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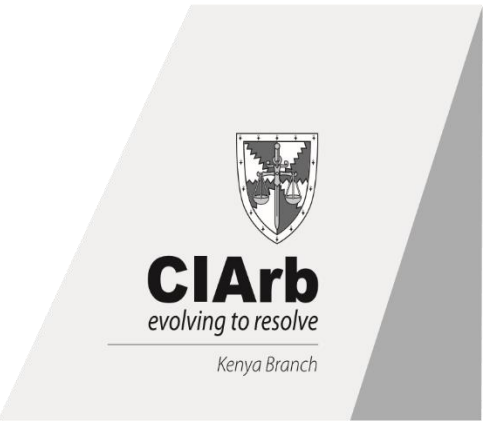

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For Marketing opportunities contact: *marketing@ciarbkenya.org*
Chartered Institute of Arbitrators, Kenya,
Nicholson Drive, Off Ngong Road,
Between Bemuda Plaza and Central Church of Nazerene
P.O. Box 50163-00200, Nairobi
Tel: 2712481, 2722724, Fax: 2720912
Mobile 0734-652205 or 0722-200496
Email: info@ciarbkenya.org
Website: *www.ciarbkenya.org*

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Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 12, No.2.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge.

It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates for the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including: *Strengthening Ethics in Arbitration in Africa; Can an arbitrator dismiss a claim (counterclaim) for want of prosecution? A look at Article 25(d) of the Model Law in Zimbabwe*; *Preparing for the Future: ADR and Arbitration from an African Perspective; Is an award of costs by an arbitrator a question of public policy?*

It contains a review of *the Journal of Conflict Management and Sustainable Development, Volume 11, Issue 1* and a Book Review of *Promoting the Rule of Law for Sustainable Development.*

It also contains three case summaries: *Amendment of Claims and The Arbitrator's Latitude Kavis Fashions Private Limited Vs Dimple Enterprises & Others Arbitration Petition No. 826 of 2014 – High Court of Judicature of Bombay; Litigation Funding as Damage-Based Agreements Case Summary: R (on The Application of PACCAR Inc and Others) (Appellants) V Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28 [1];* and *Validity of an Arbitration Agreement as A Pre-Referral Issue Magic Eye Developers PVT. LTD. V M/S. Green Edge Infrastructure PVT. Ltd. & Others (2023) 05 SC CK 0032; Cross-Border Insolvency and Arbitration: An analysis of Fotochrome Inc. v. Copal Company Limited.*

The Journal continues to shape the landscape of ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publications in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages the submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article 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.

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

Prof. Kariuki Muigua Ph.D; FCIArb; Ch.Arb; OGW
Editor, Nairobi,
January, 2024.

List of Contributors

Hon. Prof. Kariuki Muigua

Prof. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Prof. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He is a member of the Permanent Court of Arbitration, The Hague. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022.

Prof. 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 the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

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

Prof. Kariuki Muigua can be reached through muigua@kmco.co.ke or admin@kmco.co.ke

Hon. Dr. Wilfred A. Mutubwa

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

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

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

He is an Arbitrator listed on London Court of International Arbitration (LCIA); Mauritius International Arbitration Centre (MIAC); the Nairobi Centre for International Arbitration (NCIA); the Kigali International Centre for International Arbitration; the African Arbitration Association (AAA); and the CIArb President's Panel Panels. He was recently appointed by the President of the Republic of Kenya to serve on the KNHR Commission Selection Panel, and by the Chief Justice of Kenya to serve as a Member of the Political Parties Disputes Tribunal.

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

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

Hon. Dr. Mutubwa can be reached through willy@mutubwalaw.co.ke

Prince Kanokanga

Prince Kanokanga is dynamic, young and proficient arbitrator based in Harare, Zimbabwe. He has knowledge of English Law and Roman – Dutch Law having received experience and training in Mauritius, Namibia, Zambia and Zimbabwe. His research areas include aviation, corporate and commercial law, distribution and franchising, joint ventures, professional associations, real estate, retail and consumer products, social enterprises (non – governmental organisations) and tourism and hospitality.

He holds a Bachelor of Laws (Zambia) and a Postgraduate Degree in Procedural Law (Zimbabwe). Prince also sits on the board of several companies and other non –governmental organizations in Zimbabwe. He is a budding scholar and the co-author of an academic text entitled, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwe Arbitration Act [Chapter 7:15] (Juta & Co, 2022)*. He is listed on the panel of the Alternative Dispute Solutions Centre (ADSC), the African Institute of Mediation and Arbitration (AIMA) and the Commercial Arbitration Centre in Harare (CAC).

Prince can be reach through prince@kanokangalawfirm.co.zw

Anne Wairimu Kiramba

Anne is an IT Support Specialist, Digital marketer and web administrator at Kariuki Muigua & Co Advocates; she holds a Bachelor degree in Business Information Technology(BBIT), St Paul's University; Diploma Business Information Technology, St Paul's University; Diploma Digital Marketing; (Certified Digital Marketing Professional, Digital Marketing Insitute(DMI); Certified Professional Mediator (Mediation Training Institute, East Africa (MTI)); She holds A+ certification and ITIL Foundation 4. Associate member of Chartered Institute of Arbitrators (ACIArb). Anne sits as a member of the school Board of management at Kamuiru Boys Secondary School. Anne has served for over 10 years as part of editorial team for both the Journal of Conflict Management and Sustainable Development and Alternative Dispute Journal for Chartered Institute of Arbitrators (Kenya Branch).

Wairimu K. can be reached through wairimu@kmco.co.ke

James Njuguna
James is an Advocate of the High Court of Kenya. He is a law lecturer at Embu University. He practices law at Kariuki Muigua & Co Advocates as the lead lawyer. He holds a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from Mount Kenya University. He holds a Post Graduate Diploma from the Kenya School of Law and a Higher Diploma in Management, Kenya Institute of Management (KIM). He has a vast knowledge of the legal practice of conveyancing, civil and criminal law in Kenya.

A Member of Chartered Institute of Arbitrators (MCIArb). He is a certified mediator by MTI East Africa. A church Council Member, Worldwide Gospel Church of Kenya (Buruburu). James, has special interests in Alternative Dispute Resolution, Intellectual Property and Constitutional law and conflict management and Sustainable Development. His has published the following articles; *Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice, Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development, Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities, Applicability of Arbitration in Management of Community Land Disputes, Arbitration as a Tool for Management of Community Land Conflicts in Kenya*
James can be reached through njuguna@kmco.co.ke

Paul Ngotho
Paul Ngotho is a Chartered Arbitrator and full-time arbitration practitioner, author and tutor. He holds an LL.M in International Dispute Resolution from the University of London.

He is on numerous international arbitrator panels and has arbitrated a wide range of disputes. He has experience as sole, wing and presiding arbitrator. He also represents parties in arbitration and as an expert witness in court and arbitration.

He has written over 60 arbitration articles, many of which have appeared and been cited in various peer reviewed professional journals and academic writings including LLM and PhD dissertations. He has authored four books on

arbitration. He is an adjunct lecturer at the University of Nairobi.

"…a very detailed person who is very passionate about anything that he does" Chambers & Partners 2020 Ranking.

His contact is ngothoprop@yahoo.com and www.ngotho.co.ke

Shalom Bright Omondi

Shalom Bright Omondi is a dedicated legal professional with a Bachelor of Laws (LLB) degree from Jomo Kenyatta University of Agriculture and Technology. Currently serving as a research associate at AfricaHealthLaw and a Legal Trainee at Transparency International, Shalom actively contributes to the field of Alternative Dispute Resolution (ADR) as a legal writer. A student member of CIArb-Kenya and a member of the Blockchain Association of Kenya, Shalom is also affiliated with Young ICCA and holds the prestigious position of President at the Young Arbiter Society- JKUAT Karen Chapter.

