea Seet, Benson Lim and Ignacio Tasende, 'Arbitration Tech Toolbox: Looking Beyond the Black Box of AI in Disputes over AI's Use' (*Kluwer Arbitration Blog*, 25 May 2023) <*https://arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/*> accessed 25 August 2023

[67] World Litigation Forum, 'Emerging Trends: AI in Arbitration, Redefining Fair and Fast Dispute Resolution' (World Litigation Forum, 29 September 2023) <*https://worldlitigationforum.org/news/emerging-trends-ai-arbitration-redefining-fair-and-fast-dispute-resolution/#:~:text=Transparency%20and%20predictability%20are%20essential,use%20of%20AI%20in*> accessed 23 October 2023

[68] Nick Robinson, Alex Hardy and Amy Ertan, 'Estonia: A Curious and Cautious Approach to Artificial Intelligence and National Security'.

[69] Graham Ross, 'What's Good for ODR?: AI or AI.' (2021) 8 International Journal of Online Dispute Resolution.

pioneering AI-driven system, tailored for cases involving disputes under €7,000, represents a paradigm shift in how lower-value disputes can be resolved more swiftly and efficiently. China's Hangzhou Internet Court, utilizing virtual judges in digital disputes, has showcased AI's capabilities in reaching rapid decisions, significantly shortening case durations.[70]

Furthermore, AI's potential extends beyond issuing decisions; it also aids judges in rendering verdicts. However, this path has not been devoid of controversies, exemplified by instances where AI tools like COMPAS in the US perpetuated biases embedded in historical data.[71]

**CIArb Practice Guideline on the Use of Technology**

The CIArb Framework Guideline on the use of technology in international arbitration is a comprehensive document that provides guidance on the use of technology in international arbitration.[72] They address emerging technologies and their use in international arbitration. The guideline is divided into two parts: Part I contains the general principles, arbitrators' powers and duties, fairness and the standard use of technology.[73] Part II provides practical guidance on the use of specific technologies, such as videoconferencing, e-bundles, and electronic voting.

The general principles set out in Part I of the guideline include the following:

- Arbitrators must be aware of their powers in relation to technology.

[70] Meirong Guo, 'Internet Court's Challenges and Future in China' (2021) 40 Computer Law & Security Review 105522; Ekaterina P Rusakova and Evgenia E Frolova, 'Procedural Aspects of Proof in China's Internet Courts: Opportunities for Receiving BRICS Jurisdiction', *Modern Global Economic System: Evolutional Development vs. Revolutionary Leap 11* (Springer 2021).

[71] Md Abdul Malek, 'Criminal Courts' Artificial Intelligence: The Way It Reinforces Bias and Discrimination' (2022) 2 AI and Ethics 233.

[72] Chartered Institute of Arbitrators, 'Framework Guideline on the Use of Technology in International Arbitration' (CIArb, 2021) <*https://www.ciarb.org/media/17507/ciarb-framework-guideline-on-the-use-of-technology-in-international-arbitration.pdf*> accessed 23 October 2023

[73] Ibid

- Arbitrators' use of technology must be proportionate under all circumstances.
- Technology must be fair and transparent.
- The technology must be stable and secure.

The guideline emphasizes that technology can improve our ways of working in dispute resolution, provided we use it in a way that is proportionate, transparent and fair. The guideline is intended to assist all stakeholders in international arbitration to achieve a more efficient, cost-effective and environmentally friendly process.

**Proposed Solutions and Recommendations**

To address the challenges posed by technology, proposed solutions and recommendations include:

*Data Localization Compromises:* Developing frameworks that balance data privacy concerns with blockchain's potential, promoting secure and compliant evidence storage. Blockchain technology has the potential to revolutionize evidence storage by enabling secure, decentralized and transparent transactions.[74] It can encode and store timestamps, locations and other metadata, making it a useful tool for evidence storage.[75] It is important to recognize the potential benefits of blockchain technology while also addressing data privacy concerns and regulatory compliance.[76] Additionally, using private,

[74] Zhikun Miao, Chengxu Ye, Ping Yang, Ying Chen and Yutao Chen, 'Blockchain-based Electronic Evidence Storage and Efficiency Optimization' (2021) 9 IEEE Access 24487. Accessed 23 October 2023

[75] Tahj Johnson, 'Blockchain and Law Enforcement: A Solution for Evidence Mismanagement' (Harvard Technology Review, 22 August 2021) <*https://harvardtechnologyreview.com/2021/08/22/blockchain-and-law-enforcement-a-solution-for-evidence-mismanagement/#:~:text=The%20potential%20for%20blockchain%20in,Let%E2%80%99s*> accessed 23 October 2023

[76] Ragu G and Ramamoorthy S, 'A blockchain-based cloud forensics architecture for privacy leakage prediction with cloud' (2023) 13(2) Journal of Information Security and Applications 102789. Accessed 23 October 2023

permissioned blockchain servers can help address data privacy concerns. It is crucial for arbitral institutions in Kenya to enhance their capacity and that of lawyers in legal technology to navigate these challenges effectively.

*Standards for Transparency in AI Use:* Implementing guidelines that ensure AI-driven processes are transparent, understandable and ethically sound. Implementing guidelines for transparency in AI use involves focusing on high-risk uses, emphasizing transparency and explainability, enabling interpretation of AI system output, promoting responsible AI and values transparency, considering various facets of AI transparency and addressing challenges through appropriate solutions.[77]

*Guidance for Practitioners:* Providing practitioners with insights on integrating technology into arbitration proceedings and adapting to changing norms. E-arbitration and the use of technology in arbitration can be particularly attractive to technology parties, who may be able to exercise even greater control over proceedings and the confidentiality exercised over evidence and pleadings.[78] The CIArb has a Practice Guideline on the Use of Technology in International Arbitration, which sets out general principles about using technology.[79] This includes the need for arbitrators to be aware of their powers in relation to

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[77] World Litigation Forum, 'Emerging Trends: AI in Arbitration, Redefining Fair and Fast Dispute Resolution' (World Litigation Forum, 2022) <*https://worldlitigationforum.org/news/emerging-trends-ai-arbitration-redefining-fair-and-fast-dispute-resolution/#:~:text=Transparency%20and%20predictability%20are%20essential,use%20of%20AI%20in*> accessed 23 October 2023

[78] Indian Arbitration Forum, 'IAF Protocol on Virtual Hearings for Arbitrations' (Indian Arbitration Forum, October 2020) <*https://indianarbitrationforum.com/wp-content/themes/iaf/assets/IAF-Protocol-on-Virtual-Hearings-for-Arbitrations-Oct-2020.pdf*> accessed 23 October 2023

[79] 'The Future Is Now: The New CIArb Guideline on Technology in Arbitration' <*https://www.ciarb.org/news/the-future-is-now-the-new-ciarb-guideline-on-technology-in-arbitration/*> accessed 25 August 2023.

technology, the importance of proportionality and the need for technology to be stable and secure.[80]

**Conclusion**

The traditional link between the arbitral seat and procedural law has been an essential cornerstone of the arbitration landscape.[81] However, the emergence of transformative technological advancements, such as virtual hearings, online dispute resolution platforms and AI-driven tools, challenges this established connection. As we traverse the evolving terrain of technology's impact on arbitration, it is evident that a nuanced re-examination of seat-related considerations is imperative.

Virtual hearings and online dispute resolution platforms transcend geographical boundaries, rendering the physical location of the seat less pivotal.[82] This shift prompts us to rethink jurisdictional implications and the applicable law. Similarly, the integration of AI-driven tools, though heralding procedural efficiency, necessitates grappling with procedural fairness concerns and data privacy issues.[83] The harmonization of these technological disruptions with established arbitral norms requires a delicate balancing act.

The need for ongoing review and adaptation of procedural law is apparent. Clarity in integrating block chain for evidence storage, standards for AI's

[80] Chartered Institute of Arbitrators, 'The Future is Now: The New CIArb Guideline on Technology in Arbitration' (CIArb, 2021) <https://ciarb.org/news/the-future-is-now-the-new-ciarb-guideline-on-technology-in-arbitration/#:~:text=The%20first%20half%20of%20the,arbitration%20must%20not%20undermine> accessed 23 October 2023

[81] Gary B. Born, 'International Commercial Arbitration' (2nd edn, Kluwer Law International 2014) 1573

[82] Mohamed S Abdel Wahab, 'Online Dispute Resolution: The Rise of the Fourth Party' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), Online Dispute Resolution: Theory and Practice (Eleven International Publishing 2012) 27

[83] Maxi Scherer, 'Artificial Intelligence and Legal Decision-Making: The Wide Open?' (2019) 36(3) Journal of International Arbitration 337, 341-343

transparent utilization and guidance for practitioners navigating the technology-driven terrain are some of the solutions worth pursuing. Additionally, a reflective assessment of the emerging challenges posed by technology will be crucial in guiding the trajectory of arbitration's future.

In this landscape, legal scholars, practitioners and institutions must collaborate to create a harmonious symbiosis between technology and procedural law. As technology evolves, the arbitral seat's role will continue to evolve and its nexus with procedural law will be reshaped by the dynamic interplay of innovation and tradition. The future should focus on the delicate calibration of principles, embracing technology's promise while preserving the core tenets of arbitration - impartiality, fairness and access to justice.

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# Integrating Alternative Dispute Resolution Mechanisms into Kenya's Criminal Justice System: Some Reform Proposals

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***Abstract***

*This discussion explores the integration of Alternative Dispute Resolution (ADR) mechanisms and restorative justice practices into Kenya's criminal justice system. Drawing insights from international experiences, including South Africa, India, and Canada, the paper examines the constitutional basis for ADR in Kenya and highlights the potential benefits and challenges of reform proposals. Lessons from these jurisdictions emphasize victim empowerment, offender accountability, community involvement, and efficient case resolution. The discussion concludes with reform proposals that prioritize legislative support, cultural sensitivity, victim-centered approaches, and public awareness, offering a path toward a more equitable, efficient, and compassionate criminal justice system in Kenya.*

***Key Words***: *Alternative-Dispute-Resolution, Kenya, Criminal-Justice-System, Reform, Restorative-Justice.*

## 1. Introduction

Alternative Dispute Resolution (ADR) mechanisms, restorative justice practices, and innovative sentencing approaches have been transforming criminal justice systems worldwide, offering alternatives to traditional punitive measures.[1] In examining the applicability and efficacy of these methods, Kenya stands at a pivotal juncture, considering reforms to its criminal justice system. Drawing insights from diverse jurisdictions, including South Africa, India, and Canada, this discussion explores the potential benefits and challenges of integrating

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[1] Mika and Zehr "A Restorative Justice Framework for Community Justice Practice" in McEvoy and Newburn (eds) *Criminology, Conflict Resolution and Restorative Justice* (2003) 138.

ADR mechanisms and restorative justice practices into Kenya's legal framework.

The constitutional basis of ADR in Kenya, as stipulated in Article 159(2) of the 2010 Constitution, underscores the importance of alternative forms of dispute resolution, including mediation, reconciliation, arbitration, and traditional mechanisms, while preserving the rights enshrined in the Bill of Rights.[2] As Kenya contemplates reform proposals to enhance its criminal justice system, this foundation offers a constitutional mandate to explore innovative approaches.

Examining South Africa's experience with victim-offender mediation, family group conferences, and community conferences reveals valuable insights into restorative justice practices. These mechanisms prioritize victim empowerment, offender accountability, and community involvement, offering a model that Kenya can adapt to its unique cultural and legal context.

India's approach to plea bargaining and the compounding of certain offenses, as well as Canada's utilization of Alternative Measures, Family Group Conferences, and Sentencing Circles, further enrich the discourse on alternative justice methods. Lessons from these countries highlight the potential for reduced case backlog, increased victim satisfaction, and a more rehabilitative approach to justice.

As Kenya assesses the lessons learned from these jurisdictions, it can craft a comprehensive framework for integrating ADR mechanisms and restorative justice practices into its criminal justice system. This endeavour holds the promise of enhanced access to justice, greater victim participation, and a more balanced, community-centered approach to addressing criminal offenses. However, it also requires careful consideration of cultural sensitivities, legislative support, and the protection of the rights of all stakeholders involved.

[2] Constitution of Kenya, 2010, art 159

In this comprehensive exploration, I delve into the applicability of ADR mechanisms in Kenya's criminal justice system, the case for integrating these practices, lessons from international jurisdictions, and the potential for transformative reforms. Kenya's journey toward a more restorative and community-driven criminal justice system is a testament to its commitment to justice, reconciliation, and the well-being of its citizens.[3]

## 2. The Applicability of ADR Mechanisms in Kenya's Criminal Justice System

### 2.1 Constitutional Basis of ADR in Kenya

Article 159 (2) of the Constitution of Kenya 2010 provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).[4] Clause 3 provides that Traditional dispute resolution mechanisms shall not be used in a way that— (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.[5]

### 2.2 Appropriateness and Applicability of ADR in Kenya's Criminal Justice System

One of the significant advantages of ADR in the criminal justice context is its potential to alleviate the backlog of cases in formal courts.[6] Kenya, like many

[3] Paul M. Gachoka, S. Memba, 'An appraisal on the jurisprudential and precedential leaps institutionalizing the ideals of ADR in the Kenyan Criminal Justice System' (2019) 7 (1) *Alternative Dispute Resolution Journal*.
[4] Constitution of Kenya, 2010 art 159
[5] Ibid
[6] Paul M. Gachoka, S. Memba, 'An appraisal on the jurisprudential and precedential leaps institutionalizing the ideals of ADR in the Kenyan Criminal Justice System' (2019) 7 (1) *Alternative Dispute Resolution Journal*.

countries, faces challenges with court congestion and delays in the criminal justice system. ADR mechanisms, such as plea bargaining and mediation, can expedite the resolution of certain criminal cases, allowing the formal courts to focus on more complex matters.[7]

ADR aligns with the principles of restorative justice. In cases involving non-violent or property crimes, ADR mechanisms can facilitate dialogue and reconciliation between offenders and victims. This approach can help victims find closure and satisfaction while offering offenders an opportunity for rehabilitation and reintegration into society.[8]

In addition, Kenya is a diverse country with various cultures and traditions. ADR mechanisms, including traditional dispute resolution methods, can be more culturally sensitive and acceptable to certain communities. This can improve access to justice and enhance community trust in the criminal justice system.[9]

ADR can be more cost-effective than traditional court proceedings. It reduces the financial burden on both the state and the parties involved, as it typically involves fewer legal fees and shorter proceedings. This is particularly important for individuals who cannot afford protracted legal battles.[10]

Furthermore, ADR can help preserve relationships between parties in criminal cases. This is especially relevant in cases involving family disputes, juvenile offenders, or disputes within close-knit communities. The adversarial nature of the formal court system can often strain these relationships further.[11]

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[7] Ibid
[8] Ibid
[9] Ibid
[10] Ibid
[11] Ibid

However, it's essential to acknowledge the challenges and limitations of applying ADR in Kenya's Criminal Justice System. ADR may not be appropriate for cases involving serious crimes such as murder, sexual assault, or terrorism. These cases typically require a higher level of judicial scrutiny, and the interests of justice, victims, and society must be safeguarded.[12]

In some cases, there may be significant power imbalances between the parties, such as in domestic violence cases. In such situations, ensuring the safety and protection of vulnerable parties can be challenging in an ADR context.[13]Moreover, there must be robust legal safeguards in place to ensure that ADR processes are fair, voluntary, and compliant with constitutional and legal standards. This includes the right to legal representation, informed consent, and protection against coercion or undue influence.[14]

## 3. The Case for Integrating ADR Mechanisms in Kenya's Criminal Justice System

### 3.1 Greater Access to Justice

Greater access to justice is a compelling argument in favour of integrating ADR mechanisms into Kenya's Criminal Justice System. A key advantage of incorporating ADR mechanisms is that it expands access to justice for a broader segment of the population. The formal court system can be intimidating, time-consuming, and costly, making it inaccessible for many Kenyan citizens, particularly those from marginalized communities and low-income backgrounds.[15]

ADR mechanisms, such as mediation and reconciliation, can reduce the barriers that often prevent individuals from seeking justice. These processes are

[12] Ibid
[13] Ibid
[14] Ibid
[15] Muigua, K., & Kariuki, F. (2014, July). ADR, Access to Justice and Development in Kenya. In *Strathmore Annual Law Conference* 2014 held on (Vol. 3).

generally less formal, less adversarial, and more user-friendly, making them more approachable for ordinary citizens.[16] ADR processes are often quicker and more efficient than traditional court proceedings. This means that individuals can resolve their disputes in a timelier manner, without enduring lengthy legal battles. This is especially significant in criminal cases, where justice delayed can lead to negative consequences for all parties involved.[17]

In addition, ADR is typically more cost-effective than going through the formal court system. This cost-effectiveness is critical for individuals who may not have the financial resources to hire legal representation or cover court-related expenses. ADR mechanisms can reduce the economic burden associated with seeking justice.[18]

ADR, including traditional dispute resolution mechanisms, can be rooted in local communities. This proximity to the community can encourage greater trust and participation in the justice process, especially in rural areas where formal courts may be distant and unfamiliar.[19]

Finally, ADR allows for greater customization and flexibility in resolving disputes. Parties can play a more active role in crafting solutions that meet their specific needs and concerns, which can lead to more satisfactory outcomes.[20]

**3.2 Expanded Scope for Victim Participation**

Expanding the scope for victim participation is another compelling argument in favour of integrating ADR mechanisms into Kenya's Criminal Justice System. ADR mechanisms, such as mediation and restorative justice processes, offer victims a more active role in the resolution of their cases. This empowerment

[16] Ibid
[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid

can help victims regain a sense of control and ownership over the justice process, which may be lacking in traditional court proceedings.[21]

ADR allows victims to express their concerns, feelings, and expectations directly to the offender or the responsible parties. This direct communication can facilitate emotional healing and reconciliation, provide an opportunity for restitution, and help victims find closure.[22]ADR processes can facilitate discussions about restitution and compensation for victims. Victims may have specific needs, such as medical expenses or property damage, which can be addressed through ADR mechanisms, leading to quicker and more personalized remedies.[23]

Further, traditional court proceedings can be emotionally taxing for victims, involving repeated testimonies and cross-examination. ADR processes can be less adversarial and emotionally distressing, reducing the risk of retraumatizing victims.[24]ADR mechanisms can involve the broader community in the resolution of criminal cases, particularly in restorative justice practices. Community members can provide support to victims and help ensure that the offender takes responsibility for their actions.[25]

I argue that incorporating ADR mechanisms into Kenya's Criminal Justice System can provide victims with a more active, personalized, and supportive role in the justice process. It can offer them opportunities for healing, restitution, and reconciliation, aligning with the principles of restorative justice and enhancing the overall effectiveness of the criminal justice system in addressing victims' needs and concerns. However, it's important to ensure that victim

[21] Muigua, K. (2015, July). Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms. In *CI4rb Africa Region Centenary Conference 2015*.
[22] Ibid
[23] Ibid
[24] Ibid
[25] Ibid

participation in ADR processes is voluntary and does not compromise their rights or safety.

### 3.3 Suitability for Child Offenders

The suitability of ADR mechanisms for child offenders is a critical aspect in favour of integrating ADR into Kenya's Criminal Justice System. ADR processes, particularly restorative justice practices, adopt a child-centered approach that takes into account the unique needs and circumstances of juvenile offenders. Recognizing that children may have different motivations and capacities for change, ADR offers a more rehabilitative and developmental approach.[26]

ADR mechanisms can help mitigate the stigmatization that child offenders may experience in the formal criminal justice system. Traditional court proceedings can label children as criminals, potentially leading to long-lasting negative consequences for their future prospects and well-being.[27]

ADR emphasizes the rehabilitation and reintegration of child offenders into society rather than punitive measures. It seeks to address the underlying causes of their actions, provide opportunities for education, counselling, and support, and promote positive behavioural change.[28]ADR also allows for direct communication between child offenders and their victims. This dialogue can foster empathy, remorse, and accountability in child offenders while also offering victims a platform to express their feelings and seek restitution.

ADR mechanisms have shown promise in reducing recidivism among juvenile offenders. By addressing the root causes of delinquent behaviour and involving the community and support networks, ADR can help break the cycle of reoffending.[29] Finally, ADR processes often prioritize the privacy and

[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid

confidentiality of child offenders, protecting them from unnecessary exposure to the public eye. This can be especially important in safeguarding their future prospects and preventing further harm.

### 3.4 Better Complementarity of State and Customary Justice Systems

The better complementarity of state and customary justice systems is an important argument in favour of integrating ADR mechanisms into Kenya's Criminal Justice System. Kenya is a diverse country with various ethnic communities, each with its own customary justice practices and traditions. Integrating ADR mechanisms allows the criminal justice system to respect and acknowledge this diversity, making justice more culturally sensitive and acceptable.[30]

Customary justice systems often involve the community in the resolution of disputes. ADR mechanisms, including traditional dispute resolution methods, can tap into this community involvement, leveraging local knowledge and support networks to address criminal cases effectively. Traditional leaders and elders often have expertise in conflict resolution and can play a valuable role in ADR processes. Their involvement can lead to more effective resolutions, particularly in cases where cultural nuances and norms are significant factors.[31] Customary justice mechanisms can help address less serious criminal cases, freeing up the formal courts to focus on more complex matters. This reduces the burden on the formal justice system, leading to a more efficient overall process.[32] Many Kenyan communities have a deep trust in their customary justice systems. Integrating ADR mechanisms bridges the gap between these local institutions and the state's formal justice system, promoting greater trust and confidence in the overall legal framework.[33]

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[30] Muigua, K. (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.
[31] Ibid
[32] Ibid
[33] Ibid

Recognizing both state and customary justice systems as complementary allows for legal pluralism. This approach acknowledges that multiple legal orders can coexist and be utilized to address different types of disputes, offering parties more options for seeking justice[34].

**3.5 Enhanced Procedural Fairness**

Enhanced procedural fairness is another compelling argument in favour of integrating ADR mechanisms into Kenya's Criminal Justice System. ADR processes often involve collaborative decision-making where all parties have an opportunity to participate actively. This inclusiveness enhances procedural fairness as it allows for a more equal footing between parties involved in a criminal dispute.[35]

ADR mechanisms tend to be less formal and intimidating compared to traditional court proceedings. This informality can create a more comfortable environment for parties, including victims, witnesses, and even accused individuals, reducing feelings of intimidation and ensuring that they can effectively express themselves.[36] ADR processes aim to balance power dynamics among parties involved. This is particularly relevant in cases where there might be significant power imbalances, such as in cases of domestic violence or disputes involving marginalized groups. ADR mechanisms prioritize fairness and equity in decision-making.[37]

ADR allows for flexible and tailored solutions that take into account the specific circumstances of each case. This individualized approach contributes to a perception of fairness as parties have more control over the resolution process and outcomes.[38]

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[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid
[38] Ibid

While ADR processes are less formal, they still prioritize transparency and accountability. Decisions are typically documented, and there is a focus on ensuring that the process remains fair, impartial, and in line with legal standards.[39]

### 3.6 Durable Outcomes

Durable outcomes are an important consideration when advocating for the integration of ADR mechanisms into Kenya's Criminal Justice System. ADR mechanisms, particularly those emphasizing mediation and reconciliation, aim to create sustainable and lasting solutions to criminal disputes. These outcomes are more likely to endure over time compared to punitive measures that may not address the underlying causes of criminal behaviour.[40]

ADR processes often focus on addressing the root causes of criminal behaviour and finding solutions that prevent future offenses. This can contribute to a reduction in recidivism rates, as individuals are provided with support and opportunities for rehabilitation.[41]ADR also promotes the reintegration of offenders into their communities in a more positive and constructive manner. By involving the community in the resolution process, ADR helps build a support network that can assist individuals in staying on the right path after completing their sentences or agreements.[42]

Durable outcomes can also include agreements for restitution and compensation to victims. These agreements ensure that victims receive compensation for their losses, providing a sense of justice and closure that can endure over time. ADR processes often equip parties with conflict resolution

[39] Ibid
[40] Muigua, K. (2014). ADR: The Road to Justice in Kenya. *Chartered Institute of Arbitrators (Kenya Branch), 2(2014).*
[41] Ibid
[42] Ibid

skills that they can apply to future disputes. This capacity-building aspect contributes to the long-term sustainability of peaceful and just outcomes.[43]
Finally, ADR mechanisms, particularly in community-based settings, can foster social cohesion and harmony within communities. This sense of unity and cooperation can contribute to reduced crime rates and more durable social stability.[44]

## 4. Lessons from Other Jurisdictions on Integrating ADR Mechanisms into Criminal Justice Systems

### 4.1 South Africa

#### 4.1.1 Victim-Offender Mediation

Victim-offender mediation (VOM) is an ADR mechanism that has been successfully integrated into South Africa's criminal justice system. South Africa's implementation of VOM aligns with restorative justice principles. VOM allows victims and offenders to come together in a facilitated dialogue, emphasizing accountability, restitution, and the opportunity for healing.[45]

VOM in South Africa empowers victims by giving them a voice in the justice process. It provides victims with an opportunity to express their feelings, describe the impact of the crime, and seek restitution directly from the offender. This can be emotionally satisfying and aid in the healing process.[46]

VOM holds offenders accountable for their actions. Offenders are encouraged to take responsibility for their behaviour, express remorse, and make amends to the victim. This process can contribute to rehabilitation and the prevention of

[43] Ibid
[44] Ibid
[45] Batley "Restorative Justice in the South African Context" in Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (2005) 31
[46] Ibid

future offenses.[47]South Africa has also observed positive outcomes in terms of reduced recidivism among participants in VOM programs. Offenders who go through VOM are less likely to reoffend, suggesting that the restorative aspect of the process has a meaningful impact on their behaviour.[48]

VOM in South Africa often involves the participation of trained community members as mediators. This community involvement fosters a sense of local ownership and support for the justice process. South Africa's VOM programs are sensitive to the country's diverse cultural and ethnic landscape. They respect the cultural norms and values of different communities, making the process more acceptable and relevant to participants.

In addition, VOM in South Africa is often used as a pretrial diversion option for certain cases. This reduces the burden on formal courts, speeds up the resolution of cases, and offers an opportunity for a more personalized, victim-centered approach.[49]

**4.1.2 Family Group Conference**

Family group conferences (FGCs) are another notable ADR mechanism integrated into South Africa's criminal justice system. FGCs are rooted in restorative justice principles, emphasizing healing, reconciliation, and repairing harm. In South Africa, these conferences provide a platform for victims, offenders, and their respective support networks to come together and address the consequences of a crime.[50]

FGCs encourage community involvement and support in the resolution process. This communal approach helps create a sense of collective responsibility for addressing crime and its impact on society. FGCs empower victims by allowing them to have a direct say in the outcome of the case. They can express their

[47] Ibid
[48] Ibid
[49] Ibid
[50] Ibid

needs, concerns, and expectations, leading to more victim-centered resolutions.[51]

In addition, offenders are held accountable for their actions in FGCs. They are encouraged to take responsibility, express remorse, and make amends. This accountability aspect is crucial for rehabilitation and preventing future offenses. FGCs enable the customization of solutions based on the specific circumstances of each case. This flexibility allows for more tailored and meaningful outcomes.[52]

South Africa has also observed positive results in terms of reduced recidivism among participants in FGCs. Offenders who engage in these conferences are less likely to reoffend, indicating the effectiveness of restorative processes. FGCs are often used as a pretrial diversion option, particularly for juvenile offenders. This approach can help reduce the burden on formal courts and expedite the resolution of cases.[53]

**4.1.3 Community (Group) Conference**

Community or group conferences, which are also part of South Africa's restorative justice practices, offer valuable lessons for integrating ADR mechanisms into criminal justice systems. These conferences actively involve community members in the resolution process. This fosters a sense of collective responsibility and encourages community members to work together to address crime and its impact.[54]

Offenders are held accountable in the presence of their community. This accountability is not limited to the victim-offender dyad but extends to the

[51] Ibid
[52] Ibid
[53] Ibid
[54] Hargovan *Restorative Approaches to Criminal Justice: An Exploratory Study in KwaZuluNatal* (Unpublished doctoral thesis, University of KwaZulu-Natal South Africa 2008) 27.

broader community, which can play a role in ensuring the offender adheres to the agreed-upon outcomes. Community conferences also often focus on restitution and repairing the harm caused by the offense. This can include making amends to victims, offering community service, or participating in programs aimed at addressing the root causes of criminal behaviour.[55]

By addressing the factors contributing to criminal behaviour, community conferences have the potential to prevent future offenses. This aligns with the goal of reducing recidivism and enhancing community safety. In addition, participants in community conferences can develop conflict resolution skills that can be applied to future disputes. This capacity-building aspect promotes a more peaceful and harmonious community.[56]

These conferences also contribute to the reintegration of offenders into their communities in a positive and rehabilitative manner. They also promote healing and reconciliation within the community.[57]

### 4.1.3 Judicial Interpretation

**(a) Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others[58]**

This is an important judicial interpretation that emphasized the principles of reconciliation and restorative justice in South Africa. The case was decided in the aftermath of apartheid in South Africa. It reflected the country's transition to a democratic and inclusive society, which required a rethinking of legal principles.

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[55] Ibid

[56] Ibid

[57] Ibid

[58] *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)

The court viewed as follows:

> It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.[59]

The court went on:

> The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new.[60]

The court further averred that

"... the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society".[61] The court opined that the 'state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction'.[62]The court held that the Promotion of National Unity and Reconciliation Act (34 of 1995) is not unconstitutional.[63] Consequently, the court held that the attack on the

[59] Ibid par2
[60] Ibid Par 21
[61] Ibid par 59
[62] Ibid, par 31
[63] Ibid, par 52

constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail.[64]

I argue that the judgment underscored the importance of restorative justice as opposed to retributive justice. It emphasized the need to heal and reconcile society rather than solely focusing on punitive measures. The case also emphasized that the new South African Constitution and its values, which include human dignity, equality, and reconciliation, should guide legal interpretations and the justice system. The judgment acknowledged the need to strike a balance between the interests of justice and reconciliation. It recognized that achieving both goals might require innovative approaches to the justice system.

**(b) S v Maluleke 2008 (1) SACR 49**

It is significant for its judicial interpretation regarding restorative justice and the role of ADR mechanisms within the criminal justice system. The accused was convicted by one of the High Courts of South Africa, of the crime of murder. Notably, the Court underscored that whereas the facts and circumstances of the case presented an opportunity for restorative justice to be invoked, the offence the accused was guilty of (murder) constituted a very serious crime, warranting the invocation of a severe sentence.[65] After serious deliberations, the Court ultimately invoked the Restorative Justice approach, sentencing the accused to eight years imprisonment, all of which were suspended for a period of three years on condition that the accused apologized to the mother of the deceased and her family within a month after the sentence had been imposed.[66]

I aver that the judgment reinforced the importance of restorative justice principles in South Africa's criminal justice system. It recognized that punishment alone might not effectively address the root causes of criminal behaviour or promote healing in the community. The case highlighted the

[64] Ibid, par 51
[65] *S v Maluleke 2008* (1) SACR 49 par 12
[66] Ibid par 22

victim-centered nature of restorative justice. It emphasized that the needs and perspectives of victims should be central in determining the appropriate resolution of criminal cases. The case also acknowledged the value of alternative sentencing options, such as community service, mediation, and rehabilitation programs, as effective ways to address crime and reduce recidivism. Finally, the case recognized the need to strike a balance between the interests of justice, rehabilitation of offenders, and the satisfaction of victims. It suggested that innovative approaches, including ADR mechanisms, could help achieve this balance.

**c) S v CKM 2013 (2) SACR 303**

Judge Bertelsmann described the 'The Child Justice Act 75 of 2008' basic tenets in the following manner:

> [The Act] represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with [continued] emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing [their] personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative-justice processes and reintegration of the child into the community[67]

This is a significant judicial interpretation that highlights several important aspects related to restorative justice and the role of ADR mechanisms in the criminal justice system. It reaffirmed the principles of restorative justice as a crucial element in addressing criminal behaviour. It emphasized the importance of healing, reconciliation, and reintegration of offenders into society. It also emphasized the victim-centered nature of restorative justice. It recognized the rights and needs of victims to participate in the resolution process and have a say in the outcome of the case.

[67] *S v CKM* 2013 (2) SACR 303 par 7

In addition, the case underscored the value of community involvement in the resolution of criminal matters. Community conferences and similar ADR processes were seen as effective tools for repairing harm, promoting understanding, and fostering social cohesion. The judgment also highlighted the need to balance the interests of victims, offenders, and the broader community in the pursuit of justice. It suggested that restorative justice mechanisms provide a framework for achieving this balance. It also recognized the potential of alternative sentencing options, such as community-based sentences and rehabilitation programs, in achieving both punitive and rehabilitative goals in the criminal justice system.

Finally, the case emphasized the importance of reintegrating offenders into society as responsible and law-abiding citizens. Restorative justice processes were seen as contributing to this goal.

### 4.1.4 Lessons for Kenya

**Necessity for Legislative Support**

Drawing lessons from South Africa's experience in integrating ADR mechanisms into its criminal justice system, one important lesson for Kenya is the necessity of legislative support. Legislation provides a clear and consistent framework for the implementation of ADR mechanisms. It sets out the rules, procedures, and standards that govern these processes. Without clear legislative guidance, there can be confusion and inconsistency in how ADR is applied.

In addition, I argue that legislation can establish legal safeguards that protect the rights and interests of all parties involved in ADR processes. These safeguards ensure that ADR is conducted fairly, impartially, and in accordance with constitutional and legal standards.

Legislative support can make the outcomes of ADR processes legally enforceable. This means that agreements reached through ADR mechanisms

can be enforced in formal courts, providing a level of security for the parties involved.

**Emphasis on Remedies and Enforcement**

Emphasizing remedies and enforcement is another crucial lesson Kenya can draw from South Africa's experience in integrating ADR mechanisms into its criminal justice system. In ADR processes, I contend that it's vital to focus on defining clear remedies or outcomes. Parties involved in criminal cases, including victims, offenders, and the community, should have a precise understanding of what can be expected from the ADR process. This clarity ensures that everyone is on the same page regarding the resolution of the dispute.

A strong emphasis on remedies can facilitate restitution and compensation for victims. ADR mechanisms should provide a framework for offenders to make amends for their actions, whether through financial restitution, community service, or other means. Victims should have the assurance that they will receive compensation for their losses.

I also argue that effective remedies can contribute to preventing recidivism. By addressing the root causes of criminal behaviour and requiring offenders to take meaningful actions to make amends, ADR processes can support rehabilitation and reduce the likelihood of repeat offenses.

In addition, a key lesson is the need to ensure that ADR agreements and outcomes are legally enforceable. This means that if parties do not comply with the agreed-upon remedies, there should be mechanisms in place to enforce these obligations in formal courts. This enhances the credibility and effectiveness of ADR.

I aver that Kenya should establish mechanisms for monitoring and accountability to ensure that ADR outcomes are implemented as agreed. This

includes oversight to confirm that offenders fulfil their obligations and that victims receive the restitution or compensation to which they are entitled.

### 4.2 India

#### 4.2.1 Plea Bargaining

**Section 265A to 265L Criminal Procedure Code**

The code provides that the Chapter shall apply in respect of an accused against whom the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force.[68] Section 265 B describes the process of application of plea bargaining, which shall be voluntary. The code also prescribes guidelines for mutually satisfactory disposition.[69]The report of the mutually satisfactory disposition is to be submitted to court.[70]

Where a satisfactory disposition of the case has been worked out, the Court shall dispose of the case by compensating the victim or releasing of the accused on probation of good conduct or after admonition. After hearing the parties, if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment. In case after hearing the parties, the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.[71]

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[68] Criminal Procedure Code, India, sec 265 A
[69] Ibid, sec 265 C
[70] Ibid, sec 265 D
[71] Ibid, sec 265 E

### 4.2.2 Compounding of Certain Offences

**India Penal Code**

In India, the Compounding of Certain Offences is governed by provisions under the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC)[72]. Compounding refers to the process by which a victim of a crime and the accused come to an agreement to settle the case, usually through a financial arrangement, and the court accepts this agreement, leading to the withdrawal of criminal charges.[73]

Compounding is typically allowed for certain less serious and non-heinous offenses. These are offenses that are not punishable by imprisonment for life or death penalty. Compounding is a voluntary process in which both the victim and the accused must willingly agree to settle the case. The victim may agree to drop charges in exchange for compensation or other terms mutually agreed upon.[74]

The procedure for compounding offenses is outlined in the Code of Criminal Procedure (CrPC), specifically under Section 320.[75] This section specifies which offenses can be compounded and the conditions under which compounding is permitted. Some offenses can be compounded only with the permission of the court. The court will consider the nature of the offense, the impact on society, and the interests of justice before granting permission.[76]

For certain less serious offenses, compounding can be done without the court's permission, and it is solely between the parties involved. In many cases, the

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[72] Yadav, Dr Vikrant, ADR as a Means of Restorative Justice in Criminal Justice System: An Analytical Appraisal (2017). *International Journal of Law*, Volume 3; Issue 2; March 2017; Page No. 59-61, Available at SSRN: https://ssrn.com/abstract=3621192 accessed 19 September 2023

[73] Ibid

[74] Ibid

[75] India Code of Criminal Procedure, Sec 320

[76] Ibid

accused agrees to pay compensation or restitution to the victim as part of the compounding agreement. The amount and terms of compensation are usually negotiated between the parties.[77]

Once a case is compounded, it generally results in the withdrawal of criminal charges against the accused. The matter is considered settled, and the accused is not further prosecuted for that offense. In compounding cases, both the victim and the accused may need to record their statements before a magistrate, affirming their willingness to compound the offense. Some offenses are not compoundable under any circumstances. These include offenses against the state or public interest, such as treason or terrorism-related offenses.[78]

The compounding of offenses is subject to legal procedures, and the court plays a role in overseeing the process, particularly for offenses that require court permission for compounding. The aim of compounding is often to provide a mechanism for dispute resolution that is quicker and less burdensome than a full trial while allowing for restitution to the victim.[79]

### 4.2.3 Judicial Interpretation

**(a) Gian Singh v State of Punjab [2012]**

This is a landmark judgment by the Supreme Court of India that deals with the compounding of non-heinous criminal offenses. This judgment clarified and reaffirmed several principles related to the compounding of offenses. The court reiterated the distinction between heinous and non-heinous offenses. It

[77] Ibid

[78] Ibid

[79] Yadav, Dr Vikrant, ADR as a Means of Restorative Justice in Criminal Justice System: An Analytical Appraisal (2017). *International Journal of Law*, Volume 3; Issue 2; March 2017; Page No. 59-61, Available at SSRN: https://ssrn.com/abstract=3621192 accessed 19 September 2023

emphasized that the compounding of offenses is generally discouraged for heinous crimes that have a severe impact on society or public interest.[80]

In cases involving non-heinous offenses, the court emphasized the importance of obtaining the consent of the victim or the victim's family for compounding. This consent should be free, voluntary, and informed.[81] While acknowledging the significance of victim-centric justice, the court also considered public interest. It held that in certain cases where the offense affects public interest or the larger societal framework, the court may refuse to accept the compounding of an offense even if the victim consents.[82]

The court ruled that the exercise of discretion to allow or reject the compounding of offenses should be guided by principles of justice, fairness, and the impact on society. It should not be mechanical but should take into account the peculiar facts and circumstances of each case. The judgment also recognized the role of compounding in the realm of restorative justice. It noted that compounding can lead to the restoration of harmony and peace between the parties involved.[83]

The court referred to Section 320 of the Code of Criminal Procedure which provides a list of offenses that are compoundable. The court clarified that this list is not exhaustive, and compounding can be considered for other offenses as well, subject to the principles discussed in the judgment. The judgment confirmed that the high courts have inherent jurisdiction to quash criminal proceedings in appropriate cases, including those where the parties have compounded the offenses.[84]

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[80] *Gian Singh v State of Punjab* [2012]
[81] Ibid
[82] Ibid
[83] Ibid
[84] Ibid

**(b) Dalbir Singh v State of Punjab 2015**

The court quashed all the proceedings on the basis of a compromise reached between the parties.[85] This is in line with the principles of restorative justice and the provisions of Indian law that allow for the compounding of certain non-heinous offenses when the parties voluntarily agree to settle the matter through mutual agreement.