Shalom can be reached at shalombright362@gmail.com

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Strengthening Ethics in Arbitration in Africa

By: ***Hon. Prof. Kariuki*** *

Abstract

The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) mechanisms[1]. ADR refers to a set of mechanisms that are applied to manage disputes without resort to adversarial litigation[2]. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication and Traditional Dispute Resolution Mechanisms (TDRMs) among others[3]. ADR mechanisms have been hailed for their attributes which makes them viable in enhancing access to justice. Such features include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes[4]. These processes are recognized at

* *Prof. OGW, PhD in Law (Nrb), FCIArb; Ch.Arb; OGW, LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [October, 2023].*

[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
[4] 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-*

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 own choice[5]. They have also been upheld at the national level in some countries including Kenya whereby the Constitution mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6].

Arbitration refers to 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 developed as the preferred mode of management of disputes especially those that are transnational in nature[9]. This is due to the fact that it has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems[10]. It also guarantees enforcement of decisions through the *New York Convention* which

development-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf (Accessed on 11/10/2023)

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

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

[7] World Intellectual Property Organization., 'What is Arbitration' Available at *https://www.wipo.int/amc/en/arbitration/what-is-arb.html* (Accessed on 11/10/2023)

[8] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

[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 11/10/2023)

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

provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration[11].
It has been pointed out that arbitration in Africa enjoys a thriving present and a promising future[12]. Africa boasts well established, leading international arbitration institutions which offer specialised arbitral services for a full range of international disputes[13]. These 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[14]. Further, arbitration among other ADR mechanisms have been practiced in Africa for many centuries which sets the foundation for these processes to thrive in the continent[15].

Despite the efficacy of ADR mechanisms including arbitration in enhancing access to justice, it has been argued that there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution[16]. Further, it has been pointed out that regulation of ADR through a code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners[17].

The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical

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[11] United Nations Commission on International Trade Law., '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.' (New York, 1958)
[12] Ripley-Evans. J., & De Sousa. M., '2022 SOA 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/* (Accessed on 11/10/2023)
[13] Ibid
[14] Ibid
[15] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017
[16] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)
[17] Ibid

concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

2.0 The Role of Ethics in Arbitration

Due to the finality and binding nature of arbitral awards, which are often significantly shielded from judicial review, it has been argued that transparency and trust in the conduct of the arbitration proceedings are necessary to ensure the legitimacy of the process and the awards rendered[18]. The parties must have confidence that the Arbitrator has the necessary experience, is impartial, independent, possesses the relevant qualifications, is fair-minded and will be able to effectively dispense justice in awarding a fair and just award[19]. As a result, it has been observed that the quality and success of an arbitration is as good as the quality of the arbitrators involved in it[20]. The quality and credibility of an arbitrator are therefore vital for the success of the arbitration proceedings. The fundamental principles in arbitration that are vital in ensuring the success of arbitration proceedings include the impartiality, *ethics* and independence of arbitrators during the arbitral process[21].

The practice of arbitration raises several ethical concerns ranging from the particular ethical behavioral choices made by the actors inside an arbitration, including the arbitrators, lawyers (or other representatives), parties, and witnesses, to the institutions who choose, administer, and promote arbitration and courts[22]. In addition to such behavioral choices, there are ethical issues relating to how arbitral choices and decisions are made when compared to

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[18] Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' *Contemporary Asia Arbitration Journal, Vol. 6, No. 2,* pp 329-347 (2013)
[19] Ibid
[20] Ibid
[21] Ibid
[22] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not.' *University of Miami Law Review*, Volume 56, N0. 4 (2002)

other available methods of managing disputes such as litigation[23]. Further, the choice of arbitration and conduct of arbitral proceedings could result in several ethical concerns[24].

It has been argued that ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings[25]. The ethical requirement of independence ensures that an arbitrator is able to arrive at decisions independently basing the conclusions on reality and objectivity[26]. Confidentiality allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties[27]. The rules on conflict of interest in arbitration and other ADR processes are aimed at ensuring impartiality and preventing bias in management of disputes which could arise due to involvement by the arbitrator with the subject matter of the dispute or relationship between the arbitrator and either of the participants in the proceedings[28]. This is in line with the principles of natural justice and the right to a fair hearing[29]. Competence as an ethical issue is also vital for successful outcomes in arbitration. It ensures that arbitrators have the requisite expertise and qualifications require to sufficiently discharge their duties[30]. This is necessary in arbitration since it

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[23] Ibid

[24] Ibid

[25] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at *http://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf* (Accessed on 11/10/2023)

[26] Harding. K., 'Arbitration - The Role of Ethics and its Nature.' Available at https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/64.3/AMDM1998013 (Accessed on 11/10/2023)

[27] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[28] Ibid

[29] Ibid

[30] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

guarantees that arbitrators will follow due process, conduct proceedings in compliance with rules of evidence and write sound and reasoned awards[31]. The rules on costs and fees are designed to foster appropriateness and reasonableness of fees charged by arbitrators[32].

Ethics therefore play a paramount role in arbitration. Due to this fact, there is need for arbitrators, counsel and parties to be aware of how ethics affect arbitral proceedings and, consequently, their rights and obligations in those proceedings[33]. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes[34]. Complying with ethics can also guard arbitrators from proceedings concerning professional misconduct by providing a standard by which the arbitrator's performance can be measured and judged in the event of a complaint being made[35]. It is therefore imperative to strengthen ethics in arbitration.

3.0 Strengthening Ethics in Arbitration in Africa: Progress and Challenges

There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics.

The International Bar Association (IBA) has formulated guidelines on conflicts of interest in international arbitration[36]. The guidelines apply to international commercial arbitration and international investment arbitration and are

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[31] Ibid
[32] Ibid
[33] Rogers. C., 'The Ethics of International Arbitrators.' Available at https://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-49international_arbitration.pdf (Accessed on 11/10/2023)
[34] Ibid
[35] Ibid
[36] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (Accessed on 12/10/2023)

designed to assist parties, practitioners, arbitrators, institutions and courts in dealing with the fundamental ethical concerns of impartiality and independence[37]. Among the fundamental principles encapsulated in the guidelines is impartiality and independence[38]. According to the guidelines, every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated[39]. The guidelines further seek to address the ethical concern of conflict of interest. They require an arbitrator to decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent[40]. According to the guidelines, the rules on conflict of interest are aimed at fostering confidence in the arbitral process[41]. The IBA guidelines also envisage the ethical duty of disclosure. They require an arbitrator to disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to his or her impartiality or independence prior to accepting appointment or a soon as the arbitrator becomes aware of such facts or circumstances[42].

The IBA guidelines also govern parties to an arbitration and require them to disclose any relationship, direct or indirect, with the arbitrator[43]. Disclosure of such relationships is aimed at reducing the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment[44]. The IBA guidelines are important in strengthening ethics in arbitration by providing specific guidance to arbitrators, parties,

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[37] Ibid
[38] Ibid, Part 1
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid
[43] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Op Cit
[44] Ibid

institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed[45]. The IBA guidelines represent an attempt to formulate a code of ethics in arbitration at the international level. The guidelines have gained wide acceptance within the international arbitration community[46].

At the Institutional level, the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members*[47] sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness while managing disputes and withdraw from acting if they can longer fulfil this obligation[48]. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the arbitration process[49]. It also requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced[50]. In addition, the Code requires arbitrators to ensure that parties are adequately informed of all the procedural aspects of the arbitration process[51]. It further requires members to maintain trust and confidence of the dispute resolution process[52]. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators. It governs ethical issues in arbitration including integrity, fairness, conflict of interest, competence, trust and confidence.

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[45] Ibid
[46] Ibid
[47] Chartered Institute of Arbitrators., 'Code of Professional and Ethical Conduct for Members.' Available at *https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf* (Accessed on 11/10/2023)
[48] Ibid, Rule 2
[49] Ibid, Rule 3
[50] Ibid, Rule 4
[51] Ibid, Rule 5
[52] Ibid, Rule 8

The London Court of International Arbitration (LCIA) has also made progress towards strengthening ethics in arbitration vide its arbitration rules which contain general guidelines for the parties' legal representatives[53]. This has been described as the first attempt to set out an ethical framework for regulating the conduct of counsel in international arbitration at an institutional level[54]. The guidelines define the standards of ethical conduct expected of counsel appearing before the LCIA or its tribunal[55]. The guidelines prohibit legal representatives from engaging in certain conduct including activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal or the LCIA Court, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration proceedings[56]. These guidelines are binding upon the parties' legal representatives pursuant to article 18.5 of the LCIA rules[57]. They are aimed at promoting good and ethical conduct for parties' legal representatives appearing before the LCIA.

Further, arbitral institutions in Africa have made progress towards strengthening ethics in arbitration by formulating rules and guidelines to govern ethical conduct in arbitration proceedings. The Nairobi Centre for International Arbitration (NCIA) has developed a code of conduct for

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[53] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Available at *https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx* (Accessed on 11/10/2023)

[54] Dattilo. V., 'Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives.' Available at *https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2369&context=gjicl* (Accessed on 11/10/2023)

[55] Ibid

[56] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit

[57] Ibid, article 18.5

arbitrators[58]. The Code requires an arbitrator, when approached with an appointment, to conduct reasonable enquiries with regard to potential conflict of interest that may arise from his or her appointment for that particular matter that may affect impartiality and independence[59]. It requires an arbitrator to accept appointment only where certain requirements have been met. This is where an arbitrator is fully satisfied that he is independent of the parties at the time of the appointment, and is able to remain so until final award has been rendered, able to discharge his duties without bias, has adequate knowledge of the language of the proceedings, has adequate experience and ability for the case at hand, and is able to give to the proceedings the time and attention which parties are reasonably entitled to expect[60].

The Code also requires arbitrators to conduct proceedings with integrity and fairness[61]. Arbitrators are also required to disclose any interest or relationship that affects impartiality or creates an unfavorable appearance of partiality or bias[62]. The Code is also aimed at fostering appropriateness in communication between the tribunal and parties[63]. It forbids an arbitrator from discussing the case with any party in the absence of the other party[64]. The Code also safeguards the ethical requirements of honesty, trust and confidentiality and requires arbitrators to keep confidential all matters relating to the proceedings[65]. Further, it requires arbitrators to make their decisions in a just, independent and deliberate manner[66]. The Code also aims at strengthening ethics in terms of fees charged by arbitrators and requires them to adopt and

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[58] Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Available at *https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf* (Accessed on 12/10/2023)
[59] Ibid, Principle 1
[60] Ibid
[61] Ibid, Principle 2

[62] Ibid, Principle 3
[63] Ibid, Principle 4
[64] Ibid
[65] Ibid, Principle 5
[66] Ibid, Principle 6

adhere to the NCIA Schedule of Fees[67]. The NCIA Code of Conduct for Arbitrators is therefore vital in strengthening ethics in arbitration. It requires arbitrators to observe fundamental standards of ethical conduct[68].

The Arbitration Foundation of Southern Africa has also designed a Code of Conduct that stipulates ethical principles and standards to govern arbitrators[69]. The Code requires an arbitrator to always discharge his or her duties in such manner as to ensure a fair administration of justice between the parties[70]. Further, it requires an arbitrator to only accept appointment where the arbitrator is satisfied that he or she can act impartially and independently in that matter and disclose any matter that impair the ability to act independently and impartially[71]. The Code also stipulates the ethical duty of an arbitrator to act diligently and efficiently, and always with due courtesy to the parties and their witnesses[72]. Further, it enshrines the duty of confidentiality and requires the arbitrator to ensure that the proceedings remain confidential unless the parties agree otherwise[73]. The Code also envisages the ethical duty of an arbitrator to ensure efficient management of disputes and requires an arbitrator to devote sufficient time and proper attention to the matter and employ procedures which avoid unnecessary cost or delay and which promote the efficient management of disputes[74].

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[67] Ibid, Principle 8
[68] Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Op Cit
[69] Arbitration Foundation of Southern Africa., 'Code of Conduct.' Available at *https://arbitration.co.za/domestic-arbitration/code-of-conduct/* (Accessed on 12/10/2023)
[70] Ibid
[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid

The Kigali International Arbitration Centre vide its arbitration rules also aims at strengthening ethical practice in arbitration[75]. The rules require an arbitrator to be and remain at all times independent and impartial and not act as the advocate of the parties[76]. The rules further require the Centre, in confirming or appointing arbitrators, to have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such consideration as are likely to secure an impartial and independent arbitrator[77]. They also require the Centre to consider whether the arbitrator has sufficient availability and ability to determine the case in a prompt and efficient manner appropriate to the nature of arbitration[78]. Before appointment or confirmation, a prospective arbitrator is required to sign a statement of acceptance, availability, impartiality and independence[79]. The arbitrator is also required to disclose to the Centre any facts or circumstances that may give rise to justifiable doubts as to his or her impartiality[80]. Where these ethical requirements have not been met, the rules allow parties to challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed[81].

It is therefore evident that progress has been made towards embracing ethics in arbitration in Africa. However, several ethical problems are still being witnessed in arbitration practice in Africa. There have been instances where the ethical duty of confidentiality has been breached resulting in information pertaining arbitration proceedings being leaked to third parties thus affecting

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[75] Kigali International Arbitration Centre., 'Arbitration Rules, 2012.' Available at *https://kiac.org.rw/wp-content/uploads/2023/06/KIAC-arbitration-rules.pdf* (Accessed on 12/10/2023)
[76] Ibid, article 16
[77] Ibid
[78] Ibid
[79] Ibid
[80] Ibid
[81] Ibid

the integrity of proceedings[82]. There have also been cases where the competence of some arbitrators has been questioned resulting in challenges against arbitral awards and setting aside of such awards in some instances[83]. Indeed, most arbitral laws in Africa including the Arbitration Act of Kenya allows an award to be challenged in cases where such an award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration[84]. In addition, there have been cases where arbitrators have been accused of bias and favoritism towards some parties in the conduct of arbitral proceedings and the final outcome in the arbitral award[85]. Another pertinent ethical problem has been in relation to arbitral costs and fees. In some instances, arbitrators have been accused of charging exorbitant fees thus defeating one of the key purposes of arbitration which is fostering cost effective management of disputes[86]. There is need to address these challenges by strengthening ethics in arbitration in Africa.

4.0 Way Forward

There is need to Africanize conflict management processes in order to fully capture the values and ethics inherent in African societies[87]. The process of

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[82] Nairobi Centre for International Arbitration., 'Confidentiality in Arbitration: Evaluating Legal and Ethical Dilemmas.' Available at https://ncia.or.ke/wp-content/uploads/2022/10/Confidentiality-in-Arbitration-Evaluating-Legal-and-Ethical-Dilemmas-1.pdf (Accessed on 12/10/2023)

[83] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[84] Arbitration Act, No.4 of 1995, S 35 (2) (iv)

[85] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[86] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[87] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at *http://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf* (Accessed on 12/10/2023)

conflict management is largely influenced by culture[88]. African societies have since time immemorial ascribed to values aimed at promoting social cohesion[89]. Such values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect[90]. Conflicts in African societies were thus viewed as a threat to peaceful coexistence and harmony[91]. African societies thus adopted conflict management strategies that were aimed at amicable management of conflicts in order to preserve the social fabric which tied such communities together[92]. These included informal negotiation, mediation, reconciliation and arbitration that were administered by institutions such as the council of elders[93]. Conflict management processes in African societies therefore adhered to the values and ethics that were held sacrosanct including honesty, truth, peace, unity, harmony, integrity, cooperation, respect and forgiveness[94]. It is therefore vital to Africanize conflict management and embrace Africa-focused arbitration in order to fully capture the values and ethics inherent in African societies[95]. Africa-focused arbitration especially in the context of international arbitration has the ability to acknowledge the current socio-economic concerns in the continent and

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[88] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

[89] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

[90] Ibid

[91] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

[92] Ibid

[93] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf* (Accessed on 12/10/2023)

[94] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

[95] Suedi. A., 'The need for "Africa-focused" Arbitration and Reform of Tanzania's Arbitration Act.' Available at *https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/* (Accessed on 12/10/2023)

foster management of disputes in manner that takes into account local circumstances, values and ethics[96].