Quashing proceedings based on a compromise is a common practice in Indian jurisprudence, and it aligns with the idea that in certain cases, it is in the best interest of both the parties and society to resolve a criminal matter amicably rather than proceeding with a formal trial. I argue that this approach can lead to the restoration of peace and harmony between the parties and reduce the burden on the legal system.

The court's decision to quash proceedings based on a compromise is made after considering various factors, including the nature of the offense, the impact on society, the voluntariness of the parties' agreement, and the principles of justice and fairness. In such cases, the court plays a crucial role in ensuring that the compromise is legally sound and serves the interests of justice.

### 4.2.4 Lessons for Kenya

**Compounding of specified less serious offences**

Drawing lessons from India's legal framework on the compounding of specified less serious offenses, Kenya can consider implementing similar provisions to enhance its criminal justice system.

Compounding provisions for specified less serious offenses can help reduce the backlog of cases in Kenyan courts. By allowing parties to reach agreements and settle cases outside of lengthy trials, the judicial system can focus its resources on more serious cases.

[85] *Dalbir Singh vs State of Punjab* (2015) Par 7

The option of compounding aligns with restorative justice principles, emphasizing the restoration of harmony and amicable resolution between parties. Kenya can benefit from adopting this approach for non-heinous offenses.

Compounding allows victims to have a say in the resolution of their cases. Kenya can prioritize victim-centric justice by providing victims with the option to agree to settlements that they find satisfactory.

Kenya would need to establish a clear legislative framework that specifies which offenses are compoundable and under what conditions. This framework should include safeguards to protect the rights and interests of victims and accused individuals.

In addition, I posit that Kenyan courts should play a supervisory role in overseeing the compounding process. This includes ensuring that agreements are made voluntarily, are fair to both parties, and adhere to the law.

Kenya should also consider public interest when deciding which offenses are compoundable. While compounding is suitable for less serious offenses, it may not be appropriate for offenses that have a significant impact on society or public order.

### 4.3 Canada

#### 4.3.1 Alternative Measures

**Section 717 Criminal Code**

In Canada, "Alternative Measures" refer to diversionary programs and strategies that allow certain individuals, typically first-time or non-violent offenders, to address their criminal behaviour outside the traditional court process. These programs are aimed at rehabilitating offenders and addressing

the root causes of their criminal behaviour, with a focus on restorative justice and community-based solutions.[86]

The relevant legal provision governing Alternative Measures in Canada can be found in Section 717 of the Criminal Code. It allows for the use of Alternative Measures for individuals who have been charged with less serious offenses or who are first-time offenders. These programs are generally not available for serious or violent offenses.[87]

Law enforcement officers and prosecutors have discretion in deciding whether to divert a case to Alternative Measures. They consider factors such as the nature of the offense, the offender's criminal history, and the interests of justice.[88]Alternative Measures typically involve participation in community-based programs, such as counselling, rehabilitation, or educational courses. These programs are designed to address the underlying causes of criminal behaviour.[89]

Restorative justice principles often guide Alternative Measures. Offenders may be required to make amends to victims or engage in processes that promote dialogue and reconciliation. For an offender to be eligible for Alternative Measures, they must voluntarily consent to participate in the program. This consent reflects the restorative and rehabilitative focus of these measures.[90]

One of the significant benefits of Alternative Measures is that successful completion can lead to the avoidance of a criminal record. This can be important for an offender's future prospects, such as employment and housing. While the

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[86] Bargen, Tomporowski, Binder, and Manon "Reflections on the Past, Present, and Future of Restorative Justice in Canada" 2011 48 *Alberta* LR 815 826
[87] Canada Criminal Code, sec 717
[88] Ibid
[89] Bargen, Tomporowski, Binder, and Manon "Reflections on the Past, Present, and Future of Restorative Justice in Canada" 2011 48 *Alberta* LR 815 826
[90] Ibid

focus is on rehabilitation, Alternative Measures also consider the protection of the public. Measures are designed to ensure that participating offenders do not pose a risk to the community.[91]

### 4.3.2 Family Group Conference

Family Group Conferences (FGCs) are restorative justice practices used in Canada, among other countries, to address a wide range of family and community conflicts, including those involving youth offenders. FGCs are designed to empower families and communities to actively participate in decision-making and problem-solving processes.[92]

FGCs are rooted in the principles of restorative justice, emphasizing accountability, repair of harm, and community involvement. They aim to repair relationships, provide a platform for dialogue, and address the needs of victims, offenders, and the community. In the context of youth justice, FGCs are commonly used as a diversionary tool for young offenders who have committed minor offenses. Instead of entering the formal criminal justice system, youth may be referred to an FGC process.[93]

FGCs are typically initiated and facilitated by trained community members, including mediators, social workers, and facilitators. The process is community-led, with the involvement of the young person's family and other relevant individuals. FGCs encourage the active participation of all stakeholders, including the victim, the young offender, their families, and community members. The process empowers these individuals to contribute to decision-making and outcomes.[94]

In addition, during an FGC, participants share information about the offense, its impact, and potential solutions. This open dialogue helps participants gain a

[91] Ibid
[92] Ibid
[93] Ibid
[94] Ibid

deeper understanding of the situation and its consequences. The FGC process typically concludes with the development of an agreement or plan. This plan outlines actions that the young offender must take to repair the harm caused and address their behaviour. It may include community service, apologies, or restitution to victims.[95]

Participation in an FGC is voluntary for all parties involved, and they must consent to the process. If an agreement is reached, it is typically binding on the young offender, who is expected to fulfil the agreed-upon actions. FGCs focus on outcomes, such as repairing harm, preventing reoffending, and reintegrating the young person into the community. The process aims to provide a meaningful alternative to formal court processes.[96]

**4.3.3 Sentencing Circle**

Sentencing Circles are restorative justice practices used in Canada, primarily within Indigenous communities, as an alternative approach to sentencing individuals who have committed offenses. These circles aim to promote healing, reconciliation, and community involvement in the criminal justice process.[97] Sentencing Circles have their origins in Indigenous traditions and cultures, particularly among First Nations, Inuit, and Métis peoples. They draw on Indigenous values, customs, and principles of justice. Sentencing Circles operate under the principles of restorative justice, emphasizing the importance of repairing harm, addressing the needs of victims and offenders, and involving the community in decision-making.[98]

These circles are typically community-led and facilitated by Elders or respected community members. The process aims to create a safe and respectful space for

[95] Ibid
[96] Ibid
[97] Lilles "Circle Sentencing: Part of the Restorative Justice Continuum" 9 August 2002 eForum Archive *http://www.iirp.edu/eforum-archive/4250-circlesentencing-part-of-the-restorative-justice-continuum* (accessed 19 September 2023)
[98] Ibid

dialogue. The Sentencing Circle process encourages the active participation of various stakeholders, including the victim, the offender, family members, community representatives, and Elders. All participants have a voice in the decision-making process.[99]

Participants share information about the offense, its impact on individuals and the community, and potential solutions. This open dialogue helps foster understanding and empathy. Sentencing Circles aim to reach a consensus on a restorative agreement or plan. This plan outlines actions that the offender must take to make amends, address their behaviour, and contribute to community healing.[100]

Participation in a Sentencing Circle is typically voluntary for all parties involved, and they must consent to the process. The agreed-upon restorative plan is binding on the offender. The process is culturally sensitive and respectful of Indigenous customs and traditions. It recognizes the importance of spirituality and healing in the resolution process.[101]

**4.3.4 Lessons for Kenya**

Drawing lessons from Canada's experiences with restorative justice practices such as Alternative Measures, Family Group Conferences, and Sentencing Circles, Kenya can consider the following lessons to improve its criminal justice system:

Kenya can incorporate restorative justice principles into its legal framework. Emphasizing the importance of repairing harm, promoting reconciliation, and involving communities in the justice process can lead to more meaningful and lasting resolutions.

[99] Ibid
[100] Ibid
[101] Ibid

Kenya can establish and effectively implement diversionary programs similar to Canada's Alternative Measures. These programs can be used to divert first-time or non-violent offenders away from the formal court process, reducing case backlog and promoting rehabilitation.

Encouraging community involvement, as seen in Canada's Family Group Conferences and Sentencing Circles, can empower communities to play a role in resolving conflicts and addressing the needs of victims and offenders.
Ensuring that participation in restorative justice processes is voluntary for all parties involved is crucial. Kenya should require the informed consent of victims, offenders, and communities in such processes.

In addition, providing training and education to legal professionals, community leaders, and stakeholders is essential for the successful implementation of restorative justice practices. This ensures that the principles and procedures are understood and applied effectively.

Kenya should also establish a clear legal framework that defines the scope and conditions for the use of restorative justice practices. This framework should include safeguards to protect the rights and interests of all participants.

## 5. Conclusion and Reform Proposals

### Conclusion

The discussion on integrating ADR mechanisms and restorative justice practices into Kenya's criminal justice system has illuminated a path toward a more comprehensive and effective approach to addressing criminal offenses. Drawing from the experiences of diverse jurisdictions such as South Africa, India, and Canada, Kenya can forge a brighter future for its criminal justice system. The lessons learned, challenges recognized, and opportunities identified have laid the groundwork for meaningful reform.

Kenya's constitutional basis, articulated in Article 159(2) of the 2010 Constitution, underscores the importance of promoting alternative forms of dispute resolution while safeguarding fundamental rights. This constitutional mandate provides a solid foundation for exploring innovative approaches that prioritize reconciliation, mediation, arbitration, and restorative justice.

The experiences of South Africa offer profound insights into the transformative potential of restorative justice practices. Victim-offender mediation, family group conferences, and community conferences place victims at the heart of the resolution process, empowering them to heal and offenders to take responsibility. Kenya has the opportunity to adopt similar practices, fostering accountability and community cohesion.

India's model of plea bargaining and the compounding of certain offenses exemplifies efficient case resolution and reduced court backlog. Kenya can adapt these practices to address non-heinous offenses promptly, freeing up judicial resources and providing a more efficient justice system.

Canada's commitment to community-driven solutions through Alternative Measures, Family Group Conferences, and Sentencing Circles is a testament to the power of healing, reconciliation, and rehabilitation. By reducing recidivism and promoting community well-being, these programs exemplify the potential for a more holistic and victim-centered approach to justice.

The journey ahead for Kenya is not without challenges. Legislative support, cultural sensitivity, and the protection of stakeholders' rights are paramount considerations. However, the benefits of reform are vast – greater access to justice, expanded victim participation, enhanced procedural fairness, and more enduring outcomes.

**Reform Proposals:**

Kenya should establish clear legislative support for the integration of ADR mechanisms and restorative justice practices into its criminal justice system.

This includes defining which offenses are eligible for alternative resolution, ensuring safeguards for all parties, and outlining procedures for implementation.

Kenya should invest in capacity building for legal professionals, community leaders, and stakeholders involved in the justice system. Training programs should focus on the principles and procedures of ADR and restorative justice practices.

Kenya should promote community engagement in the resolution process. We should establish mechanisms for communities to actively participate in ADR and restorative justice proceedings, fostering a sense of ownership and responsibility.

Kenya should also prioritize victim-centric approaches that empower victims to participate in the resolution process, voice their concerns, and seek restitution or redress. Kenya should launch public awareness campaigns to educate citizens about the benefits of ADR and restorative justice, dispelling myths and misconceptions.

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# Mediation as an Alternative Dispute Resolution (ADR) Mechanism for Construction Disputes in Kenya

*By:* ***Eng. Odhiambo Aluoch****

***Abstract***

*This paper seeks to establish the future of mediation of disputes in the construction Industry in Kenya against the backdrop of the failures of arbitration and backlog of the cases in the courts. Questionnaires were adopted as research methodology for data collection from the participants. Relevant questions were formulated, developed in google forms and sent to the participants to give their opinion and response accordingly. The participants were largely drawn from different institutions like the CIArb (K) with registered ADR practitioners and also have experience in the construction industry.*

*The response to the questionnaires sent out was at 87.5% with over 76.2% of the respondent having six (6) years and above experience in mediation of construction disputes. The practice of ADR has been in Kenya long enough and the promulgation of the Constitution of Kenya, 2010, legitimized the practice but most practitioners have not embraced mediation as a mechanism for resolving construction disputes. The challenges facing mediation in the industry has been outlined in this paper including*

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*the weak legal and legislative framework, inadequate training institution, mentorship and capacity building program for the practitioners. It has also been established that there is a need to develop rules and regulation, code of practice and ethics for the practitioners. Sensitization through conferences and workshops for the practitioners in the construction industry and ADR including the judiciary to embrace mediation of the construction dispute would ensure a peaceful coexistence in the industry. Approximately 95% of the respondents believe that there is a bright future for mediation practice in Kenya.*

*This being a new area in Kenya there is need for further research by the practitioners on unexploited areas to assist on realizing the benefits of mediation process as a form of ADR.*

## Introduction

Engineering construction works operates in a very complex and competitive environment with the players being of diverse opinions, interest, talents, knowledge with varying degree of experience[1]. In such an environment it is argued that conflicts are inevitable because of difference in opinion of the participants[2][3]. If the conflicts are not properly managed they can easily generate into disputes[4]. In the Industry conflicts are caused by many factors which other authors and researchers opined that is not bad[5] and includes but not limited to the owners or the client, contractors, consultants, project scope, human resources, contracts and specifications, external factors among others. These

[1] Cakmak, P.I., & Cakmak, E. (2013). An analysis of causes of disputes in the construction industry using analytical hierarchy process (AHP). AEI 2013 Architectural Engineering Institute Conference, 3-5 April, The Pennsylvania State University, University Park, Pennsylvania, USA.

[2] Sameer S.K, Magar B Rajendra and Parkar Fauwaz, 2016 Claims and Disputes in Construction Projects International Journal for Research in Applied Science & Engineering Technology (IJRASET).

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[4] Supra note 2

[5] Ankit Sharma and Disha Chauhan, "Mediation as a Method of Dispute Resolution in Construction Projects" (IJPIEL, 07 October, 2021).

factors affect the efficiency and productivity of the works and disturbs the implementation process of the project.[6]

The concept of Alternative Dispute Resolution (ADR) originated from the United States and has been gradually developed in the last century for a variety of non-adversarial settlement mechanism which has been advanced in most countries in the world today.[7] Traditionally construction disputes were being resolved through adversarial methods, which proved to be costly, lengthy and often the common reason for strained relationship between the contracting parties[8]. FIDIC, a known worldwide international engineering consulting agency, has been effectively compiling a series of standard contracts for construction projects since its establishment in 1913, and these contracts have been widely used in construction projects around the world and Kenya included. Amicable settlement was formally introduced in FIDIC in 1987 and then the Dispute Adjudication Board (DAB) introduced in 1999, and FIDIC's efforts to promote dispute resolution with ADR mechanisms have never stopped[9]. This was proposed because of the cost of disputes in terms of money and time among others factors. Earlier on if the disputes were not resolved through DAB, the parties were most likely to resort to the traditional means of adjudication of construction disputes or courts.[10] The argument of Sharma (2021) is not universal, the successful cases by ADR for construction dispute resolutions have not been seen much in practice, or in another words, the relative laws and articles of such standard contracts have not worked well, that

[6] Fenn, P., Lowe, D., & Speck, C. (1997). Conflict and dispute in construction. Construction Management and Economics, 15, 6, 513-518
[7] Li Dezhi, Zhang Huiyan, and Fang Xuehua 2018 The deficiency of dispute settlement mechanism seen in Chinese construction field from FIDIC
[8] Ankit Sharma and Disha Chauhan, "Mediation as a Method of Dispute Resolution in Construction Projects" (IJPIEL, 07 October, 2021).
[9] Li Dezhi. Introduction to Fidic Contract Terms (Bilingual).China Construction Industry Press (2017) 8. FIDIC（First Edition 1999）ISBN2-88432-022-9
[10] Supa note 5

thought had been overtaken by time.[11] FIDIC represents globally the consulting engineering industry by promoting the business and interest of the professionals in the industry.[12] The corresponding articles and clauses of ADR have also been inserted in most standard conditions of construction contract compiled and implemented by the government of China and most governments across the world.[13]

Conflicts are problems to be solved and not a war to be won,[14] in order to achieve satisfaction along with maintaining relationships and interests. Many governments in many jurisdictions has now opted either through legislations or use of standard forms of contract that has ADR clauses or they opt that the clauses to be included in the contract. The settlement of disputes in the implementation of construction services out of court are done in the following levels: (i) consultation and negotiation, (ii) third party involvement: a. Mediation appointed by the parties or ADR institutions. b. Conciliation. c. Arbitration through institutions.[15]

**Background**

A Mediator is an independent neutral who was never been part of conflict or dispute but is normally nominated or appointed by an ADR nominating body to put two or more warring parties at peace with each other.[16] The choice of mediator(s) determines the success of the mediation process.[17] It is argued that

[11] Li Dezhi, Zhang Huiyan, and Fang Xuehua 2018 The deficiency of dispute settlement mechanism seen in Chinese construction field from FIDIC
[12] Supra note 9
[13] Li Dezhi, Zhang Huiyan, and Fang Xuehua 2018 The deficiency of dispute settlement mechanism seen in Chinese construction field from FIDIC
[14] Rauzana Anita Causes of Conflicts and Disputes in Construction Projects IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE) e-ISSN: 2278-1684, p-ISSN: 2320-334X, Volume 13, Issue 5 Ver. VI (Sep. - Oct. 2016), PP 44-48 www.iosrjournals.org.
[15] Ibid
[16] Kariuki Muigua, 2015, Court Sanctioned Mediation in Kenya-An Appraisal.
[17] Blake, Susan, et al. The Jackson ADR Handbook, Oxford University Press, Incorporated, 2016. ProQuest Ebook Central,

the mediator enjoys broad acceptability; have competence; and adequate knowledge on the conflict or the dispute to be able to properly handle the parties and the issues. The final choice of mediator, is to be made and agreed upon by the parties in dispute.[18] The mediator and his team should also have adequate support. Legal advisors, experts and technical assistance should be engaged to assist with issues that involve technicality or require agiven level of expertise.[19] Mediation is a facilitative procedure in which disputing parties seek the aid of an impartial third party, the mediator, who assists them in attempting to reach an agreement on the settlement of their conflict.[20],[21] Mediation as a conflict resolution technique is thus a consensual process; it is, in a way, an assisted negotiation between the two disputing parties, with the mediator acting as the facilitator, evaluator or middleman. Unlike in arbitration or litigation, the process is not adversarial, and the focus of the mediator is to empower the parties by focusing on the disputes and eliminating jargons.[22]

Mediation has evolved as a dispute resolution mechanism around the world and is still developing especially in Kenya[23]. It is hard to determine the exact types of methods of Mediation as it varies across jurisdictions. Some of the leading lawyers and Mediators in the industry have provided different opinions on the topic. However, its generally accepted that the Mediation process can only be either voluntary or Court-Mandated[24].

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[18] Richbell, D. (2008) *Mediation of Construction Disputes* [Online]. Oxford: Blackwell Publishing Ltd. Available from: <*https://my.leedsbeckett.ac.uk*> [Accessed 10 November 2021].

[19] Ibid

[20] Supra note 17.

[21] Supra note 14

[22] Ibid

[23] Supra note 16

[24] Meadow, C. Lawyer Negotiations: Theories and Realities What We Learn From Mediation. (1993). 56 Modern L. Rev. 361 379

The newest form of Mediation in Kenya is the "Court-Mandated/annexed" Mediation wherein the local courts are now mandating the parties to explore mediation option for the purposes of time and cost savings. In the Kenyan context, the government has enacted various special legislations to refer the parties to Mediation. The Constitution of Kenya 2010 Chapter 10 Article 159 (2)c was the first step towards an ADR oriented approach in the judiciary then followed with Mediation Act 2020.

ADR including mediation is now anchored in the constitution vide Article 159 (2) (c) which provides;

"*In exercising judicial authority, the courts and tribunals shall be guided by the following principles – (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)*"

Subsequently, out of the various legislations introduced towards this reform, the most concrete step towards the mandatory Pre-Litigation has been entrenched in the Mediation bill 2020 that mandate the parties to attempt mediation before initiating a suit.

Mediation as a method of dispute resolution has not been the most preferred choice primarily because the process was voluntary and non-binding thereby meaning that it lacked legal backing in case of enforcement.[25] However, the lacunae have now been filled by the Act which establishes the legal framework for the enforceability of settlement agreements resulting from mediation to resolve commercial disputes.[26]

**Mediation of Construction disputes**

In Kenya there aren't many pieces of evidence to support the theory of Mediation being used in CI or being recognized in the judicial process.[23]

[25] Ibid
[26] Ibid

However, after the promulgation of the constitution of Kenya in 2010, numerous efforts have been put to have ADR recognized and practiced in all forms of dispute in Kenya and this has shown that Mediation was now rising to be one of the top choices amongst all kinds of disputes irrespective of its nature. Most standard contract forms in the CI across many jurisdictions in the world acknowledges and has included ADR clause as a dispute resolution mechanism in their contracts. [27] Joint Building and Construction Council (JBCC) 2020 edition Sec 44 provides for three levels of dispute resolution, adjudication, amicable settlement which includes negotiation and mediation process and finally arbitration. The Joint Contracts Tribunal (JCT) in its Joint Contracts Tribunal (JCT) 2016 with Quantities, Design and Build Contract, specifically included mediation in sec 9.1 as dispute resolution mechanism. In fact, the FIDIC 1999, included an amicable settlement alongside adjudication and arbitration.

Construction disputes differ from other kinds of legal disputes as it involves involve complex technical and legal (also referred to as techno-legal) issues that in their nature requires immediate and speedy disposal so as to not to interfere with the stipulated timeline of the project and cause further delays in completion of the project.[28] Looking at the resolution of construction disputes, it would not be wrong to say that ADR has always been symbolic in resolving construction disputes.[29] The most viable practices for the resolution of construction disputes include prevention, early intervention, inclusion and exercise of ADR, and a pre-decided agenda as to how disputes will be handled.[30]

Almost every construction contract contains a clause regarding dispute resolution mechanism, negotiation and/or an amicable settlement. Another important factor for non-adversarial dispute resolution of construction contracts is that the contracting parties in a construction project are primarily working for a common target of completion of the project as per the terms and

[27] Supra note 16
[28] Supra note 17
[29] Supra note 18
[30] Supra note 5

conditions, implying that they are not in competition with each other, but, on the same side.[31] The Mediation process also provided the contracting parties with the requisite confidentiality to resolve their disputes which also ensured that the relations between the parties were not hindered.

However, despite such advantages, mediation could not gain widespread popularity amongst the general public, lawyers or jurists.[32] Often Mediation has been considered as a mere secondary technique when the primary adversarial technique fails to cater to the needs of the parties or to give a resolution.[33]

Nevertheless, mediation as an ADR technique has stood the test of time in other jurisdictions and is now evolving as the most preferred method with governments, jurists and lawyers alike, having seen the drawbacks of adversarial or court mechanisms most countries are now promoting the use of mediation and Kenya is not an exemption.[34]

**Methodology**

It is generally accepted that there is no perfect method of doing research or collecting data and information from the respondents but all depends on the researcher's reflections and consideration of the prevailing circumstances[35]. However, the amount of impact and the mechanism of relevant variables

[31] Supra

[32] Zulhabri Ismail, Jamalunlaili Abdullah, Padzil Fadzil Hassan and Rosli Mohamad Zin, 2010, Mediation in Construction Industry? Journal of Surveying, Construction & Property Vol. 1 Issue 1 2010 ISSN: 1985-7527.

[33] Kariuki Muigua 2011 "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

[34] Ibid.

[35] Blaxter, Loraine Hughes, Christina Tight, Malcolm. (2006) *How to research*. 3rd Ed. Open University Press [Online] *https://r2.vlereader.com/Reader?ean=9780335229536*. *(accessed on 21st October, 2021).*

determines the choice of research methodology adopted by the researcher.[36] Research method is therefore a means of collecting data from the participants, [37] using tools like questionnaires, observation and interviews (Hussey & Hussey 1997). Methodology is therefore, a logical system with an overall approach on the view of the practitioners in the industry. Research can either be done at the comfort of the desk or office or it can also involve gathering information from the field.[38] However, it is close to impossible to successful complete a research on the desk alone without going to the field.[39] Actually, the discovery and development of internet has blurred the distinction between desk study and field work in research.[40]

For the purpose of this research, questionnaires had been adopted for gathering data against the known challenges posed by formulation of the questions.[41] The questions were prepared then presented in google forms (https://forms.gle/yWnYjLXEAS4KB6Xh6) to make it easy for the participants which were then sent to the participants via email. The proposed questionnaires for this research contained 20 statements or questions designed based on the earlier research and literature review on the construction industry mediation. The major consideration or emphasis was placed on the targeted population who had to be registered ADR practitioners in Kenya and this was to ensure

[36] Inger Furseth, Euris Larry Everett (2013) Doing Your Master's Dissertation: From Start to Finish. SAGE publication. [online] https://ebookcentral.proquest.com/lib/leeds-beck/reader.action?docID=1191085&ppg=104 [Accessed 22nd October 2021].
[37] Gina Wisker (2018) *The undergraduate Research Handbook* Houndmills, Basingstoke, Hampshire [England]; New York. Palgrave Macmillan, (accessed online *https://ebookcentral.proquest.com/lib/leeds-beck/reader.action?docID=6234347* [Accessed 22nd October 2021].
[38] Biggam, John. (2008) *Succeeding with your master's dissertation: a step-by-step handbook*, Open University Press [Online] https://r1.vlereader.com/Reader?ean=9780335235469 [Accessed 15th October 2021]
[39] Supra note 37
[40] Supra 38
[41] Inger Furseth, Euris Larry Everett (2013) Doing Your Master's Dissertation: From Start to Finish. SAGE publication. [online] https://ebookcentral.proquest.com/lib/leeds-beck/reader.action?docID=1191085&ppg=104 [Accessed 22nd October 2021].

that the data and information collected was of high quality. The structure and the framing of the questions were of great importance to avoid collection of irrelevant information that are vague to the respondents, inconsistent and disjointed for the purpose of the research. The questions consist of both open ended to allow for divergent views and closed ended. Emails were adopted because of the distance between the researcher and the respondent and also to enable the respondents fill them at their own free time and at the convenience of their offices or homes.

**Research Focus**

The aim of this research is to explore the development of Mediation as a form of dispute resolution in Kenya under the ambit of the Constitution of Kenya 2010, the anticipated impact should the proposed Mediation bill passes to be an act and how it will shape the disputes resolutions in the construction industry CI in Kenya. Construction project spurs country's infrastructure and industrial growth and many Governments has standardized their bidding and contract documents to ensure that the dispute resolution clause mechanism is properly drafted.[42] A considerable amount of money is usually locked up due to disputes between contractors and clients, leading to cost and time overruns and therefore this must take the attention of the construction practitioners.[43] The sector offers significant employment both directly and indirectly to large labour force, material suppliers, plants and machinery suppliers.[44] According to the Chartered Institute of Arbitrators Kenya (CIArb-K) branch register in the website (https://ciarbkenya.org/) 80% of the registered members are lawyers by profession and out of the remaining approximately 8% are construction and ADR practitioners. CIArb-K is a premier Institution known for training and regulating the practice of ADR in Kenya. In a document published by the CIArb-

[42] Sakate Priyanka, Dhawale Arun W. (2017) Analysis of Claims And Dispute In Construction Industry International Journal Of Engineering Sciences & Research Technology

[43] Supra 41

[44] Kenyatta Mark Obegi, Alkizim Ahmad Omar and Mbiti Titus Kivaa 2015 Recapitulating the Payment Default Effects to Contractors in The Kenyan Construction Industry.

K on the state of ADR in Kenya 2021 only 27% of the respondents practice mediation. This therefore suggests that the practice of mediation in Kenya is an area that need further research for a deeper understanding. There are other Institutions that also play a major role in providing a framework not just for the training of mediators, but for the development of practice in this important area. A part from CIArb, others include: The Mediation Training Institute, the Dispute Resolution Centre, Nairobi Centre for International Arbitration, among others.[45] More importantly, there is also the Mediation Accreditation Committee an independent body established under the Civil Procedure Act, 2012 which is mandated to regulate certification and accreditation of mediators, keep a register of qualified mediators, and enforce a code of ethics among mediation practitioners though the mediation practice in Kenya is still not well regulated and there are opportunities for training. The report further reveals that the government together with the private sector has sufficiently encouraged mediation as a form of dispute resolution in a number of state corporations, government agencies and commissions. Despite the many successes mentioned in the report there was no a count or mentioning of the construction disputes and the participation of the construction industry practitioners in the research and therefore this paper aim at bridging the knowledge gap identified.

**Problem statement**

The Kenyan courts are congested and a lot of efforts are being made to decongest the courts. In the literature review it had been proved that no dispute cannot be mediated and CI is not an exemption (Richbell, 2008). This paper seeks to answer the question: ***What would be the future of mediation in the construction industry when arbitration have had its shortfall and mediation has not been fully embraced since the enactment of the constitution of Kenya 2010?***

**The research objectives**

This paper has the following objectives:

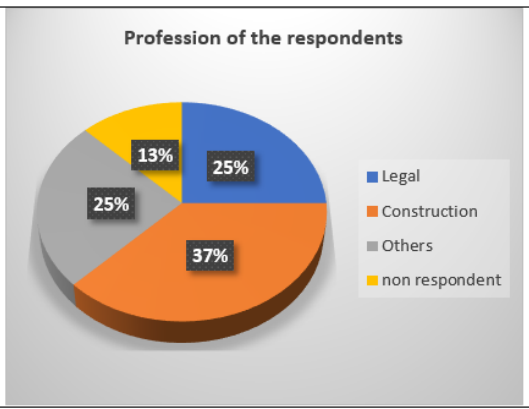
[45] Kariuki Muigua, 2015, Court Sanctioned Mediation in Kenya-An Appraisal.

i. To find out the extend of the use of mediation as an ADR mechanism in Kenya since the promulgation of the constitution 2010.
ii. To establish whether there is hope to institutionalize mediation in the construction contracts.
iii. To establish whether construction disputes are candidates for mediation.

**Findings and observations:**

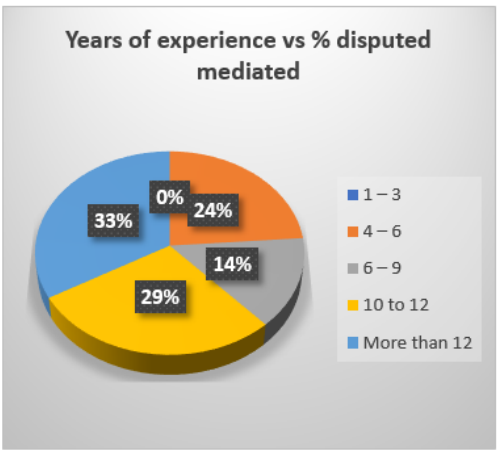
The sample population used in this research are a list of ADR practitioners in the construction industry while they may not be construction experts but have handled disputes in the construction industry including mediation.

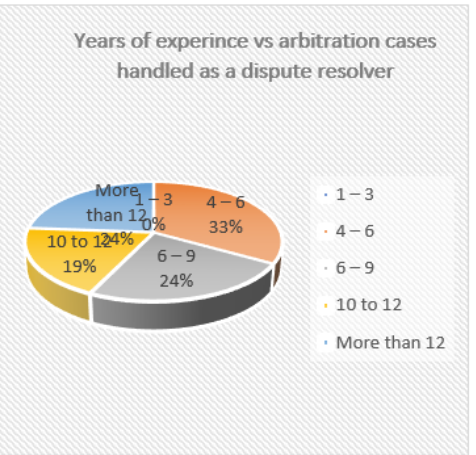
**Quantitative analysis of the findings**




25% of the responses were from individuals from the legal profession and Advocates of the High court of Kenya while 37% were from construction experts, that is: Quantity Surveyors (QS); Architects (A); and Engineers (E) who practice ADR specifically mediation. The final category that forms 25% are ADR practitioners specifically mediators who have handled construction disputes. However, 13% did not respond to the questionnaires sent to them.

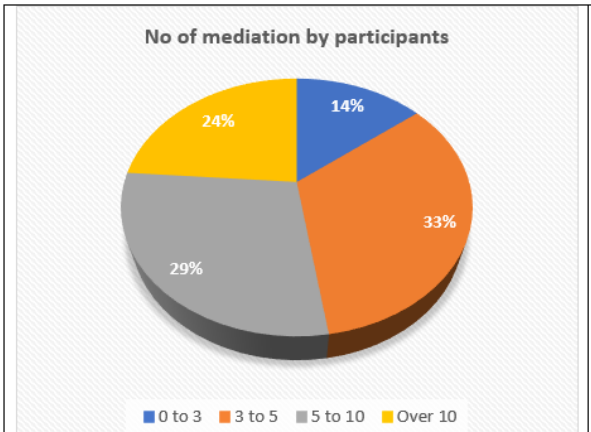
*Table 3: Years of experience of the respondents*




The years of experience of the participants was also a critical factor just to ensure that the participants are people that have been in the industry for some time. According to the responses received 76.2% and 66.7% of the arbitration and mediation cases are handled by people who have 6 years and above experience in the ADR industry.

***Table 4: No of mediation cases the respondents has taken***




It is clear from Table 4 above that 61.9% of the respondents has handled 3 to 10 mediations and 23.8% has handled more than 10 mediation process. This indicate that as much the mediation practice is in its formative stage the participants have knowledge and understanding of the practice, the law and the procedure including drafting of a settlement agreement between the parties.

**Qualitative analysis of the findings**

According to the research all practitioners confirmed to have advised their clients at one point or the other to attempt an ADR mechanism before going for litigation. The reasons included: the advantages ADR mechanisms pose in the industry for economic reasons in terms of cost echoed by 80% of the respondents. Convenience and the expertise services offered by the practitioners in the industry was highlighted by 56% while 40% mentioned that the ADR clause has always been in the agreement document entered into by the parties and therefore it has been the first option in case of a dispute. Other reasons that were stated are the speed, efficiency and effectiveness of the process. The process is private, confidential and conducted without prejudice to any legal proceedings this validated the research carried out by others as demonstrated in the literature review.

When the respondents were asked which mechanism of the ADR they would recommend for their clients in the construction industry 52.4% preferred arbitration with only 23.8% would go for mediation or a multi-tiered approach with mediation being the first tier then followed by arbitration. The reason fronted by participants for arbitration stated that the process is very formal and

the finality nature of the outcome with the mechanism being done by the expert make it more appropriate. Other respondents prefer arbitration because it is well-known and prominent for the construction disputes. The 23.8% that would prefer mediation as the first attempt to settle construction disputes argues that the process is less technical and will fit best in less complex disputes and for the sake of trust and future relationship between the parties, mediation forms the best method of settling construction dispute.

About 90.1% of the respondents believed in the applicability of the proposed forms of the ADR mechanism as detailed in the Chapter 10 Article 159(2) of the Kenya Constitution 2010 with specific bias to mediation in the industry. Another confession from 14.3% of the respondents indicates that the mediation mechanism has had a good uptake in other sectors but the uptake in the construction contracts in Kenya has been very low. The argument is that mediation has not been properly legislated in Kenya and the proposed Mediation bill 2020 is new to many practitioners in the industry. This has come with an urgent call by a number of the respondents that there is need for an urgent statutory intervention to also introduce adjudication in the CI and ensure that the ADR practitioners are well and properly regulated. This argument has been objected by some respondents suggesting that the enactment of the Chapter 10 of the constitution just gave the practice a legitimacy since ADR has always been practiced in the industry. This opinion is sensible since over 95% of the respondents did confirm to have advised their clients to consider ADR before litigation though it had not been properly legislated, however, the absence of legislative gaps could not be ruled out.

To lay the foundation for the argument about the benefit of arbitration and mediation, the participants were asked to comment on the challenges facing arbitration in Kenya since problems associated with litigations go without say. About 72% stated that over judicialization of the arbitral process and constant reference to the courts have made the arbitration process a mirror of court procedures and that therefore discourages the clients. Of the responses, 32% of the participants suggested that through training and capacity building and legal

regulation of the practice including putting in place the code of ethics and disciplinary procedure for the arbitrators and mediators would be necessary. Delays in payment to the neutral by the parties was raised by 20% of the participants and other associated costs brought about by the technicalities and experts indulgences has made most practitioners to be hesitant to recommend arbitration to parties.

**Mediation Practice in CI in Kenya**

When the participants were asked if it is time to shift the construction disputes to mediation from arbitration and litigation, the participants reacted differently. About 52% of the respondents are not convinced that it is time to embrace mediation in Kenya for construction disputes. Out of the results, 50% argues that every ADR mechanism has its place in the bigger conflicting world and therefore mediation should not be brought into the industry. Some 20% of the participants argues that most practitioners in the industry are not aware of the mediation success in the industry and therefore propose further training of the industry players. Whether it will bear fruits or not is a discussion for further research and beyond the scope of this paper. Mediation is not binding and cannot be conclusive in resolving disputes according to 35% of the respondents a statement reinforced by other researchers, who argue that until the settlement agreement is signed mediation is just negotiation. The 48% who are pro mediation in the industry argue that there is less technicalities in mediation, little applications of the legal jargons and indulgence of the courts. The uniqueness of the settlement solution likely to be offered by mediation may not be available in courts of law[46] and this has made it the preferred mechanism of dispute. Mediation is faster, cost effective and it saves the faces and the relationships of the parties according to 35% of the respondents a discussion also echoed by other researchers and therefore this makes mediation a trusted process. According to 24% of the respondents there exists a need to have a hybrid Mediation - Arbitration (med-arb). This should be the approach to disputes resolution mechanism in the industry and not one ADR method

[46] Dunnett v Railtrack [2002] All ER 850

because of the many parties and at time the complex nature of the disputes in the construction industry.[47] They argue that parties should start with negotiation followed by Mediation – Arbitration and this will give a perfect settlement outcome. On average 38.1% of the respondents indicated that in their earlier engagements as mediator they had taken less than 3 days to reach settlement with 48% taking between 1 – 5 weeks to reach a settlement which is a time span not realistic for Arbitration or litigation. This result therefore reinforces the argument that mediation is a faster process and saves on time which is one of the key parameters in the construction industry.