It is also vital to enforce ethical standards and conduct among arbitrators. Ethical codes and standards formulated by various arbitral institutions have been criticized as being merely soft law norms which lack enforcement[97]. It is therefore important to ensure that such codes and standards are enforced in order to strengthen ethics in arbitration. It has been pointed out that the primary regulators of arbitral conduct and ethics are the appointing institutions and parties through challenge procedures[98].

Further, arbitrators, counsel and parties should be encouraged and advised to adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate[99]. Arbitrators should be encouraged to act with impartiality and integrity in management of disputes and avoid conflict of interest in order to promote the right to a fair hearing[100]. They should also only accept appointments in situations where they are competent to manage the dispute in question and charge fees according to the scale and schedules stipulated by respective institutions in case of institutional arbitration and reasonably in case of ad hoc arbitration[101]. Counsel appearing before arbitral tribunals should also embrace ethical conduct by refraining from activities including acts intended to unfairly obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any

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[96] Ibid
[97] Hacking. L., & Berry. S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available at *https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf* (Accessed on 12/10/2023)
[98] Ibid
[99] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[100] Ibid
[101] Ibid

document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration proceedings[102]. Parties' also have a duty to foster ethics in arbitration by acting in a courteous and respectful manner towards each other and the arbitral tribunal, disclosing all material facts to aid the tribunal in arriving at a just determination and avoiding making unilateral contact with the tribunal or influencing the tribunal in order to get a favourable outcome[103]. These measures are essential in strengthening ethics in arbitration.

There is also need foster competence by promoting standards and accreditation for arbitrators. It has been argued that this approach will enhance accountability, efficiency and competence of arbitrators and promote public confidence in arbitration[104]. Arbitral institutions in Africa should therefore continue enhancing training, licencing and accreditation of arbitrators in accordance with universally accepted standards while also bearing in mind local circumstances and needs[105]. This will be an important step in strengthening ethics in arbitration in Africa since it will ensure the availability of competent arbitrators who will be expected to adhere to the rules of conduct and ethics stipulated by the respective arbitral institutions.

Finally, there is need to enhance access to justice in Africa through ADR mechanisms including arbitration. The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, and the ability to foster expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as

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[102] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit
[103] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit
[104] Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,' *Alternative Dispute Resolution,* Vol. 3, No. 2 (Chartered Institute of Arbitration-Kenya, 2015).
[105] Ibid

litigation[106]. It has been pointed out that ADR mechanisms such as arbitration are enjoying a thriving present and a promising future in Africa[107]. It is therefore vital to encourage the uptake of ADR mechanisms such as arbitration and continue refining them by addressing ethical concerns among other underlying issues in order to enhance their suitability as 'Appropriate' Dispute Resolution mechanisms[108].

These measures among others are needed in order to strengthen ethics in arbitration in Africa.

5.0 Conclusion

Ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings[109]. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes[110]. There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics. However, several ethical issues are still prevalent in arbitral practice in Africa especially those related to confidentiality, conflict of interest, competence, bias and costs and fees[111]. It is imperative to address these challenges in order to strengthen ethics in arbitration in Africa. This can be achieved by Africanizing conflict management and embracing Africa-

[106] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[107] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit
[108] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[109] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[110] Rogers. C., 'The Ethics of International Arbitrators.' Op Cit
[111] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

focused arbitration[112]; enforcing ethical standards and conduct among arbitrators; encouraging arbitrators, counsel and parties to adhere to the rules of conduct and ethics; fostering competence by promoting standards and accreditation for arbitrators; and enhancing access to justice in Africa through ADR mechanisms including arbitration[113]. Strengthening ethics in arbitration in Africa is a desirable outcome that must be pursued.

[112] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[113] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

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content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

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Amendment of Claims and The Arbitrator's Latitude Kavis Fashions Private Limited vs Dimple Enterprises & Others Arbitration Petition No. 826 of 2014 – High Court of Judicature of Bombay

By: ***Wilfred Mutubwa****

BACKGROUND

The Petitioner, Kavis Fashions Limited, entered into a Memorandum of Understanding to enter into an agreement for the purchase of land upon which the Petitioner would set up an additional manufacturing facility. The MoU was dated 31st August, 2006. Consequently, the parties entered into negotiations for the purchase of the land. However, while in the course of negotiations and having exchanged documents, the head lessor to the land in question issued a notice purporting to terminate and forfeit the indenture of lease issued on that land in favour of the 1st Respondent. That notwithstanding, negotiations on the land proceeded with the parties discussing and exchanging plans on the planned construction on the land.

According to the Petitioner, its bank had sanctioned loan for construction of the factory building on the said plot of land and a credit arrangement letter was also issued by the bank sanctioning working capital facility to the petitioner. The negotiations were further frustrated and eventually the 1st respondent issued a letter to the Petitioner noting that the MoU had come to an end and could not be performed further. The Petitioner consequently invoked the arbitration clause in the MoU after a series of communications. The tribunal passed an

* *Advocate of the High Court of Kenya and the founding principal at Dr. Mutubwa Law Advocates. Senior Lecturer and Dean, Mount Kenya University School of Law. He is a Chartered Arbitrator (C.Arb) and a Fellow of the Chartered Institute of Arbitrators (FCIArb). He holds an LL. D from University of South Africa focusing on International Economic Law. He is currently one of the Kenya Representatives to the Permanent Court of Arbitration.*

order in the interim restraining the respondents from creating third party rights in the plot in question.

During the pendency of the arbitration proceedings before the tribunal, the Respondents made a "with prejudice" offer to the petitioner to complete the transaction under the MoU by accepting the title of the respondents on as is where is basis and to approve the plans within 15 days, with such changes in the plans as were permissible in law. A series of meetings and exchange of communications took place between the parties. Consequently, a joint letter was sent to the arbitral tribunal on behalf of the parties to adjourn the matter as the parties were at an advanced stage of negotiations and settlement. However, eventually, the negotiations could not be completed as the Respondents accused the Petitioner of inordinately delaying the negotiations thereby terminating the. Consequently, the petitioner filed an application to amend its statement of claim in order to bring on record the entire correspondence and the events that had transpired after the "with prejudice" offer made on behalf of the respondents. The tribunal dismissed the application. By a majority of 2:1, the tribunal rendered a final award in 2014 dismissing the claims by the Petitioner and awarding the Respondents costs of the arbitration. The majority held that the MoU was not a binding contract, being an agreement to enter into an agreement while the minority award held that the MoU was indeed a binding contract, specific performance of which could be granted.

On this basis, the Petitioner filed an arbitration petition in the High court challenging the final award under Section 34 of the award on the ground that the tribunal wrongly rejected its application for amendment and therefore the award ought to be set aside on that ground alone.

HELD:

- *An arbitral tribunal has power to allow or reject amendments to a claim under Section 23(3) of the Arbitration Act.*
- *An order rejecting amendment of a claim can be used as a ground to challenge a final arbitral award under Section 34 of the Arbitration Act. However, the order itself is not an interim award hence cannot be challenged under Section 34.*
- *A party opposing an application for amendment of a claim under Section 23(3) may do so on all available grounds including delay in bringing the application before the tribunal.*
- *The jurisdiction of the court under Section 34 is only available to interfere with the final award if the tribunal arrives at a perverse view or a view, which cannot be said to be a possible view in the facts and circumstances of the case. The arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award.*

APPLICABLE LAW

The court considered Section 23(3) of the Arbitration and Conciliation Act with regards to the powers of the arbitral tribunal on amendment of pleadings. It provides thus:

> **Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.**

Furthermore, Section 34 of the Act was relevant for the consideration of the scope of jurisdiction of the Court to interfere with an award under Section 34 that provides:

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the court only if-

(a) The party making the application furnishes proof that-

(i) A party was under some incapacity, or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) The arbitral award is in conflict with the public policy of India.