**Challenges of Mediation in CI in Kenya**

At any time when engaged in mediation 95.2% confirmed that the parties have always reached a settlement and each had left the process satisfied with the outcome a revelation that the win-win principle of mediation settlement is possible. The parties crafted their own solution that is not based on any legal principle in terms of their right but future relationship and hope of doing business together once again. Another reason for this high success rate is that none of them refused to comply with the settlement agreement and they all went home happy. Where both parties embrace Mediation there is a tendency to resolve disputes quickly usually with parties coming up with innovative solutions that works for both parties as opposed to the winner loser dynamic in adversarial mechanisms like Arbitration and Litigation.

According to 62% of the participants opined that there is serious lack of awareness, sensitization and understanding of mediation process procedures to foster its wide use in Kenya. In one of the research papers it is stated that the number of the training institutions of mediators in Kenya is wanting, it further states that '*… Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance*

[47] United States v Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001)

*an established NGO network of community-based paralegals …'* and therefore this finding validates the argument that more training is required for the practitioners and also an environment where the consumers of the services can also be enlightened.[48]

Another challenge raised by the participants is that mediation practice in Kenya remains largely within the court annexed program and therefore the enforcement and encouragement can only come from the courts. It has not been adopted whole in Kenya as a voluntary mechanism. The involuntariness of this process clouds its actual benefits due to the perceived coercion by the courts. The encroachment of the process by the lawyers or legal practitioners with the technicalities and judicial procedures were among the some of the issues raised by others.

Finally, the mediation process lacks the enforceability mechanism should the other party fail to execute its part of the agreement and is therefore non-binding and it would not be a preferred dispute settlement mechanism in the construction industry.

**Legal framework for mediation practice in the Construction Industry in Kenya**

The fragmented nature of the construction industry and the involvement of many parties in a construction project is one of the factors that has made the industry so prone to disputes[49]. This research has revealed that the legal framework of mediation practice in Kenya is weak with 68% of the respondents suggesting that there is need for the development of rules and regulations to guide the practice is long overdue. A part from the Chapter 10 of the Constitution of Kenya 2010 and the Mediation Act 2020 it is reported that there is so little that has been developed to encourage and guide the Mediation practice in Kenya. The respondents (45%) call for strengthening of the legislation for the purpose of advocacy and propagation of the practice in the country.

[48] Kariuki Muigua, 2015, Court Sanctioned Mediation in Kenya-An Appraisal.
[49] Supra

When the participants were asked if it would be advantageous to make mediation a precondition before filling an application in Arbitration or any court of law, about 67% of the respondents objected this suggestion stating that it will make the mediation process lose it voluntary nature and therefore shall become a compulsory justice process. This reasoning contradicts the opinion of other researchers in the same area, where the court will stay proceedings and order the parties to attempt mediation before the proceedings are allowed to continue. The parties on application of either or both, may be ordered by the courts to advance disclosure of more information and documents about the dispute to foster settlement. 'Parties should have a free will to choose which form of ADR they would wish to use including the choice of the mediator'. 'There is still great value in allowing parties to determine the tone and content of their agreement' some respondents opined. This facilitates greater participation and compliance with the outcome rather than imposing the decision upon the parties. There is a proposal among the respondents that the country need to ratify the Singapore Convention on mediation (2019) to remain relevant and competitive in the practice in mediation around the world.

Other reasons raised by the participants why mediation should not be made a precursor to arbitration is because mediation should be voluntary; access to justice should not be fettered but the disputant should be made aware of its existence and why they should embrace it.

There was also the argument amongst 33% of the participants, that it should be made a mandatory process for the parties to attempt mediation before arbitration. This argument is in line with clause 34 of the proposed Mediation bill 2020 which state that '*(1) A party shall file with the court a mediation certificate, at the time of commencing judicial proceedings, stating that mediation has been considered. (2) A party entering appearance shall file with the court a mediation certificate, at the time that party enters appearance or acknowledges the claim, stating that mediation has been considered. (3) An advocate shall file with the court a mediation certificate, at the time of instituting judicial proceedings, stating that the advocate has advised a party to consider mediation. (4) A court may consider the fact that a party has*

*considered or participated in mediation when making orders as to costs, case management or such orders as the court may determine..."* It is also important to note that the clause is not explicit and that the construction disputes are also part of the disputes that the parties must refer to mediation for attempted settlement. The bill under clause 4 states that "*(1) This Act shall apply to all civil disputes'* and therefore, construction dispute cannot be taken as an exemption provided the dispute falls with the Act.

The respondents (58%) argues that the court annexed mediation is a step in the right direction but few challenges have been encountered including but not limited to the issue of renumeration, the willingness of the parties to adopt mediation as their preferred ADR mechanism to settle their dispute. About 23% argued that court annexed mediation is not being used to settle construction disputes despite the fact of it being efficient on other sectors of the disputes like family and community boundary disputes, its deficiency is largely felt in the construction Industry.

Despite the challenges in the legislation and the practice of mediation and especially in the construction industry 95.2% of the participants are able to see a very bright future of mediation practice in the construction industry in Kenya. In addition to that 78% of the respondents believe that there is need for more training and practice of the mediators in Kenya to make the practice relevant and applicable in the country with 23% advocating for inclusion of the mediation clause in the conditions of contracts. Harmonization of the laws has further been stressed by respondents and statutory instruments for the purpose of the success of the resolution of disputes in the industry. The respondents were then put to task to comment according to their own judgement the future of mediation as a form of dispute resolution in the industry in Kenya. Over 90% of the participants sees a very bright future for mediation with the opinion that training institutions need to be amalgamated, capacity strengthened for the purpose of quality control of the industry practitioners. Mediation is a form of

ADR that when proper administered the backlog of cases in courts shall be a thing of the past. [50]

**Conclusion**

Based on the findings and the objectives of this research the following conclusions can be drawn:

Mediation practice in Kenya is still in its formative stage there are few training institutions, legal and regulatory framework not adequate and the practitioners are well aware of the challenges facing the industry and they know where they want to be. It is clear that the parties should only be encouraged to attempt mediation before filing their dispute in arbitration or courts but they should not be forced, for the voluntary nature of mediation shall be lost. The future of mediation is very bright, the practice is welcome and the practitioners are optimistic that the mediation practice shall be embraced and finally take shape in the construction industry. Therefore, the research has achieved its objectives. The future is very rough but it would be a journey worth taking by addressing the findings as outlined in this paper.

**Recommendations**

From this paper, the following recommendations can be drawn:

1. The need to fast track the development of legislation and supportive legal instrument including the rules to guide the mediation practice in the country;
2. Construction practitioners to pay attention to the dispute clauses in the contract documents to ensure that they are operable and ADR given priority and more so mediation for it advantages cannot further be over emphasized;

[50] Supra note 48

3. Training institutions including mentorship of the young and upcoming practitioners for capacity building and quality assurance of the practice in the industry would be very necessary; and
4. Sensitizations through seminars, workshops and conferences for the industry players would go a long way in ensuring that the people in the industry are well informed of ADR.

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***((2023) 12(1) Alternative Dispute Resolution))***

# Public Private Partnerships in Kenya: Navigating The Legal Pitfalls in Infrastructure Projects Tendering and Contracting

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***Abstract***

*Infrastructure gap is an issue that developing countries continue to grapple with. Kenya is no exception. Public Private Partnerships (PPPs)[1] remain key and come in handy in bridging the existing infrastructure financing gap. Despite private sector increasing appetite for public sector infrastructure development and financing, PPP projects success rates remain worryingly low, with only about ten percent (10%) of such projects reaching financial close. Legal, regulatory and related challenges during the conceptualization, tendering and contracting phases form part of the reasons for project false-starts or delays.*

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[1] Hereinafter referred to as PPP.

*This article examines key legal, regulatory and related risks as far as PPPs are concerned while offering solutions for the same. It examines the legal and regulatory framework governing PPPs tendering and contracting, the dispute resolution mechanisms under the Public Private Partnerships Act*[2]*. Relatedly, the emerging role of Disputes Boards (DBs) in resolving PPP Project Agreement disputes is also explored.*

**Key Words**: Public Private Partnerships; Tendering; Contracting; Dispute Resolution; Risk Management; PPP Petition Committee; Value for Money; Accountability; Transparency; and Integrity.

## 1.0. Introduction

Public Private Partnership is defined as a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.[3] PPPs[4] represent an approach to procuring infrastructure services that is radically different from traditional public procurement.[5] Piet de Vries considers PPP as an arrangement that ''relates to risk transferring and long-term cooperation between the State and a private institution to realise a public facility and/or service.''[6] Public private partnerships therefore are part of a fundamental, global shift in the role of government – from being a direct provider of public services to becoming the planner, facilitator, contract manager and/or the regulator who ensures that

[2] No. 14 of 2021, Laws of Kenya, hereinafter called the PPPA.

[3] PPP Reference Guide Version 3.0 (Published on 27 April, 2017). Available on *https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/PPP%20Reference%20Guide%20Version%203.pdf.* Accessed on 20 October 2023.

[4] Currently governed and procured under the Public Private Partnerships Act, No. 14 of 2021, Laws of Kenya.

[5] Currently governed by the Public Procurement and Asset Disposal Act, No. 33 of 2015, Laws of Kenya.

[6] de Vries, P, ''The Modern Public-Private Demarcation: History and Trends in PPP'' in de Vries, P and Yehoue, E.B, *The Routledge Companion to Public – Private Partnerships* (Routledge, New York, 2013) 9.

local services are available, reliable, fit for purpose in meeting key quality standards, and are affordable for users and the economy.

Poor infrastructure or lack of it impedes a nation's economic growth and international competitiveness;[7] it represents a major cause of loss of quality life, illness and death.[8] Such costs are beyond the financing capacities of governments or even donors. Experts say countries must attract private finance to complement public resources.[9] Attracting private sector participation through Public Private Partnerships therefore remains essential for the delivery of various and the much needed infrastructure projects envisioned under Program Infrastructure Development for Africa.[10]

## 2.0. A Review of the Legal, Regulatory & Related Framework for Public Private Partnerships Disputes Resolution in Kenya

### 2.1. Constitutional Underpinnings

The Constitution of Kenya[11], provides the statutory foundation for the procurement of public goods and services. It provides for essential public procurement principles such as good governance, transparency and accountability;[12] access to information;[13] fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair[14]. Most

[7] *Infrastructure at the Crossroads: Lessons Learned from 20 Years of World Bank Experience*, World Bank (2006); *Infrastructure and the World Bank: A Progress Report*, World Bank (2005).
[8] Willoughby, *Infrastructure and the Millennium Development Goals* (2 Oct. 2004).
[9] Program Infrastructure Development for Africa (PIDA) Study Synthesis. Available on *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/PIDA%20Study%20Synthesis.pdf.*
[10] Program Infrastructure Development for Africa (PIDA) Study Synthesis. *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/PIDA%20Study%20Synthesis.pdf*
[11] Promulgated on 27 August, 2010.
[12] Article 10
[13] Article 35
[14] Article 47

importantly, it provides that, when a state organ or any other public entity contracts for goods or services, the same shall be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.[15] Article 227(2) formed the basis for the enactment of the Public Procurement & Asset Disposal Act[16].

Much as the PPPA, is not expressly anchored on Article 227(1) as is the case with the PPADA it is right to make a conclusion that Article 227(1) remains applicable on Public Private Partnerships as far as the procurement principles apply. In essence, in procuring and awarding a contract to a private party under the PPPA, a contracting authority[17] should be guided by the said principles.

### 2.2. Public Private Partnerships Act, No. 14 of 2021

The PPPA commenced on the 23rd December, 2021[18]. It is an Act of Parliament to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects of the Government through public private partnerships; to streamline the regulatory framework for public private partnerships and for connected purposes.

**Public Private Partnership**[19] is defined under the Act as a contractual arrangement between a contracting authority and a private party under which a private party –

(i) undertakes to perform a public function or provide a service on behalf of the contracting authority;
(ii) receives a benefit for performing a public function by way of:- compensation from a public fund; charges or fees

[15] Article 227(1)
[16] No. 33 of 2015, hereinafter called the PPADA.
[17] This is the government or public entity seeking the services of a private party or partner to deliver on the delivery of public goods or services and mandate.
[18] It repealed the Public Private Partnerships Act, No. 15 of 2013.
[19] Section 2(1) of the PPPA.

collected by the private party from users or consumers of a service provided to them; or a combination such compensation and such charges or fees;

(iii) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement; and

(iv) transfers the facility to the contracting authority.

### 2.2.1. Public Private Partnerships Petition Committee

#### A. Establishment and Composition of the PPP Petition Committee

The Public Private Partnerships Petition Committee[20] is established under Section 75 of the Act. Its function is to, among other functions, consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement.[21]

The Petition Committee is comprised of the following members: - the chairperson who should be a person qualified for appointment as a judge of the High Court of Kenya;[22] Four (4) other persons with such knowledge and experience as the Cabinet Secretary shall, consider appropriate;[23] two (2) persons not being members of county executive committees, and possessing such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate, nominated by the Council of County Governors.[24] The Petition Committee is supported by a secretary who should be a public officer designated by the Cabinet Secretary.[25] The secretary shall be an Advocate of the High Court of Kenya of at least seven (7) years standing.[26] Members of the

[20] Hereinafter referred to as the Petitions Committee
[21] Section 75(1) of the PPPA.
[22] Section 75(2) of the PPPA.
[23] Section 75(2) of the PPPA.
[24] Section 75(2) (c) of the PPPA.
[25] Section 76(1) of the PPPA.
[26] Section 76 (2) of the PPPA.

Petition Committee hold office for a term of three (3) years and are eligible for re-appointment for one further term.[27]

### B. *Locus Standi* - Who can approach the Petition Committee?

A person who is aggrieved by a decision of the Directorate, PPP Committee or a contracting authority regarding a tender process or project agreement may lodge a petition to review the decision with the Petition Committee.[28]For instance, a bidder whose bid is rejected may file a written objection with the Petition Committee to a decision of the proposal evaluation team. A private party may also object to the decision of the pre-qualification committee not to shortlist a bidder.

### C. Jurisdiction and powers of the Petition Committee

The Petition Committee considers all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under the PPPA. Such complaints more often than not arise from dissatisfaction with the decision of the prequalification committees, proposal evaluation team, decisions made by the contracting authority and the Directorate, which decisions affect the tendering and contracting process.[29]

[27] Section 75(3) of the PPPA.

[28] Section 75 (4) of the PPPA.

[29] A case in point is *Consumer Federation of Kenya & Another – Vs – Cabinet Secretary Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works & 3 Others* (In the High Court of Kenya at Nairobi, Constitutional & Human Rights Division, Petition No. E213 of 2022 as Consolidated with Petition E218 of 2022). In summary, the High Court made a determination upholding a preliminary objection that the Petitioners were prematurely before it having, among other reasons, not exhausted the remedies available under the PPPA and for which the right forum would have been the PPP Petition Committee as constituted and mandated under Section 75 of the PPPA.

### D. Timelines, Finality and binding nature of PPP Petition Committee Decisions

A complaint to the Petition Committee has to be lodged within seven (7) days from the date of the decision of the Directorate, PPP Committee or a contracting authority.[30] The Petition Committee should hear and determine the petition within twenty-eight (28) days from the date the petition is lodged.[31]

The Petition Committee issues a decree setting out its decision in a particular matter and the decree is enforceable in the same manner as a decree of the Court.[32] Any person aggrieved by the decision of the Petition Committee has a right of appeal to the High Court within fourteen (14) days from the date of the Petition Committee decision.[33]

## 2.2.2. The Emerging Role of Disputes Adjudication & Review Boards in Resolving PPP Projects Agreements Disputes

The long-term, complex nature and involvement of variety of stakeholders and interested parties in PPP projects make them easy candidates of possible conflicts, complex and often debilitating disputes.[34] From a business perspective, conventional disputes management and resolution can be very costly.[35] Not only are there significant additional costs in hiring expert consultants and legal counsels, but project personnel can become tied up in preparing or defending claims rather than focusing on the delivery of the project.[36]

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[30] Section 75(5) of the PPPA.
[31] Section 75 (6) of the PPPA.
[32] Section 80 of the PPPA.
[33] Section 75(8) of the PPPA.
[34] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapter 14.
[35] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 15.
[36] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 16.

Disputes Boards are an important aspect of best-practice in project management.[37] There are several models for the structure of Dispute Boards worldwide. These DB models are distinguished by their primary role within a project (dispute avoidance or resolution, or both), the number of DB members (one or three), the duration of the DB (standing or ad hoc) and the nature of the rules or procedures under which the DB operates. [38]

In its disputes avoidance role, the DB assists the parties in managing or resolving contentious issues and contractual disagreements before they develop into a formal dispute.[39] Typically, the DB takes a proactive stance and encourages dispute avoidance by addressing project management and resolution of issues during regular DB Meetings.[40] Furthermore, before formally referring a dispute to the DB, the parties may seek an informal, nonbinding advisory opinion from the DB.

Where the parties cannot resolve the disputes in a timely manner, either by themselves or with the assistance of the DB, either party may formally refer the dispute to the DB for resolution.[41]

In summary, DRBs can look at disputes as they emerge and make recommendations to the parties with a view to 'nipping in the bud' such incipient disputes.[42]

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[37] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 14.
[38] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 16.
[39] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 16.
[40] *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 17.
[41] For detailed analysis on the workings of DBs please refer to Disputes Board Manual: *A Guide to Best Practices and procedures* published by the Disputes Resolution Board Foundation, Chapters 14 – 17.
[42] Sir Robert Akenhead, International Arbitrator and former Judge of the UK High Court.

## 3.0. Addressing Legal, Regulatory and Related Risks in PPPs

When planning, developing and implementing PPP infrastructure tenders and projects, the existing legal, regulatory, social and related environment of the country must always be had in mind. Below are some of the key aspects one must take into consideration for the success of any PPP project.

### 3.1. Ensure Adequate Stakeholder Participation and Engagement for Public Acceptability of PPP Project

PPPs are meant to provide value to the public.[43] Getting the right level of public involvement in any PPP project is therefore not a choice but an imperative.[44] Public participation directly speaks to, contributes to good governance and enhances the chances of making success of projects.[45]

There are many challenges to effective PPP information disclosure. These include the reluctance of public bodies to share information in the absence of a clear mandate or framework for proactive disclosure, the lack of clarity on disclosure specific to PPPs, and the confidentiality issues with respect to PPP contracts and the interest of the private party.[46] The complex and technical nature of PPPs can create misunderstandings of their benefits and their rationale for their use.[47] For example, PPPs are often linked to the privatization or outsourcing of public services. Effective stakeholder management, including

[43] Finance & Development; a quarterly Magazine of the IMF September 2001 Volume 38, Number 3 page 16.
[44] Finance & Development; a quarterly Magazine of the IMF September 2001 Volume 38, Number 3 page 20.
[45] Finance & Development; a quarterly Magazine of the IMF September 2001 Volume 38, Number 3 page 30.
[46] DOMINGO PEÑALVER, Public-Private Partnerships 2.0: Value for People and Value for Future *https://blogs.worldbank.org/ppps/public-private-partnerships-20-value-people-and-value-future*.
[47] European PPP Expertise Center (EPEC) PPP Motivations and Challenges for the Public Sector Why (not) and how, 2015.

understanding who may have an interest (both positive and negative) in a PPP project therefore remains of considerable importance.[48]

Countries like Australia, Canada and British Columbia have witnessed increased levels of transparency and disclosures.[49] The World Bank Group has published guidelines on best practice frameworks for disclosure providing for suggested framework and additional resources for policy makers interested in developing a policy for PPP disclosure.[50] A paramount factor that promotes disclosure is the existence of access to information laws, or equivalent safeguards, that mandates proactive disclosures and that applies to PPP projects as well.[51] Developed Economies and Emerging Markets like Colombia, have developed structured and institutionalised approaches to PPP information disclosure.[52]

There is thus need to ensure transparent processes and effective stakeholder identification and analysis, information disclosure, engagement and robust public participation.[53] This is especially so in cases of Privately Initiated Investment Proposals (PIIPs) also known as Market Led Proposals (MLPs).[54] Although some jurisdictions simply discourage privately initiated investment

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[48] European PPP Expertise Center (EPEC) PPP Motivations and Challenges for the Public Sector Why (not) and how, 2015.

[4949] The World Bank Group frameworks for disclosure in Public private partnerships, page 18.

[50] The World Bank Group frameworks for disclosure in Public private partnerships, page 24.

[51] The World Bank Group frameworks for disclosure in Public private partnerships, page 12.

[52] The World Bank Group frameworks for disclosure in Public private partnerships, page 6.

[53] European PPP Expertise Center (EPEC) PPP Motivations and Challenges for the Public Sector Why (not) and how, 2015.

[54] Section 2 of the PPPA defines privately-initiated proposal as a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables the complete evaluation of the proposal as if it were a bid.

proposals, many including Kenya have developed mechanisms to take advantage of the PPP market initiatives, while also introducing competitive tension.[55] These include Swiss Challenge,[56] Inclusion in best and final offer round[57], Developer's fee[58] and Bid bonus.[59]

A case in point where inadequate stakeholder engagement and shortfall in competition led to failure of a proposed PPP project is the proposed PIIP by the Kenya Airways for the concession of the Jomo Kenyatta International Airport

[55] Government of Indonesia (2005) Presidential Regulation No. 67 concerning Government Cooperation with Business Entities in the Supply of Infrastructure, as amended by Government of Indonesia (2011) Presidential Regulation No. 56.

[56] Following unsolicited approach, an open bidding process is conducted. If the proponent does not win, it has the option to match the winning bid and win the contract. This approach is used in the Philippines and several states in India. For details refer to Reddy & Kalyanapu (undated) Unsolicited Proposals – New Path to Public Private Partnership: Indian Perspective.

[57] In this case a two-stage bid process in which the highest ranked bidders from the first stage (such as an expression of interest) are invited to submit final proposals in a second stage. The proponent of the market-initiated project is automatically included in the second stage. This approach (as well as the developer's fee approach) is used in the South Africa roads sector. Reference is made to the South Africa National Roads Authority (1999) Policy of the South African National Roads Agency in Respect of Unsolicited Proposals.

[58] In this case the firm which made the original offer is paid a fee by the government or the winning bidder. The fee can simply be reimbursement of the project development costs, or to be set to provide a return on developing the project concept and proposal. This is one option for dealing with unsolicited proposals permitted in Indonesia under the Presidential regulations governing PPPs. Refer to the Government of Indonesia (2005) Presidential Regulation No. 67 concerning Government Cooperation with Business Entities in the Supply of Infrastructure, as amended by Government of Indonesia (2011) Presidential Regulation No. 56.

[59] In this case the proponent receives a scoring advantage typically defined as an additional percentage added to its evaluation score in an open bidding process. This approach is used in Chile where the bid bonus can be between 3 and 9 percent of the financial evaluation score. In addition the proponent is reimbursed for the cost of detailed studies. Refer to Government of Chile (2010) Regulation No. 956 of Public Works Concessions (Reglamento de Concesiones de Obras Publicas).

currently owned, operated and maintained by the Kenya Airports Authority.[60] In Nigeria, the Lekki – Eppe Toll project failed and had to be bought back by the Lagos State Government for failure to consult with the stakeholders before project inception[61].

In the absence of continued public support and political good will, a project may be cancelled by the next elected government. For example, in 2015 a proposed road toll road in Melbourne was cancelled when a new state government was elected, costing the government USD 250 million in fees for planning, preliminary works and other fees.[62]

### 3.2. Facilitate adequate understanding of the PPP Act and other PPP enabling regulatory framework.

Conceptualisation, preparation, procurement and implementation of PPP tenders and project agreements, has proven to be a complex and resource-intensive undertaking for contracting authorities in Kenya and economies world-wide.[63] Even when the need for external advisers is accepted, these may not be affordable, may be limited in their availability, or may be poorly managed once brought on board.[64] The problem may be further compounded by resistance or inertia within the public sector to new and unfamiliar processes

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[60] Detailed parliamentary report on the proposed and stalled privately initiated investment proposal is available on *http://www.parliament.go.ke/sites/default/files/2019-06/Report%20on%20the%20inquiry%20into%20the%20proposed%20KQ%20PIIP%20to%20KAA.pdf.* Accessed on 17 November 2023.

[61] See generally Augustine E Arimoro, *'Impact of Community Stakeholders on Public Private Partnerships: Lessons from the Lekki-Epe Concession Toll Road* (2015) International Journal of Law and Legal Studies 3(7) 165-167.

[62] East West Link: Taxpayers hit with $339 million bill as Government strikes deal to scrap East West Link (15 April, 2015). ABC News. Accessed online on 17 November, 2023 at *https://www.abc.net.au/news/2015-04-15/victorian-government-to-pay-339-million-east-west-link-contracts/6393536#:~:text=Victorian%20taxpayers%20have%20been%20left,life%20of%20the%20tunnel%20project.*

[63] Global Platform for Sustainable Cities, the World Bank Report 2018 page 15.

[64] Global Platform for Sustainable Cities, the World Bank Report 2018 page 23.

and approaches such as developing contracts on an output and function, rather than input basis.[65] A project agreement, no matter how well drafted, may be declared unenforceable if it is inconsistent with the country's PPP laws and regulations and the tender documents out of which it arises.[66] Additionally, regard should be paid to constitutional provisions like Article 10[67]; Article 35[68]; and Access to Information Act[69]; Article 47[70]; Fair Administrative Action Act[71] and Article 227(1)[72].

On Access to Information, the decisions in *R – Vs – PPP Petitions Committee (1st Respondent), Kenya Ports Authority (2nd Respondent) and Bollore/Toyota Tsusho Corpn, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd and Mombasa Maize Millers Ltd (1st Interested Party), International Container Terminal (2nd Interested Party)*[73] come to play. The PPP Petitions Committee had disallowed the Applicants request to have the contracting authority supply them with a technical evaluation report. The Applicant then filed for JR No. 325 to have the PPP Petitions Committee decision under PPP Petition No. 2 of 2015 quashed. In this case the High Court held that if the Petition Committee concludes that there is need for disclosure, it is the one to set the boundaries bearing in mind that confidentiality is still a very important principle. It will decide whether or not to give redacted reports to the Petitioners. It may impose an order of secrecy on the Petitioners.

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[65] Erik Gawel, Political drivers of and barriers to Public-Private Partnerships – The role of political involvement

[66] Public private partnership Legal Resource Centre, Legal and Regulatory Issues Concerning PPPs.

[67] National Values and principles of Governance.

[68] Access to Information.

[69] No. 31 of 2016, Laws of Kenya.

[70] Fair Administration Action.

[71] No. 4 of 2015, Laws of Kenya.

[72] Value for Money, among other principles.

[73] *JR Case No. 325 of 2015 Consolidated in JR Case No. 298 of 2015.*

The order in this case was that the applications for disclosure by the Applicant and the consortium of Bollore/Toyota Tshuso Corporation be remitted to the Petition Committee for fresh consideration. Pursuant to the decision under JR No. 325 of 2015, the Petition Committee directed the Respondent to, inter alia, file and provide a summary of the technical evaluation criteria and results to the Petitioner.

### 3.3. Ensure use of appropriate tender methods and documents

As a matter of good practice, there exists various tender templates for different tender needs. For instance, Request for Proposals (RfPs) are the recommended tender documents for consultancies and PPPs. An omission or failure to use appropriate tender template may be fatal to a PPP tender process, necessitating a re-tender. This was the case in *Societe General de Surveillance, SA (SGS) – Vs – Kenya Bureau of Standards*[74], where the administrative review tribunal found that the appropriate tender document for selection of consultants is the Standard Tender Document Request for Proposals. It thus directed a re-tender of the procurement process using a Request for Proposals.

### 3.4. Avoid Flawed Tender Documents – Need for Clarity and Alignment with the PPP Law

"Model'' and "Standard'' contracts[75] can ensure consistency in the design of PPP contracts. They may also have disadvantages since they may make it harder to tailor contracts to the needs and objectives of the particular PPP Project.

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[74] HCCC. No. App No. 10 of 2009.

[75] The APMG Public-Private Partnership (PPP) Certification Guide defines a model contract are one that embodies good practice and is available for agencies to use and a standard contract as one that public agencies are required to use (or at least requirement to document and justify any deviations from it). Also standard contracts may not be a full set of all provisions in the contract, but rather a set of recommendations (including alternative approaches for some issues) in the form of guidelines. Developing standardized approaches to PPP contracts and other key documentation at a national or sub-national/sector level (as has been deployed in the French, Dutch and UK markets for example) can help to ensure the quality of project documentation, as well as reducing preparation time and costs.

In some instances, some sections of the tender documents have been declared inconsistent with the provisions of the PPPA. A case in point is the matter of the *Consortium of Toyota Tsusho Corporation; Kyuden International Corporation & DL Koisagat Tea Estate – Vs - Kenya Electricity Generating Company PLC*[76]. In this case, the Respondent published an advertisement inviting bids for qualification of bidders for the financing, design, supply, construction, commissioning, operation and maintenance of a 140MW Olkaria Public Private Partnership Geothermal power plant located in Olkaria, Nakuru County.

In response to the Request for Pre-Qualification, the Petitioner alongside eight (8) other bidders submitted applications. The Petitioner's Consortium designated Engie Energie Services as the lead member. After a successful evaluation process, the Respondent notified the Petitioner that it had, among other bidders, been pre-qualified. However, before the Respondent invited the Petitioner to bid for the Request for Proposals (RFP), the lead member of the Petitioner's consortium withdrew from the consortium. The Petitioner thus informed the Respondent of the withdrawal of its lead member and requested for approval to change the lead member of the consortium to Kyuden International Corporation.

The Petitioner further submitted documents to the Respondent demonstrating the eligibility of the proposed new lead member. The Respondent later wrote to the Petitioner informing it of its decision to disqualify them from the bidding process. Following the disqualification of the Petitioner, the Respondent published in a Gazette Notice an updated list of pre-qualified bidders effectively closing the Request for Pre-qualification process and initiating the commencement of the RFP process. The Petitioner made an application to the Petition Committee seeking review of the Respondent's decision to disqualify its consortium from the bidding process.

[76] Public Private Partnerships Petition No. 1 of 2020.

According to the Respondent, the departure of the lead member from the Consortium led to an automatic disqualification on the strength of Clause A.3(h) of the RFQ. The Petitioner relying on Clause A.3(f) of the RFQ and Sections 46(6) and (7) of the PPP Act, 2013 maintained that the Respondent was mandated to substitute the departing member since the replacement member remained compliant with the eligibility and qualification requirement set out in the RFQ. The Petitioner further contended that Clause A.3(h) of the RFQ was inconsistent with Section 46(7) of the PPP Act of 2013.

The Petition Committee held that the provisions of the RFQ document remain subordinate to the provisions of the PPP Act, 2013 and hence the provisions of the Act override those of the tender documents issued to the bidders. As a general rule, the hierarchy of laws exists such that the Constitution, legislation, regulation, rules and guidelines would supersede the provisions of the RFQ. The Petition Committee further held that the decision to disqualify an already shortlisted party without allowing the options already provided in law for re-evaluation was wrong and unlawful.

In the premise, the Respondent's decision to disqualify the Petitioner from participating further in tender was set aside and quashed entirely. The Respondent was ordered to undertake an evaluation of the proposed lead member for the Petitioner in accordance with the provisions of section 46(6) and (7) of the repealed Public Private Partnership Act of 2013[77].

[77] It's the view of the authors of this article that the issue of determination on the flaws in the tender document ought to have been raised by the prospective bidder/s early enough in the procurement process before bidding and not after the tender award. The Petitions Committee ought to have taken this approach and dismissed the Petition for being time-barred and having been brought too late in the process.

### 3.5. Embrace Function Based Tender Preparation & Completeness in Tender Document Development

Before any PPP transaction can be implemented, the tender documents and the draft PPP project agreement need to be prepared.[78] To prepare a contract, the outputs, responsibilities, and risk allocation, among other requirements need to be fully defined and expressed in appropriate legal language.[79] By focusing on outputs and allowing more scope for the private sector to decide how best to deliver these outputs and functionalities, incentives can be created for innovation and to maximize efficiency in delivering public services. This benefit of PPPs can easily be referenced as a success factor in the PPP programmes in jurisdictions like Australia and Canada.[80]

Section 50(1) of the PPPA provides for a complete suite of all the information and documentation required of a contracting authority in inviting prequalified bidders to tender for PPPs. These include: general information related to the project necessary for the preparation and submission of a bid; specifications of the project including the technical and financial conditions that should be met by a bidder; specifications of the final product, level of services, performance indicators and such other requirements as the contracting authority and relevant regulatory bodies shall consider necessary including safety, security and environmental preservation requirements; basic terms and conditions of the project agreement including non-negotiable conditions; the evaluation criteria and method; the forms and documents required to be filled by the bidder; value of the bid security; the deadline and place for submission of the bid by the bidder. As such the Act places an obligation on the contracting authority to ensure completeness of the tender documents.

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[78] Section 69 of PPPA.

[79] Section 70 of PPPA.

[80] For further reading on this, see, *https://infrastructure.org.au/wp-content/uploads/2016/12/IPA_PPP_FINAL.pdf* & *https://www.pppcouncil.ca/web/P3_Knowledge_Centre/Research/P3_s__Bridging_the_First_Nations_Infrastructure_Gap.aspx?WebsiteKey=712ad751-6689-4d4a-aa17-e9f993740a89.* All accessed on 20 October, 2023.

The rationale for clear non-ambiguous tenders is to avoid the application of the *contra proferentum* rule by the Petition Committee or Courts.[81] The effect of the rule is that an ambiguous tender ought to be interpreted as against the contracting authority which initiated it and in favour of the bidder.[82] In *R – Vs – PPARB & 3 Others Ex Parte Olive Telecom PVT Ltd*[83], the High Court of Kenya held that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution it is important that public entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture.[84]

### 3.6. Need for Public Sector Comparator

Any PPP process must be geared towards delivering infrastructure which can only be delivered through PPP framework after a detailed Public Sector Comparator (PSC) analysis.[85] This is a determination whether the infrastructure is better delivered through traditional public procurement or PPP. PSC is a tool used by governments in determining the proper service provider for the public sector project.[86] It consists of an adjusted estimate of the total cost for the lifetime of a project, including all capital, operating financing, and ancillary costs that the government would pay were it to deliver the service by traditional procurement, in other words, itself and using its own funds, as opposed to through PPP. The assessment of Value for Money[87] helps the government assess whether a project should be implemented as a PPP and how much support the government should provide to that project. A robust VfM exercise at the time of

[81] Janna McCunn, *The Contra Proferentum Rule: Contract Law's Great Survivor*, Oxford Journal of Legal Studies, Volume 39, Issue 3, Autumn 2019, Pages 483–506, *https://doi.org/10.1093/ojls/gqz002.*
[82] Janna McCunn, *The Contra Proferentum Rule: Contract Law's Great Survivor,* Oxford Journal of Legal Studies, Volume 39, Issue 3, Autumn 2019, Pages 483–506. Available on *https://doi.org/10.1093/ojls/gqz002.*
[83] JR. Appl. No. 106 of 2014, 2 KLR.
[84] For further reading refer to PPP Petitions Committee, Petition No. 2 of 2015 (*APM Terminal B.V (Petitioner) – Vs – Kenya Ports Authority (Respondent).*
[85] PPIAF: *Toolkit for Public Private Partnerships*, Value for Money and the PSC.
[86] PPIAF: Toolkit for Public Private Partnerships, Value for Money and the PSC.
[87] Hereinafter referred to as VfM.

the project selection and procurement can protect a project from several challenges, criticism and cancellation.[88]

### 3.7. Ensure Appropriate and Balanced Risk Allocation

PPP projects are long-term undertakings, during which any number of events might occur and adversely affect the project.[89] The opportunity to share risk is one of the major reasons for implementing PPPs.[90] According to the theory of risk transfer establishment, risks in PPPs need to be allocated to the party who is most effective in monitoring and managing the risk at the minimum cost.[91] Walwyn and Nkolele[92], emphasized that effective risk allocation is the main success factor for PPPs. With effective risk allocation, parties identify project risk factors in advance and allocate these risk factors to the party which can manage them the best.[93] For example, public sector party is good at handling risks associated with changes in political and regulatory environments; on the other hand private party is best placed to deal with financial and technical risks and risks associated with project management and implementation. Allocating risks to a private partner when they are better managed by the contracting authority may lead to low interest from the private sector in the PPP project. They may even render the project unbankable.[94] Shifting too much risk to the

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[88] PPIAF: Toolkit for Public Private Partnerships, Value for Money and the PSC.

[89] Chishiro Matsumoto, Rui Monteiro, Isabel Rial, and Ozlem Aydin Sakrak; Mastering the Risky Business of Public-Private Partnerships in Infrastructure 2021

[90] Pauline Hovy, Risk Allocation in Public-Private Partnerships: Maximizing value for money, 2015

[91] Brogaard and Peterson, 2017.

[92] Walwyn D and Nkolele AT (2018). "An Evaluation of South Africa's public private partnership for the localization of vaccine research, manufacture and distribution''. *Health Research Policy and Systems*, 16(30): 1 – 17.

[93] Wang H, Xiong W, Wu G and Zhu D (2018). "*Public Private Partnerships in Public Administration Discipline: A literature review*''. Public Management Review, 20(2): 293 – 316.

[94] A bankable project provides lenders with confidence that that the project will succeed and the lending is secured sufficiently to attract financing. This concept applies to all kindly of financing, but is more important and better defined when it comes to non-recourse or limited recourse financing like public private partnerships, because the

private party thus can reduce the Project's value for money[95]. In the extreme, it may undermine the project's ability to remain attractive to the prospective bidders. In instances where the bids are received and an award made, the level of risk may be too much for the private party to bear and manage leading to project failure and nonperformance[96].

It is therefore imperative that an appropriate risk management plan be developed to minimize the likelihood of the risk occurring and the impact in case it occurs.[97]

### 3.8. Need for Tender Evaluation in line with the laid-out criteria

Establishing a suitable criteria, determining the relative significance and sticking to the same in evaluation is critical to selecting the right private party to deliver a PPP project and in achieving PPP project goals.[98] Section 54 of the PPP Act provides that the proposal evaluation team shall open and evaluate bids in accordance with the procedure and evaluation criteria specified in the tender documents and any guidelines issued by the PPP Directorate for that purpose. A case in point is *ITNL International & Hembley Holdings – Vs – Kenya*

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lenders recourse for payment of debt will be primarily limited to the revenue flow from the project.

[95] Section 2 of the PPPA defines value for money as an undertaking of a public function of the contracting authority by a private party under a public private partnership results in a net benefit accruing to that contracting authority defined in terms of cost, price, quality, quantity, timeliness or risk transfer. Value for money is a measure of the net value that a government receives from a PPP project.

[96] A case in point is the Lagos Ibadan Expressway Bi-Courtney Highway Services Limited PPP Project. In this case, the project had to be cancelled because the project company failed to raise the needed finance for the project. For further details - https://link.springer.com/chapter/10.1007/978-3-030-96474-0_9. Accessed on 17 November, 2023.

[97] Pauline Hovy, *Risk Allocation in Public-Private Partnerships: Maximizing value for money*, 2015.

[98] Zhang X (2005). "*Criteria for selecting the private-sector partner in public private partnerships*''. Journal of Construction Engineering and Management, 131(6): 631 – 644, https://doi.org/10.1061/(ASCE) 0733-9364 (2005) 131: 6(631).

*National Highways Authority*[99]. In this case, the 1st Respondent (Kenya National Highways Authority) invited submissions for prequalification vide a Request for Proposals - Tender No. KeNHA/900/2014 in respect of the development of various roads on a finance, build, maintain, and transfer basis.

The key issue for determination was the correct procedure for the evaluation of the Financial Proposal according to the PPP Act and the RFP, how the tender process was conducted and the effect of apparent omissions, ambiguities, errors in an RFQ document.

The Petition Committee identified several ambiguities within the RFP document as well as the tender evaluation process itself. The Committee pointed out that if the ambiguities, omissions, and errors are such that they have result in an unfair competition then the tender process ought to be rendered flawed. The Committee held that the evaluation of the Financial Proposal was flawed as the 1st Respondent conducted an evaluation that was not provided for in the Request for Proposals. The Committee ordered a retender.

In *International Container Terminal Services Inc (Petitioner) – Vs - Kenya Ports Authority (Respondent)*[100], the Petition Committee in ordering a re-evaluation, held that the Respondent did not evaluate the bidders experience information using the criteria set out in the Request for Proposals which was contrary to the provisions of Regulation 47(1) of the PPP Regulations, 2014.

In light of the above, it's important to ensure proper, clear tender structuring, avoid ambiguities, respond to tender clarifications and also issue addendums which are aligned with the PPP Law and Regulations. It's also important to have regular consultation and participation of the user department whilst ensuring that the draft project and related agreements are detailed as possible. This helps to reduce clarifications and protracted negotiations with the bidders.

[99] Petition No. 1 of 2015.
[100] Petition No. 4 of 2015.

### 3.9. Enlist the professional services of PPP transaction advisers

Public agencies may lack the skills needed to effectively identify, develop, engage in rigorous project analysis and value for money analysis and as a whole deliver PPP projects successfully. The public sector resources and delivery timetables likely to be involved in a PPP should be identified at an early stage. This is to bring on board the requisite technical, financial, economic, social, environmental, governance and legal expertise and skills for the success of the project. For example, in the Netherlands, initially external advisors constituted about 75% percent of the personnel engaged in any given PPP project. This slowly changed in favour of internal staff as they became more familiar and better qualified to prepare and procure PPP transactions. Moreover, the Dutch government initially used United Kingdom advisers as they were more experienced with PPPs. Over time these were replaced by local Dutch advisors who had demonstrated their skills in this area.

A consortium or a Joint venture where members are jointly and severally liable is highly recommended. This may include: Technical, Financial, Economic, Legal & Environmental Social Governance (ESG) experts. This is to assist in the feasibility studies[101], pre-qualification & RFP structuring, clarifications, evaluation and project agreement negotiations. Engagement of local consultants is recommended to ensure that they bring on board the necessary local content expectations and project support continuity when external consultants are long gone.

### 3.10. Ensure any Tender & Project Cancellation is effected in compliance with the Provisions of the PPP Act and enabling laws.

For avoidance of any doubt, any tender cancellation must be well-grounded in law and authentic. Under Section 62(1), a contracting authority may cancel a tender process at any time before the execution of the project agreement if it is

[101] Generally, the best practice is to assign the feasibility to one adviser, and to use entirely different advisers for transaction advice. Using two different set of advisers allows the transaction advisers to independently review the feasibility study and test its recommendations.

in the public interest[102] to do so. Despite the foregoing, a contracting authority is prohibited from cancelling any tender unless the Petition Committee and Attorney-General approve the cancellation[103]. Such a cancellation ought to be by a notice in writing issued to the bidders and must specify the reasons for the cancellation[104]. Tender cancellation under this section is however not a compensation event[105]. For purposes of this section, public interest is impaired where the following circumstances exist—

(a) the project has been overtaken by operation of law or rendered obsolete as a consequence of substantial technological change or by reason of a force majeure event;
(b) there is evidence that the bids are significantly above market prices;
(c) material governance issues have been demonstrably detected;
(d) all evaluated tenders are non-responsive;
(e) civil commotion, hostilities or armed conflict has arisen that renders the implementation of the project impractical; or
(f) evidence of commission of an offence under the Anti-Corruption and Economic Crimes Act, 2003 or the Proceeds of Crime and Anti-Money Laundering Act, 2009.

For abundance of caution, and as a matter of good practice in PPP procurement and contracting, renegotiations and project agreement variations (if any) must be voluntary and consensual and not unilateral. Absence of this approach risks opening floodgates for litigation. The rationale for this is the preservation of sanctity of contracts, need to maintain investor confidence and taking cognizance of the underlying transactions like financing arrangements which often back PPP projects. Cancellation of a project at the end of procurement, as

[102] Public Interest means the proposed project aligns with stated infrastructure needs, policy objectives and priorities of the Government, addresses a defined societal need, and contributes to the country's socio-economic agenda.
[103] Section 62(2) of the PPPA
[104] Section 62(3) of the PPPA
[105] Section 62(4) of the PPPA

much as it may be necessary, is undesirable and can damage the market reputation of the country. From an international investment perspective, it may border on breach of bilateral or multilateral investment treaties and attract enforcement measures through arbitration, among other mechanisms. It's to be borne in mind that Kenya is a signatory to quite a number of such treaties[106] and has in place constitutional safeguards on right to property[107], Foreign Investments Protection Act[108], among other laws.

Some limited exceptions however do exist but in clearest of cases where the project was clearer a case of government incurring odious debt. The international law legal doctrine of odious debt makes an analogous argument that sovereign debt incurred by a despotic regime and without the consent of the people and not benefiting the people is odious and an illegitimate unenforceable debt and should not be transferable to a successor government, especially if creditors are aware of these facts in advance.[109]

## 4.0. Conclusion

The aim of utilising the PPP model of infrastructure procurement by any government is to deliver well-maintained, cost-effective infrastructure by tapping into private sector capital and expertise. In considering whether and why to pursue PPP as a project delivery avenue, contracting authorities ought

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[106] For a review of such treaties please visit the link here: - *https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya.* Accessed on 17 November, 2023.

[107] Specific reference is made to Section 75 of the Constitution of Kenya, 2010.

[108] Chapter 518, Laws of Kenya. This is an Act of Parliament to give protection to certain approved foreign investments and for matters incidental thereto. Specific reference is made to Sections 7, 8 & 8B.

[109] For detailed and further reading on odious debts please refer to Michael Kremer and Seema Jayachadran, *Odious Debt*, Working Paper 8953, May, 2002. Available on *https://www.nber.org/system/files/working_papers/w8953/w8953.pdf.* Accessed on 17 October, 2023. See also Robert Howse, 2007. ''*The Concept of Odious Debt in Public International Law,*'' UNCTAD Discussion Papers 185, United Nations Conference on Trade and Development. Available on *https://unctad.org/system/files/official-document/osgdp20074_en.pdf. Accessed* on 17 November, 2023.

to consider the relative pros and cons of using PPP as compared to the other options for delivering the same project.

In particular, any PPP project ought to be conceptualized, procured, implemented and managed through the lens of efficient service delivery, legal regulatory compliance, public investment management, fiscal risk management, and importantly it must achieve value for money. To this end, the contracting authority should assess how PPPs factor into broad planning and budgeting systems and ensure adequate processes are in place to determine the most efficient use of limited public resources and fiscal space.

In summary, PPP projects Success is much on delivery of a project within scope, time, cost and right quality and with stakeholder expectation realization and achievement. There is greater need for constitutional and relevant statutory compliance in the development, contracting and implementation of any PPP project.

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*R – Vs – PPP Petitions Committee (1st Respondent), Kenya Ports Authority (2nd Respondent) and Bollore/Toyota Tsusho Corpn, Kamigumi Co. Ltd, Mitsui Engineering & Ship Building Co. Ltd and Mombasa Maize Millers Ltd* (1st Interested Party), International Container Terminal (2nd Interested Party)

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# The Pros and Cons of Third Party Funding in International Arbitration: Balancing Risks and Opportunities

*By:* ***Paula Kilusi****

***Abstract***

*Third party funding in international arbitration refers to the involvement of a third party (not involved in the dispute) who provides financial assistance to one of the parties, mostly the claimant, in exchange for a share of the proceeds in case of a successful outcome. It has become a common practice in international arbitration due to its high value claims, perceived finality of awards, and enforcement regime. There are currently no specific rules in place to regulate third party funding in Kenya and the international sphere, although some arbitration institutes require disclosure of third party funding. The rationale behind third party funding includes providing financial support to companies that cannot pursue claims on their own and being a source of capital for good claims. However, it has faced concerns in the past on the basis of maintenance and champerty, which were considered illegal due to excessive litigation and gains from a dispute by a stranger. This paper explores the advantages and disadvantages of third party funding, the areas of concern that have arisen, and the best way forward for its sustainable use.*

**Keywords;** Third Party, Maintenance and Champerty, Funding, Arbitration, Public Policy

## Introduction

Third Party Funding has become increasingly prevalent in the world of arbitration both domestically and internationally.[1]It involves a third party entity

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[1] Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti, 'Third-Party Funding in International Arbitration' (Global Arbitration Review) *https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration accessed 22 November 2023.*

with no prior interest in the legal dispute; providing financial assistance to one of the parties, mostly the claimant in exchange for an agreed return in the event of a successful claim and on a non-recourse basis in the event of an unsuccessful claim.[2] This innovative approach marks a notable departure from traditional loans, providing a novel paradigm for managing the escalating costs of arbitration proceedings.[3]

When the party receiving funding assumes the role of the plaintiff in a legal dispute, the funding arrangement takes on a distinctive character.[4] In this setting, the funded plaintiff is unburdened by the obligation to reimburse the funder in the event of an unfavorable ruling or the absence of any financial recovery.[5]The linchpin of this financial model is its non-recourse foundation.[6] Instead of requiring repayment, the funder is entitled to a predetermined percentage or fraction of the case proceeds in the event of the plaintiff's victory.[7] This symbiotic alignment of interests between the plaintiff and the funder, contingent on a successful arbitration, motivates the funder to meticulously

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[2] Irene Nyamasi,''Third Party Funding in International Arbitration'' MAL 27,Issue 18 *https://ncia.or.ke/wp-content/uploads/2021/03/Third-Party-Funding-In-International-Arbitration.pdf accessed 15th December, 2022*.

[3] 'Jurisdiction guide to third party funding in international arbitration' (Pinsent Masons) *https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration* accessed 22 October 2023.

[4] Adam Silverman and Camilla Godman, 'The current approach to recovering third party funding costs in arbitration' (Omni Bridgeway, 12 January 2022) *https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/01/12/the-current-approach-to-recovering-third-party-funding-costs-in-arbitration* accessed 22 October 2023.

[5] Victoria Sahani , '' Third Party Funding in Dispute Settlement in Africa'' American Society of International Law, Vol 110 pp 90-92 < *https://www.jstor.org/stable/10.2307/26420162*> accessed 23rd August 2023.

[6] Ibid

[7] Julia Kagan, 'Non-Recourse Finance: Definition, Uses, Vs. Recourse Loan' (Investopedia) *https://www.investopedia.com/terms/n/non-recoursefinance.asp* accessed 22 November 2023.

select cases with robust merits and wholeheartedly support the plaintiff's pursuit of justice.[8]

Conversely, when the funded party assumes the role of the defendant, the dynamics of third-party funding adopt a somewhat different configuration.[9] In these scenarios, the funder contracts with the defendant to receive predetermined payments that bear a resemblance to insurance premiums.[10] Just as with a plaintiff-funding arrangement, the defendant-funding agreement may also include an additional payment to the funder if the defendant prevails in the case.[11]This model is primarily designed to ease the financial burden on the defendant while shifting the risk associated with the arbitration process to the third-party funder.[12] The funder's compensation in defendant-funded cases is typically structured in such a way that it provides financial stability for the defendant and encourages the funder's active involvement in the case's defense.[13]

The key players in this process include claimants, respondents, the funders, lawyers and potentially, the fund-brokers.[14] The funding may be sought to cover legal fees, out of pocket costs such as expert fees, arbitral institution fees,

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[8] Ibid
[9] Dalal Alhouti and Haleema Wahid, 'Disclosing Third-Party Funding in International Arbitration: Where Are We Now?' (Charles Russell Speechlys, 29 November 2022) *https://www.charlesrussellspeechlys.com/en/insights/expert-insights/litigation--dispute-resolution/2022/disclosure-obligations-and-third-party-funding* accessed 22 November 2023.
[10] Ibid.
[11] Ibid
[12] Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti, 'Third-Party Funding in International Arbitration' (Global Arbitration Review) *https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration* > *accessed 22 November 2023*
[13] 'Third Party Funding in International Arbitration' (Ashurst) *https://www.ashurst.com/en/insights/quickguide-third-party-funding-in-international-arbitration* accessed 22 November 2023.
[14]Irene Nyamasi,''Third Party Funding in International Arbitration'' MAL 27,Issue 18 *https://ncia.or.ke/wp-content/uploads/2021/03/Third-Party-Funding-In-International-Arbitration.pdf* accessed 15th December, 2022.

discovery related fees, or costs associated with subsequent enforcement actions or appeals and may be structured around a single claim or a portfolio of claims.[15] Recent years have seen an upsurge in the number of third-party funders, the number of funded cases, the number of law firms working with third-party funders, and the number of reported cases involving issues relating to funding. [16]With the growing popularity of third party funding in the world of arbitration, it is important to understand its workings, benefits, drawbacks, and the regulatory framework that governs it. This paper aims to provide a comprehensive analysis of third party funding in Kenya and the international arena. While third party funding can provide access to justice and help mitigate the high costs of arbitration, it also poses certain ethical and legal challenges that need to be addressed.

To achieve this goal, this paper will first examine the rationale driving the adoption of third-party funding and its growing prominence in arbitration. Subsequently, it will explore the advantages and disadvantages of third-party funding for both claimants and respondents. The paper will then navigate the regulatory terrain, discerning variations and commonalities between the Kenyan and international frameworks. Following this, ethical and legal concerns that have emerged in the use of third-party funding, including issues of conflicts of interest, confidentiality, and control over litigation, will be scrutinized. Lastly, the paper will conclude by presenting recommendations for ensuring a sustainable and ethically sound utilization of third-party funding in the foreseeable future.

[15] Ibid.

[16] International Council for Commercial Arbitration (ICCA). (2018, April). *Report of the ICCA–Queen Mary task force on third-party funding in international arbitration*. Retrieved from <*http://www.arbitrationicca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf* accessed 12th December,2022.

**Rationale behind Third Party Funding**

Initially, third-party funding emerged as a means to promote access to justice for under-resourced claimants.[17] Arbitration, being a costly process, often posed financial barriers for individuals and companies seeking to resolve their disputes. [18]Illustratively, in the case of ***Arkin v Borchard Lines Ltd,*** before the English Court in upholding the validity of third party funding, stated that third party funding was crucial as a means for seeking access to justice which the parties might not have access to otherwise.[19]

However, the acceptance of third party funding was not without challenges. Traditional legal doctrines of Maintenance and Champerty, which viewed financial support from third parties as illegal, were significant roadblocks. Lord Justice Steyn in the case of ***Giles v Thompsons*** stated that ''*…in modern idiom* ***maintenance*** *is the support of litigation by a stranger and* ***champerty*** *is an aggravated form of maintenance.*''[20] Both maintenance and champerty were considered illegal on public policy concerns given that it would interfere with the judicial system's efficiency by encouraging excessive litigation. Nonetheless, the court in ***Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*** found that third party funding did not interfere with due process nor public policy but instead useful in promoting access to justice.[21]

Over time, the focus of third-party funding in arbitration has shifted from merely providing financial support to becoming a niche for commercial investment. Reputable funders now see good claims as valuable assets and a

[17] Victoria Sahani , '' Third Party Funding in Dispute Settlement in Africa'' American Society of International Law, Vol 110 pp 90-92 < *https://www.jstor.org/stable/10.2307/26420162*> accessed 23rd August 2023.

[18] Third Party Funding: A New Perspective of Access to Justice' (American Bar Association 2021)*https://www.americanbar.org/content/dam/aba/publications/just-resolutions/february-2021/sweify-tpf-access-to-justice.pdf.* Accessed 15th, September 2023

[19] Arkin v Borchard Lines Ltd (2005) EWCA Civ 655.

[20] Giles v Thompsons (1993) UKHL 2.

[21] Campbells Cash and Carry Pty Ltd v Fostif Pty Limited (2006) HCA 41.

source of potential capital for companies.[22] Today, third party funding is predominantly attracted to international arbitration, where high value claims, the perceived finality of awards and favorable enforcement regimes offer assurance of substantial returns.[23]In echoing this move in the international sphere, the case of ***Giovanni Alemanni v. The Argentine Republic*** the tribunal stated that "*the practice [of third-party funding] is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection*"[24].

Third-party funders consider various factors when deciding whether to fund an international arbitration, including the value and complexity of the claim, the likelihood of success, jurisdiction, arbitral institution and the ease of award enforcement.[25] This consideration often involves a legal memorandum analyzing various aspects of the case. A number of high profile cases on the continent have been brought with the backing of a third party funder.[26]A good example is the **Cortec Mining Case,** which was funded US$350m by Alliance 1 against Kenya over revocation case.[27] Some leading arbitration law firms such

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[22] José Ángel Rueda-García, 'Third-Party Funding and Access to Justice in Investment Arbitration: Security for Costs as a Provisional Measure or a Standalone Procedural Category in the Newest Developments in International Investment Law' (Springer 2023) *https://link.springer.com/chapter/10.1007/978-3-030-48393-7_7.* Accessed 10th September 2023

[23] Third-Party Funders for International Arbitration' (International Arbitration Attorney) *https://www.international-arbitration-attorney.com/third-party-funders-international-arbitration/* accessed 15th September, 2023

[24] Giovanni Alemanni and Others v The Argentine Republic, ICSID Case No. ARB/07/8.

[25] The Growth of Third-Party Funding: A Global Perspective' (White & Case) *https://www.whitecase.com/insight-alert/growth-third-party-funding-global*-perspective. Accessed 6th September, 2023

[26] Kirsty Simpson and Ben Sanderson, ''A Guide to Third Party Funding in Africa '' DLA Piper Africa < *https://www.dlapiperafrica.com/en/africa-wide/insights/2022/A-guide-to-third-party-funding-in-Africa.html*> published on 3rd Nov 2022, accessed 3rd August 2023.

[27]Brooke Guven, 'From Transparency to Prohibition : UNCITRAL WGII considers options to Regulate Third-Party Funding' (IISD, 14th September,2021)< *From transparency to prohibition: UNCITRAL WGIII considers options to regulate third-party funding – Investment Treaty News (iisd.org)*> accessed 3rd October, 2023

as Aceris Law LLC, do not charge to assist clients in need of third party funding, for commercial or investment arbitrations.[28] Third Party Funding is now practiced by reputable funders as a force for good. [29] Whichever the scenario, the commercial reality is the same: a good claim is an unrealized asset of the company and third party funding is a source of capital for any company with a good claim. [30]

**Pros and Cons of Third Party Funding**

**Pros**

1. **Third Party Funding provides a cost effective solution for parties with meritorious claims who cannot afford the high costs of arbitration.**

Third-party funding undoubtedly provides for easier access to arbitration for parties with meritorious claims who may not have the funds available to mount a claim.[31] The average cost of international arbitration can exceed $50,000, which can be a substantial burden for companies and individuals with limited financial resources.[32] TPF allows these parties to pursue their claims without the financial burden of the arbitration process. TPF undoubtedly provides easier access to arbitration for parties with meritorious claims who may not have the funds to mount a claim. This is particularly relevant in investor-state dispute

[28]*https://www.international-arbitration-attorney.com/third-party-funders-international-arbitration/*

[29] Andrew Roberts, ''Third Party Funding : A source of Capital for Any Company with a Good Legal Claim" FTI Consulting, 2018 *https://www.fticonsulting.com/emea/insights/articles/third-party-funding-source-capital-any-company-with-good-legal-claim,* accessed 17th December,2022.

[30] Ibid.

[31] Dalal Alhouti, "Disclosing Third Party Funding in International Arbitration; Who are we now?'' Charles Russel Speechyls published on 29th November, 2022 *https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/litigation--dispute-resolution/2022/disclosure-obligations-and-third-party-funding/* accessed on 20th December, 2022.

[32] 'Cost of International Arbitration' (International Arbitration, 2023) < Cost of International Arbitration • Arbitration (international-arbitration-attorney.com)> accessed 3rd October 2023.

settlement (ISDS) cases, where TPF can help level the playing field between the investor and the host state. Studies have shown that many parties with valid claims are unable to pursue them due to financial constraints. For instance, a report by the World Economic Forum found that 67% of executives from SMEs cite survival and expansion as their main challenge, suggesting that a significant number of SMEs might not pursue their legal rights due to financial constraints.[33]

Third party funding provides a solution for parties who cannot afford the high costs of arbitration. Funders provide the necessary funding to pursue a claim in exchange for a share of the recovery. This means that parties with valid claims can access justice without the financial burden of the arbitration process. Moreover, third party funding also provides access to legal expertise and resources that parties may not have on their own. This can help level the playing field in disputes where one party may have more resources than the other.[34]

**2. Third Party Funding can help manage the risks associated with arbitration**

Arbitration is not without risks and the associated costs and unpredictability of expenses can be burdensome for claimant companies, especially those with limited financial means.[35]In addition, the possibility of losing a claim can leave a company with few options for recovering the funds already invested in the arbitration process.[36]There is always a risk that the arbitration process may not

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[33] 'Future Readiness of SMEs and Mid-Sized Companies :A Year On' (World Economic Forum, 2nd December, 2022) < Future Readiness of SMEs and Mid-Sized Companies: A Year On | World Economic Forum (weforum.org)> accessed 4th October, 2023.

[34] 'Third Party Funding in International Arbitration' (Ashurst, 15th June 2022) < QuickGuide - Third party funding in international arbitration (ashurst.com)> accessed 5th October, 2023.

[35] Third-Party Funding in Investment Arbitration | SpringerLink. *https://link.springer.com/referenceworkentry/10.1007/978-981-13-3615-7_75.* Accessed 4th September,2023

[36] Third Party Funding: A Source of Capital | FTI Consulting. *https://www.fticonsulting.com/insights/articles/third-party-funding-source-capital-any-company-with-good-legal-claim.* Accessed 10th September, 2023

result in a favorable outcome leaving the claimant with little to show for their investment.[37]

Third party funding can provide a solution to this problem. By assuming some of the financial risk associated with arbitration, third party funders allow claimant companies to focus on other aspects of their business while relieving them of the cash-flow concerns and expenditures related to legal fees.[38] While claimants may have to forego a percentage of their potential recoveries to secure third party funding, this trade-off can be well worth it in the long run, particularly in high-stakes disputes where the risks and costs are particularly high.[39]

### 3. Third Party Funding may be used as a means of encouraging early settlement

TPF provides the necessary financial support for claimants to continue with the arbitration process.[40]This is particularly important in arbitration cases where defendants may try to prolong the process, which can be financially crippling for the claimant.[41] As the arbitration process can be lengthy and expensive, it can quickly deplete the claimant's resources, making it difficult or impossible to continue with the case. This can put the claimant in a vulnerable position where they may be forced to settle for less than what they are owed. In A paper titled "Against Settlement" by Owen M. Fiss argues that in many cases, parties settle

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[37] Ibid

[38] Maria Beatriz Burghetto,'Risk Assessment and Third-Party Funding in Investment Arbitration'European Yearbook of International Economic Law, 2021 < *https://doi.org/10.1007/978-3-030-48393-7_6*> accessed 7th October, 2023.

[39] Ibid.

[40] Victoria Sahani , '' Third Party Funding in Dispute Settlement in Africa'' American Society of International Law, Vol 110 pp 90-92 < https://www.jstor.org/stable/10.2307/26420162> accessed 23rd August 2023.

[41] Sebastian Gutiu, 'Third-party Funding in International Arbitration' (Schonherr,08 January 2019) < *Third-party funding in international arbitration (schoenherr.eu)*> accessed 7th October, 2023.

because they do not have the resources to continue with the litigation process.[42] This shows that lack of resources is a significant obstacle to achieving a just outcome in legal disputes.

Third party funding can provide a solution to this problem by giving claimants the financial resources they need to continue with the arbitration process. Because third party funders are primarily concerned with investing in meritorious claims, they may be more inclined to urge early settlement after the other party is made aware that the claim has the endorsement of a funder.[43] This puts pressure on the defendant to settle early, rather than prolonging the arbitration process.[44] As a result, the claimant can achieve a just outcome without having to deplete their resources or settle for less than what they are owed.

## Cons

**1. Third party funding may come at a significant cost to some claimants.**

While third party funding can provide access to justice for those who might not otherwise be able to afford arbitration, it is important to note that the cost of this funding can be significant. This is because the claimant must pay a considerable portion of the damages obtained to the funder, typically ranging from 20-40% of the recovered amount.[45] This could result in a substantial reduction in the amount of compensation the claimant receives.

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[42] Ellen Waldman, 'What Against Settlement Got Right',in Art Hinshaw, Andrea Kupfer Schneider and Srah Rudolph Cole (eds), Discussions in Dispute Resolution: The Foundational Articles (New York,2021;online edn, Oxford Academic, 17 June 2021) https://doi.org/10.1093/oso/9780197513248.003.0073 accessed 7th October, 2023.

[43] Ignacio Torterola, 'Third-party Funding in International Investment Arbitration'( Investment Policy Hub, 08 April, 2018) < Blog | UNCTAD Investment Policy Hub> accessed 11th September, 2023.

[44] Ibid

[45] Jeffery Commission, 'The more users encounter third-party funding in practice, the more favorably they tend to perceive it' (Burfod ,11th October, 2019) < *"The more users encounter third-party funding in practice, the more favorably they tend to perceive it" | Burford Capital*> accessed 4th October, 2023.

A study by Burford Capital found that third party funders charge an average of 37% of the recovered amount in fees.[46] This can be a significant financial burden for some claimants, especially if the recovered amount is not substantial. It is important for claimants to carefully evaluate the terms of any third party funding arrangement before agreeing to it. Some funders may offer more favorable terms than others, so it may be worthwhile to shop around. Additionally, it is important to carefully consider the potential risks and benefits of third party funding in each individual case.

In the event that the damages awarded are lower than expected, there may be additional complications.[47]Depending on the terms of the funding agreement, the funder may be entitled to recoup their investment before the claimant receives any compensation.[48]This could leave the claimant with little to no recovery. Furthermore, in some cases, the funding agreement may be structured as a loan rather than an investment, meaning that the claimant may still be responsible for repaying the funder even if they do not receive a favorable outcome in the arbitration.[49] While third party funding can provide a valuable means of accessing justice, it is important for claimants to carefully evaluate the potential costs and risks associated with such funding before entering into an agreement.[50]

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[46] Ibid

[47] Victoria Sahani , '' Third Party Funding in Dispute Settlement in Africa'' American Society of International Law, Vol 110 pp 90-92
< *https://www.jstor.org/stable/10.2307/26420162*> accessed 23rd August 2023.

[48] Swargodeep Sakar, 'Third Party Funding in International Arbitration: New Challenges and Global Trends' International Journal of Legal Science and Innovation, 2020, 2(3) *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846346 accessed 3rd October, 2023.*

[49] Ibid

[50] Peter Muriithi,, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (3 May 2022) *Alternative Dispute Resolution Journal https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476 (accessed 20th December 2022).*

**2. Third Party Funding might interfere with party autonomy**

Party autonomy is a crucial principle in arbitration.[51] It provides that the parties to an arbitration have the freedom to choose how their arbitration is conducted as well as how their arbitral panel is constituted.[52] This principle is enshrined in Section 34(1) of the Arbitration Act 1995 and is a core tenet of the arbitral process.[53] However, TPF might interfere with party autonomy in terms of loss of autonomy and potential conflicts of interests.[54]There will inevitably be some loss of autonomy since the funder will need some degree of control over its investments, particularly when it comes to any proposed settlement.[55]This is because the funder has a direct economic interest in the outcome of the claim and may exercise a controlling influence over the proceedings.[56] Interests between the funder and the funded party should be aligned. However, if they begin to diverge on strategy, this can strain the relationship and possibly lead to conflicts of interest.[57]

**3. Third Party Funding may raise potential conflicts of interest**

In some cases, potential conflicts of interest may arise when arbitrators have links with third-party funders. These links may create a risk that arbitrators may not evaluate a case impartially. Arbitrators may have sat as counsels in other

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[51] Kariuki Muigua, 'Settling Disputes Through Arbitration' (Glenwood Publishers 2022).
[52] Ignacio Torterola, 'Third-party Funding in International Investment Arbitration'( Investment Policy Hub, 08 April, 2018) < *Blog | UNCTAD Investment Policy Hub*> accessed 11th September, 2023.
[53] Arbitration Act 1995, S34(1).
[54] Peter Muriithi,, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (3 May 2022) *Alternative Dispute Resolution Journal https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476* (accessed 20th December 2022).
[55] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023
[56] Hussein Haeri Et Al, 'Third Party Funding in International Arbitration' (Global Arbitration Review, 30 December, 2022) < *Third-Party Funding in International Arbitration - Global Arbitration Review*> accessed 2nd October, 2023.
[57]Ibid

cases financed by the same funders or have a previous professional relationship with the funder. In such cases, the funder may be more interested in getting a return on their investment rather than ensuring justice is served. If arbitrators do not rule in favor of the financier, they risk their professional future, which may lead to a conflict of interest.[58]

To avoid potential conflicts of interest, parties engaging in third-party funding should disclose any relationships with the funders or their representatives to the arbitrators.[59] If conflicts arise, the arbitrator should step down or disclose the potential conflict to the parties involved. In addition, arbitrators should be cautious when dealing with third-party funding cases and ensure that they are impartial in their evaluation of the case.[60]

**Regulation of Third Party Funding**

There are presently no rules in place to regulate or govern the functioning of Third Party Funding in the context of domestic arbitration and international arbitration in Kenya.[61] Similarly, there is presently no clear restriction of its use in the international sphere.[62]A brief analysis of; the Arbitration Act No. 4 of

[58]'Speculating on injustice : Third-party funding of investment disputes' 'Chapter 5 of TNI's Profiting from Injustice, Boston College, Law School Americas Working Paper Series published on 27th November, 2012 <*https://corporateeurope.org/en/trade/2012/11/chapter-5-speculating-injustice-third-party-funding-investment-disputes* >accessed on 17th December, 2022.

[59] Ibid

[60] Ibid

[61] Peter Muriithi,, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (3 May 2022) *Alternative Dispute Resolution Journal* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476 (accessed 20th December 2022).

[62] Ibid

1995(Kenya)[63], UK Arbitration Act 1996 Cap 23,[64] Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules October 2015[65], the Centre for International Arbitration (Arbitration) Rules, December 2015(UK), Chartered Institute of Arbitrators Arbitration Rules 1 December 2015(UK)17, and the London Court of International Arbitration, Arbitration Rules October 2018[66] demonstrates that all these statutes and rules all give a wide berth to the issue of third-party funding in Arbitration.[67]

Similarly, in the international sphere, third party funding is not out-rightly outlawed in a majority of the jurisdictions.[68] Nonetheless, there have been efforts by some arbitral institutions mandating for disclosure of third party funding by the funded party. These institutions include, ICC Arbitration rules,[69]Beijing International Arbitration Commission,[70]Singapore International

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[63] Arbitration Act, 1995 *https://ncia.or.ke/wp-content/uploads/2021/02/ArbitrationAct4of1995_2.pdf* accessed 26th December, 2022.

[64] Arbitration Act 1996, Cap 23 *https://www.legislation.gov.uk/ukpga/1996/23/data.pdf accessed 26th December,* 2022.

[65]Chartered Institute of Arbitrators Rules, Kenya *https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf* accessed 26th December, 2022.

[66]London International Court of Arbitration Rules, 2018 *https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx* accessed 26th December, 2022.

[67] Peter M. Muriithi, ''Champerty and Maintenance : The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions" Alternative Dispute Resolution Journal, Volume 10, Issue No. 1,2022 ,3 May 2022 *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476* accessed 20th December, 2022.

[68] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023

[69] Article 11(7) ,ICC Arbitration Rules < *https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/*> accessed 23rd December 2022.

[70] Article 39, Beijing International Arbitration Center Rules *https://www.acerislaw.com/beijing-arbitration-commission-beijing-international-arbitration-center/#:~:text=The%20Beijing%20Arbitration%20Commission%2C%20also,and%20other%20dispute%20resoluti* accessed 23rd December 2022.

Arbitration Centre[71] and the Hong Kong International Arbitration Centre Rules[72] .These impose ethical obligations related to funding by requiring that the existence and identity of the funder be disclosed to the tribunal and other parties with the ability of the tribunal to order disclosure of the funding agreement in certain contexts.[73]

While this is a welcome step toward reducing the complexity of enforcing awards including third-party claims, the challenge of enforcing awards under an anti-third-party financing system cannot be disregarded. US, UK ,Australia, Germany, France, and the Netherlands are considered funder friendly.[74]There are however jurisdictions that prohibit third party funding such as Ghana, Namibia, Nigeria, Rwanda, Tanzania, Uganda and Zimbabwe.[75] Typically, the prohibition stems from the doctrines of maintenance and champerty, or from the professional conduct provisions applicable to legal practitioners.[76]

**Areas of Concern in Third Party Funding in Arbitration.**

For effective utilization of third party funding three issues have to be considered. Public policy concerns, duty to disclose to avoid conflict of interest.[77]

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[71] Rule 24.1 SIAC Rules 2016 < *https://siac.org.sg/siac-rules-2016*> accessed 24th December, 2022

[72]Hong Kong International Arbitration Rules< *https://www.acerislaw.com/wp-content/uploads/2022/09/2018-HKIAC-Arbitration-Rules-1.pdf*> accessed 26th December, 2022.

[73] Brooke Guven and Lise Johnson, ''The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement'' CCSI Working Paper, May 2019.

[74] Third Party Funding: A Comparative Legal and Factual Overview. *https://www.cambridge.org/core/books/abs/third-party-funding/third-party-funding-a-comparative-legal-and-factual-overview/CDB4D61CE52188C3C8607B7352969572* accessed 4th October, 2023

[75] Ibid

[76] Kirsty Simpson and Ben Sanderson, ''A Guide to Third Party Funding in Africa'' 3rd November, 2022 DLA Piper *https://www.dlapiperafrica.com/en/africa-wide/insights/2022/A-guide-to-third-party-funding-in-Africa.html* accessed 18th December 2022.

[77] Peter Muriithi, 'Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions' (3 May 2022) *Alternative Dispute Resolution*

### a. Public Policy Concerns

Third party funding can potentially undermine the public policy of a country.[78] To be effectively enforced in any jurisdiction, an award must be consistent with that of a country's public policy.[79] Certain countries have expressed reservations and have even made third-party fundraising illegal. One such regime is Irish law, where in the case of *Persona Digital Telephony Limited & Sigma Wireless Networks Limited v. The Minister for Public Enterprise, Ireland, and the Attorney General*,[80] the court declared third-party funding to be contrary to Irish public policy and thus decided to set aside the award rendered in that case. In order for the award to be successfully enforced in any jurisdiction, it has to be aligned with the public policy of that country.

To determine whether third-party funding is a danger to public policy, a case-by-case analysis is necessary. While third-party funding can be helpful in providing access to justice, it should be closely monitored to ensure that it does not undermine public policy concerns, such as the independence of the judiciary, the integrity of the legal system, or the fairness of the proceedings.[81] Some examples where third-party funding could potentially harm public policy include cases where funders seek to influence the outcome of the proceedings, or where they exert undue influence over the parties or the tribunal.[82] Therefore, it is important to strike a balance between facilitating access to justice and protecting the public policy concerns of a country.

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*Journal* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4073476 (accessed 20th December 2022).

[78] The Impact of Third-Party Funding on Access to Justice. *https://link.springer.com/chapter/10.1007/16495_2023_55.* Accessed 3rd September, 2023

[79] Ibid

[80] Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland and the Attorney General (2017) IESC 27

[81] Third Party Funding: A New Perspective of Access to Justice. *https://www.americanbar.org/content/dam/aba/publications/just-resolutions/february-2021/sweify-tpf-access-to-justice.pdf.* Accessed 7th September, 2023

[82] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023

**Duty to Disclose to avoid conflicts of interest**

The potential for conflict of interest arises in third party funding of international arbitration in several ways. Firstly, the third-party funder, by virtue of financing the legal fees and expenses, may have a vested interest in the outcome of the dispute.[83]This could potentially influence proceedings, especially if the funder has a history of involvement with the same arbitrator in previous arbitrations.[84] In such cases, the funder's financial interests may jeopardize the principles of equality of parties and impartiality of the arbitrator.[85] For instance, if a funder has provided financial support to a party in a previous arbitration involving the same arbitrator, the arbitrator may feel indebted to the funder and may be biased in favor of the party supported by the funder.[86] This could lead to an unfair outcome, contrary to the principles of impartiality and equality of the parties.[87] Secondly, there is a risk that the third-party funder might exert undue influence over the arbitrator.[88] This could be through direct or indirect means, such as promising future funding opportunities or threatening to tarnish the arbitrator's professional reputation. This could potentially sway the arbitrator's decision-making process and compromise the fairness of the arbitration proceedings.