ANALYSIS

The arguments by the Petitioner before the court were two-fold. First, that if it was able to convince the Court that the amendment application could not have been rejected and that it ought to have been allowed, the impugned arbitral award would stand set aside on that ground alone. On this ground, the petitioner argued that a reading of section 23(3) of the Act only permitted the Respondent to object to an application for amendment on only one ground, delay. Therefore, by not permitting the amendment, the tribunal committed a fatal flaw vitiating the entire proceedings. The second argument advanced for the Petitioner was that the tribunal committed a grave error in interpreting the terms of the MoU to conclude that it was not a binding contract and that it was an agreement to enter into an agreement hence specific performance could not be granted. In this regard, it was argued for the petitioner that the intention of the parties was evident from the plain words used in the MoU, which indicated that it was nothing but a concluded and binding contract between the parties. It was submitted that had the tribunal considered the evidence on record with regards to its readiness and willingness to perform its obligations under the MoU it would have come to the same conclusion as the minority did.

On behalf of the Respondents, it was argued that the rejection of the amendment was in accordance with the law. It was the Respondent's position that a clear reading of Section 23(3) allowed it to contest the application on its merits as it did, as opposed to only delay. It was further submitted that a rejection order could not be challenged under Section 34 of the Act nor could it be relied upon

to set aside a final award under the said section. On the Petitioner's second limb of argument, it was submitted that since the terms of the MoU were clear, there was no need to look at any evidence. In any event, they further contended, MoU was not a binding contract and that, further requirement of execution of the agreement to sell was not a mere formality in the facts and circumstances of the present case hence specific performance could not issue.

DETERMINATION AND DISPOSAL

The court dismissed the petition. First, it observed that the dispute having been commenced before 2015, the applicable law to the dispute was the Arbitration Act before it was amended. This was in light of the fact that post 2015 amendments confer a wide discretion to the court under Section 34.

Secondly, the court held that Section 23(3) of the Act allows the tribunal power to allow or reject an amendment and such power cannot be disputed. In any event, the negotiations between the parties had not born any fruit to warrant consideration. Furthermore, it was the holding of the court that a party was allowed to oppose an application for amendment on all available grounds including delay.

On whether the MoU was binding, the court observed that such a question depended upon the intention of the parties and the special circumstances of each case. The court therefore found that there was no latent ambiguity in the terms of the MoU to warrant use of evidence or outside interpretation. In this regard therefore the court affirmed that the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was therefore concluded that the views taken by the majority were possible views on the MoU and were therefore not perverse to warrant interference by the court under Section 34.

Can an Arbitrator Dismiss a Claim (counterclaim) for Want of Prosecution? A look at Article 25(d) of the Model Law in Zimbabwe

By: ***Prince Kanokanga****

Abstract

The legislature in enacting the Zimbabwean Arbitration Act [Chapter 7:15] ('the Act') and adopting the UNCITRAL Model Law on International Commercial Arbitration in Zimbabwe on the 13 September 1996 adopted it with minor modifications. Article 25(d), as adopted and modified in Zimbabwe, is an important provision of the Model Law that is meant to ensure that claims in arbitral proceedings are not unnecessarily delayed and that they cannot be allowed to remain pending ad infinitium. Several jurisdictions such as Australia, Canada, England, Kenya, Hong Kong, Malaysia, New Zealand, Uganda and Zambia have enacted provisions which support the expeditious resolution of disputes and in essence extend the doctrine of want of prosecution in arbitration. The purpose of this article is, therefore to examine the authority of an arbitrator in arbitration proceedings to dismiss a claimant's claim for want of prosecution given that the doctrine of want of prosecution is a drastic measure.

I Introduction

The law and practice of arbitration as an alternative dispute resolution mechanism (ADRM)[1] in Zimbabwe has been embraced for more than a century,[2]

* *Prince Kanokanga LLB, BLP is an Advocate of the High Court and Supreme Court of Zimbabwe. He is an Associate with Kanokanga & Partners in Harare, Zimbabwe with extensive experience in commercial dispute resolution. He also serves on the panels of the Alternative Dispute Solutions Centre (ADSC) in Harare, the African Institute of Mediation and Mediation (AIMA) in Harare, the Commercial Arbitration Centre (CAC) in Harare and the Law Society of Zimbabwe Presidential List of Mediators and Arbitrators. Prince Kanokanga can be reached through prince@kanokangalawfirm.co.zw*

[1] See generally R Matsikidze *Alternative Dispute Resolution in Zimbabwe: A Practical Approach to Arbitration, Mediation & Negotiations* (2013).

[2] For the history and development of arbitration in Zimbabwe see HM Barbour 'The Law of Arbitration in Southern Rhodesia: Its History and Development' (1939) Vol 3 *Arbitration Journal, American Arbitration Association* 251 – 254; BG Abrahams, 'The Call

and has continued to gain momentum.[3] Resultantly, a number of books,[4] including one of the present author,[5] and numerous book chapters and articles have been published on the subject of arbitration in Zimbabwe.[6] More so, the legislature in Zimbabwe has in various enactments, provided for the resolution of certain disputes by means of arbitration.[7]

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for Arbitration in the Federation of Rhodesia and Nyasaland' (1957) Vol 23 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 101 -101, 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.

[3] Since the introduction of the Arbitration Act [Chapter 7:15], the use of arbitration has gained momentum. Most commercial contracts now contain an arbitration clause in terms of which the parties choose arbitration as their preferred method of resolving any existing or future dispute between them arising out of or in connection with the contract.

[4] See generally IA Donovan, AR McMillan & MA Masunda *Source of arbitration materials* (1996); D Kanokanga *Commercial Arbitration in Zimbabwe* (2020). The academic text *Commercial Arbitration in Zimbabwe* by Kanokanga was reviewed and given two thumbs up for being a useful guide for use in commercial arbitration. See G Blanke 'Book Review: Commercial Arbitration in Zimbabwe, D. Kanokanga, Juta: 2020' (2021) Vol 87 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 149 – 150.

[5] See also D Kanokanga & P Kanokanga *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15* (2022) 18 – 19.

[6] IA Donovan 'Zimbabwe' in E Cotran & A Amissah (eds) *Arbitration in Africa* (1996);; Q Tannock 'Public Policy as a Ground for Setting Aside an Award: Is Zimbabwe out of Step?' (2008) Vol 74 (1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 72 – 81; MA Masunda & LG Smith 'Chapter 1.12: Zimbabwe' in L Bosman (ed) *Arbitration in Africa: A Practitioner's Guide* (2013) 89 – 96; D Kanokanga & P Kanokanga 'Zimbabwe' in S Finizio & C Caher (eds) *International Arbitration Laws and Regulations 2021* (18 ed) (2021) 377 – 385.

[7] For instance in Sec 27 of the Animal Health Act [*Chapter 19:01*]; Sec 60 of the Consumer Protection Act [*Chapter 14:37*]; Sec 115 of the Co-operative Societies Act [*Chapter 24:05*]; Sec 75 of the Insurance Act [*Chapter 24:07*]; Sec 98 of the Labour Act [*Chapter 28:01*]; Sec 337 of the Mines and Minerals Act [*Chapter 21:05*]; Sec 6 of the Mozambique – Feruka Pipeline Act [*Chapter 13:07*]; Sec 19 (5) of the National Payment Systems Act [*Chapter*

On the 13 September 1996, Zimbabwe repealed and replaced the outdated Arbitration Act [Chapter 7:02] and replaced it with the Arbitration Act [Chapter 7:15] (the Act).[8] Through section 2 of the Act, the nation adopted albeit with minor modifications,[9] the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[10]

Within a relatively short period of time of having adopted the Model Law on International Commercial Arbitration,[11] Zimbabwe is considered as having one of the best body of reported decisions on the UNCITRAL Model Law on the continent.[12] Pursuant to the enactment of various legislation providing for the resolution of disputes by arbitration, the courts no doubt have had occasion to interpret several articles of the Model Law so much so that the decisions of the courts in Zimbabwe have had a profound influence on the development of arbitration jurisprudence and legislation on the continent[13] and more

24:23]; Sec 42 (4) of the People's Own Savings Bank of Zimbabwe Act [*Chapter 24:22*]; Sec 4 of the Railways Act [*Chapter 13:09*]; Sec 30 of the Road Motor Transportation Act [*Chapter 13:10*]; Sec 72 (4) (b) (ii) of the Road Traffic Act [*Chapter 13:11*]; Sec 32 of the Troubled Financial Institution (Resolution) Act [*Chapter 24:28*]; Sec 38 of the Zimbabwe Investment and Development Agency Act [*Chapter 14:38]*

[8] J Rowland 'Arbitration in Zimbabwe: The UNCITRAL Model Law in Practice in a Developing Country' (2007) Vol 73 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 216 – 223

[9] The modifications to the Model Law in Zimbabwe appear in italics. See *RioZim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another* SC 30-22.