The disclosure of third-party funding agreements serves to mitigate these risks. By making these agreements transparent, all parties involved in the arbitration

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[83] Hussein Haeri et al, 'Third Party Funding in International Arbitration' (Global Arbitration Review, 30 December 2022) <Third-Party Funding in International Arbitration - Global Arbitration Review> accessed 27th February, 2023.
[84] Ibid
[85] Ibid
[86] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023
[87] Emerging approaches to the regulation of third-party funding. *https://www.nortonrosefulbright.com/en-nl/knowledge/publications/4f5fb25c/emerging-approaches-to-the-regulation-of-third-party-funding.* Accessed 5th October, 2023
[88] Ibid

are made aware of any potential conflicts of interest.[89] This allows for measures to be put in place to ensure that the arbitrator remains impartial and that the proceedings are conducted fairly.[90] Disclosure reduces professional risk for arbitrators.[91] If a third-party funder knows that their involvement will be disclosed, they are less likely to attempt to exert undue influence over the arbitrator.[92]This protects the arbitrator from potential professional repercussions and ensures that they can make decisions without fear of retaliation or bias.[93] In essence, disclosure promotes transparency, safeguards impartiality, and upholds the integrity of international arbitration proceedings.[94]

To address this problem, the International Bar Association's General Standard 7 of the Guidelines on Conflict of Interest in International Arbitration requires that any third-party financing agreements be disclosed.[95]This means that parties and arbitrators must disclose any third-party funding arrangements before the arbitration process begins.[96] By disclosing such agreements, the risk of conflicts

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[89] Valentina Frignati, 'Ethical Implications of Third-Party Funding in International Arbitration'(2016) 32(3) Arbitration International *https://doi.org/10.1093/arbint/aiw011* accessed 15th September, 2023.

[90] Miriam Harwood and Christina Trahanas, 'Conflicts of Interest – Part 1 General Report – Chapter 3 – Handbook on Third Party Funding in International Arbitration' (Arbitration Law, March 2018) <*Conflicts of Interest - Part I General Report - Chapter 3 - Handbook on Third-Party Funding in International Arbitration | ArbitrationLaw.com*> accessed 27th June, 2023.

[91] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023

[92] Ibid

[93] Third Party Funding: A New Perspective of Access to Justice. *https://www.americanbar.org/content/dam/aba/publications/just-resolutions/february-2021/sweify-tpf-access-to-justice.pdf.* Accessed 15th September, 2023

[94] Ibid

[95]International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (2014) <*IBA Guidelines on Conflict of Interest NOv 2014 TEXT PAGES.indd (ibanet.org)*> accessed 28 October 2023.

[96] Pierre Bienvenu and Alison FitzGerald 'The IBA on Conflicts of Interest'(Norton Rose Fulbright, October 2015) <*The IBA on conflicts of interest | International arbitration report,*

of interest can be mitigated, and the arbitrator can ensure that they remain impartial throughout the process.[97]In essence, disclosure promotes transparency, safeguards impartiality, and upholds the integrity of international arbitration proceedings.[98]

**b. Security for costs**

Security for costs is a legal mechanism that allows a party to request that the other party provide security, typically in the form of money, to cover the costs that may be awarded against them in the event that they lose the case.[99]This is typically used in situations where there is a concern that the other party may not be able to pay the costs if they lose, which could result in the successful party being unable to recover their costs.[100] The concern with security for costs is that it can create a barrier to access to justice, particularly for parties who may not have the financial resources to provide the required security.[101]This can be particularly problematic in situations where there is a power imbalance between the parties, as the party with greater financial resources may be more easily able to provide the required security.[102]

This issue had been considered in a recent English arbitration case, *Essar Oilfields Services Ltd. v. Norscot Rig Management*[***103***] the arbitrator considered it reasonable

*Issue 5 | Publications | Global law firm | Norton Rose Fulbright*> accessed 6th September, 2023.

[97]Ibid

[98] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023

[99] Anticipating, managing and mitigating power imbalances. *https://www.thepartneringinitiative.org/wp-content/uploads/2018/12/Managing-power-imbalances.pdf* accessed 4th September, 2023

[100] Security for Costs in Arbitration - Lexology. *https://www.lexology.com/library/detail.aspx?g=c588ced7-0e74-40d6-8090-295d7ce84767* accessed 4th September,2023

[101] Ibid

[102] Ibid

[103] Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd (2016) EWHC 2361.

and in the interests of justice to award indemnity costs and included in his costs award almost £2 million in funding costs. [104]The costs were then upheld by the English Court. [105]This decision by the court reaffirmed that the cost of funding can in fact be included in the costs awarded to the successful party. However, this principle had been proposed by the case on a subjective, case-to-case basis.

One way forward is to consider alternative mechanisms for managing the risk of non-payment of costs, such as after-the-event insurance or third-party funding arrangements.[106] These can help to mitigate the risk of non-payment of costs, while also avoiding some of the access to justice concerns associated with security for costs. While security for costs can be an important mechanism for managing the risk of non-payment of costs, it is important to ensure that it does not create a barrier to access to justice or unfairly disadvantage parties with fewer financial resources.

**Conclusion**

In conclusion, while the shift towards regulation of Third-Party Funding (TPF) in arbitration may not be immediate, it is indeed inevitable. This inevitability is driven by two key factors: firstly, the global best practices that endorse TPF, and secondly, the pressing need to enhance access to justice, not only in Kenya but also worldwide. Given the significant benefits that TPF brings in terms of expanding the use and access to arbitration, it should not be dismissed outright. However, it is crucial to acknowledge and address the potential risks it poses to fundamental principles of arbitration such as confidentiality, impartiality, and equality of parties. Therefore, it is imperative to regulate the process of third-party funding at both domestic and global levels. A well-structured regulatory framework can pave the way for a potential win-win situation for both the funded party and the financier. It can ensure that TPF serves its purpose of

[104] Ibid.
[105] Ibid.
[106] Tabitha Joy Raore 'Reform of Investment Arbitration in the Context of Third-Party Funding' 1(1 )Alternative Dispute Resolution Journal < *https://ncia.or.ke/wp-content/uploads/2022/03/NCIA-Journal-2022.pdf*> accessed 5th September, 2023

enhancing access to justice while preserving the integrity of arbitration proceedings. Thus, regulation of Third-Party Funding is not just desirable but an urgent necessity in today's arbitration landscape.

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*Giovanni Alemanni and Others v The Argentine Republic, ICSID Case No. ARB/07/8*.

*Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* (2016) EWHC 2361.

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# Journal Review: Journal of Conflict Management and Sustainable Development Volume 10 Issue 5 (2023)

*By:* ***Mwati Muriithi****

Published in August 2023, the Journal of Conflict Management and Sustainable Development Volume 10 Issue 5 is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Conflict Management and Sustainable Development.

It is edited by Hon. Dr. Kariuki Muigua, Ph.D a member of the Permanent Court of Arbitration, who was awarded: the ADR Practitioner of the Year 2022, The African Arbitrator of the Year 2022; The Chartered Institute of Arbitrators (CIArb) (Kenya Branch) ADR Lifetime Achievement Award 2021; The ADR Publisher of the Year 2021 and The Law Society of Kenya (LSK) ADR Practitioner of the Year Award 2021.

His book, *Settling Disputes through Arbitration in Kenya, 4th Edition;* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022. He is a member of the National Environment Tribunal which was awarded the best performing Tribunal in Kenya for handling the most cases.

Hon. Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Sustainable Development in his paper *'Reconceptualizing Corporate Governance for Sustainable Development'*. The paper argues a case for reconceptualizing corporate governance in order to realize Sustainable Development.

Anne Wairimu Kiramba in her paper *'Harnessing technology to foster biodiversity conservation for Sustainable Development'* examines various technologies that can

* *LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.*

be harnessed to foster biodiversity conservation for Sustainable Development. The paper discusses the role of technology in biodiversity conservation.

*'Reviewing Kenya's Civil Aviation (Unmanned Aircraft Systems) Regulations, 2020 to Address the Threat of Hostile Drones and Artificial Intelligence'* by Michael Sang explores the regulatory landscape surrounding hostile drones and artificial intelligence (AI) in Kenya, focusing on the Civil Aviation (Unmanned Aircraft Systems) Regulations, 2020.

Dr. Winnie Waiyaki and Dr. Gowon Cherui in their paper *'The Mental Health Situation Among Teachers in Learning Institutions in Kenya: A Concern for Attainment of Quality Education (SDG. NO. 4)'* assesses instructors' awareness of their mental health and coping strategies in technical and vocational training institutions. The paper relies on available secondary data and reviewed existing literature on mental health issues and interventions among instructors.

*'Fostering Africa's Blue Economy: Problems and Promises'* by Hon. Dr. Kariuki Muigua discusses the problems and promises of the Blue Economy in Africa. The paper further suggests reforms towards fostering Africa's Blue Economy.
Michael Sang in his paper *'Operationalizing the Compensation of Victims of TerrorismFund in Kenya: A Step Towards Compliance with Statutory and International Obligations'* focuses on the operationalization of the Compensation for Victims of Terrorism Fund in Kenya, with a primary emphasis on compliance with statutory and international obligations.

The Journal contains a review of the Alternative Dispute Resolution (ADR) Journal Volume 11 Issue 3 by Mwati Muriithi. The ADR 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.

*'Cultivating Sustainability: Nurturing Resilient Agriculture for a Greener Future'* by Dr. Dynesius Nyangau explores the multifaceted realm of sustainable

agriculture, delving into the challenges and opportunities presented by sustainable farming practices. The paper advocates for the promotion and adoption of sustainable farming practices by farmers, policymakers, and consumers alike.

Ndirangu Ngunjiri in his paper *'Fragile Ecosystems, Fragile Peace: Examining the Fragility of Peace and Security in the Face of Climate Change in Northern Kenya'* investigates the fundamental issue of environmental change and its unfavorable effect on harmony and security in Northern Kenya.

*'Actualizing Africa's Green Dream'* by Hon. Dr. Kariuki Muigua asserts that green growth in Africa can aid in achieving Sustainable Development by striking a balance between human development, environmental conservation and economic development. The paper examines the progress made towards achieving green growth in Africa.

Maryanne Mburu in her paper *'The Role of Alternative Dispute Resolution in the Management of Water Related Disputes in Kenya'* recognizes the challenges and the prospects of utilizing Alternative Dispute Resolution (ADR) for the resolution of water related disputes and proposes the strengthening of existing water dispute management frameworks through the inclusion of ADR mechanisms to complement existing formal mechanisms.

Lastly, *'Parliamentary Scrutiny of Statutory Instruments in Kenya: Problematic Implications for Criminal Justice and Proposals for Amendment'* by Michael Sang explores the legal principle of separation of powers and the exclusive domain of Parliament in legislative power. The paper discusses the delegation of legislative power to the executive and the scope of parliamentary oversight over delegated legislation, as outlined in Article 94(5) of the 2010 Constitution.

# An examination of Kenya's divergent approach to the meaning of 'delivery' of an arbitral award in contrast to other Model Law jurisdictions

*By:* ***Prince Kanokanga****

***Abstract***

*This article discusses the meaning of the term 'delivery' in respect of arbitral awards. Initially, the meaning of the term 'award' in the context of domestic and international arbitration is discussed. Secondly, by way of illustration, the effects of an award are presented. In the third section, the concept of 'communication' is discussed. The main focus of this article, however, is the examination of the tendency by the judiciary in Kenya to adopt what can only be described as a divergent approach as to the meaning of the term 'delivery' in the context of the communication of arbitral awards to the parties. In this respect, the article examines the meaning of the term 'delivery' as it has been defined in other Model Law jurisdictions, particularly: Egypt, Madagascar, Mauritius, Nigeria, South Africa, Tunisia, Uganda, Zambia and Zimbabwe.*

* *Prince Kanokanga (LLB) Credit (Cavendish University, Zambia) 2017. Postgraduate Degree in Bachelor of Procedural Law (University of Zimbabwe) 2022. prince@kanokangalawfirm.co.zw.* *I would want to thank Paul Ngotho HSC a fellow of the Chartered Institute of Arbitrators (CIArb) – Kenya Branch for his encouragement to me, to peruse a further analysis of his earlier publication entitled, Paul Ngotho, 'Arbitral Award Setting Aside – 3 Months from When?' (2021) 9 (2) Alternative Dispute Resolution 142 – 169. This article, therefore can and should be read together with his earlier account for a comprehensive understanding on the subject matter.*

## 1 Introduction

The magnitude of international commercial and investment transactions continues to grow[1] which correspondingly has the effect of giving rise to an increase in the number,[2] size and complexity of international business disputes.[3] In this shifting era of international trade, the Kenyan legislature recognized the need to have in place in the country an elaborate system designed to foster alternative dispute resolution mechanisms,[4] particularly in the form of the Arbitration Act 1995 ('the Arbitration Act').[5]

A significant feature of the current arbitral regime which came into force on the 02nd January 1996,[6] is that it gave effect to both domestic and international

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[1] W Mattli & T Dietz, 'Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction' in Walter Mattli, and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford Academic 2014) 1 – 21.

[2] JW Salacuse, *The Global Negotiator: Making, Managing, and Mending Deals Around the World in the Twelve-First Century* (Palgrave Macmillan 2003) 266.

[3] See generally B Hanotiau, *Complex Arbitrations: Multiparty, Muticontract, Multi-Issue and Class Actions* (Kluwer Law, 2005); WM Reisman et al, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Foundation Press 2015).

[4] In terms of section 159(2)(c) of the Kenyan Constitution (2010) the courts are to be guided by the principles of alternative forms of dispute resolution, such as arbitration.

[5] The Arbitration Act 1995 which came into force on the 02nd January 1996 repealed and replaced the Arbitration Act [Chapter 49]. It based on the United Nationals Commission of International Trade (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law). This means that it adopts substantially the Model Law. see Parliamentary Debates Hansard Report, 5th July 1995 at 1353.

[6] For a detailed understanding on the law and practice of arbitration in Kenya, see Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (Law Africa 2011); Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (1st edn, Glenwood Publishers 2012); Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (Law Africa 2013); Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (2nd edn, Glenwood Publishers 2015); Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (3rd edn, Glenwood Publishers 2017); K Muigua, *Settling Disputes through Arbitration in Kenya* (4th edn, Glenwood Publications 2022). See also, K Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers 2015).

arbitration in the country and it implemented with modifications,[7] the Model Law on International Commercial Arbitration ('Model Law') as adopted by the United Nations Commission on International Trade law ('UNCITRAL') on the 21st June 1985.[8]

In enacting the UNCITRAL Model Law in Kenya with modest modifications,[9] the country affirmed its position to the international community as a safe seat for the resolution of disputes. The Model Law, the Arbitration Act, the Arbitration Rules 1997 and the Arbitration (Amendment) Act No. 11 of 2009[10] embody a framework for the recognition of arbitration in the country.

The courts are pro – arbitration! It can be inferred that it is both safe to arbitrate and or have Kenya nominated as a seat for both domestic and international arbitration.[11] It is submitted that the Model Law (also known as the MAL) seeks to promote the harmonization and uniformity of national laws pertaining to international arbitration procedures, thereby, providing a framework within which international commercial arbitration can be conducted with a minimum degree of judicial intervention and a significant degree on party autonomy.[12]

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[7] The amendments or modifications to the Arbitration Act [Chapter 49] which adopted the 1985 UNCITRAL Model Law are as follows: section 16A (withdrawal of an arbitrator); section 16B (immunity of an arbitrator); section 19A (the general duties for parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings); section 32A (effect of an award); section 33B (costs and expenses of arbitration); section 33C (interest).

[8] Kenya has not adopted the Model Law as amended by UNCITRAL on the 07th July 2006.

[9] For a brief background to the Arbitration Act 1995 see generally, *TSJ v SHSR* [2019] eKLR; *Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti* [2020] eKLR.

[10] For an background on the Arbitration (Amendment) Act No. 11 of 2009 see, *National Cereals & Procedure Board v Erad Suppliers & General Contracts Ltd* [2014] eKLR; *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] eKLR at para 67.

[11] *Kenya Oil Company Ltd & Another v Kenya Pipeline Company Ltd* [2014] eKLR.

[12] D Kanokanga, *Commercial Arbitration in Zimbabwe* (Juta & Co 2020) 8.

It is significant to note that, several international textbooks and casebooks are available to arbitrators, law students, lawyers, judges, business people and arbitration practitioners in general.

The extensive literature available on arbitration has simplified this field of law. On the other hand, an examination of the literature on arbitration, shows that not much discussion has been had on the meaning of term 'delivery' of an award.[13] 'Unsurprisingly, it has attracted little or passing attention in international case law and scholarly works.'[14]

This, therefore, article examines how Kenya has adopted what can only be described as a divergent approach to the interpretation and application of the term 'delivery' with regards to the delivery of signed copies of awards to the parties in arbitral proceedings in contrast the meaning ascribed to the same expressing in other Model Law jurisdictions.

**2 What is an award?**

Section 3(1) of Arbitration Act defines an arbitral award to mean, 'any award of an arbitral tribunal and includes an interim arbitral award.' With due respect, this definition is unhelpful as it does not accurately define what an award is. The effect of an unhelpful definition of the term 'award' in the Arbitration Act, more so when dealing with one of the oldest methods of settling disputes, is imperfect.

It can only be assumed, that the legislation did not provide a thorough definition of the term 'award' in the Arbitration Act as neither the Working Group or the

[13] see generally, H van Houtte, 'The Delivery of Awards to the Parties' (2005) 21 (1) *Arbitration International* 177 – 186.

[14] P Ngotho, 'Arbitral Award Setting Aside – 3 Months from When?' (2021) 9 (2) *Alternative Dispute Resolution* 142, 142.

UNCITRAL Commission were able to come up with a singular definition of the term.[15]

As a result, the definition of the term 'award' in the Arbitration Act is essentially the same as that which had been accepted under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted on the 10th June 1985 (New York Convention.[16]

Whilst there is no internationally accepted definition of the term 'award'.[17] The term 'award' is commonly accepted to relate to a decision of an arbitrator or arbitrators which disposes of the issues of a particular matter submitted to the arbitrator or arbitrators i.e. a final decision.[18]

An award can either be international or domestic.[19] Procedural decisions, procedural orders and peremptory orders[20] (including an order for security for costs,[21] preservation of property, discovery of documents or inspection, or

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[15] Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UNCITRAL, 8th Session, UN Doc A/CN.9/264 (1985), at 72; Report of The Working Group On International Contract Practices, UNCITRAL, 7th Session, UN Doc A/CN.91246 (1984), at paras 192–94.

[16] I Bantekas, 'Article 3: Receipt of Written Communications' in I Bantekas et al (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020) 26 – 27.

[17] Kanokanga (n 12 above) 155

[18] *McKelvey v Abrahams & Another* 1989 (2) ZLR 251 (S) 264C – D.

[19] *Jambo Biscuits (K) Ltd & 3 Others v Jambo East Africa Ltd & 3 Others* [2021] eKLR.

[20] For the meaning of peremptory orders see, *Slocan Forest Products Ltd v Skeena Cellulose Inc*, 2001 BCSC 1156; Yee *Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 SLR (R) 512; *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] SGHC 8.

[21] Article 9(2)(b) of the Zimbabwean Arbitration Act 1996 permits the High Court to order an interim measure securing the amount in dispute or the costs of the arbitral proceedings. Whilst Article 17(2)(a) of the Zimbabwean Arbitration Act 1996 permits the arbitral tribunal to order interim measures so as to order the parties to make a deposit in respect of the fees and costs of the arbitration. In terms of section 26(f) of the Kenyan Arbitration Act 1995, a party which fails to comply with a peremptory order of

admissibility of witnesses)[22] which in essence relate to the conduct of arbitration proceedings are not recognized as arbitral awards.[23]

Likewise, a decision or a ruling (as opposed to an award) by an arbitral tribunal with regards to questions of jurisdiction or the filing of a plea to the effect that an arbitral tribunal does not have jurisdiction including any objections with respect to the existence or validity of an arbitration agreement in terms of Article 16 of the Model Law is not considered an award.[24]

The determination of an arbitrator's jurisdiction in terms of Article 16 of the Model Law is not an award.[25] It is merely a Decision or a Ruling.[26] Consequently, an arbitral tribunal cannot exercise a lien against its jurisdiction Ruling or Decision as same is not an award in terms of the Model law.[27]

However, it is well established that, after an award has been rendered by a tribunal and where either of the parties have failed, neglected or refused to pay the arbitrator's outstanding fees and expenses, the tribunal, as an established principle of law, has a right to exercise a lien on the award until the fees and

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the tribunal to provide for security costs, the tribunal has a discretion to make an award dismissing the claim.

[22] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597; PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157.

[23] JK McEwan & LB Herbst, *Commercial Arbitration in Canada* (Canada Law Book 2009) 9:30:10.

[24] For the meaning of a procedural award, see *Republic of India v Vedanta Resources plc* [2021] SGCA 50.

[25] L Boo, 'Rulings on Arbitral Jurisdiction – Is that an Award?' (2007) 3 (2) *Asian International Arbitration Journal* 125 – 141. see also ML Moses, The Principles and Practice of International Commercial Arbitration (2 ed) (Cambridge University Press 2012) 189 – 190.

[26] *Inc Owners of Tak Tai Building v Leung Yau Building* [2005] HKCA 87; *PT Asuransi Jasa Indonesia (Pereso) v Dexia Bank SA* [2006] SGCA 41.

[27] *Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party)* [2021] eKLR.

expenses are paid.[28] The 'simplicity and the usual efficiency of this procedure'[29] ensures that the fees and expenses of a tribunal are paid. It is unusual for both domestic and international arbitrators to conduct pro bono arbitration.[30]

The parties must be able to read and understand the award: the clearer it is, the easier it is to understand. In order to cater to the different situations and circumstances which may arise in arbitral proceedings, it is not uncommon for awards to be bear names to cater to such situations and circumstance, which include: [31] Consent Award ( or an Award on agreed terms),[32] Interim Award (or Interlocutory award),[33] Partial Award,[34] Additional Award[35] or Final Award.[36]

**3 The effect of an award**

The 'making of the award has a number of immediate effects'.[37] It brings finality to the dispute between the parties.[38] Whether an award is registered or not, an award remains binding on the parties who may fulfil its terms even in the absence of registration.[39]

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[28] S Greenberg, C Kee & JR Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) 8.41 – 8.42.

[29] DW Butler & E Finsen, *Arbitration in South Africa: Law and Practice* (Juta & Co, 1993) 268.

[30] E Gaillard & J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 625.

[31] see generally, R Gerbay & A Harris, 'Awards, Orders and Other Types of Decisions' (2018) 5(1) *Bahrain Chamber for Dispute Resolution International Arbitration Review* 85 – 102.

[32] Section 31 of the Arbitration Act.

[33] Section 18.

[34] Section 32(6).

[35] Section 34.

[36] AJ van Den Berg, 'Why Are Some Awards Not Enforceable?' in AJ van Den Berg (ed) *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International 2005) 317.

[37] Gaillard & Savage (n 30 above) 1413.

[38] *Ropa v Reosmart Investments (Pvt) Ltd & Another* 2006 (2) ZLR 283 (S); *Kundan Singh Construction Ltd v Tanzania National Roads Agency* [2012] eKLR; *Tanzania National Roads Agency v Kundan Singh Construction Ltd* [2014] eKLR.

[39] *Olympio & Others v Shomet Industrial Development* HH 191-12.

The essential purpose of registration of awards by the courts is in order to give legal effect to the awards as well as to give an award an official seal for enforcement purposes.[40]

According to leading scholars Redfern and Hunter:

> *"One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties; if the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the cause to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, a final proposal as to how the dispute might be resolved, not that it is intended to be the first step on a ladder of appeals through national courts".*[41]

It is clear that a valid award leads to the following consequences: it brings the dispute to finality; it terminates the arbitrator's mandate;[42] the award becomes

[40] *TranSom Sharaf Mozambique Lda v Manyame Milling Company (Pvt) Ltd* 2019 (2) ZLR 102 (H).

[41] A Redfern & M Hunter (with N Blackaby & C Partasides) *Law and Practice of International Commercial Arbitration* (4 ed) (Sweet & Maxwell 2004) 406.

[42] Section 33 of the Arbitration Act 1995.

binding,[43] registerable;[44] lis alibi pendens,[45]*res judicata* and a judgment debt;[46] it creates new rights and obligations.[47]

Hence, the effect of a valid arbitral award is that, it 'brings the parties dispute to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts; for better or worse, the parties must live with the award.'[48]

## 4. Communication of an Award

The term 'communication' is important in one particular manner: it allows for the parties to a dispute to be notified accordingly as to the availability of an award.[49] This communiqué or notice to the parties informs them of how and where the award may be collected upon due payment of any outstanding fees.[50]

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[43] cf, section 32A of the Arbitration Act 1995 provides that:

> *"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."*

[44] Section 36 of the Arbitration Act 1995.

[45] C Söderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings' (2005) 22 (4) *Journal of International Arbitration* 301 – 322; P Janeþková, 'Lis Pendens Before National and Arbitration Courts' (2017) 6 (1) *International Journal of Multidisciplinary Thought* 291 – 300; PFP Machado, 'Lis Alibi Pendens in International Arbitration' (2020) 86 (1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 22 – 38.

[46] S Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited' (2005) 16 *The American Review of International Arbitration* 1 – 31; N Yaffe, 'Transnational Arbitral Res Judicata' (2017) 34 (5) *Journal of International Arbitration* 795 – 833; R Nazzini, 'Enforcement of International Award Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context (2018) 66 (3) *The American Journal of Comparative Law* 603 – 638.

[47] *Primavera Construction SA v Government, North-West Province & Another* 2003 (3) SA 579 (B) 604.

[48] Butler & Finsen (n 29above) 271.

[49] *Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Others* 2016 (2) ZLR 306 (CC) 311B – G.

[50] see *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] SGCA 14 provides a history analysis on the need of payment of just and reasonable expenses in arbitration albeit with regards to English law. see also F Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (Cambridge University Press 2016) 8.06.

In terms of section 9 of the Arbitration Act, it is clear that the parties may agree on any method of written communication, as well as proof of effective receipt.[51]

This provision of the Act is rudimentary as it governs the rules of written communication. It bears mention that, during the drafting of the Model Law there was no 'dissention as to the fact that the award should be communicated to the parties.'[52] Accordingly, copies of an award should be signed by the arbitrator(s) and communicated to the parties.[53]

In practice the communication of an award in *ad hoc* arbitration is done by the sole arbitrator or in event of a panel of arbitrators,[54] by the Chairperson[55] and in institutional arbitration, the award is communicated by a designated officer of the arbitral institution.[56] For instance, in arbitration conducted under the auspices of the Nairobi Centre for International Arbitration (Arbitration) Rules 2015 (NCIA Arbitration Rules) an award is communicated to the parties by the NCIA Registrar.[57]

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[51] Section 9 of the Arbitration Act is verbatim Article 3 of the Model Law.

[52] Bantekas (n 16 above) 50.

[53] Article 34(6) of the UNCITRAL Arbitration Rules, 1976 provides:

> *"Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal."*

[54] M Sammartano, *International Arbitration Law and Practice* (3rd ed) (Juris 2014) 1260.

[55] Rule 111 of the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules 2020 provides as follows:

> *"When the Arbitral Tribunal has made and published its award it shall inform the parties accordingly and shall specify how and where it may be taken up upon due payment of its fees."*

[56] Rule 29(8) of the Nairobi Centre for International Arbitration (Arbitration) Rules 2015 provides as follows:

> *"The sole arbitrator or chairman shall be responsible for delivering the award to the Centre, which shall transmit certified copies to the parties provided that the costs of arbitration shall be paid to the Centre in accordance with rule 31."*

[57] Rule 29(9) of the Nairobi Centre for International Arbitration (Arbitration) Rules 2015 provides as follows:

> *"The Registrar shall notify the parties of the receipt of the award from the Arbitral Tribunal, and the award shall be considered to have been received by the parties upon collection by hand by an authorized representative or upon delivery by registered mail."*

An interesting feature of the 'communication' of an award is that it is in essence the mere notification to the parties and or their appointed representatives that the award is ready for dispatch against payment.[58] Interestingly, in Zimbabwe, arbitral tribunals have the power to order interim measures with respect of the deposit of their fees and the costs of arbitration, so as to ensure, that the proceedings are conducted effectively and efficiency.[59]

## 4 A uniform approach with regards the interpretation and application of the Model Law

Considering the need for a uniform approach[60] with regards to the interpretation and application of the Model Law,[61] a crucial step of examining the divergent 'approach' in Kenya is apposite and this will be elaborated further in this treatise.

Article 2(A)(1) of the MAL provides that, '[i]n the interpretation of this Law, regards is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'

The High Court of Zimbabwe in ***Courtesy Connection (Pvt) Ltd v Mupamhadzi***, held that:

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[58] *Musselbrook v Dunkin* (1833) 9 Bing 605; *Macarthur v Campbell* (1833) 5B & Ad; 11 ER 882.

[59] Section 17(2)(b) of the Model Law.

[60] see generally, J Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation' (2003) 50 (3) *Netherlands International Law Review* 267 – 288.

[61] The material to which an arbitral tribunal or a court should refer to when interpreting and applying the Model Law include: the documents relating to the Model Law and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law, that is to say the travaux préparatoires to the Model Law, and, in interpretation the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

> *"I am further persuaded to hold as I do by the fact that the Act is on international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that in interpreting the Model Law, regards shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application."*[62]

Kenya is an exception.[63] It is interesting to note that Article 2(A)(1) of the Model Law was not adopted in the Arbitration Act, the Arbitration Rules 1997 nor by the 2009 Arbitration Amendments.[64] It is perhaps for this reason, that the country has adopted a divergent approach to the meaning of the term 'delivery' of an award in terms of Article 31(4) and 34(3) of the Model Law.[65]

Notwithstanding the fact that Article 2(A)(1) of the Model Law was not adopted in Kenya, it is commonplace that the Model Law should be interpreted in way that promotes its purpose, which is the need to promote uniformity in its

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[62] 2006 (1) ZLR 479 (H) 483B – C.

[63] PP Viscasillas, 'The UNCITRAL Model Law on International Commercial Arbitration: Interpretation, General Principles and Arbitrability' (2016) 3 (1) *Journal of Law, Society and Development* 67 – 84.

[64] Ibid 68:

> *"The original draft of MAL did not contain a provision dealing with its interpretation and gap-filing system."*

[65] The *travaux préparatoires* on article 31 as adopted in 1985 which is the same as section 32B of the Arbitration Act 1995 are contained in the following documents:

(a) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Official Records of the General Assembly, Fortieth Sessions, Supplement No. 17 (A/40/17), paras 11-333;
(b) Reports of the Working Group; A/CN.9/216; A/CN/.9/232; A/CN.9/245; A/CN/.9/246, annex; A/CN.9/263 and Add.1-2; A/CN.9/264. Relevant working papers are referred to in the reports;
(c) Summary records of the 328th, 329th and 333rd UNCITRAL Meetings.

application and the observance of good faith for the purposes of expeditious resolution of disputes.[66]

The Ghanaian Supreme Court recently, in the case of, ***De Simone Ltd v Olam Ghana Ltd***, held that:

> *"Thus it is quite convenient to make reference to the relevant provisions of the model law which have been incorporated in national laws, and to see how the courts in the various countries have applied them."*[67]

Considering the centrality of the Model Law, not as a treaty,[68] but as a collaborative effort brought about by debate and discussion internationally among nations and leading organisations to facilitate the resolution of international commercial disputes through arbitration,[69] due to a lack of a modern framework, it is not only appropriate, but essential, that in interpreting the Arbitration Act, that, tribunals and courts pay regard to the meaning of any expressions as assigned in the Model Law, the Reports of the UNCITRAL Working as well as the reasoned decisions of other Model Law jurisdictions.[70]
It is surprising to note that whilst in a majority of decisions, the Kenyan judiciary have found it convenient to make reference to relevant provisions of the Model law and to adopt a comparative analysis from different Model Law jurisdictions, including but not limited to: Australia, Canada, India, Hong Kong, New Zealand, Nigeria, Singapore, South Africa and the United States of America have applied the Model Law,[71] the courts have failed to apply that analysis to

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[66] *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] eKLR.
[67] [2018] GHASC 22.
[68] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at para 57.
[69] *Corporation Transnacional de Inversiones, SA de CV v STET International, SpA* [1999] Carswell Ont 2977.
[70] *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at 31.
[71] *Royal Exchange PLC v Patrick Nyaemba Tumbo* [2019] eKLR; *Euromec International Ltd v Shandong Taikai Power Engineering Co Ltd* [2021] KEHC 93 eKLR.

the meaning of the term ''received' in Article 34(4) of the Model Law which is reproduced in section 32(5) of the Arbitration Act.[72]

## 5 The divergent approach

Time may not be identical for all the parties involved in arbitration.[73] Considerations such as geographical location and time also play a part. It cannot, therefore, be guaranteed that an award will be delivered to the parties at the same time nor where an agreement provides that it be read to the parties, that it, will bear the same date or time.[74]

However, it is important to underscore that, the delivery of awards by arbitrators is unlike the manner in which court judgments or rulings are made.[75] The pronouncement of court judgments are regulated by relevant court rules as part of the justice dispensation system.[76] It is for this reason, that the court rules with respect of date of delivery of its judgments and rulings have no applicability in arbitration proceedings, as arbitration and litigation are not the same concepts.[77] For instance, courts rules provide that decree bears the date of the day on which the judgment is delivered i.e. it is pronounced.[78]

The approach in Kenya, is that the date of 'receipt' of an award is the same as the date on which the party would have been 'notified' that an award is ready

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[72] Ngotho (n 14 above).
[73] P Ortolani, 'Article 34: Application for Setting Aside as exclusive recourse against arbitral award' in I Bantekas et al (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020) 896.
[74] B Harris, R Planterose & J Tecks, *The Arbitration Act 1996: A Commentary* (5 ed) (Wiley Blackwell 2014) 275.
[75] *Lantech (Africa) Ltd v Geothermal Development Company* [2020] eKLR.
[76] *Fountain Publishers v Nantamu & Another* [2019] UGCommC 30.
[77] PK Bookman, 'The Arbitration – Litigation Paradox' (2019) 72 (4) *Vanderbilt Law Review* 1119 – 1195.
[78] *Lantech (Africa) Ltd* (n 754 above).

for collection.[79] It bears mention that Article 34(3) of the Model Law was reproduced verbatim as section 35(3) of the Arbitration Act.[80]

Subsequently, in Kenya and with regards to Article 34(3) of the Model Law and by implication Article 31(4) of the Model Law the judiciary has in interpreting the Model Law adopted a divergent interpretation with regards term expression 'delivery' an award as compared to the practice in other Model Law jurisdictions.[81]

In Kenya, the date of notification of an award, also known as the date of publication of the award,[82] is regarded as the date of receipt of an award. The implication of this is that, there does not need to be actual receipt of an award in order for it to have been received, as the date of publication of an award is deemed to be the date of delivery of an award.

It is useful to observe that neither the Model Law nor the Arbitration Act make reference to the word 'publication'[83] which appears in a number of court decisions in Kenya. Commentators, Russell and Walton observed that:

> *"Publication to the parties of an award (as distinct from publication of it simply) entails both completion of the award so that the arbitrator has finally adjudicated and retains no power of altering it, and also notice to the parties that this has*

[79] *Siginon v Gitutho Associates & Others* [2005] eKLR.

[80] For cases on section 35, see generally, *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR; *Heva Fund LLP v Katchy Kollections Ltd* [2018] eKLR; *Pesa Print Ltd v Atticon Ltd Another; Symphony Technologies & 2 Others (Interested Parties); Barrons Estates Ltd (Interested Respondent)* [2019] eKLR.

[81] Ngotho (n 14 above).

[82] cf, In *P N Mashru Ltd v Total Kenya Ltd* [2013] eKLR it was held that:

> *"Section 35(3) aforesaid talks about 'receipt' of the award as opposed to the publication of the award. Accordingly, I am not satisfied that the two terms can be used interchangeably."*

[83] For a more information on the publication of an award, see *Bulk Transport Corporation v Sissy Steamship Co Ltd* (1979) 2 Lloyd's Rep 289; *Kelcar Developments Ltd v M.F. Irish Gold Design Ltd* [2007] IEHC 468.

> *been done. It is immaterial, however, whether or not the parties are then made acquainted with the contents of the award or received copies of it."*[84]

English arbitration law served as a model from the development of Kenyan arbitration law. It can only be assumed that the word 'publication' which the courts have paid regard to is derived from English law arbitration.[85]* The English recognise the Model Law, but have not adopted it. Sight therefore should not be lost to tribunals and courts in Kenya that regard, should be had to the documents relating to the MAL and originating from the UNCITRAL, its working group for the preparation of the MAL, in interpreting the Model Law.[86] In what may be deemed to be a divergent approach the courts in Kenya are steadfast to that fact that in their jurisdiction, there does not need to be 'actual receipt' of the signed award by a party.[87] There are a plethora of cases which support this divergent approach.[88] The courts appear to be adamant on the fact that, that in order for an award to be set aside, an application to set aside must be made within the strict three months[89] of the date that the award is published.[90]

The failure by any of the parties to collect an award does not delay or postpone the 'delivery' of the award.[91] As a result, the actual receipt of a signed copy of an award by the party to the proceedings in Kenya is not necessary in order for there to have been received of the award. [92] The rationale for this deviating approach as to the meaning of 'delivery' is somewhat rooted in the need to

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[84] F Russell & A Walton, *Russell on the Law of Arbitration* (19 ed) (Stevens 1979) 497.
[85] *Brooke v Mitchell* (1840) 6 M & W 472.
[86] Viscasillas (n 63 above) 68.
[87] *Lantech (Africa) Ltd* (n 75 above).
[88] *Hinga* (n 80 above); *Dewdrop Enterprises Ltd v Harree Construction Ltd [2009] eKLR.*
[89] Universally, the courts above a strict approach to the three month time limit. see, *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* [2014] NZCA 507; *Kyburn Investments Ltd v Beca Corporate Holdings* [2015] NZCA 290; *BXS v BXT* [2019] SGHC (1) 10.
[90] *National Housing Corporation v Custom General Construction Ltd* [2019] eKLR.
[91] Ibid.
[92] *University of Nairobi v Multiscope Consultancy Engineers Ltd* [2020] eKLR.

interpret the Arbitration Act in a way that promotes 'its purpose, the objectives of arbitration law and the purposes of an expeditious yet fair dispute resolution legal system.'[93]

## 6 A critique on the Kenyan divergent approach

Father and son, Davison and Prince Kanokanga, both of whom are leading African academics and arbitrators analyzed the Kenyan school of thought on the delivery and receipt of arbitral awards in the following manner:

> *"There is, however, a school of thought which argues that the word 'received' or the word 'delivery' as transported under Article 31(4) of the Model Law and the word 'received' or the word 'receipt' as taken from Article 34(3) be given the same meaning.*
> *The rationale for this thinking in based on the construction that it would introduce unnecessary delays in the arbitral process and deny it the virtue of finality if the words are not to be construed together. In terms of this school of thought, the date of publication or the date of notification is the date of receipt of the arbitral award. On the question of the delivery of an award, the court in Lantech (Africa) Ltd v Geothermal Development Company held:*
> *[D]elivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regards, therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties."*[94]

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[93] *Ngutu Agrovet Ltd v Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)* [2019] eKLR.

[94] D Kanokanga & P Kanokanga, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15*] (Juta & Co, Cape Town, 2022) 401.