[10] The modifications in the First Schedule which contains the Model Law in Zimbabwe relates primarily to, Article 8, Article 9, Article 10, Article 11, Article 15, Article 17, Article 19, Article 24, Article 25, Article 27, Article 31, Article 34 and Article 36 of the Model Law.

[11] Kanokanga (n 2) 147 – 149.

[12] Tannock (n 6) 72.

[13] Relatively a few African countries have adopted the Model Law into their legislation. For instance, the Model Law has been adopted by **Nigeria** in 1990, **Tunisia** in 1993, **Egypt** in 1994, **Kenya** in 1995, **Zimbabwe** in 1996, **Madagascar** in 1998, **Uganda** in 2000, **Rwanda** in 2008, **Mauritius** in 2008, **South Africa** in 2017 and **Sierra Leone** in 2022. See P Kanokanga, 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern African

specifically with regards to arbitration in the Southern African Development Community (SADC)[14] among the member states.[15]

Due to the purpose of the Model Law, which is to promote and harmonise the uniformity of national laws pertaining to arbitration, the decisions on the Model Law in Zimbabwe have also been used in other jurisdictions to interpret and develop the jurisprudence of arbitration.[16]

Culture of Arbitration' (2022) Vol 1 *Young Lawyers Association of Zimbabwe Law Journal* 1, 1.

[14] See generally RH Christie 'The UNCITRAL Model Law in Southern Africa (1998) Vol 64 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 272 – 274.

[15] P Kanokanga 'The History & Development of International Commercial Arbitration in Zambia' (2022) *Zambia Law Review* (forthcoming).

[16] For instance, the Ghanaian Court of Appeal in *GCB Bank Ltd v Jarvis Asiedu & Another* [2023] GHACA 38 approved the definition of 'final and binding' as adopted by the Zimbabwean Supreme Court in *Zimbabwe Educational Scientific, Social and Cultural Workers Union v Welfare Educational Institutions Employer's Association* 2013 (1) ZLR 187 (S). Also, the Supreme Court of Zambia in *Zambia Revenue Authority v Tiger Ltd & Another* SCZ No. 11 of 2016 and *Tiger Ltd v Engen Petroleum (Z) Ltd* (2019) ZMSC 22 adopted the definition of 'public policy' with regards Article 34 of the Model Law from the leading Zimbabwean case of *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S). The South African Labour Court in *Mmethi v DNM Investments CC t/a Bloemfontein Celtics Football Club* [2011] 3 BLLR 268 (LC) adopted and cited the meaning of the term of 'stay of proceedings' in terms of Article 8 as determined by the Zimbabwean courts in the following decisions, *Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H); *Thornton v McKenzie & Others* [2006] JOL 18561 (ZH) and *Shell Zimbabwe (Pty) Ltd v Zimsa (Pvt) Ltd* [2008] JOL 21589 (ZH).

One of the defining characteristics of adjudication, whether in arbitral proceedings or in litigation is finality,[17] not procrastination.[18] There is an implied term in every arbitration agreement, in terms of which the parties mutually agree to conduct the arbitral proceedings diligently and without undue delay.[19]

Article 25(d) is a statutory solution or relief in a situation where a Claimant who can be described as the *dominus litis*, that is a person to whom a suit belongs, who derives the benefit of either a favourable or adverse award exhibits signs of having developed cold feet[20] or fails to conduct the arbitration proceedings in a commercially appropriate manner.[21] When it comes to arbitration, there is no basis for the proceedings to be become dormant nor protracted.

Efficiency in arbitration refers to time, costs and quality.[22] Thus, Article 25(d) is a unique provision, in that it is a modified provision of the Model Law, which was adopted by the legislature in Zimbabwe to ensure that claims in arbitral proceedings are not unnecessarily delayed, and that claims cannot be allowed to remain pending *ad infinitum*. The efficient resolution of disputes is a distinctive feature of arbitration.[23]

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[17] In *Cawood v Madzingira & Another* HMA 12-17 it was held that:

> *Justice delivery requires that in every case the real or main dispute between the parties be determined finally. It is like surgery. The main dispute is the cyst or boil or ulcer that is threatening the social harmony that must exist between people. That ulcer must be opened up and treated. The patient has to be booked for surgery. It may take time. The patient has to wait in the queue, just like in ordinary application or action proceedings. Until the ulcer is removed, the pain may remain. The ulcer may actually lead to other complications.*

[18] *Denton v TH White Ltd* [2014] EWCA Civ 906.

[19] JB Casey *Arbitration Law of Canada: Practice & Procedure* (2 ed) (2011) 277.

[20] *Mutisi v Musarurwa* HH 341-17.

[21] *P v Q & Others* [2018] EWHC 1399 (Comm).

[22] J Kirby 'Efficiency in International Arbitration: Whose Duty Is It?' (2015) Vol 32 *Journal of International Arbitration* 689 – 695.

[23] KP Berger 'The Need for Speed in International Arbitration: Supplementary Rules of Expedited Proceedings of the German Institution of Arbitration (DIS)' (2008) Vol 25 *Journal of International Arbitration* 595 – 612.

Leading commentators McIlwrath and Schroeder observed that:

> *There is no need to explain why businesses like speed, are impatient with delay, and abhor unnecessary cost. The duration of a financial dispute can have direct economic consequences for a business, whether in terms of delay in the collection of amounts owed, or the setting of financial reserves that must be posted under accounting rules and which impair the reporting of profits until the final resolution of the dispute. And time has a direct and negative impact on the cost of adjudication, as businesses know from experience that the longer it takes to resolve a dispute, the more effort and resources that will inevitably be expended on it. Thus, when businesses pay for private adjudication, they rightly expect speed and efficiency from the process, just as they expect these qualities from other service providers. And that is where business expectations too often run into harsh conflict with international arbitration, as, realistically, it is difficult to comfortably predict an arbitration of any commercial complexity ending in fewer than two or three years. Although there are still courts in the world in which the resolution of a dispute can take considerably longer, there are also many that do not and where litigation is conducted with reasonable efficiency. In the business world, a time frame of two to three years is simply too long, particularly for a private process paid for by the parties, in which any right to appeal is largely given up.*[24]

II A comparison of arbitration and litigation

While not addressing the question of whether arbitration proceedings can be dismissed for want of prosecution at this juncture, it is worth briefly considering the similarities and differences between arbitration and litigation. It is a fact that both arbitration and litigation are similar in nature, for instance, both are methods used for the resolution of disputes between parties.

[24] M McIlwrath & R Schroeder 'The View from an International Arbitration Customer: In Dire Need of Early Resolution' (2009) Vol 2 *International In-house Counsel Journal* 1355 at 1356 – 1357.