It cannot be said that the divergent Kenya approach as to the meaning of 'delivery' of an award has not been applied by the courts, to give practicality to the ideal virtues of arbitration which include: cost effectiveness, confidentiality,[95] choice, experience, flexibility, finality and the principle of party autonomy.[96] However, this school of thought is flawed, as it does not take into account the fact that a party cannot set aside for instance, or have recognized and enforced an award which it does not have actual possession of the award.[97]

In order for there to have been 'receipt' of an award, a party must have actually received the award.[98] Put differently, the party must be aware of their rights and obligations thereunder. A party to the arbitral proceedings cannot request an arbitral tribunal to correct in the 'award' any errors in computation, clerical or typographical errors and or other any errors of a similar nature to which it was simply notified off.[99]

Such a request can only be made once a party has identified that an award or certain parts of the award are ambiguous and require correction and or clarification.[100] It would be untenable if parties who select arbitration as their preferred dispute resolution mechanism, fail to take up the award from the

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[95] *Century Oil Trading Co Ltd v Kenya Shell Ltd* [2008] eKLR.

[96] *ABC Co v XYZ Co Ltd* [2003] SGHC 107 para 2.

[97] *Moohan v S.&R. Motors [Donegal] Ltd* [2009] IEHC 391 para 3.10.

[98] Ibid para 3.10.

[99] N Blackaby & C Partasides, *Redfern and Hunter on International Commercial Arbitration* (6 ed) (Oxford University Press 2015) at 558 observe that:

> *"The time limit within which a party may apply to the appropriate court for recourse against the award often runs from the date of communication of the award and not from the making of the award itself. If this were not so, the possibility of injustice would arise: the arbitral tribunal might make its award and then fail to communicate it to the unsuccessful party until after the time limit for recourse had expired."*

[100] GB Born, *International Commercial Arbitration* (3rd ed) (Kluwer Law International 2020) 3401.

tribunal. This may result in dilatory tactics which have the potential to defeat the arbitral process.[101]

It is a universally accepted principle that parties to arbitration are under a duty to act bona fide[102] in arbitral proceedings.[103] Simply put, there is an obligation of the parties in arbitration to act in good faith throughout the proceedings.[104] The legislature went a step further, such that, it is a statutory requirement for both domestic and international arbitration proceedings in Kenya to be conducted in good faith.[105]

Article 19A of the Arbitration Act provides that:

> *The parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitration proceedings*.[106]

It is thus very interesting, if not worrying, to note that, inspite the fact that the Arbitration Act providing for parties to arbitration to do all things necessary for the proper and expeditious conduct of the arbitration proceedings, which also includes, the payment of fees due to the tribunal, the period of dispatch of a notice of an award, be regarded in Kenya regarded as the date of delivery. Such

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[101] *Mahinder Singh Channa v Nelson Muguku & Another* [2007] eKLR.

[102] For the meaning of 'bona fide' see generally, R Zimmerman 'Good Faith and Equity' in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co 1996) 239 – 241.

[103] D James, 'The Notion of Good Faith in Construction and Arbitration' (2023) 11 (1) *Alternative Dispute Resolution* 256 – 266.

[104] *Hebei Import & Export Corporation v Polytech Engineering Co Ltd* [1999] 2 HKCFAR 111, 136.

[105] Article 19(1) of the Arbitration Act 1995. see also Article 32 of the UNCITRAL Arbitration Rules 1976 and Article 34 of the UNCITRAL Arbitration Rules 2010.

[106] Article 19(1) of the Arbitration Act 1995 traces its history to section 40 of the English Arbitration Act 1996. See also Article 14.5 of the LCIA Arbitration Rules 2014.

an approach is unwarranted as shall be seen below as the Model Law does not provide a time limit with regards to the delivery of an award.[107]

## 7 The meaning of the term 'delivered' in other Model Law jurisdictions

There is an overabundance of different jurisdictions to select from for the purposes of a comparative analysis on this particular subject matter. However, for the purposes of promoting the Africanisation of arbitration, an analysis of the meaning of the term 'delivered' will be made by examining the legislation and court decisions of the relatively few African countries that have adopted the Model Law.[108]

In Africa, as elsewhere, even after three decades of the Model Law's success, interpreting the MAL still presents new challenges both domestically and internationally, partly because a variety of issues have yet to be determined by the different courts.[109] The focus of this part of the article, is therefore to examine the meaning of the term 'delivered' and or 'delivery' as it has been defined in notable African jurisdictions which include: Egypt, Madagascar, Mauritius, Nigeria, South Africa, Tunisia, Uganda, Zambia and Zimbabwe.

### 7.1. Egypt

The Arab Republic of Egypt in Africa was the third country, after Nigeria (1990) and Tunisia (1993) to adopt the MAL. The Law Concerning Arbitration in Civil and Commercial Matters[110] gave effect to the MAL in Egypt.[111]

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[107] G Cuniberti, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Elgar Edward Publishing 2022) 432.

[108] In chronological order, the following counties adopted the Model Law on International Commercial Arbitration in Africa: **Nigeria** (1990), **Tunisia** (1993), **Egypt** (1994), **Kenya** (1995), **Zimbabwe** (1996), **Madagascar** (1998), **Uganda** (2000), **Zambia** (2000), **Rwanda** (2008), **Mauritius** (2008) and **South Africa** (2017).

[109] *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd* [2008] SC (Bda) 27 Com.

[110] Law Concerning Arbitration in Civil and Commercial Matters 1994.

[111] For a detailed understanding on the law and practice of arbitration in Egypt see, MI Alamedin, *Arbitral Awards of the Cairo Regional Centre for International Commercial*

Egypt has one of the most prestigious arbitration institutions within the continent, the Cairo Regional Centre for International Commercial Arbitration (CRCIA), which is an independent non – profit international organisation established in 1979.[112]

Article 31(4) of the Model Law was modified in Egypt, under Article 44(1) of the Law Governing Arbitration in Civil and Commercial Matters. It provides as follows:

> *The arbitral tribunal shall deliver to each of the two parties a copy of the arbitral award signed by the arbitrators who approved it within thirty days of the date of its making.*

From the foregoing, it is clear that under Article 44(1) of the Law Governing Arbitration in Civil and Commercial Matters an arbitral tribunal has an obligation to deliver to the parties, a copy of the signed award, within thirty days of the 'making' of the award. There does not appear to be any decided cases on this subject. However, adopting a literal interpretation of the above Article, it is clear, that, after an award is rendered, it has to be given to each party.

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*Arbitration 1997 - 2000* (Kluwer Law 2003); S Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt* (Hart Publishing 2006); M El-Awa, *Confidentiality in Arbitration: The Case of Egypt* (Springer 2016); Ibrahim Shehata, *Arbitration in Egypt: A Practitioner's Guide* (Wolters Kluwer 2021).

[112] H Al Mulla, G Blanke & K Nassif, *Comparison on MENA International Arbitration Rules* (JurisNet 2011) 42.

### 7.2 Madagascar

Madagascar was the sixth country in Africa to adopt the MAL after Nigeria (1990), Tunisia (1993), Egypt (1994), Kenya (1995) and Zimbabwe (1996).[113] The Code of Civil Procedure,[114] gave effect to MAL in Madagascar.[115]

Article 31(4) of the Model Law was modified by Article 461.3(4) of the Code of Civil Procedure 1998 and a literal French to English translation would read:

> *After the award is pronounced, a copy signed by the author or the arbitrators in accordance with paragraph 1 of this article shall be given to each party.*

From the foregoing, it is clear that 461.3(4) of the Code of Civil Procedure 1998 does not use the term 'delivered' as expressed in Article 31(4) of the Model Law. There do not appear to be any decided cases on this subject. However, a literal reading of the above Article, is clear that after an award is pronounced, it has to be given to each party. It is, thus hoped that the Malagasy will adopt an interpretation that is consistent to that of other Model Law jurisdictions.

### 7.3 Mauritius

Mauritius was the tenth country on the African continent to adopt the Model Law. The International Arbitration Act[116] gave effect to the MAL.[117] The country also adopted the 2006 revisions of the MAL.[118]

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[113] For a detailed understanding on the law and practice of arbitration in Madagascar, see generally, R Jokoba, 'Comments on the New Malagasy Arbitration Act' (2000) 17 (2) *Journal of International Arbitration* 95 – 99.

[114] Code of Civil Procedure 1998, art 439 – 464.

[115] The main arbitration institution in the country is the Centre d'Arbitrage et de Mediation de Madagascar (CAMM).

[116] International Arbitration Act 2008.

[117] The main arbitration institutions in the country include the Mediation and Arbitration Centre (MARC), the Mauritius International Arbitration Centre (MIAC) and the Permanent Court of Arbitration (PCA) Mauritius Office.

[118] Government of the Republic of Mauritius, *The Mauritius International Arbitration Act 2008: Text and Materials Updated 2016 Edition* (Government of the Republic of Mauritius 2016).

Mauritius adopted Article 31(4) of the Model Law with no changes. There do not appear to be any decided cases on the issue of delivery in Mauritius.[119] The country generally follows the decisions in other Model Law jurisdiction. It is, thus hoped that Mauritians interpretation of Article 31(4) of the Model Law will be consistent with that of other Model Law jurisdictions.

### 7.4 Nigeria

Nigeria was the first country in Africa to adopt the MAL in 1990.[120] The Arbitration and Conciliation Act[121] gave effect to the MAL in Nigeria. The country has the most arbitral institutions on the continent.[122]

The Arbitration and Conciliation Act was repealed and replaced by the Arbitration and Conciliation Act 2023. Article 31(4) of the Model Law is reproduced with modification in Section 47(4) of the Arbitration and Conciliation Act 2023 which provides as follows:

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[119] Section 36(3) of the International Act 2008.

[120] For a better understanding of the law and practice of arbitration in Nigeria, see E Akpata, *The Nigerian Arbitration: Law in Focus* (West African Book Publishers 1997); G Ezejiofor, *The Law of Arbitration in Nigeria* (Longman 1997); JO Orojo & MA Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi Associates 1999); G Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Iyke Ventures Production 2004); F Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (Commercial Law Development Services) 2007); C Candide-Johnson & O Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis 2012); PO Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (LawLords Publications 2015); A Rhodes-Vivour, *Commercial Arbitration Law and Practice in Nigeria through the Cases* (LexisNexis 2016); T Oyekunle & B Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis 2018).

[121] Arbitration and Conciliation Act 1990.

[122] These include the Abuja Chamber of Commerce – Dispute Resolution Centre (ACC – DRC), the Chartered Institute of Arbitrators, Nigeria Branch (CIArb Nigeria), the International Centre for Arbitration and Mediation Abuja (ICAMA), the International Dispute Resolution Institute (IDRI), the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), the Lagos Court of Arbitration (LCA), the Nigerian Institute of Chartered Arbitrators and the Regional Centre for International Commercial Arbitration – Lagos (RCICAL).

> *Subject to the provisions of section 54 of this Act, after the award is made, a copy signed by the arbitrators in accordance with subsections (1) and (2) shall be delivered to each party.*

Section 47(4) of the Arbitration and Conciliation Act 2023 is similar to section 35(3) of the Kenyan Arbitration Act 1995 in terms of which an arbitrator, and in Nigeria an arbitration institution, may, refuse to deliver to an award to the parties on the full payment of the fees and expenses of the arbitrators or the arbitral institution.[123]

Bearing in mind that the Nigerian Arbitration and Conciliation Act 2023 is relatively new, there do not appear to be any decided cases with regards to the meaning of delivery.[124] It is hoped that the courts will adopt a position consistent to that applied in other Model Law jurisdictions.

**7.5 Rwanda**

Rwanda was the ninth country in Africa to adopt the MAL in 2008 after Nigeria (1990), Tunisia (1993), Egypt (1994), Kenya (1995), Zimbabwe (1996), Madagascar (1998), Uganda (2000) and Zambia (2000).[125] The Law on Arbitration and Conciliation in Commercial Matters Act[126]gave effect to the MAL in Rwanda.[127]

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[123] Section 54(1) of the Arbitration and Conciliation Act 2023.

[124] Cases such as *House Development Ltd v Scancila Contracting Co Ltd* (1994) 8 NWLR 252 and *Hon. Emmanuel Oseloka Araku v Ejeagwu* (2000) 15 NWLR 684 did not address the issue of delivery of receipt of awards. The cases dealt with the time frame within which to lodge an application for the setting aside of an award.

[125] For a better understanding on the law and practice of arbitration in Rwanda see, J Cantor, 'Rwanda and the Kigali International Arbitration Centre: The Future Faces of East African Arbitration and Growth' (2017) 19 *Cardozo Journal of Conflict Resolution* 93 – 127; KM Didas, CU Munyentwari & JM Rutta, 'Striking a Balance Assistance and Interventionism: The Role of Courts in Rwanda - Seated Arbitrations' (2020) 37 *Journal of International Arbitration* 143 - 158.

[126] Law on Arbitration and Conciliation in Commercial Matters Act 2008.

[127] The leading arbitration institution in the country is the Kigali International Arbitration Centre (KIAC).

The country also adopted the 2006 revisions of the MAL. Rwanda adopted Article 31(4) of the Model Law with no changes.[128] There do not appear to be any decided cases on the issue of delivery. In any case, it is hoped that Rwandese interpretation of Article 31(4) of the Model Law is consistent with that of other Model Law jurisdictions.

### 7.6 South Africa

South Africa was the eleventh country on the continent to adopt the MAL.[129] The International Arbitration Act[130] gave effect to the MAL in 2017. [131] It has also adopted the 2006 revisions to the MAL.

The country is considered a safe venue for arbitration within the continent, and houses leading arbitration institutions which include the African Foundation of Southern Africa (AFSA),[132] the Association of Arbitrators (Southern Africa), the China – Africa Joint Arbitration Centre (CAJAC),[133] the Commission for Conciliation, Mediation and Arbitration (CCMA)[134] and the Tokiso Dispute Settlement.

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[128] Article 43(4) of the Law on Arbitration and Conciliation in Commercial Matters Act.

[129] For a better understanding on the law and practice of arbitration in South Africa, see Butler & Finsen (n 29 above), P Ramsden, *The Law of Arbitration: South Africa and International Arbitration* (2nd edn, Juta & Co 2018).

[130] International Arbitration Act 2017.

[131] D Butler, 'A New Domestic Arbitration Act for South Africa: What Happens After The Adoption of the UNCITRAL Model Law for International Arbitration?' (1998) 9 *Stellenbosch Law Review* 3 – 20.

[132] The African Foundation of Southern Africa (AFSA) is the designated BRICS Disputes Resolution Centre for South Africa.

[133] For a detailed analysis of CAJAC, see P Kanokanga, 'The China-Africa Joint Arbitration Centre (CAJAC)' (2022) 16 *Pretoria Students Law Review* 144 - 163.

[134] The Commission for Conciliation, Mediation and Arbitration is a statutory body which deals with labour issues. It was established in terms of Labour Relations Act 1995, s 112.

South Africa adopted Article 31(4) of the MAL with no changes.[135]* It is interesting to note that, even, prior to the adoption of the MAL in South Africa, the courts had already provided that in order for the 'delivery' of an award, that in order for it to have been deemed to have 'delivered, there had to be effective delivery.[136]

In fact the judiciary in South Africa, prior to the adoption of the Model Law, had endorsed the meaning of 'delivery' as expressed in the leading Indian case, *Union of India v Tecco Trichy Engineers & Contractors*.[137] Furthermore, the courts have held that an agreement relating to the procedure, which may also determine the manner of publication of an award which is reached with an arbitration, which is complied with, constitutes a valid award.

This position confirms that the parties together with the tribunal can agree on the time of delivery of an award together with the method or mode of delivery of an award.[138] For instance the parties have the discretion to agree on the actual date of receipt, i.e. that the date of delivery be that date upon which the last party to the dispute received, the award.

Parties to a contract are allowed the discretion to choose the different forms of written communication include legal notices and arbitral award. The parties may elect to use registered mail or electronic communication or any other recognized method of delivery.[139] *The parties are also bound in terms of which

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[135] Article 31(4) of the International Arbitration Act, 2017.

[136] *South African Transport and Allied Workers Union v Tokiso Dispute Settlement & Others* [2015] 8 BLLR 818 (LAC).

[137] (2005) 4 SCC 239. This approach was also adopted in *State of Maharashtra & Others v ARK Builders Pvt Ltd* (2011) 4 SCC 616. This approach is consistent with the approach adopted in other leading MAL countries such as India, Mauritius, Rwanda, Singapore, Zambia and Zimbabwe.

[138] *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town & Another & Four Related Applications* 2014 (1) SA 141 (WCC).

[139] J Zheng, *Online Resolution of E-Commerce Disputes: Perspectives from the European Union, the UK, and China* (Springer 2020) 237.

they would have adopted the modes and or methods of and service as provided in institution rules concerning the resolution of their dispute.[140] Therefore, in South Africa, 'delivery' is not a matter of mere formality. It is a matter of substance.[141] Consequently, the term 'delivery' refers to the effective receipt of an award. So, the unlike Kenya, in South Africa, the notification that an award is not deemed the date of effective delivery.[142]

**7.8 Tunisia**

Tunisia was the second country to adopt the MAL after Nigeria (1990) in Africa.[143] The Code of Arbitration[144] gave effect to the MAL in Tunisia.[145] Article 31 (4) of the MAL is found in 33 of the Arbitration Code of 1993. It is different from the MAL. It provides that:

> *The arbitral tribunal shall delivery a copy of the award to the parties within 15 days from the day it was rendered. The arbitral tribunal shall deposit, within the same period of time, at the clerk of the competent court's office, against a receipt, the original of the award together with the arbitration agreement. The deposit is done at no charge.*

Notwithstanding the significant difference with regards Article 31(4) of the MAL and section 32(5) of the Kenya Arbitration Act 1995, in Tunisia, arbitral tribunals have a statutory duty to deliver a signed copy of the award to the awards within 15 days from the date it was rendered. From the foregoing, it is

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[140] *South African Transport and Allied Workers Union* (n 136 above).

[141] *Buildcure CC v Brews & Others* [2017] 3 All 843 (GJ) para 26.

[142] Ibid.

[143] For a better understanding of arbitration in Tunisia, see generally, KB Salah, 'An overview of the Tunisian Arbitration Regulations' (2000) 17 (3) Journal of International Arbitration 141 – 150; A Ouerfelli, *International Arbitration in Tunisian Law and in Comparative Law* (Al Atrash Publications 2006).

[144] Code of Arbitration 1993.

[145] The main arbitration institutions in Tunisia include the Local and International Arbitration Centre 'Al-Insaf, the Tunis Centre and Conciliation (CCAT). It is also known as Centre de Conciliation et d'Arbitrage de Tunis.

submitted that the meaning of 'delivery' is the same as that which is applied in other MAL jurisdictions.

### 7.8 Uganda

Uganda was the seventh country in Africa to adopt the MAL after Nigeria (1990), Tunisia (1993), Egypt (1994), Kenya (1995), Zimbabwe (1996) and Madagascar (1998).[146] The Arbitration and Conciliation Act[147] gave effect to the MAL in Uganda.[148]

Article 31(4) of the MAL is contained in Article 31(8) of the Arbitration and Conciliation Act [Chapter 4] which provides that, '[a]fter the arbitral award is made, a signed copy shall be delivered to each other.' There do not appear to be any reported cases in Uganda which give a different meaning to the meaning of the term 'delivery' or 'delivered' as provided in Article 31(4) of the MAL.[149]

[146] For a better understanding of the law and practice of arbitration in Uganda, see generally, S Taboswa-Chemonges, *The Law and Practice of Commercial Arbitration in Uganda* (Erasmus Universiteit 2008) ; AC Kakooza, 'Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects (2009) 7 (2) *Uganda Law Journal* 268 – 294; GI Adenyuma & S Faruku, 'Principle of Arbitrability in Arbitration and the Judicial Attitude in Uganda' (2022) 1 *Cavendish University Law Journal* 161 – 178.

[147] Arbitration and Conciliation Act 2000.

[148] There are two recognized arbitration institutions in Uganda which are the Centre for Arbitration and Dispute Resolution (CADER) and the International Centre for Arbitration and Mediation in Kampala (ICAMEK).

[149] The case of *Mohammed v Ruko Construction Ltd* [2017] UGSC 13 did not determine the meaning of delivery of an award. It dealt with the inconsistency between the First Schedule of the Arbitration Act (the Arbitration Rules) and the Arbitration Act.

### 7.9 Zambia

Zambia was the eighth country in Africa to adopt the MAL after Nigeria (1990), Tunisia (1993), Egypt (1994), Kenya (1995), Zimbabwe (1996), Madagascar (1998) and Uganda (2000).[150] The Arbitration Act[151] gave effect to the MAL.[152] Article 31(4) of the MAL is contained in section 16(4) of the Arbitration Act 19 of 2000 which provides as follows:

> *After the award is made, a copy signed by the arbitrators in accordance with subsection (1) shall be delivered to each party.*

In Zambia the delivery of an award is not a matter merely a matter of procedure but of substantive law.[153] Furthermore, in terms of section 17 of the Zambia Arbitration Act 2000, the courts have held that the 'purpose of putting a time frame of 3 months was to ensure that matters which are commenced through arbitration are speedily disposed of.'[154]

In view of the Zambian courts have followed the decisions of the leading Model Law jurisdictions in the interpretation of the Model Law in Zambia, it follows that the meaning of the term 'delivery' as used in Article 31(4) of the Model Law is applied the same.

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[150] For a better understanding on the law and practice of arbitration in Zambia, see also, K Mwenda, *Principles of Arbitration Law* (Brown Walker Press 2003); N Mutuna & C Kajimanga, *Handbook on Arbitration in Zambia* (Juta & Co 2023).

[151] Arbitration Act 2000.

[152] There are two active arbitration institutions in Zambia, namely, the Zambian Association of Arbitrators (ZAA) and the Chartered Institute of Arbitration, Zambia Branch (CIArb Zambia). See also, P Kanokanga, 'The History & Development of International Arbitration in Zambia' (2022) *Zambia Law Review* (forthcoming).

[153] *Marondola & Others v Milanese & Others* SCZ No. 6 of 2014.

[154] *Food Reserve Agency v C.B.R. Business Ltd* Appeal No. 34 of 2016.

### 7.10 Zimbabwe

Within the continent, among a dozen of countries, Zimbabwe was the fifth country to adopt the MAL after Nigeria (1990), Tunisia (1993), Egypt (1994) and Kenya (1995).[155] The Arbitration Act[156] gave effect to the MAL in Zimbabwe.[157] It is worth noting that the law and practice of arbitration in the Republic of Zimbabwe[158] has been embraced for more than a century, and the practice of arbitration continues to gain momentum[159] in the country, such that a significant number of academic books, articles[160] and book chapters[161] have been published both locally, regionally and internationally on the subject.

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[155] See also, Kanokanga (n 12 above). This publication received internationally positive reviews. see, G Blanke, 'Book Review: Commercial Arbitration in Zimbabwe, D. Kanokanga, Juta: 2020' (2021) 87 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 149 - 150.

[156] Arbitration Act 1996.

[157] For a better understanding on the Model Law on International Commercial Arbitration, see generally, Kanokanga and Kanokanga (n 94 above). The father and son commentary on the Model Law in Zimbabwe has been given positive reviews. see, B Lumbwe, 'Book Review: UNCITRAL Model Law on International Arbitration: A Commentary on the Zimbabwean Arbitration Act' (2023) 11 *Alternative Dispute Resolution* 252 – 255.

[158] The main arbitration institutions in Zimbabwe include, the Africa Institute of Mediation and Arbitration (AIMA), the Alternative Dispute Resolution Centre (ADSC) and the Commercial Arbitration Centre (CAC).

[159] For the history and development of arbitration in Zimbabwe see, P Kanokanga, 'Matrimonial arbitration in Zimbabwe: an analysis of section 4 (2) (d) of the Arbitration Act [Chapter 7:15]' (2022) *University of Zimbabwe Students Law Review* 43 – 73; P Kanokanga, '25 Years of UNCITRAL Model Law in Zimbabwe' (2022) *University of Zimbabwe Students Law Review* 147 – 187.

[160] J Rowland, 'Arbitration in Zimbabwe: the UNCITRAL Model Law in practice in a developing country' (2007) 3 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 216 – 223.

[161] IA Donovan, 'Zimbabwe' in Eugene Cotran and Austin Amissah (eds), *Arbitration in Africa* (Kluwer Law 1996); MA Masunda & LG Smith, 'Chapter 1:12: Zimbabwe' in L Bosman (ed) *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law 2013) 89 – 96; D Kanokanga & P Kanokanga, 'Zimbabwe' in Steven Finizio and Charlie Caher (eds), *International arbitration laws and regulations 2021* (Global Legal Group 2021) 376 – 385; D Kanokanga & P Kanokanga 'Zimbabwe' in Steven Finizio and Charlie Caher (eds), *International arbitration laws and regulations 2022* (Global Legal Group 2022) 379 - 388.

Zimbabwe adopted Article 31(4) of the Model Law with no changes. Thus, in order for an award to have been received by a party to the proceedings, the award must have been either sent to the parties and or delivered to the parties and or their representatives.

Until an award is either collected or delivered by either of the parties, it cannot be said that such party received it.[162] Consequently, the delivery does not necessarily have to a physical delivery.[163] An arbitral tribunal has an obligation to deliver an award to the parties in accordance with any agreed procedure as laid out in an arbitration agreement, the procedural orders or institutional rules[164]

The High Court of Zimbabwe in ***Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd,*** held that:

> *The word 'received' to me means that the award must have been sent or delivered to the receipt. In this case there was an invitation to collection the award. Until the award was delivered to or collected by the applicant one cannot sat that the applicant had received it. The latter of 25 February 2011 does not amount to tradition longa many as submitted by Mr Morris. That letter does not amount to a pointing out (with long hand) of the item to be delivered. Further, the nature of the thing – the award – is such that the court would be most reluctant to extend that form of delivery to it as it could be easily handed and physically given to the applicant, as what eventually happened on 14 March 2011.*[165]

On appeal, in ***Peruke Investments (Pvt) Ltd v Willoughby's Investments (Pvt) Ltd***, the Supreme Court held that what is required is actual as opposed to putative receipt of an arbitral award. Its rationale was based on the

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[162] *Changara v Row Croppers (Pvt) Ltd* HH 350-22.
[163] *Shapton Enterprises (Pvt) Ltd t/a Newbase v Mimosa Mining Co (Pvt) Ltd & Another* HH 132-17.
[164] Kanokanga & Kanokanga (n 94 above) 342.
[165] 2014 (1) ZLR 501 (H) 505H – 506B.

interpretation of Article 31(4) of the Model Law which mandates for the delivery of a signed copy of an award to each party to the proceedings.[166]

Thus, in Zimbabwe a burden to deliver a signed award is placed on the tribunal and not on the parties, who, generally do not have an obligation imposed upon them to take steps to actively obtain the award.[167]

## 8 Conclusion

In an interesting reveal, there are at least three possible variants as to the meaning of Article 31(4) of the Model Law which has been adopted in section 32(5) of the Arbitration Act with regards to the meaning of delivery: the date on which the award is made, (b) the date of which the award is delivered to the parties, or (c) the date on which the period for making an application for setting aside the award in terms of section 34(4) of the Model Law which was reproduced in section 35(3) of the Arbitration Act.[168]

Drawing attention to the jurisprudence of other eminent African countries to have adopted the Model Law, it is clear that the meaning of the term 'delivery' with regards to the date of receipt of an award in Kenyan is divergent.

It is a well-established principle, that, regards should be had to the international origin of the Model Law and to the desirability of achieving international uniformity in its interpretation and application.

Thus, absent, a statutory definition of the term 'delivery' with regards to section 32(5) and section 35(3) of the Arbitration Act, it is suggested that the courts adopted a literal interpretation of the term.[169]

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[166] 2015 (2) ZLR 491 (S).
[167] Ibid.
[168] Kanokanga and Kanokanga (n 94 above) 339 – 342.
[169] *Chihava & Others v Provincial Magistrate & Another* 2015 (2) ZLR 31 (CC).

It is a general principle of law, that the literal, ordinary or plain meaning of an expression or word,[170] that is as popularly understood, should be adopted, unless that meaning is at variance with the intention of the legislature, as shown by context, or that it would create an irrational result.[171] The justification for this proposition is that the Kenyan school of thought with regards to the meaning of 'delivery' of an award is flawed, as it does not take into account the fact that a party cannot set aside for instance, or have recognized and enforced an award which it does not have actual possession of. It is questionable to infer that the date of notification of the award, also known as the date of 'publication' of an award in Kenya should be regarded as the date of receipt of the award. For instance, in order a party to have an 'award' recognised as binding, the duly authenticated original of the 'award' or a duly certified copy thereof must be attached to the court application.

Secondly, where an award is not in English, a duly certified translation of the award should be accompanied to an application. How that is achieved on the date of notification of an award is unknown. It is submitted that the date of receipt of the date of delivery, refers to actual delivery, or possession.[172]

It is only after the actual receipt of an award, that a party, with notice to the other party, may request a tribunal to correct in the award any errors in computation or such other clerical or typographical errors. Respectfully, this cannot be achieved on the mere notification of an award.

In any case, it is common cause that an application for the setting aside of an award in terms of section 35 of the Arbitration Act can only be made within three months from the date the award was received (not notified). It is

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[170] *Endevour Foundation & Another v Commissioner of Taxes* 1995 (1) ZLR 339 (S) 356F – 357A.

[171] *Stellenbosch Farmers' Winery Ltd v Distillers' Corporation (SA) Ltd & Another* 1962 (1) SA 458 (A) 476E – F; *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 384 (W) 846G – H.

[172] *Sharma v Military Ceramics Corporation* [2020] FCA 216.

rudimentary that the existence and or validity of an award can only be ascertained when a party has actual possession of it.

If the contrary position is to be accepted as correct (which it should not), then, parties would be bound for instance to the determination of an award which deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. It is submitted that a great travesty would be created, thereby binding parties to relief that they may not have sought.[173] It is thus submitted, that, a party can only have recourse to a court against an arbitral award it has actual possession off.

[173] GB Born, *International Commercial Arbitration* (2nd ed) (Kluwer Law International 2014) 3124 – 3125.

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# The Viability of Plea Bargaining as Alternative Dispute Resolution in Kenya's Criminal Justice System

*By:* ***Michael Sang****

***Abstract***

*This comprehensive exploration delves into the intricate world of plea bargaining within the context of the Kenyan criminal justice system. Drawing on legal frameworks, policy guidelines, and comparative experiences from the United States of America, Canada, and South Africa, the discussion unveils the challenges, inconsistencies, and potential enhancements surrounding plea bargaining practices in Kenya. By dissecting Kenya's legal provisions, policy guidelines, and practical experiences, this analysis sheds light on the crucial role of the Director of Public Prosecutions, the significance of alternative justice approaches, and the complexities of plea negotiations. Insights from international jurisdictions provide valuable lessons, emphasizing transparency, information parity, judicial oversight, and safeguarding defendants' rights. Furthermore, the examination of inconsistent judicial decisions in Kenya underscores the importance of adhering to established norms. This discourse not only deepens the understanding of plea-bargaining mechanisms but also offers a roadmap for refining Kenya's approach to plea negotiations, aiming for justice, accountability, and equitable outcomes in the criminal justice landscape.*

***Key Words****: Plea-Bargaining, Alternative-Dispute-Resolution, Kenya, Criminal-Justice-System*

## 1. Introduction

Plea bargaining, an integral facet of modern criminal justice systems, seeks to balance efficiency and fairness by enabling negotiated settlements between

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prosecutors and accused individuals.[1] While designed to streamline court proceedings and alleviate case backlogs, the implementation and practice of plea bargaining have encountered multifaceted challenges across jurisdictions.[2] This comprehensive exploration delves into the nuanced landscape of plea bargaining, with a focus on Kenya, and draws lessons from comparative jurisdictions including the United States, Canada, and South Africa. By analyzing the legal frameworks, policy guidelines, judicial decisions, and practical experiences in each jurisdiction, this discussion aims to illuminate the complexities, inconsistencies, and potential enhancements within Kenya's plea-bargaining system.

Beginning with a detailed examination of Kenya's legal framework for plea bargaining, the paper delves into the Criminal Procedure Code and the Criminal Procedure (Plea Bargaining) Rules, 2018, which lay the foundation for plea negotiations. These rules establish a structured process for negotiations, emphasizing transparency, accountability, and protection of defendants' rights. The involvement of the Director of Public Prosecutions and adherence to procedural safeguards are paramount in shaping the plea-bargaining landscape.

The subsequent section delves into the policy guidelines that guide plea bargaining practices in Kenya. The paper evaluates the ODPP Plea Bargaining Guidelines, which elucidate the role of public prosecutors in the process, the criteria for initiating negotiations, and the importance of victim considerations. Furthermore, the paper scrutinizes the Diversion Policy Guidelines and Explanatory Notes, which advocate for alternatives to prosecution and emphasize restorative justice approaches.

Drawing inspiration from international models, I analyze the United States' Rule 11 of the Federal Rules of Criminal Procedure and its implications for

[1] Alkon C, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems' (2010) 19 *Transnat'l L. & Contemp. Probs* 355.
[2] Ibid

Kenya's plea-bargaining framework. The importance of prompt disclosure of materials and complementary use of legal aid in the U.S. model underscores the significance of information equity and comprehensive legal representation for accused individuals.

My examination also extends to Canada, where plea bargaining is widely accepted and constitutes a significant portion of criminal case resolutions. I delve into the inherent challenges posed by unregulated plea bargaining and explore how Canada addresses these concerns through its legal framework and guidelines. Lessons from Canada underscore the delicate balance between plea negotiations and justice, with a focus on fairness and transparency.

The discussion then shifts to South Africa's Section 105A of the Criminal Procedure Act, a provision that regulates plea negotiations and agreements. This segment highlights the significance of written agreements, the role of prosecutors, and the court's involvement in confirming compliance with agreed terms. The exploration of this South African provision provides insights into the pragmatic judicial management of plea bargains.

As the analysis progresses, I delve into inconsistent Kenyan judicial decisions on plea bargaining, evaluating cases that deviate from legal provisions and principles. These instances shed light on the challenges of maintaining consistency and adherence to the law within plea negotiations.

In conclusion, this comprehensive examination of plea bargaining in Kenya and comparative jurisdictions illuminates the intricacies of its practice, potential pitfalls, and lessons that can be drawn from international experiences. As Kenya navigates the evolving landscape of criminal justice, the insights gained from this analysis offer a holistic perspective on strengthening plea bargaining mechanisms, enhancing transparency, and upholding the fundamental principles of justice.

## 2. Plea Bargaining and Its Relevance for Alternative Dispute Resolution

### 2.1 Concept of Plea Bargaining

Plea bargaining is a legal process within the criminal justice system where a defendant (accused person) agrees to plead guilty to a lesser charge or to a reduced sentence in exchange for a concession from the prosecution or the court.[3] This practice allows defendants to avoid a full trial and the potential for a more severe punishment if found guilty, while also providing benefits to the criminal justice system by saving time, resources, and court costs.[4]

Plea bargaining typically involves negotiation between the prosecution and the defense, with the ultimate goal of reaching a mutually agreeable resolution that benefits both parties. The defendant's willingness to plead guilty often hinges on the promise of a reduced sentence, a lesser charge, or the dismissal of some charges altogether. In return, the prosecution obtains a conviction without the need for a lengthy trial, which can help alleviate the burden on the court system.[5]

The concept of plea bargaining has been widely debated due to potential drawbacks and ethical concerns. Critics argue that it might lead to innocent defendants pleading guilty out of fear of facing a harsher penalty if they go to trial. There's also concern about unequal bargaining power between the prosecution and defense, as well as the potential for coercion or pressure on defendants to accept plea deals.[6]

However, proponents of plea bargaining emphasize its benefits in reducing the caseload of courts, freeing up resources for more complex cases, and achieving quicker resolutions for both defendants and victims. In many jurisdictions, plea

[3] Ibid
[4] Ibid
[5] Ibid
[6] Ibid

bargaining has become an integral part of the criminal justice system, aiming to strike a balance between expediency and fairness.[7]

In the context of Kenya's criminal justice system, the viability of plea bargaining as an alternative dispute resolution mechanism would need to be assessed based on the country's legal framework, cultural factors, and the specific challenges faced by its criminal justice system.

**2.2 Plea Bargaining as Alternative Dispute Resolution**

Plea bargaining can indeed be viewed as a form of alternative dispute resolution (ADR) within the criminal justice system. ADR methods aim to resolve disputes outside of traditional court trials, offering benefits such as efficiency, cost-effectiveness, and reduced strain on the judicial system.[8]

One of the primary benefits of plea bargaining is its potential to expedite case resolution. By avoiding lengthy trials and case backlog, plea bargaining can lead to quicker outcomes, which is a shared goal of ADR. In cases where the evidence against the defendant is strong, a guilty plea through plea bargaining can prevent the unnecessary use of court resources and time.[9]

Both plea bargaining and ADR methods are designed to reduce the financial burden associated with court proceedings. A shorter process means lower costs for all parties involved, including the government, defendants, and taxpayers who fund the court system.[10]

A key feature of ADR is its collaborative and less adversarial nature compared to traditional litigation. Plea bargaining involves negotiation between the prosecution and the defense, where both parties work towards a mutually

[7] Ibid
[8] Kagu A B, 'Globalization of Plea Bargaining: An Imperative Reform or A Compromise of Ideals?' (2017) 3 (1) *Strathclyde Law Review* 14.
[9] Ibid
[10] Ibid

agreeable outcome. This can contribute to a more cooperative atmosphere, where the focus shifts from proving guilt to finding a resolution that satisfies all parties.[11]

Furthermore, ADR methods emphasize flexibility in finding solutions that suit the unique circumstances of each case. Similarly, plea bargaining allows for tailored agreements that consider factors like the defendant's criminal history, the severity of the offense, and the interests of justice.[12]

In cases involving plea bargaining, defendants often admit guilt and take responsibility for their actions, which can be seen as a form of restitution or repair for the harm caused. This aspect aligns with the restorative justice principles often associated with ADR, where the focus is on repairing harm and addressing the needs of victims and communities.[13]

Despite these benefits, it's important to recognize that plea bargaining also faces challenges as an ADR method. Concerns about coerced pleas, unequal bargaining power, and potential injustices must be addressed to ensure that plea bargaining operates fairly and respects defendants' rights.[14]

In the context of Kenya's criminal justice system, embracing plea bargaining as an ADR mechanism could potentially alleviate the strain on courts, provide swifter resolutions, and allow for a more tailored approach to criminal cases. However, careful consideration and appropriate safeguards must be in place to protect the rights of defendants and maintain the integrity of the justice system.