An arbitrator, is similar to a judge in civil proceedings in that an arbitrator is also a 'judge' of fact and law[25] who has the authority to decide questions of law.[26] The term 'arbitral tribunal' refers to a sole arbitrator or a panel of arbitrators.[27] However, arbitration and litigation are distinct concepts. For instance, an arbitrator is not a court of law and the decision of an arbitrator is known as an award and not a judgment.[28] Furthermore, an arbitrator is neutral and impartial third party who is appointed or nominated by the disputants to resolve their disputes.[29] Put differently, an arbitrator is an independent and impartial decision-maker in arbitration proceeding 'hired' by the disputants to resolve their dispute(s) pursuant to an arbitration agreement outside of the tradition court system.[30]

An arbitrator's powers generally derive from: (a) an arbitration agreement; (b) an agreement of the parties subsequent to the arbitration agreement; (b) an Act; and any arbitration rules, if any, governing the arbitration.[31] On the other hand, judicial authority[32] derives from the people of Zimbabwe and is vested in the courts, which comprise the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court, the Magistrate's Court, the Customary Law Courts, and any other courts established by or under an Act of Parliament.[33]

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[25] *Dickinson & Brown v Fisher's Executors* 1915 AD 166 at 174.
[26] *Scholtz v Mostert* 1926 CPD 406 at 409; *Mackintosh v Pybus & The Rhodesia Railways* Ltd 1933 SR 356.
[27] Section 2 (b) of the Arbitration Act [Chapter 7:15].
[28] Arbitration, does not develop the law. It is the courts that have an obligation to interpret and develop the law.
[29] DW Butler & E Finsen *Arbitration in South Africa: Law and Practice* (1992) 1.
[30] P Ramsden *The Law of Arbitration: South African and international arbitration* (2009) 5.
[31] Kanokanga (n 4) 87.
[32] For the history and development of the judiciary in Zimbabwe see P Kanokanga *The Law of Costs in Zimbabwe: Text, Cases & Materials* (2021) 8 – 12.
[33] Section 162 of the Constitution of Zimbabwe (Amendment) (No 20) Act, 2013.

In general, the rules which govern arbitration, are simple in nature and more flexible than the rules applied by the traditional courts.[34] These rules are in general provided to secure the inexpensive and expeditious resolution of disputes.[35] In arbitration, the parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting the arbitration.[36] This, gives the parties the opportunity to tailor-make the procedural rules[37] in accordance with their needs or based on the particular facts and circumstances of the case.[38]

The judicial context, the rules of court,[39] exist in order to enable to the courts to perform their duties, and to ensure the orderly functioning of the courts.[40] Thus, rules of court,[41] were not designed to give the parties party autonomy,[42] which

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[34] One commentator has observed that, the 'arbitration process is intended to be informal and inexpensive. Accordingly, pleadings can be short and conclusory with a one-sentence statement of claim being sufficient to initiate proceedings.' See TO Rogers 'The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?' (2001) Vol 16 *Ohio State Journal on Dispute Resolution* 633, 634.

[35] *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) 654C-D.

[36] *OK Zimbabwe Ltd v Admbare Properties (Pvt) Ltd & Another* SC 55 – 17.

[37] There are some arbitral institution that will refuse to administer modified arbitral procedures. WL Craig et al (eds) *International Chamber of Commerce Arbitration* (3 ed) (2000) 295.

[38] The parties have the freedom to adopt standard arbitration practices of their respective trade and business associations, or the rules of arbitral institutions. The parties, may even consolidate, incorporate specific aspects from their trade associations and established arbitral institution or modify the rules of an arbitration institute, thus creating their own unique arbitral procedural rules.

[39] The rules of court are a species of subordinate legislation. See *Computer Brilliance CC v Swanpoel* 2005 (4) SA 433 (T) at para 36.

[40] *Makuruse v Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) 65D – E.

[41] For the nature and purpose of the court rules see *Scottish Rhodesian Finance Ltd v Honiball* 1973 (2) SA 747 (R); *Moulded Components v Coucourakis & Another* 1976 (2) SA 457 (W).

[42] Party autonomy is the 'freedom of the parties to construct their contractual relationship in the way they see fit.' S Abdulhay *Corruption in International Trade and Commercial Arbitration* (2004) 159.

is the backbone[43] and cornerstone of arbitration,[44] which favours convenience, flexibility, simplified procedure and speed among other issues, with the result being an arbitral award rendered by an arbitral tribunal which is final and binding on the parties.[45]

III A brief look at Article 25 of the Model Law

Article 25 is a non-mandatory provision of the Model Law,[46] which has been adopted in almost all modern instruments relating to international commercial arbitration with regards to the non-co-operation of parties,[47] and the arbitral tribunal's powers in default proceedings.[48] It is thus an important provision of the Model Law as it gives the parties the autonomy to decide the consequences of a default of either party in the arbitral proceedings.[49]

Article 25 specifically deals with four default provisions. In the first instance, Article 25(a) with the default of a Claimant when he fails to communicate his Statement of Claim in terms of Article 23(1). Whilst Article 25(b) deals with the

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[43] *Centrotrade Minerals & Metal Inc. v Hindustan Copper Ltd* (2017) 2 SCC 228.

[44] J Ansari 'Party Autonomy in Arbitration: A Critical Analysis' (2014) Vol 6 *Researcher* 47 at 53.

[45] *Harare Sports Club v Zimbabwe Cricket; Zimbabwe Cricket v Harare Sports Club and Arbitrator Advocate Daniel Tivadar* HH 398-19.

[46] The *travaux préparatoires* on Article 25 of the Model Law as adopted in 1985 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 Session, 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 325th and 332nd UNCITRAL meetings.

[47] CH Schreuer *The ICSID Convention: A Commentary* (2001) 694.

[48] JC Betancourt 'What Are the Arbitral Tribunal's Powers in Default Proceedings?' (2019) Vol 36 *Journal of International Arbitration* 485 – 502.

[49] Seventh Secretariat Note, Analytical Commentary on the Draft Text, UN Doc A/CN.9/207.

default position where a Respondent fails to communicate his Statement of Defence in accordance with Article 23(1).

Article 25(c) deals with the default provision where either party fails to appear at a hearing, or such party fails to procedure documentary to the tribunal. Finally, Article 25(d) is a unique provision of the Model Law adopted and modified in Zimbabwe to extend the doctrine of 'want of prosecution' into the arbitral arena. It was the primary intention of the legislature to ensure that matters brought before arbitral tribunals are dealt with expeditiously.[50]

IV The doctrine of want of prosecution

The doctrine of want of prosecution is a drastic remedy which was ordinarily only available to available to a party who was sluggard in prosecuting its case in the ordinary courts of law.[51] The doctrine of want of prosecution has been extended to apply to arbitration in terms of Article 25(d). It is a policy of law, that the law will help the diligent not the sluggard.[52]

The effect of granting an application for dismissal for want of prosecution is to terminate stale or unnecessarily protracted arbitration proceedings and remove them from an arbitrator's 'roll' of matters.[53] The power to dismiss an application for want of prosecution, is sparingly used, and used only in deserving cases[54] because the dismissal of a claim for want of prosecution impacts on a Claimant's constitutional and common law right to have his or her dispute adjudicated.[55]

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[50] Law Development Commission of Zimbabwe, Final Report on Arbitration Law in Zimbabwe, Report No. 31 (1994) 52.

[51] For an understanding of the doctrine of want of prosecution in litigation, see *Anchor Ranching (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Another* 2008 (2) ZLR 246 (H) 245H-249A.

[52] *Ndebele v Ncube* 1992 (1) ZLR 288 (S).

[53] *Ngwerume v Masawi & Another* HH 69-18.

[54] *Marange v Mutowo* HH 315-21.

[55] *Sanford v Haley N.O.* 2004 (3) SA 296 (C).

The doctrine of want of prosecution was deliberately introduced into the High Court Rules,[56] to ensure the expeditious prosecution of matters in the High Court.[57] The purpose of this drastic remedy was to ensure that matters brought to the courts are dealt with due expedition.[58] Neither the Act nor the High Court Rules, 2021 set out any factors which are to be considered on an application for dismissal for want of prosecution.[59] There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised.[60]

The grant or refusal of an application for dismissal for want of prosecution is an exercise of discretion.[61] The discretion, like all others, must be exercised judicially[62] with regard to all the relevant considerations. These would include, but not limited to the nature of the arbitration, the conduct of the parties (or their representatives). Guidance on the factors which are to be considered on an application for dismissal for want of prosecution can be derived from judicial precedent,[63] in terms of which the discretion to dismiss a Claimant's claim for want of prosecution include:[64]

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[56] Rule 236 (3) and 4 of the High Court Rules, 1971 dealt with the doctrine of want of prosecution. The High Court Rules, 1971 have since been repealed and replaced with the High Court Rules, 2021 in terms of which Rule 59, Sub-Rule 15 of the High Court Rules, 2021 as read together with Rule 59, Sub Rule 16 of the High Court Rules, 2021 now deal with the doctrine of want of prosecution in the High Court.