[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid

## 3. The Framework of Plea Bargaining in Kenya and its Systemic Challenges

### 3.1Statutory Framework for Plea Bargaining

#### 3.1.1 Section 137A – 137O Criminal Procedure Code

It provides that a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—(a) reduction of a charge to a lesser included offence; (b)withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. This flexibility ensures that either party can propose a plea agreement, fostering a balanced approach to negotiation. A plea agreement entered into may provide for the payment by an accused person of any restitution or compensation. A plea agreement shall be entered into only after an accused person has been charged, or at any time before judgement. Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions.[15] The requirement for written consent helps ensure oversight and fairness.

It adds that an offer for a plea agreement may be initiated by—(a) a prosecutor; or (b) an accused person or his legal representative. The court shall be notified by the parties of their intention to negotiate a plea agreement. The court shall not participate in plea negotiation between a public prosecutor and an accused person.[16] By prohibiting the court from participating in the negotiations, the process aims to maintain the impartiality of the court and prevent undue influence.

Furthermore, it provides that a prosecutor shall only enter into a plea agreement in accordance with section 137A—(a) after consultation with the police officer investigating the case;(b) with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community; (c) unless the circumstances do not permit, after

[15] Criminal Procedure Code, sec 137A
[16] Ibid, sec 137C

affording the victim or his legal representative the opportunity to make representations to the prosecutor regarding the contents of the agreement.[17]
A plea agreement shall be in writing, and shall—(a) be reviewed and accepted by the accused person, or explained to the accused person in a language that he understands; (b) if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement;(c) state fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person; (d) be signed by the prosecutor and the accused person or his legal representative; (e) be signed by the complainant if a compensation order contemplated in section 175(2)(b) has been included in the agreement.[18]

Before the court records a plea agreement, the accused person shall be placed under oath and the court shall address the accused person personally in court, and shall inform the accused person of, and determine that the accused person understands—(a) the right to—

(i) plead not guilty, or having already so pleaded, to persist in that plea;
(ii) be presumed innocent until proved guilty;
(iii) remain silent and not to testify during the proceedings;
(iv) not being compelled to give self-incriminating evidence;
(v) a full trial;
(vi) be represented by a legal representative of his own choice, and where necessary, have the court appoint a legal representative;
(vii) examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

[17] Ibid, sec 137D.
[18] Ibid, sec 137E

(b)that by accepting the plea agreement, he is waiving his right to a full trial; (c) the nature of the charge he is pleading to; (d) any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge; (e) any mandatory minimum penalty; (f) any applicable forfeiture; (g) the court's authority to order compensation under section 175(2)(b), restitution under section 177, or both; (h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence; (i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement. The prosecutor shall lay before the court the factual basis of a plea agreement and the court shall determine and be satisfied that there exists a factual basis of the plea agreement.[19] This is essential to prevent baseless or coerced agreements. This safeguards the integrity of the process and ensures that the agreement is grounded in factual accuracy.

Moreover, the court shall, before recording a plea agreement, satisfy itself that at the time the agreement was entered into, the accused person was competent, of sound mind and acted voluntarily.[20] Where the court accepts a plea agreement; the agreement shall become binding upon the prosecutor and the accused. Where a plea agreement entered into in accordance with section 137A(1)(a) is accepted by the court, the court shall proceed to convict an accused person accordingly.[21]

Where the court rejects a plea agreement—(a) it shall record the reasons for such rejection and inform the parties accordingly; (b) the plea agreement shall become null and void and no party shall be bound by its terms; (c) the proceedings giving rise to the plea agreement shall be inadmissible in a subsequent trial or any future trial relating to the same facts; and (d) a plea of not guilty shall be entered accordingly. Where a plea agreement has been

[19] Ibid, sec 137F.
[20] Ibid, sec 137G.
[21] Ibid, sec 137H.

rejected by the court and a plea of not guilty consequently entered, the prosecution may, upon being informed of the fact, proceed to try the matter afresh before another court. Provided that the accused person may waive his right to have the trial proceed before another court. Upon rejection of a plea agreement, there shall be no further plea negotiation in a trial relating to the same facts. Where the court has rejected a plea agreement, no party shall appeal against, or apply for a review of, the order of the court rejecting the agreement.[22] An accused person may withdraw a plea of guilty pursuant to a plea agreement—(a) prior to acceptance of the plea by the court, for any reason; or (b) after the court accepts and convicts on the plea, but before it passes a sentence, if the accused person can demonstrate, to the satisfaction of the court, a fair and just reason for requesting the withdrawal.[23]

The sentence passed by a court shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed. However, The Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.[24]

Finally, the provisions also provide that this Part shall not apply to—(a) offences under the Sexual Offences Act, 2006 (b) offences of genocide, war crimes and crimes against humanity.[25]

### 3.1.2 Criminal Procedure (Plea Bargaining) Rules, 2018

The rules provide that a plea agreement may be entered into between the prosecutor and an accused person where (a)an accused person has been charged in court; and (b) at any time before the court passes judgment.[26] The information

[22] Ibid, sec 137J.
[23] Ibid, sec 137K.
[24] Ibid, sec 137L.
[25] Ibid, sec 137N.
[26] Criminal Procedure (Plea Bargaining) Rules, 2018, rule 2

obtained from an accused person during the course of plea negotiations shall not be used against him or her during the prosecution of the case if the plea negotiations are ultimately unsuccessful: Provided that where the failure of plea negotiations is on account of an act or omission by the accused person, the information obtained during plea negotiations may be used during the prosecution of the accused person.[27] This provision encourages open and honest negotiations without the fear of self-incrimination.

A prosecutor shall obtain written approval from the Director of Public Prosecutions (DPP) or from a person authorized in writing by the DPP in this regard before entering into a plea agreement with an accused person.[28] This ensures oversight and consistency in plea agreement negotiations and helps maintain the integrity of the process.

Before entering into a plea agreement with an accused person, the prosecutor shall (a) consult with the investigating officer of the case; (b) give due regard to the nature of and the circumstances relating to the case, the personal circumstances of the accused, the interests of the community; and (c) unless the circumstances do not permit, afford the victim or the victim's legal representative an opportunity to make a representation to the prosecutor regarding the terms of the agreement. The prosecutor shall maintain the sole discretion on whether or not to enter into a plea agreement with the accused person.[29]

In addition, a plea agreement may include a clause for the payment of compensation to a victim by an accused person. Where a plea agreement includes a clause for compensation payable to the victim by an accused person, the value or form of compensation shall be as agreed to after negotiations between the victim and the accused person and endorsed by the prosecutor if, in his or her opinion, the compensation serves the ends of justice. A proposal to

[27] Ibid, rule 3
[28] Ibid, rule 5
[29] Ibid, rule 7

include the payment of compensation to the victim in a plea agreement or any negotiation for compensation payable to the victim may be made or initiated by the accused person or the victim. Where negotiations for compensation payable to the victim break down or the prosecutor determines that the proposed compensation defeats the ends of justice, the prosecutor shall not include the proposal for compensation in the final draft of the plea agreement.[30]

The prosecutor shall present to the court all circumstances of the case including any mitigating circumstances in favor of the accused person at the hearing where the accused person pleads guilty in accordance with the terms of the plea agreement. The prosecutor shall, at the time that the accused person pleads guilty, call the court's attention to section 137I of the Criminal Procedure Code and the Sentencing Policy Guidelines, 2016.[31]

Furthermore, a prosecutor and the accused person or his or her legal representative may each make a specific recommendation to the court as to the sentence to be imposed and include the recommendation in the final plea agreement. Notwithstanding the recommendation of the parties, the court shall retain sole discretion in sentencing. This maintains the independence of the judiciary in sentencing decisions. Where the prosecutor recommends to the court the imposition of a sentence that is more severe than the recommendation included in the plea agreement, the accused person may withdraw his or her plea of guilty and set aside the plea agreement. Where the accused person recommends to the court the imposition of a sentence that is less severe than the recommendation in the plea agreement, the accused person shall not be permitted to withdraw his or her plea of guilty on that ground alone. Where the accused person recommends to the court the imposition of a sentence that is less severe than the recommendation in the plea agreement, the prosecutor may recommend to the court any other appropriate sentence.[32]

[30] Ibid, rule 8
[31] Ibid, rule 11
[32] Ibid, rule 12

Moreover, where the accused person is not represented by a legal representative, the prosecutor shall inform him or her of his or her right to have a legal representative or any other party of his or her choice. Where the accused person is a child who has a legal representative, the plea agreement shall be executed by the prosecutor, the child and the child legal representative. Provided that the court shall ascertain the competency of the child to enter into the plea agreement through voire dire examination.[33]

Finally, a plea agreement shall be finalized when the prosecutor and the accused person sign the agreement. Where applicable, the legal representative shall also sign the plea agreement. Where the plea agreement includes a compensation clause, the complainant shall sign the compensation clause of the agreement.[34]

## 3.2Policy Framework for Plea Bargaining

### 3.2.1 ODPP Plea Bargaining Guidelines, 2019

The Plea-Bargaining Guidelines and Explanatory notes were developed pursuant to Section 137A-O of the Criminal Procedure Code (CAP 75) and the Plea-Bargaining Rules. These guidelines are an important addition to the general prosecutorial policy framework and serve to elaborate the Plea-Bargaining Rules. The Guidelines are meant to guide public prosecutors, as well as other prosecutors who may be granted prosecutorial powers, in the best practices and application of the plea bargain provisions within the Kenyan context.[35]

Plea bargain has in theory been part of Kenya's criminal justice system for a long time, yet its applicability has been poorly utilized. It is not every criminal case that should be prosecuted to finality through a trial if it can be resolved by alternative means. What is important is that justice is done in each case and as far as is possible, all parties are dealt with fairly and equitably. Considering that

[33] Ibid, rule 13
[34] Ibid, rule 14
[35] ODPP Plea bargaining guidelines, 2019, acknowledgements

in some cases remandees remain in prison custody during court proceedings, it is important that stakeholders embrace creative provisions in our law to decongest the prisons. It is against this backdrop that the Plea-Bargaining Rules, Guidelines and Explanatory Notes were developed.[36]

These guidelines, therefore, set out the procedure by which a prosecutor, with a view to agreeing to an alternative means of disposing of a criminal case, may conduct discussions with an accused or their legal representative. These guidelines are premised on transparency, accountability, integrity, consistency, predictability and credibility.[37]

The Guidelines set out the process by which a prosecutor may negotiate with an accused person, his/her legal representative or any other party of his/her choice on the charges at any time before judgment. The prosecutor must ensure that a charge or charges have been registered before entering into plea negotiations.[38]

Plea negotiations shall be initiated and entered into by the DPP or any other officer acting under his or her direction.[39] In cases of great public interest (including those touching on National Security and public figures), the DPP shall be consulted and appraised on the Plea Agreement before commencement and during the negotiations. In conducting plea negotiations and presenting a Plea Agreement to the court, the prosecutor shall act openly, reasonably, fairly and in the interests of the administration of justice and shall ensure that: i) The procedures followed command public and judicial confidence; ii). The accused person has sufficient information to enable him/her to make an informed decision in the plea negotiations including the right to have a legal representative or any other person of his/her choice; iii). That the accused person has the assistance of an interpreter where he/she cannot understand the

[36] Ibid, preface
[37] Ibid
[38] Ibid, section 1
[39] Ibid, section 2

language of the court; iv). The accused person has entered into plea negotiations voluntarily and without undue influence, coercion or misrepresentation of facts by any party to the negotiation; v). The accused person is informed of his/her rights under section 137F 1(a)of the CPC and that by entering into the plea negotiations he/ she waives his/her right to a full trial and appeal except as to the extent or legality of sentence; vi). A full and accurate record of the plea negotiations is prepared and maintained; vii). Reasonable effort is made to communicate with the victim, the victim's family, victim's representative or any other person whether natural or artificial likely to be affected by the terms and the status of the Plea Agreement; viii.) The Plea Agreement placed before the court fully reflects the matters agreed upon in a clear and simple way; ix.) The court has sufficient material and information to pass an appropriate sentence; x.) The investigating officer is notified in writing of the intention to enter into plea negotiations.[40] Once plea negotiations are initiated, the accused person may express the intention to plead guilty to one or more of the charges preferred. If the accused person pleads guilty to one or some, but not all the counts or to less serious count (s), the prosecutor may accept such plea(s).[41] The prosecutor shall consider carefully the impact of the Plea Agreement on the victim and community as well as the prospects of successfully prosecuting any other person implicated in the offence. There is no bar on continuing the investigation while negotiations are ongoing.[42]

The guidelines also provide procedures for initiating plea negotiations,[43] conducting plea negotiations[44] and termination of plea negotiation process.[45]

[40] Ibid
[41] Ibid, section 2
[42] Ibid
[43] Ibid, section 3
[44] Ibid, section 4
[45] Ibid, section 7

### 3.2.2 ODPP Guidelines on the Decision to Charge, 2019

The Decision to charge Guidelines are anchored on Article 157 of the Constitution 2010, National prosecution Policy and the General Prosecution Guidelines. It provides the framework of exercising the state powers of prosecution ensuring justice is served to all. The Guidelines were developed with the aim of ensuring the quality of prosecutorial decisions, accountability of the prosecutors and transparency of prosecutorial processes to the right holders.[46] The focus is on the prosecutors in adopting and implementing these Guidelines to ensure they know and consider evidential thresholds before institution of proceedings, review of ongoing proceedings as well as adopt alternatives to prosecution if and where need be to ensure the interests of justice are served.[47]

The guidelines provide that prosecutors must be familiar with the ODPP Plea Bargaining Guidelines as read together with the Criminal Procedure (Plea Bargaining) Rules and section 137A to O of the CPC. A plea agreement may be entered into between the Prosecutor and an accused person where an accused person has been charged in court; and at any time before the court passes judgment. At the earliest opportunity and where possible, Prosecutors should apply plea bargaining in line with the stated provisions.[48]

### 3.2.3 ODPP Diversion Policy Guidelines and Explanatory Notes, 2019

The Diversion Policy Guidelines and Explanatory Notes were developed in pursuant to the Diversion Policy, National Prosecution Policy, Article 159 of the Constitution of Kenya and International Legal Framework that emphasizes the use of diversion as an alternative to prosecution.[49] Diversion enables prosecutors to divert cases from the court process and allow matters to be settled out of court, on merit and through agreed structures. Diversion is meant to give offenders a second chance in life, assisting them to reintegrate into the

[46] ODPP Guidelines on the decision to charge, 2019, foreword
[47] Ibid
[48] Ibid, section 4.7
[49] ODPP Diversion Policy Guidelines and Explanatory Notes, 2019, acknowledgments

community, and reduce the risks of re-offending. Diversion also ensures that individuals avoid a criminal record but nonetheless atone for their mistakes.[50] Criminal practice in Kenya has long focused on retributive justice with an emphasis on punishing offenders for their crimes. Modern-day criminal law practice has shifted from this approach, instead focusing on restitution, restoration and reintegration. Through diversion, ODPP is better able to deal with the case backlog in Kenya's judicial system, reduce overcrowding in the prisons and enhance reconciliation by allowing victims and offenders to settle cases out of court. Thus, the Diversion Policy and its Guidelines and Explanatory Notes are important means of operationalizing Article 159 of the Constitution of Kenya 2010.[51]

When deciding whether to prosecute or divert an offender or to apply one of the other ODPP policies such as plea bargaining, the key question should always be whether the conduct warrants the intervention of the criminal process or whether diversion should be offered in the interests of justice to provide a fair solution to the victim, society and the offender.[52] There is a potential interface between the Diversion Policy, plea bargaining and other Alternative Justice System. The Public Prosecutors must ensure that all of the options have been carefully considered.[53]

### 3.3 Inconsistent Kenyan Judicial Decisions on Plea Bargaining

Even though the law requires that a plea agreement should be in writing as described above, courts have in some instances accepted plea bargains made orally. This was the case in *Joyce Gwendo v Chief Magistrate's Court*[54] where, during plea negotiations, the accused agreed to compensate the victim but the

[50] Ibid, foreword
[51] Ibid
[52] Ibid, section 26
[53] Ibid, section 92
[54] Chief Magistrate's Court *at Nairobi Anti-Corruption Division & 2 others; Kisumu East Cotton Cooperative Society (Interested Party).* The accused had been charged with five counts and one of them was abuse of office contrary to section 46 as read with section 48 (1) (a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

final agreement submitted to the court did not have a provision to that effect. As a result, the proposal to offer compensation was made in court verbally, upon which the court gave directions with regards to the manner of making the instalments.[55] This inconsistency between the oral agreement and the written agreement raises concerns about the proper documentation and transparency of plea negotiations. A written agreement is typically required to ensure clarity, avoid misunderstandings, and provide a record of the terms agreed upon.

In addition, as described above, Statute laws expressly provide that plea agreements cannot be adopted in crimes against humanity, war crimes, offences of genocide and offences under the Sexual Offences Act. However, jurisprudence emanating from Kenyan courts seems to lengthen the list of offences that are not open to plea bargaining. In *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni*.[56] The DPP declined an offer for plea bargaining, on grounds that grand corruption scandals are matters of great public interest which ought to be allowed to go to full trial. Similarly, the ODPP later in Florence *Wanjiku Muiruri v Republic*. declined to approve a plea bargain of a public officer who had been charged with the offence of receiving a bribe. '[57]These decisions could be inconsistent with the law if the statute does not explicitly include these offenses as exceptions to plea bargaining.

The paper avers that it's important for judicial decisions to align with the letter and spirit of the law, as well as with established legal principles. Inconsistencies between court decisions and the law can lead to confusion, lack of predictability, and potentially undermine the fairness and effectiveness of the criminal justice system.

[55] Ibid, para 31.
[56] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 28
[57] *Forence Wanjiku Muiruri v Republic* [2020] eKLR 3

### 3.4 Why is Plea Bargaining Failing in Kenya?

Plea bargaining can face challenges in any legal system, including Kenya. While plea bargaining has the potential to offer benefits such as reducing case backlogs, ensuring more efficient justice delivery, and promoting alternatives to full trials, there can be several reasons why plea bargaining might face difficulties or even fail in Kenya.

First, the concept of plea bargaining might not be widely understood by all stakeholders, including accused persons, victims, and even some legal professionals. This lack of awareness can hinder the successful implementation of plea bargaining.[58]

Secondly, cultural norms and societal attitudes towards crime and justice might not align with the concept of plea bargaining. In some cases, there might be a preference for traditional justice mechanisms or a general mistrust of negotiated settlements.[59]

Thirdly, if there's a significant power imbalance between the prosecution and the accused, plea agreements might not be entered into on a level playing field. This could lead to coerced pleas or unfair agreements.[60]

In addition, adequate resources are required to conduct thorough investigations, engage in negotiations, and provide legal representation. A lack of resources on both sides (prosecution and defense) can affect the quality and fairness of plea bargaining.[61]

Furthermore, corruption within the criminal justice system can undermine the credibility of plea bargaining. If individuals believe that plea agreements are

[58] Munyao Sila (2014) 'Modern Law of Criminal Procedure in Kenya' Partridge Africa
[59] Ibid
[60] Ibid
[61] Ibid

influenced by bribes or other forms of corruption, they might lose trust in the process.[62]

In some cases, there might be a prevailing belief that serious offenses should be punished harshly, and plea bargaining might be seen as letting offenders off too easily. This perspective can lead to resistance against plea bargaining.[63]

Victim participation and consent are important in plea bargaining, particularly when compensation or restitution is involved. If victims feel excluded from the process or that their rights are not being considered, it can lead to challenges.[64]Moreover, if the public perceives plea bargaining as a tool for the wealthy or well-connected to avoid justice, there might be resistance and skepticism towards its implementation.[65]

### 3.4.1 Conflict with ADR

Plea bargaining and alternative dispute resolution (ADR) are both mechanisms designed to provide efficient and effective ways to resolve legal disputes. However, conflicts can arise between these two approaches, potentially contributing to the challenges faced by plea bargaining in Kenya.

Plea bargaining primarily focuses on criminal cases and aims to secure a guilty plea from the accused in exchange for certain concessions. On the other hand, ADR, such as mediation or arbitration, focuses on resolving disputes amicably and collaboratively without necessarily determining guilt or innocence. The differing objectives of these approaches can create conflicts when trying to fit plea bargaining into the broader context of ADR.[66]

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[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Dervan, L. (2013). Negotiating Punishment in the Shadow of the Jury. *Ohio State Journal of Criminal Law,* 10, 595.

Plea bargaining inherently involves admitting guilt to a criminal offense in exchange for reduced charges or penalties. This emphasis on criminal liability can conflict with the principles of ADR, which often prioritize finding common ground and achieving mutually beneficial solutions without a clear admission of guilt.[67]

Further, in ADR processes, victim involvement and satisfaction are often important components. Victims may have the opportunity to participate in discussions and decisions. In plea bargaining, the focus is primarily on the accused and the prosecution, which may not fully align with the interests of victims or the objectives of ADR.[68]

ADR methods often emphasize restitution and compensation to victims as part of the resolution process. In plea bargaining, restitution and compensation may be part of the agreement, but the primary focus is on the accused's admission of guilt and the negotiation of charges. This difference in emphasis can create tensions between the two approaches.[69]

Plea bargaining involves prosecutors and defense attorneys negotiating outcomes behind closed doors. ADR, on the other hand, may involve more transparent processes that parties perceive as more accountable. The lack of transparency in plea bargaining can contribute to public mistrust and conflict with the principles of ADR.[70]

In addition, ADR methods often prioritize reconciliation and maintaining relationships between parties, even in criminal cases. Plea bargaining, while it can result in resolutions, is still fundamentally a legal process with a focus on

[67] Ibid
[68] Ibid
[69] Ibid
[70] Ibid

achieving legal outcomes, which may not always align with the broader goals of ADR.[71]

To overcome these conflicts, jurisdictions that wish to integrate plea bargaining with ADR principles may need to carefully consider how to balance the objectives of both approaches. This might involve developing specific guidelines for when and how plea bargaining can be used within an ADR framework, ensuring that the interests of victims, the accused, and the community are properly addressed. It's crucial to create a clear legal and procedural framework that allows for flexibility while upholding the principles of justice and fairness.[72]

### 3.4.2 Contestation over Judicial Discretion

Contestation over judicial discretion is another factor that can contribute to the challenges and potential failures of plea bargaining in Kenya. Judicial discretion refers to the authority given to judges to make decisions based on their judgment and evaluation of the facts and circumstances of a case.

Judicial discretion plays a significant role in determining the outcomes of plea agreements, including the sentences imposed on convicted defendants. However, inconsistent sentencing, where different judges impose varying sentences for similar offenses, can lead to public perception issues and undermine the credibility of the plea-bargaining process.[73]

If the public perceives that judges have too much discretion in plea bargaining, there might be concerns about potential favoritism, bias, or arbitrary decision-making. This can lead to public mistrust in the criminal justice system and the plea-bargaining process.[74]

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[71] Ibid
[72] Ibid
[73] Dervan, L. (2014). The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem. *Iowa Law Review*, 100(3), 1023-1102.
[74] Ibid

On the other hand, some judges might exercise their discretion in a manner that leads to excessively harsh sentences, which can undermine the perceived fairness of the plea-bargaining process. Defendants might be reluctant to engage in plea negotiations if they fear they will receive disproportionately severe penalties.[75]

Judicial discretion requires a deep understanding of the legal context, sentencing principles, and the specific circumstances of each case. If judges lack appropriate training in these areas, their exercise of discretion might be inconsistent or inadequately informed.[76]

## 4. Reforming Plea Bargaining as Alternative Dispute Resolution in Kenya: Guidance from Comparable Jurisdictions

### 4.1United States of America

#### 4.1.1 Prompt Disclosure of Materials

In the United States, plea bargaining is a well-established practice and plays a significant role in the criminal justice system. The concept of prompt disclosure of materials is a crucial element of the plea-bargaining process that offers valuable lessons for Kenya and other jurisdictions considering reforms in their plea-bargaining procedures.

In the U.S., the principle of prompt and full disclosure of materials to the defense is essential for a fair and transparent plea-bargaining process. This principle ensures that defendants have access to all relevant evidence and information held by the prosecution, allowing them to make informed decisions about whether to accept a plea agreement or proceed to trial.[77]

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[75] Ibid
[76] Ibid
[77] Yuracko, K. A. (2014). Plea Bargaining and Gender Justice. *Georgetown Law Journal*, 103, 283.

Many U.S. jurisdictions have adopted open discovery rules that require prosecutors to disclose evidence and materials to the defense in a timely manner. This includes providing police reports, witness statements, forensic evidence, and any exculpatory or impeachment evidence.[78]

The prosecution's obligation to disclose exculpatory evidence, which is evidence that could potentially prove the defendant's innocence or impeach the credibility of prosecution witnesses, is a fundamental aspect of ensuring a fair plea-bargaining process.[79]

In addition, prompt disclosure enables defense attorneys to evaluate the strength of the prosecution's case, identify potential weaknesses, and advise defendants on whether to accept a plea deal or proceed to trial. This ensures that defendants make informed decisions about their legal options.[80]

**Lessons for Kenya**

Prompt disclosure of materials is essential for maintaining the integrity of the plea-bargaining process and upholding the accused's right to a fair trial. The paper argues that Kenya can draw several lessons from the U.S. experience when considering reforms to its own plea-bargaining system.

First, timely and complete disclosure of materials promotes transparency and accountability within the criminal justice system. It helps prevent cases of evidence being hidden or suppressed, which could result in wrongful convictions or unjust outcomes.

Secondly, when defendants have access to all available evidence, they are less likely to be pressured into accepting plea agreements based on incomplete information. This reduces the risk of coerced pleas and ensures that defendants can make voluntary and informed choices.

[78] Ibid
[79] Ibid
[80] Ibid

Thirdly, timely disclosure allows defense attorneys to prepare a robust defense strategy, cross-examine witnesses effectively, and challenge the prosecution's evidence. This contributes to a more balanced and fair plea-bargaining process. In addition, clear rules regarding disclosure help prevent disputes between the prosecution and defense over access to evidence. This contributes to smoother plea negotiations and reduces the potential for delays in the legal process.

### 4.1.2 Complementary Use of Legal Aid

The complementary use of legal aid in the United States offers valuable lessons for Kenya as it seeks to reform its plea-bargaining system and enhance access to justice within the alternative dispute resolution framework.

In the United States, legal aid plays a significant role in ensuring that defendants have access to quality legal representation, especially when engaging in plea bargaining. Many jurisdictions in the U.S. have established public defender offices that provide legal representation to indigent defendants. Public defenders are attorneys employed by the government to represent defendants who cannot afford private counsel.[81]

In cases where public defender offices are unavailable or have a conflict of interest, courts may appoint private attorneys to represent defendants who qualify for legal aid. The provision of legal aid ensures that defendants are not left to navigate the complex legal system on their own. It guarantees that defendants receive effective assistance of counsel during plea negotiations, trial, and other stages of the legal process.[82]

**Lessons for Kenya**

The paper posits that complementary use of legal aid can have several positive implications for Kenya's plea-bargaining system and its efforts to ensure access to justice.

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[81] Dervan, L. (2014). The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem. *Iowa Law Review*, 100(3), 1023-1102.
[82] Ibid

Legal aid helps level the playing field for defendants, particularly those from disadvantaged backgrounds. Adequate representation ensures that defendants understand the implications of plea agreements, the charges they face, and their legal rights.

Legal aid can prevent defendants from feeling pressured into accepting plea agreements without fully understanding the consequences. Legal representation provides defendants with the information and guidance they need to make informed decisions.

In addition, legal aid attorneys can identify potential violations of defendants' rights, such as coerced confessions or evidence obtained unlawfully. This protection is essential to maintaining the integrity of the plea-bargaining process.

Legal aid attorneys can investigate cases, uncover evidence, and challenge the prosecution's case effectively. This proactive approach helps prevent wrongful convictions.

Furthermore, when defendants have competent legal representation, plea negotiations can proceed more smoothly and efficiently. This benefits the courts, the prosecution, and the defendants themselves. Complementary legal aid demonstrates a commitment to upholding defendants' rights and due process, which in turn builds trust in the criminal justice system.

### 4.1.3 Rule 11 of Federal Rules of Criminal Procedure

Rule 11 of the Federal Rules of Criminal Procedure governs all federal plea proceedings and is also the rule prohibiting a judge's involvement in plea proceedings.[83] According to Rule 11, a defendant has the option to enter a plea of not guilty, guilty, or nolo contendere. However, plea negotiations can commence well before Rule 11 becomes applicable. In certain instances, even

[83] Rule 11 of Federal Rules of Criminal Procedure

before charges are formally brought, the prosecution might initiate contact with a person under investigation and propose potential benefits in exchange for their cooperation against others. This could involve sharing information about a broader criminal activity, wearing a recording device, or seeking participation in a sting operation. Similar to other state regulations, Rule 11 serves as a crucial framework for enforcing procedural safeguards related to plea agreements. The most comprehensive section of this rule delineates the steps a court must take before accepting a defendant's guilty plea. Specifically, the rule mandates that the court engage the defendant directly in an open courtroom setting to ensure a clear understanding of the implications of pleading guilty and the rights being waived by choosing this plea option.[84]

The court must explain to all defendants that, if they plead guilty, they will be giving up the constitutional rights associated with a trial listed in the Rule.[85] The Rule also requires the court to describe the salient terms of the plea agreement.[86] These include the government's right to use any statements made by the defendant against the defendant in a prosecution for perjury, the nature of the charges, the maximum and minimum possible penalties, and the terms of any waivers.[87] In its latest update, the Rule introduced a provision mandating that courts inform all defendants intending to enter a guilty plea that non-U.S. citizens who plead guilty may face consequences such as deportation, denial of citizenship, and future ineligibility for entry into the United States.[88]

The court must also satisfy itself that a defendant is voluntarily pleading guilty and that no promises have been made outside of the plea agreement itself.[89] Finally, the Rule requires the court to ensure that there is a sufficient factual basis for the plea.[90] Typically, this is achieved by having the prosecution present

[84] Ibid r. 11(b)(2).
[85] Ibid. r. 11(b)(1)(F).
[86] Ibid. r. 11(b)(1).
[87] Ibid
[88] Ibid. r. 11(b)(1)(O).
[89] Ibid. r. 11(b)(2).
[90] Ibid. r. 11(b)(3)

the factual basis outlined in the plea agreement, followed by asking the defendant for their concurrence with the provided facts. In certain instances, courts may also request defendants to openly declare the precise actions they undertook during the proceedings.

While the majority of plea agreements receive court approval, there are instances where a plea might be declined due to concerns that it is unfair, the factual foundation is insufficient, or the defendant has been compelled or deceived into entering a guilty plea.[91] When that happens, the court must inform the defendant that he or she may withdraw the plea and that the court may then treat the defendant less favorably than contemplated by the plea agreement.[92] Because all bargaining occurs outside the presence of the court, however, courts know so little about the case or the equities prior to the plea that rejections are rare.[93]

Because Rule 11 prohibits judges from any substantive involvement in plea negotiations,[94] the judge's role in the process in federal court is extremely limited.[95] The judge's responsibilities primarily involve determining the time allocated for negotiation and evaluating whether to approve or decline the plea agreement. The judge's constrained involvement shifts the primary

[91] Ibid. r. 11(b)(1) -(3).
[92] Ibid. r. 11(c)(5)(C)
[93] If a court does reject a plea agreement and the defendant is allowed to withdraw the plea, the defendant has three choices: attempt to negotiate a different agreement which will be more acceptable to the court, plead "blind" without any agreement, or go to trial.
[94] See *United States v. Davila*, 133 S. Ct. 2139, 2148 (2013) (the parties and the Court agreed that the magistrate judge's involvement in plea negotiations violated Rule 11(c)(1)'s prohibition on judicial participation in plea discussions).
[95] Most states have similar restrictions. See, e.g., *McDaniel v. State*, 522 S.E.2d 648, 650 (Ga. 1999) ("Judicial participation in the plea negotiation process is prohibited by court rule in this state and in the federal system.); *State v. Moe*, 479 N.W.2d 427, 430 (Minn. Ct. App. 1992) (It is error for a trial court judge to participate directly in plea agreement negotiations.); *Fermo v. State*, 370 So. 2d 930, 933 (Miss. 1979) (The judge] should never become involved, or participate, in the plea-bargaining process. He must remain aloof from such negotiations.

responsibility of plea negotiations to the lawyers. This often involves a sequence of conversations between defense and prosecution lawyers, where the defense lawyer subsequently communicates all details to their client. Alternatively, it may involve a proffer session (or sessions) attended by lawyers, the client, and federal agents.[96] As the prosecutor engaging in plea negotiations doesn't possess ultimate authority in the process, even after the defendant's acceptance of a specific agreement, supervisors might ultimately dismiss the agreement, resulting in a return to the initial stage.

The paper avers that Rule 11 provides several important lessons for Kenya as it considers reforming its plea-bargaining system.

Kenya can draw from the provision added to Rule 11, which requires courts to notify defendants who are not U.S. citizens about the potential immigration consequences of pleading guilty. This ensures that defendants are aware of the broader consequences of their plea, especially those related to their immigration status.

In addition, Kenya might consider the principle of limiting judicial involvement in plea negotiations, similar to Rule 11's approach. This ensures that the judge's role remains impartial and focused on the court's acceptance or rejection of the plea agreement, while allowing defense and prosecution lawyers to negotiate the terms of the agreement.

Supervisors' ability to review and potentially reject plea agreements in the U.S. provides a system of checks and balances, ensuring that plea agreements are fair and just. Kenya could consider implementing a review mechanism to prevent unfair or improper plea agreements from being accepted.

[96] See, e.g., David P. Leonard, Let's Negotiate a Deal: Waiver of Protections Against the Use of Plea Bargains and Plea-Bargaining Statements After Mezzanatto, 23 CRIM. JUST. 8 (2008).

Finally, Kenya can learn from the U.S. model of providing adequate legal representation for defendants during the plea-bargaining process. Legal aid and public defenders play a crucial role in ensuring defendants receive proper guidance and representation throughout the negotiation and plea process.

### 4.2 Canada

Recognized as an integral element of the Canadian criminal process,[97] plea bargaining has gained wide acceptance in Canada. Exact and up-to-date figures are challenging to ascertain, but it seems that a substantial majority of criminal prosecutions are settled through plea agreements.[98] One of the foundational documents in Canada is The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, released in 1993.[99] The report identified certain perceived drawbacks of unregulated plea bargaining: These concerns involve the secrecy associated with plea bargaining, the way negotiated pleas circumvent the procedural safeguards of a trial overseen by an impartial judge, thus potentially concealing coerced pleas or unethical behaviors; the tendency for legal representatives to adopt excessively aggressive stances to gain negotiating advantages (a practice acknowledged and disapproved by the Committee in an earlier section); and the worry that plea bargaining outcomes may not align closely with the specifics of the offense or the offender's circumstances, as plea bargaining often prioritizes negotiation tactics and strengths over the merits of the case.[100]

In essence, a significant portion of the criticism directed towards plea bargaining within scholarly works is founded on the underlying notion that bargaining and the concept of justice are distinct concepts: It is argued that

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[97] *R. v. Burlingham*, [1995] 2 S.C.R. 206, 208 (Can.).

[98] See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea-Bargaining System*, 50 U. CHI. L. REV. 931, 973-74 (1983) (suggesting that, based on a survey of available studies, approximately 70 percent of successful prosecutions in Canada are disposed of by guilty pleas);

[99] ONT. Ministry of The Attorney Gen., Report of The Attorney General's Advisory Committee on Charge Screening, Disclosure, And Resolution Discussions (1993).

[100] Ibid. at 276-77 (footnotes omitted).

justice must not be treated as something that can be acquired or negotiated at the bargaining table.[101]

In the recent case of *R. v. Nur*, the Supreme Court of Canada, striking down a mandatory minimum sentence for a firearms offense, commented on the difficulties that flow when all meaningful discretion is vested in the prosecutor: "This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation[.] We cannot ignore the increased possibility that wrongful convictions could occur under such conditions."[102]

The Canadian experience with plea bargaining and the challenges it has faced provide valuable lessons for Kenya as it considers reforming its own plea-bargaining system.

Canada's concerns about the secrecy of plea bargaining and the potential for coercive effects highlight the importance of transparency and oversight. Kenya could consider implementing mechanisms to ensure that plea bargaining negotiations are conducted in a transparent manner and that the defendant's rights are safeguarded throughout the process.

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[101] Ibid

[102] Carol A. Brook, Bruno Fiannaca, David Harvey, Paul Marcus, Jenny McEwan, and Renee Pomerance, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 Wm. & Mary L. Rev. 1147 (2016), https://scholarship.law.wm.edu/ accessed 25 August 2023

The Canadian experience emphasizes the need to address the imbalance of power between the prosecution and the accused during plea negotiations. Giving prosecutors significant discretion and bargaining power can lead to unfair outcomes, including wrongful convictions. Kenya should aim to establish a balanced system that prevents coercive situations and ensures that the accused has meaningful input and representation in the negotiation process.

Furthermore, The Canadian Supreme Court's observation about the dangers of vesting excessive power in prosecutors during plea negotiations underscores the importance of judicial involvement in the process. Kenya might consider mechanisms to involve judges or magistrates in plea discussions to mitigate the power imbalance and ensure fairness.

The Canadian cases of innocent persons pleading guilty highlight the need for strong safeguards against wrongful convictions. Kenya should prioritize mechanisms to prevent innocent individuals from feeling compelled to plead guilty due to undue pressures or inducements.

Given the potential power dynamics in plea negotiations, ensuring that defendants have access to quality legal representation is crucial. Kenya can take lessons from Canada's emphasis on providing effective legal aid to defendants during plea bargaining discussions.

### 4.3 South Africa

#### 4.3.1 Section 105A of the Criminal Procedure Act

It stipulates that a prosecutor, duly authorized in writing by the National Director of Public Prosecutions, and an accused who is legally represented, are permitted to engage in negotiations and establish an agreement before the accused formally enters a plea to the charge filed against them. This agreement pertains to: (i) the accused's plea of guilt to the charged offense or an offense for which they could potentially be convicted based on the charge; and (ii) if the accused is indeed convicted of the specified offense and has agreed to plead

guilty - (aa) determining a fair sentence to be handed down by the court; or (bb) deferring the issuance of the sentence as outlined in section 297 (1) (a); or (cc) establishing a just sentence to be imposed by the court, where the execution of the entire sentence or a portion thereof is suspended under section 297 (1) (b); and (dd) if applicable, an award for compensation as outlined in section 300.[103] Furthermore, it specifies that the prosecutor may engage in an agreement as outlined in paragraph (a) under the following conditions: (i) after consulting the individual responsible for investigating the case; (ii) while giving appropriate consideration to, at a minimum, the - (aa) nature and circumstances surrounding the offense; (bb) personal situation of the accused; (cc) any prior convictions of the accused, if applicable; and (dd) welfare of the community; and (iii) upon offering the complainant or their representative, if reasonable and taking into account the nature and circumstances of the offense along with the interests of the complainant, the opportunity to provide input to the prosecutor regarding - (aa) the contents of the agreement; and (bb) the potential inclusion of a condition related to compensation or an alternative provision for the complainant involving a particular benefit or service in lieu of compensation for damages or financial loss. The necessity of compliance with the provision outlined in paragraph (b) (i) may be waived if the prosecutor deems that consultation with the person responsible for the case investigation could result in significant delays to the proceedings, potentially leading to considerable harm to the prosecution, the accused, the complainant, or their representative, and negatively impacting the administration of justice.[104]

Moreover, it highlights that a plea agreement contemplated in subsection (1) must be documented in writing and must include, at a minimum - (a) a declaration that the accused, before entering into the agreement, has been duly informed of their entitlement to - (i) the presumption of innocence until proven guilty beyond a reasonable doubt; (ii) the option to remain silent and abstain from testifying throughout the proceedings; and (iii) the right not to be

[103] Section 105 A (1) Criminal Procedure Act
[104] Ibid

compelled to provide self-incriminating statements; (b) a comprehensive articulation of the agreement's terms, the significant details of the case, any additional facts relevant to the negotiated sentence arrangement, and all acknowledgments made by the accused; (c) the signatures of both the prosecutor and the accused, as well as that of their respective legal representatives; and (d) if the accused has been engaged in negotiations with the prosecutor through an interpreter, an endorsement from the interpreter certifying the faithful and precise interpretation during the negotiations and pertaining to the contents of the agreement.[105]

It aptly stipulates that the court shall not participate in the negotiations.[106] Prior to the accused being called upon to enter a plea, the prosecutor is obliged to notify the court that an agreement envisaged in subsection (1) has been established. Subsequently, the court shall - (i) request the accused to validate the existence of such an agreement; and (ii) ensure that it is convinced of the adherence to the prerequisites specified in subsection (1) (b) (i) and (iii). If the court is not convinced that the agreement conforms to the prerequisites outlined in subsection (1) (b) (i) and (iii), the court shall - (i) inform both the prosecutor and the accused about the reasons for the non-conformity; and (ii) extend the opportunity to the prosecutor and the accused to rectify the specific requirements.[107]

Finally, it provides that following the disclosure of the agreement's contents, the court will proceed to interrogate the accused in order to establish whether - (i) the accused confirms both the terms of the agreement and the admissions made within it; (ii) in relation to the alleged facts of the case, the accused acknowledges the allegations in the charge to which they have agreed to plead guilty; and (iii) the agreement was willingly and voluntarily entered into by the accused in a state of clear-mindedness and without being subjected to undue influence. (b) After conducting an inquiry as described in the preceding section,

[105] Ibid sec 105 A (2)
[106] Ibid sec 105 A (3)
[107] Ibid sec 105 A (4)

the court shall, if - (i) the court is unconvinced of the accused's guilt pertaining to the offence for which the agreement was established; or (ii) the court perceives that the accused does not admit to an allegation in the charge, or the accused has mistakenly admitted such an allegation, or the accused has a legitimate defense against the charge; or (iii) for any other valid reason, the court is of the viewpoint that the accused's plea of guilty should not stand - record a plea of not guilty and duly inform both the prosecutor and the accused of the underlying reasons. In the event that the court has officially recorded a plea of not guilty, a completely new trial shall commence before a different presiding officer: It is worth noting that the accused retains the option to voluntarily waive their right to be tried before an alternative presiding officer.[108]

### 4.3.2 Lessons for Kenya

#### 4.3.2.1 Judicial Role in Encouraging Agreement

The provisions of section 105A of the Criminal Procedure Act in South Africa provide insights into how the judicial role can encourage plea agreements while ensuring fairness and adherence to legal standards. The paper posits that Kenya can learn several lessons from these provisions.

First, the section emphasizes that the court shall not participate in the negotiations. This is important to maintain the impartiality of the court and prevent any perception of bias. Kenya can adopt a similar approach to ensure that judges maintain their role as neutral adjudicators and avoid any influence on the negotiation process.

The section grants the court the power to consider whether the plea agreement is valid and whether the accused's plea of guilt should stand. If there are valid reasons to doubt the defendant's guilt or the fairness of the plea agreement, the court can reject it. Kenya can empower its courts to critically assess the merits of plea agreements and intervene if necessary.

[108] Ibid, sec 105 A (6)

By incorporating these principles from South Africa's section 105A, Kenya can ensure that its judiciary plays an active role in encouraging plea agreements while maintaining fairness, transparency, and the protection of defendants' rights. The judicial role should focus on oversight, compliance, and ensuring that plea agreements are entered into voluntarily and with a clear understanding of their implications.

**4.3.2.2 Pragmatic Judicial Case Management**

The paper also postulates that Section 105A provides some valuable lessons for Kenya in terms of pragmatic judicial case management, particularly when it comes to handling cases involving plea agreements.

Section 105A emphasizes that the court should be informed about the existence of a plea agreement before the accused is required to plead. This ensures that the court is well-prepared and can efficiently manage the case. Kenya can adopt a similar approach by requiring timely disclosure of plea agreements to the court, allowing for better case scheduling and preparation.

Furthermore, the provision outlines a clear and structured process for handling cases involving plea agreements. Kenya can benefit from adopting a streamlined procedure that ensures uniformity and predictability in plea agreement cases. This can lead to more efficient court proceedings and reduced delays.

While section 105A emphasizes that the court should not participate in negotiations, it highlights the importance of judicial involvement at critical points, such as confirming the agreement and assessing the accused's understanding. Kenya can implement a similar approach where judges play a role in ensuring the integrity of the process without interfering in negotiations. Moreover, the provision strikes a balance between ensuring fairness to the accused and maintaining efficiency in the judicial process. Kenya can learn to manage cases involving plea agreements in a way that upholds defendants' rights while also preventing unnecessary delays.

The provision also ensures that the court exercises oversight over the entire plea agreement process. Kenya can enhance its judicial oversight to ensure that plea agreements are not only beneficial to the accused and the prosecution but also adhere to principles of justice and legality.

Incorporating these lessons from South Africa's Section 105A can help Kenya establish a pragmatic and effective approach to judicial case management in cases involving plea agreements. The focus should be on maintaining fairness, efficiency, transparency, and the protection of defendants' rights throughout the process.

**Conclusion**

The landscape of plea bargaining is marked by a complex interplay of legal frameworks, policy guidelines, judicial decisions, and practical experiences that vary across jurisdictions. This comprehensive discussion has provided a thorough exploration of plea bargaining in Kenya, drawing valuable lessons from the practices and experiences of comparative jurisdictions such as the United States, Canada, and South Africa. Throughout this analysis, the challenges, inconsistencies, and potential enhancements within Kenya's plea-bargaining system have been unveiled, contributing to a more comprehensive understanding of this vital aspect of modern criminal justice.

Kenya's legal framework for plea bargaining, as encapsulated in the Criminal Procedure Code and the Criminal Procedure (Plea Bargaining) Rules, 2018, establishes the procedural foundations for negotiated settlements. The emphasis on transparency, accountability, and safeguarding defendants' rights underscores the importance of due process and the role of the Director of Public Prosecutions in the plea-bargaining process.

Examining Kenya's policy guidelines, the paper has recognized the significance of alternative approaches to prosecution, as seen in the Diversion Policy Guidelines and Explanatory Notes. These guidelines highlight the potential of

restorative justice and alternatives to trial, aligning with international trends that prioritize rehabilitation and community reintegration.

Drawing inspiration from comparative jurisdictions, the discussion has highlighted the United States' Rule 11 of the Federal Rules of Criminal Procedure, emphasizing prompt disclosure of materials and the complementary use of legal aid. These principles underscore the importance of transparency, information parity, and comprehensive legal representation within plea negotiations. Moving to Canada, the evolution of plea bargaining in that jurisdiction showcases the need for a balanced approach that considers fairness, transparency, and the prevention of wrongful convictions. Despite the inherent challenges of unregulated plea bargaining, Canada's model reflects a commitment to justice and accountability. In South Africa, Section 105A of the Criminal Procedure Act provides a notable example of judicial involvement in plea negotiations. This legal provision demonstrates the potential for pragmatic judicial case management, ensuring compliance with agreed terms and upholding the integrity of plea bargains.

The discussion also revealed instances of inconsistent judicial decisions in Kenya regarding plea bargaining, which underscore the need for maintaining adherence to legal principles and preventing deviations from established norms. This comprehensive analysis of plea bargaining in Kenya and comparative jurisdictions serves as a roadmap for addressing challenges, enhancing transparency, and advancing justice within the criminal justice system. By drawing insights from diverse legal frameworks, policy guidelines, and practical experiences, Kenya can forge a path towards a plea-bargaining system that upholds the rule of law, safeguards defendants' rights, and promotes equitable outcomes for all stakeholders involved. As Kenya navigates the ever-evolving landscape of criminal justice, the lessons learned from this discussion provide a holistic perspective that can contribute to the continued refinement and improvement of plea-bargaining practices in the country.

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# Alternative Dispute Resolution (ADR) Mechanisms for Engineering Contracts: Opportunities and Challenges for Engineers

*By:* ***Eng. Odhiambo Aluoch****

## *Abstract*

*Engineering is a multifaceted discipline with so many players each with different level of experience, training and with competing interest to an extend that disputes at times are unavoidable. Proper management of conflicts and dispute resolution mechanism is therefore an inevitable skill that a practicing Engineer must have. There is no engineering sector that would work absolutely in isolation of the input of other professionals to achieve anything realistic and reasonable for the society. Disputes in project causes delays, escalation of costs leading to wastage of resources and if not properly managed it strains the relationship of the contracting parties.*

*This paper analyses the existing literature on the causes of dispute in engineering contracts and the place of ADR in resolving such disputes. Engineers drawing contract agreements, pays little attention to the dispute settlement clause and they finally end up with a pathological clause that then turn to be disputes by*

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*themselves. In Engineering disputes, if parties fail to agree they are left with two options litigation through courts or to present themselves before a skilled dispute resolver.*

*Mediation, Adjudication and Arbitration have been used to resolve construction disputes but the opportunities have not been exhausted. The arbitral institutions are also not well equipped with the necessary tools in terms of the skills required to resolve disputes emanating from engineering contracts.*

*It's therefore imperative that alternative dispute resolution mechanism (ADR) must then be exploited to ensure that parties in engineering contracts get value for their investments and the skilled experts take the rightful position to offer the much-needed peaceful coexistence. Could the absence of the Engineers and the built environment experts in the arbitral institution have hindered expeditious and cost-effective resolution of the disputes within the industry and if so how and what can be done? This paper seeks to exploit this area, it presents practical and working solutions including the opportunities available in the ADR world for Engineers.*

**Keyword:** Mediation, Adjudication, Arbitration, Engineering Contracts, Arbitral Institutions.

## Introduction

Alternative Dispute Resolution was conceived of as a dispute resolution mechanism outside the court of law established[1] by the Sovereign or the State. ADR is described as a process or mechanism that parties can use to resolve disputes rather than bringing a claim through the formal court structure.[2] The biggest stepping stone in the field of international ADR is the adoption of UNCITRAL (United Nations Commission on International Trade Law) model law on international commercial arbitration.[3] An important feature of the said model is that it has harmonised the concept of arbitration and conciliation in order to

[1] Fiadjoe, A. (1999) p. 200
[2] Rao, P.C et al (2011)
[3] Ibid note 2

designate it for universal application. Many international treaties and conventions have been enacted for establishing ADR worldwide. Some of the important international conventions on arbitration[4] are:

- The Geneva Protocol on Arbitration clauses of 1923.
- The Geneva Convention on the execution of foreign award, 1927.
- The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In Kenya, The Constitution of Kenya, 2010, in Article 159 (2) provides that:

> *2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –*
> *(a) justice shall be done to all, irrespective of status;*
> *(b) justice shall not be delayed;*
> *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

Since the enactment of the constitution of Kenya 2010, there have been a shift in the judicial system and the courts including Tribunal has been mandated to promote other forms of alternative mechanisms to resolve dispute including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.[5] As a result ADR has slowly been embraced by the courts which however, though this has not gone without some obstacles despite being a step in the right direction making the access to justice very convenient by the general public.[6]

*"The new landscape will have the following features: Litigation will be avoided wherever possible. (a) People will be encouraged to start court proceedings to*

[4] Sinha, S.N.P and Mishra, Dr. P.N, 2004
[5] Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi
[6] K. Muigua, "Settling Disputes Through Arbitration in Kenya," 4th Edition March, 2022, pp 3- 8

*resolve disputes only as a last resort, and after using other more appropriate means when these are available. (b) Information on sources of alternative dispute resolution will be provided at all civil courts"* Lord Woolf 1995.

Globally, construction industry is one of the major parameters for economic and industrial growth for any country,[7] and Kenya is not an exception. Construction projects are multi-disciplinary engagements with so many parties playing different roles, with varying level of experience, diverse educational background, culture with competing interest that at time makes it a dispute prone industry.[8] The advancement in technology in terms of the artificial intelligence, internet of things in the industry has made the situation more complex. Not surprisingly, the number of reported disputes, conflicts and construction claims globally has been in the increase in the recent past.[9] Construction contracts give rise to very unusual difficult and complex disputes that prove very hard to evaluate compared to normal litigation process.[10] The performance of many construction contracts run over much longer periods than most other forms of commercial contract, with potential scope for disagreements and financial disagreements arising constantly during the construction period, and with large sums of money and cash flow pressures concerned on both sides.[11] There is plenty of chances of disputes or difference of opinion from the very inception of entering into the contract and commencing the work because consistently, both the parties have to meet with reciprocal obligations on either side one after the other and a single case of default is satisfactory to upset the balancing pendulum[12] and the whole development, programming enhances targeted schedule of completion of work.

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[7] Sakate, P., & Dhawale, A. W. (2017). Analysis of Claims and Dispute in Construction Industry. International Journal of Engineering Sciences & Research Technology, 6(5), 523-535. doi:10.5281/zenodo.400838

[8] 10.1061/(ASCE)LA.1943-4170.0000111. © 2013 American Society of Civil 12 Engineers.

[9] Makarem et al. 2012.

[10] Ibid note 9

[11] Ibid note 9

[12] Rauzana A., (2016)

The dynamic and the high level of sensitivity of the parameters in the industry therefore necessitates the need for adequate research before drafting of the contracts are done.[13] Parameters such as cost and time are always major resources in a project and any external or internal exigencies that are likely to affect the environment in which these two operates in cannot be taken lightly.[14] This paper gives a wide approach to the built environment practitioners and especially, Engineers, information on potential disputes areas in the industry and further information on how, should be dispute arise it can be resolved. The paper exploits the importance of proper drafting of the dispute clause or dispute agreement and it gives the appropriate dispute resolution mechanism for the construction industry claims. It concludes by analyzing the opportunities and challenges faced by the Engineers and if the Arbitral institution, in the country are well placed to assist the built environment practitioners to handle the problems associated with the disputes in the industry.

**Causes of disputes in projects**

When two or more parties fail to have a meeting of mind or each maintain a hard stand of opinion about certainty of a question then dispute is said to have occurred.[15] Construction contracts are contracts made between the project owner (the Employer) and the construction enterprise (the contractor). It defines the order and the procedure to accomplish specific task or installation and further defines the rights and obligation of both parties.[16] The parties themselves are not competitors and in most cases may not have any competing interest but are associates, with different functions to accomplish a certain function.[17] Most of the disputes arises during the occurrence of the contract but unfortunately, they are usually

[13] Ibid no 12

[14] Supra note 4

[15] Karape. A. M. and Joshi A. M. "Dispute Resolution in Construction Industry" IJSTE - International Journal of Science Technology & Engineering | Volume 5 | Issue 6 | December 2018.

[16] Mohd et al 2012.

[17] Supra note 4

unforeseen at the time the parties are entering into contract. Most of the contractual problems arise from lacunae in and misinterpretation of the clauses pertaining to the following:

i. *Changes in Contract work,*
ii. *Differing in unusual site conditions actually encountered*
iii. *Suspension of Work*
iv. *Variation in quantities*
v. *Damage due to natural disasters and force-majeure*
vi. *Re-inspection and acceptance*
vii. *Termination for the convenience of the client*
viii. *Possession prior to completion*
ix. *Escalation of price due to inflation*
x. *Acceleration of work progress*
xi. *Ripple effect*
xii. *Currency fluctuation effect*
xiii. *Ambiguity and errors in contract documents, specifications and drawings*

If these conflicts are not clearly managed, Claims are made by contractor and further if claims did not get clearly resolved disputes arises.[18]

**ADR mechanism in Engineering Contracts**

For the parties to effectively deal with or control claims and disputes, the concerned parties must establish a good claim management procedure within the institution.[19] Given the uncertainty and ambiguity surrounding the construction projects and the financial obligations involved it is only fair to have any disagreement between the parties being resolved promptly. Should dispute arise, a part from the normal legal processes, alternative dispute resolutions mechanisms are available in construction contracts.[20] Such mechanisms include negotiations, mediation/conciliations, adjudication, mini-trial and Arbitration.

[18] Supra note 15
[19] Supra note 6
[20] Supra note 15

Many parties to a contract shall prefer ADR mechanisms over litigation because of the advantages it presents to their commercial engagement. [21] The reasons why people may ought for alternative mechanisms include but not limited to; greater satisfaction of the outcome of the process, flexibility and confidentiality of the settlement processes and procedure. Low cost since it is not necessary for the parties to be represented by legal experts[22] which are likely to increase the cost. The speed at which disputants are able to resolve their differences are higher than the time taken in litigation. The proponents of ADR argue that processes such as mediation can maintain existing business relationships as the parties are aided towards reaching a settlement.[23]

***Negotiation***

This is a process of working out the difference by direct communication between the parties.[24] The process is voluntary and non-binding.[25] It can either be bilateral or multilateral especially being that in most case construction matters involved a number of parties performing different roles to accomplish the project.[26] The use of external form can only be recommended if necessary but then the process shall be termed as supported negotiation. The discussions are usually held in a cordial and a peaceful environment.[27] The process aimed at a win-win situation and it is at this stage that the parties brings out the main issues in contention and agree to agree or to disagree[28].

[21] Supra note 12
[22] Sec 25(5) Arbitration Act No 4, 1995
[23] Supra
[24] K. Muigua, "Settling Disputes Through Arbitration in Kenya," 4th Edition 2022, p 20-21
[25] Ibid
[26] Ibid
[27] Supra 15
[28] Supra 24

### *Mediation and conciliation*

This is like a continuation of the negotiation, being assisted by a third party.[29] These are essentially informal processes whereby the parties are assisted by one or more neutrals in their efforts to reach a settlement. The mediator tries to advise or consult impartially with the parties with the main objective of bringing a mutually agreeable solution[30]. The mediator has no power to impose an outcome upon the parties like the judge[31]. The process is informal and non-binding however when the settlement is reached and is signed by the parties it become binding. The only difference between the mediator and the conciliator is that the Conciliator makes a recommendation or proposes for a solution pertaining to the dispute.[32] A mediation procedure is steered by the parties and the settlement is voluntarily reached.[33] It is likely that an agreement constructed by the parties themselves in which they have been given the flexibility to defend all their interests, will be perceived as fair. Thus, a voluntarily reached agreement is more likely to be honoured than one imposed by an investment tribunal.[34] Therefore, mediation provides for the opportunity to conduct creative and unique resolutions of the disputes in which the interests of parties are adequately considered.[35]

### *Dispute Review, Avoidance or Dispute Adjudication Boards*.

This may be a combination of dispute avoidance, conciliation, neutral evaluation, dispute board and adjudication, as described here, but with the involvement of a project panel. [36] The panel in most cases are

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[29] Ibid, p 22-24

[30] Supra, note 10 p 2

[31] S.2, Civil Procedure Act, Cap 21, Laws of Kenya (Government Printer, Nairobi, 2010); Mediation Rules, 2015, Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, pp. 1283-1291.

[32] Karape. A. M. and Joshi A. M. "Dispute Resolution in Construction Industry" IJSTE - International Journal of Science Technology & Engineering | Volume 5 | Issue 6 | December 2018.

[33] Supra 31

[34] Anoosha 2009, p. 30

[35] Rhoades et al 2007, p. 407.

[36] Supra 31

appointed at the beginning of the project and visit site and hold discussions to seek to resolve disputes and give a decision. The main question is whether the decision of the board is binding, conditionally binding or temporarily binding. [37] The cost of providing for and maintaining the board can often be a factor in deciding whether to have a board and this method is usually chosen for larger projects.[38]

### *Adjudication*

This is a process whereby an impartial, third party neutral makes a fair decision, rapidly at a low cost on a construction dispute,[39] that is binding unless and until reversed in arbitration or litigation. The use of an adjudicator has been entrenched in many standard construction documents. Adjudication take different forms; Construction adjudication a mandatory or statutory construction dispute resolution mechanism[40] in other jurisdiction and for all construction contracts and even when the contract itself is not in writing.[41]

### *Mini trial*

In this process the dispute is presented to the senior executives or managers either by a legal expert or any other informed person for the purpose resolution of the matter at hand.[42] In construction projects, parties hold management meetings or management tender committees to unlock a stale mate between the contracting parties. After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.[43]

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[37] Supra 35

[38] Supra 32

[39] Chartered Institute of Arbitrators, The CIArb (K) Adjudication Rules, Rule 2.1

[40] Housing Grants Construction and Regeneration Act 1996 and Statutory Scheme for Construction Contracts Regulations 1998

[41] S139 Local Democracy, Economic Development and Construction Act 2009 repealing s107 HGCRA 1996

[42] Supra note 24

[43] Lowe, D. & Leiringer, R., Commercial Management of Projects: Defining the Discipline, op cit., p.239

### *Arbitration*

Traditionally, Arbitration is a process where a neutral party (in the context the person(s) is not a party to the contract) is appointed as arbitrator and controls the outcome of the process[44]. Arbitration process is mostly regulated by legal authority. Final decision is imposed on the contending parties which is called an 'award', based on the merits of the case, and such award usually is binding and not appealable except under certain circumstance depending with the jurisdiction and the seat[45]. Arbitration is perhaps the most commonly used mechanism for settlement of technical disputes in a construction project and has proved very effective in the western world[46]. It is a quasi-judicial process to the extent that legal protocol is largely observed, and it is important that the arbitrator, who basically acts as a judge, understands legal procedures[47].

### Effective dispute settlement clause

It is important for a contract to contain a language and means of addressing disputes and claims at the relevant stage in a project. The expression must be explicit with clear instruction for parties to resolve disputes as they arise.[48] The first and most important issue is for the parties to have control of the process of how their disputes are going to be settled is the drafting of the dispute resolution clause.[49] In drafting the clause, there are a few mandatory requirements that must be met, and a few provisions that must be included. These provisions should be clear and unequivocal.[50] In addition to these provisions, however, a clause may be ornamented in virtually endless combinations with a cornucopia of provisions covering topics as important as the situs/seat of the arbitration and as esoteric as class action arbitrations. There is no such

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[44] Fiadjoe, A (2004). P. 203
[45] Ibid p. 286
[46] Li D., et al 2018 p. 5
[47] Sameer SK et al. (2016)
[48] Supra 24
[49] Supra 43
[50] Stephen B., How to Draft an Arbitration Clause (Revisited), 1 ICC Int'l Ct. Arb. Bull. 14 (Dec. 1990)

thing as a single "model", "miracle" or "all purpose" clause appropriate for all occasions.[51]

In Kenya, the formal requirements of an arbitration agreement are outlined in Section 4 of the Arbitration Act. The Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement must be in writing. It is in writing if it is contained in a document signed by the parties; an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.[52]

Pathological clauses in the Arbitration are those clauses that are sick or ill or defective in there very nature. [53] The degree of sickness may vary in the nature of; naming a specific person in the contract as an arbitrator and by the time the dispute occurs the person is deceased or rejects the nomination, naming an institution that is nonexistence for an appointment [54] among many others.

Some other mistakes or illnesses that arise in drafting arbitration clause include but are not limited to: failure to specify whether arbitration outcome will be binding or non-binding; failure to design a clause that fits the circumstances of the transaction and the needs of the parties; a clause that expresses an agreement to arbitrate, but fails to provide guidance on how to or where to do so; drafting a clause that is excessively detailed; an arbitration clause with unrealistic expectations; and a clause that incorporates litigation or court procedural rules. [55] If possible, it is appropriate to state the number of the arbitrators involve, the seat of

[51] Ibid
[52] Sec. 4 (3) of the Arbitration Act, No 4 1995
[53] Ngotho P, 2016, Contemporary Issues in arbitration, p 210-225
[54] Ibid note 53 pg 2018
[55] Ibid note 53 pg 220

arbitration and the appointing authority should parties fail to agree.[56] Ambiguous or defective arbitration agreements can lead to lengthy litigation challenging jurisdiction both at the outset and when enforcement of the award is sought. [57]

There is need to ensure that the foregoing mistakes are avoided because, as it has been contended, the most important clause in any contract is the dispute resolution clause for so many reasons, not the least of which is that the way contracting parties manage any dispute, disagreement or controversy that arises in the course of implementing the contractual agreement, would invariably determine their future commercial relationship.[58]

**The Role Engineers in dispute resolution**

A lot of research has been done on the proliferation of the lawyers and court indulgence in construction matters and little influence of the Engineers has been felt. [59] Whether construction disputes arise between the parties or a liability suit from a third party, the engineer today has all the reasons to fear litigation from all fronts. Everyone associated with construction industry is probably familiar with construction liability horror stories.[60]

The Fédération Internationale des Ingénieurs-Conseils (FIDIC) for the "Conditions of Contract for Works of Civil Engineering Construction" (often known as the "Red Book"), a standard contract document widely used in international construction and civil engineering projects and is

[56] "Drafting an Arbitration Agreement in 2022;2021 Considerations' p. 1. Available at *https://www.ciarb.org/media/22281/barakat-nylj-series.pdf* [Accessed on 11/09/2023]

[57] Ibid note 56

[58] Funmi, R., 'Drafting the Dispute Resolution Clause: The Midnight Clause,' p.1. Available at *http://www.nigerianlawguru.com/articles/arbitration/DRAFTING%20THE%20DISPUTE%20RESOLUTION%20CLAUSE.pdf* [Accessed on 11/09/2023]

[59] Supra note 53

[60] Rubino J. 1989, Dispute Resolution in Construction.

based on the English Institution of Civil Engineers (ICE) Standard Contract.[61] The FIDIC contract involves three parties: the owner or employer, the contractor, and the engineer. The latter is firm of consultants or engineers engaged by the owner under a separate contract to assist the owner and to act on its behalf during the project implementation phase. [62]

The role of the Engineer in the implementation of the contract is placed in a sharp focus in the whole spectrum of the project from the initiation to the closure.[63] In case of a dispute the Engineer decides then informs the parties before the next level of resolution process is evoked.[64] Disputes arising from FIDIC contracts provides for a compulsory pre-arbitral stage, which is to take place should a party be dissatisfied with the Engineer's determination. However, in addition to the fact that he/she is appointed and remunerated exclusively by the owner, the engineer himself/herself is often at the heart of the dispute.

The Engineer's intervention can hardly be described as arbitration or even quasi arbitration. [65] The engineer is not required to follow a pre-determined procedure before reaching a decision, and any decision is provisional. Although the engineer's decision must be carried out immediately in order to ensure continuation of the works, it will only become final if it remains unchallenged or if it is upheld by an arbitral award. [66]

The Engineer can be appointed as an expert by the Tribunal or by the parties to give evidence on the areas they are well knowledgeable in. The role of the expert is then to give an opinion to enlighten the court or the

[61] Supra note 53
[62] FIDIC Conditions of Contract, the Red book/Yellow Book
[63] Ibid
[64] Clause 20, FIDIC Condition of the Contract Red/Yellow book
[65] Supra note 60
[66] Ibid

Tribunal of specific technical issues, however the expert opinion binds neither the party nor the court.[67]

The Engineer that by the very nature is involved in the contractual process is considered as advisors and expert witness within the industry. It then means that the Engineer plays a very key role in dispute avoidance and the resolution process. An Engineer holds key project implementation records and information that can drastically reduce the time spent in locating the same and build up claims against the opponent.[68]

As an advisor having or being in possession of the factual evidence of the project, the engineer understands the technical issues in aspect of the strength and weaknesses of the case and as a result is in a position to prose a better mitigation measures very important in the promotion of quick settlement.[69]

**The role or Arbitral institutions in promoting ADR for Engineers**

Arbitral institutions are organisations managing arbitral procedures. [70] Their role is to facilitate the dispute resolution for the parties, by offering a set of procedural rules to guide the arbitration process. The procedural rules set out by the arbitral institutions guide, among other things:-[71]

a) the commencement of an arbitration;
b) the elements to be contained in a request for arbitration or in a statement of claim;
c) the elements to be contained in an answer to a request for arbitration, in a statement of defence, or in a counterclaim;

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[67] Supra note 27
[68] Supra note 27
[69] Hussein F. H. (2020) The Engineer's role in execution disputes of civil engineering contracting contracts – Palarch's Journal of Archaeology of Egyptology 17(07), 1673-1691
[70] Ibid
[71] Ibid

d) the manner in which the Arbitral Tribunal will be constituted; and
e) the time limits for the award to be rendered.

The functions undertaken by arbitral institutions are limited to the procedural aspects of the arbitration. [72] An arbitral institution will not decide on the merits of a dispute – this will be the role of the arbitrators. Furthermore, the arbitral institution has the duty to oversee the proper conduct of the arbitration proceedings. [73]

Arbitral bodies then play a very important roles in weeding out of pathological clauses in engineering contracts and help in the appointment and where possible in the administration of the dispute resolution process.[74]

There is need for the institution to work together with other international commercial courts to provide innovative and improved dispute resolution mechanism adaptive to the need of the users and especially in the construction industry.[75]

**Challenges and Opportunities**

There are numerous opportunities as well as challenges for the built environment expert in the world of ADR. [76] In most Engineering contracts many of the differences which arises between the parties are technical in nature and technical experts are better placed to offer a solution. [77]

A 2015 study by the International Chamber of Commerce (ICC) Commission on Arbitration and Alternative Dispute Resolution found that arbitrators' fees and expenses accounted for only 15% of the costs of arbitration; administrative fees made up another 2%; while the remaining

[72] Ibid
[73] Ibid
[74] Supra note 6 p. 5
[75] Supra note 69
[76] ICC, 'ICC Commissions Report' 2015, p3.
[77] Menon S., 17 May 2018, para 21

83% was made up of lawyers' fees and other party costs.[78] Therefore the most significant way costs can be reduced is by encouraging greater efficiency in the disposal of disputes [79] where the Engineer is at the very heart.

Party representation and claim preparation for the party left to the technical people will drastically reduce the cost and time in the settlement process. There is no requirement in law that the plaintiff or the defendant must be represented by a legal expert but the law allows the party to be represented either by themselves or any other person of their choice.[80]

It can generally be appreciated that ADR mechanisms are highly efficacious means of achieving satisfactory resolution of many disputes in the construction industry, however their benefits have not been appreciated by the built environment experts including the general public.[81]

As much as the mechanisms are not universal panaceas of the solution, the processes can be expensive and could occasionally fail, though their success rates are very high, ADR have greater significant role to play in the civil justice system and decongestion of the national courts in the country.[82]

The parties must know when to engage and when to disengage. Mediation when started too early when the parties still do not know enough about each other's case may not reach a settlement or when it is undertaken too late, substantial cost and time shall have been incurred.[83] To identify the appropriate time to engage is a matter upon which

[78] Supra note 77
[79] Supra note 77
[80] Sec 25(5) Arbitration Act No 4 of 1995
[81] Supra note 77
[82] Ibid
[83] Supra note 69

experienced practitioners (Engineers) should advice by reference to the circumstances of the individual case. [84]

There is a need for cultural and attituded change from the built environment practitioners towards disputes in the industry. Change of law and rules including sanctions and compulsions to go the ADR way may not be the solution but the parties should be allowed to operate with the spirit they had at the time they are drafting their contracts and should be based on the individual case.[85]

ADR campaigns is now an urgent issue and especially within the construction industry experts. The indulgence of the litigation lawyers has made most technical people to shy away from the profession but it in now high time Engineers, Quantity Surveyors, Construction experts, the general public among others including judges to be sensitized on the benefits of ADR to both small, medium and large businesses and project. The information including legislation on ADR is very much fragmented, the Arbitration Act 1995 is archaic and not in line with the Kenya Constitution 2010. There is no law that governs Adjudication or Mediation procedures including other ADR mechanisms in the country.[86] Our ADR institutions have been over judicialized with high infiltration of the lawyers and legal experts. The Engineers with knowledge in the matters of dispute are better placed to be parties representative and better dispute resolvers of construction disputes.[87]

Most arbitral institutions are dependent on the funds from a strong market position to fulfill their mandate, construction industry has been reported to be one of the biggest market shares in the disputes world and this places the construction expert at the competitive advantage.[88]

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[84] Supra note 77
[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid

## Conclusion

Without compromising their neutrality, arbitral institutions need to work with governments, businesses, lawyers, academia and other stakeholders to put in place legal frameworks that promote and shape economic and commercial practice. This can be achieved though an active participation of the built environment experts.

As much the global economic outlook may look bleak and dark the Arbitral institutions and the ADR practitioners should put their talents and skills to proper use to turn disputes into an opportunity for future new business and to spur economic growth.

The main concern for the ADR users and especially in arbitration are: speed; cost; and enforceability. The arbitral institutions must come up with innovative way to address them and improve of the quality of arbitration and training of the ADR practitioners in the industry.[89]

[89] Ibid

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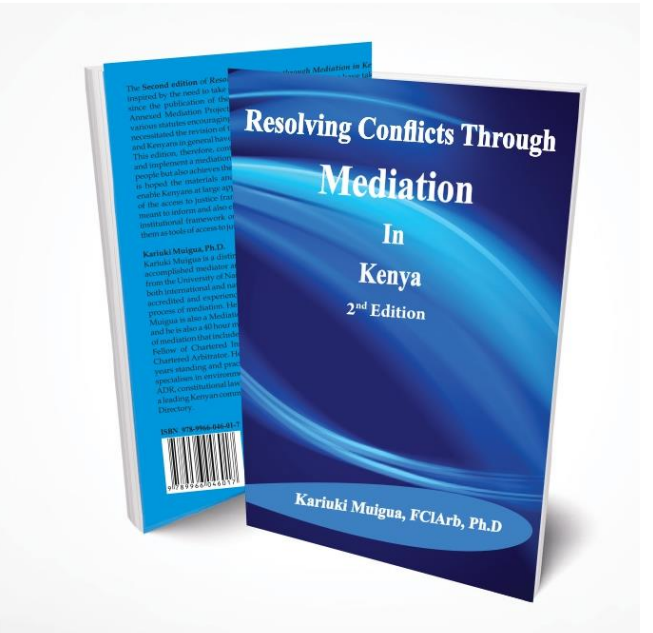



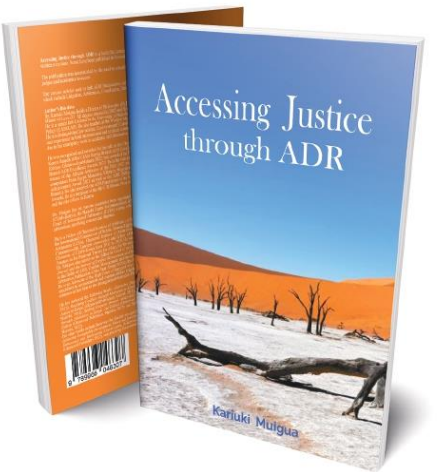

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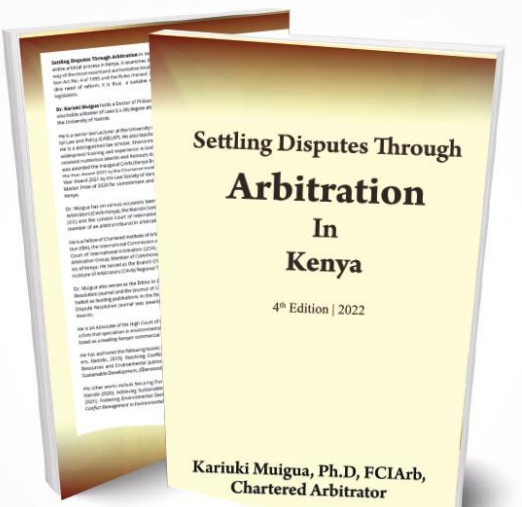


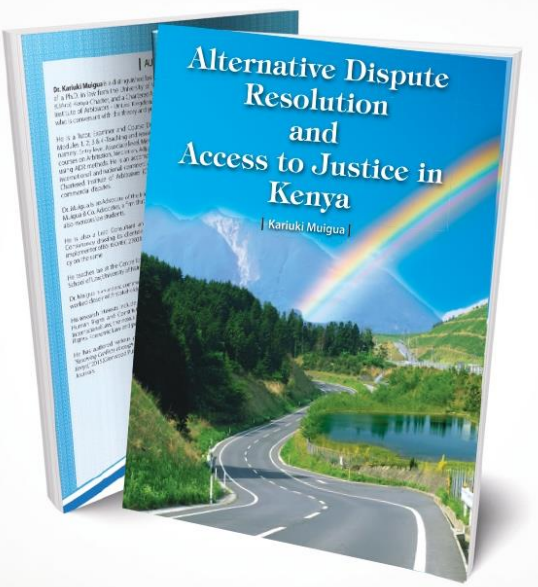

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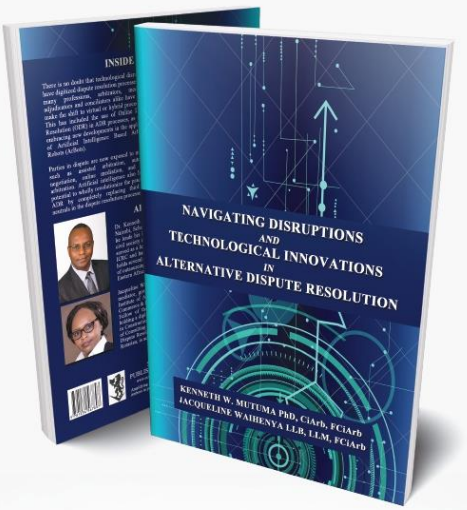


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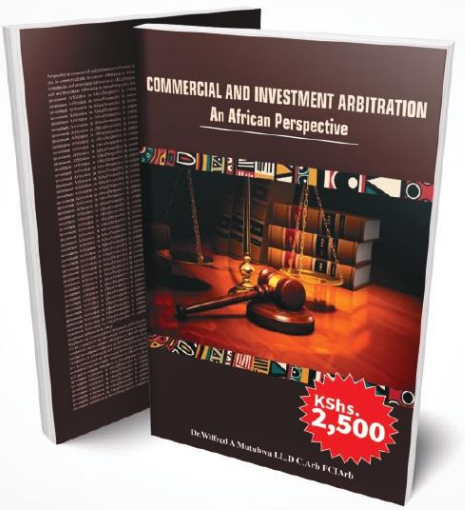

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