[57] Order 32 Rule 236 (3) of the High Court Rules was amended by section 7 of the High Court (Amendment) Rules (Statutory Instrument 80 of 2000).

[58] *Shanje v Murehwa & Others* HH 218-18.

[59] *Dube v Premier Medical Investments (Pvt) Ltd & Another* SC 32-22.

[60] *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) para 11.

[61] *Mashangwa & Another v Makandiwa & Others* SC 95-21.

[62] The word judicially means 'not arbitrarily'. *Levben Products v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR); *Gelb v Hawkins* 1960 (3) SA 687 (AD) at 694.

[63] The doctrine of judicial precedent is such a cornerstone of any legal system based on case law that it automatically applies to all lesser courts. J Cohen 'Jurisdiction, Practice ad Procedure of the Court of Appeal' (1951) Vol 11 *Cambridge Law Journal* 3 – 14.

[64] *Guardforce Investments (Pvt) ltd v Ndlovu & Others* SC 24-18.

(a) The length of the delay;
(b) The delay must be inexcusable;
(c) The prospects of success on the merits;
(d) The balance of convenience and the possible prejudice to the Respondent caused by the Claimant's failure to prosecute its case on time;[65] or substantial risk of unfair resolution of the dispute;[66]
(e) The availability of less drastic solution.

Whilst guidance on the doctrine of want of prosecution in arbitration in Zimbabwe can be taken from the court rules, and or judicial precedents the court rules and precedents of the doctrine of want of prosecution in litigation, are not strictly applicable in arbitration proceedings.[67] As the doctrine of want of prosecution is also applicable in other Model Law jurisdictions such as Canada, Kenya, Malaysia, New Zealand, Uganda and Zambia, it is submitted that an arbitral tribunal should also seek guidance from the legislation and case law arising from such jurisdictions when such an application befalls a tribunal.[68]

Another reason, why the rules of court and local judicial precedent on the doctrine of want of prosecution in Zimbabwe are not automatically applicable to arbitral proceedings, is that in terms of Article 19 of the Model Law, the parties have autonomy to determine the rules of procedure, unlike in litigation where the parties do not have such autonomy. Thus, disputants to arbitration are at liberty to agree on the powers of an arbitrator tribunal, including the power of an arbitral tribunal to dismiss a claim for want of prosecution.[69]

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[65] Prejudice may take different forms. For instance, the lapse of time will impair the memory of witnesses. In other instances, witnesses may die or move away and become untraceable. See *Reserve Bank of Malawi & Others v Attorney General* [2013] MWHC 451 para 11.
[66] *Grindrod Shipping v Hyundai* [2018] EWHC 1284 (Comm).
[67] Kanokanga & Kanokanga (n 5) 278.
[68] Ibid.
[69] M Waring *Commercial Dispute Resolution* (2020) 13.6.4.

The doctrine of want of prosecution in the litigation is generally used to assist in case management.[70] Moreover, in litigation, an application for dismissal for want of prosecution is made to the court. In arbitral proceedings, such an application is made to the tribunal. Be that as it may, an arbitral tribunal will generally look at the reasons for a party's failure to act timeously, and whether there is sufficient cause for that.[71]

Commercial arbitration, unlike litigation, was designed to provide parties to the dispute with a speedy resolution, hence there is no room for condonation for a party's failure to act timeously or to observe any agreed time limits.[72] Parties to arbitration have a duty of good faith to be proactive and swift in the prosecution of their disputes.[73] An applicant who brings an application for dismissal for want of prosecution before a tribunal should show that there has been a failure by the Claimant to take the necessary steps to bring the dispute to finality in terms of the agreed arbitral timeframes,[74] if any, and also that the delay is inexcusable or that the Claimant does not have 'sufficient cause' justifying the delay.

The meaning of the term inordinate delay is contextual and depends on the facts and circumstances of a particular case.[75] There are no laid-out rules of what amounts to an inordinate delay.[76] Agreed time-frames, or time tables by the

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[70] P Hettiarachi, 'Dismissal for want of prosecution: charting a course between the Scylla of binding principles and the Charybdis of a discretion at large' (1996) 3 (2) *Deakin Law Review* 223 – 236.
[71] Kanokanga & Kanokanga (n 5) 279.
[72] *Kekkel en Kraai Suid Afrika (Pty) Ltd v Bes-Buhr Trading CC & Others* [2023] 4 All SA 439 (WCC) para 59.
[73] Section 19A of the Arbitration Act No. 4 of 1995.
[74] *TAG Wealth Management v West* [2008] 2 Lloyd's Rep 699.
[75] *Hepworths Ltd v Thornloe & Clarkson Ltd* 1922 TPD 336 at 339.
[76] *Allen* v *Sir Alfred McAlpine & Sons Limited; Bostic* v *Bermondsey & Southwark Group Hospital Management Committee. Sternberg & another* v *Hammond & another* [1968] 1 All ER 543 (CA) at 561E-H.

parties, or under arbitrational rules, may provide useful guidelines.[77] It is submitted that some of the circumstances which may warrant delay can often be observed at the procedural journey of the proceedings, and whether one or both of the parties filed any ancillary proceedings during the pendency of the arbitration for instance, a jurisdiction challenge or either party sought interim measures against the other during the pendency of the arbitral proceedings.[78] Once an application for dismissal for want of prosecution has been filed with an arbitral tribunal, in order to escape the dismissal of the application, the Respondent, must show good cause why the application should not be dismissed.[79] It is respectfully submitted that a Respondent cannot upon being served with an application for dismissal for want of prosecution in arbitration proceedings file any other process in pursuance of the proceedings under scrutiny.[80] The parties, should await the outcome of the application. In considering an application for dismissal of want of prosecution, an arbitral tribunal should also consider the extent of the party's personal responsibility.[81]

An applicant to an application for dismissal for want of prosecution cannot rely on any prejudice caused by it; the prejudice to the adversary cause by the failure to meet agreed timeframes.[82] An arbitral tribunal should also consider the chronology of events, the history of dilatoriness in the matter and whether the conduct of the party of the legal practitioner was wilful or in bad faith;[83] the effectiveness of directions, other than dismissal and the merits of the claim or

[77] C Ambrose & K Maxwell *London Maritime Arbitration* (3 ed) (2009) 236.
[78] Kanokanga & Kanokanga (n 5) 279.
[79] *Scotfin Ltd v Mtetwa* 2001 (1) ZLR 249 (H); *Permanent Secretary; Ministry of Higher and Tertiary Education v College Lecturers Association & Others* 2015 (2) ZLR 290 (H).
[80] *Melgund Trading (Pvt) Ltd v Chinyama & Partners* 2016 (2) ZLR 547 (H).
[81] DS Jones, 'Delay by parties to an Arbitration' (1983) 2 (2) *The Arbitrator* 30 – 34.
[82] *Sishuba v National Commissioner of SAPS* (2007) 10 BLLR 988 LC.
[83] *Beitbridge Rural District Council v Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (S).

defence of such an application.[84] However, not all factors need to be satisfied for dismissal to be warranted.[85]

V An examination of Article 25(d) of the Model Law

Article 25(d), as adopted and modified in Zimbabwe, is an important provision of the Model Law that is meant to ensure that claims in arbitral proceedings are not unnecessarily delayed and cannot be allowed to remain pending *ad infinitum* 'as it undoes the very *raison d'etre* of international arbitration - rapid, economical and fair dispute resolution that does justice to the parties and encourages a productive economic process.'[86] This special provision, was designed to deal with the default position of where a Claimant fails to prosecute its claim in arbitration proceedings. Put differently, the Article 25(d), as adopted and modified in Zimbabwe deals with the issue of delay by a Claimant in the arbitration proceedings.[87]

This unique provision of the Model Law is exclusive to jurisdictions which include Canada,[88] Kenya,[89] Malaysia,[90] New Zealand,[91] Uganda[92] and Zambia.[93] In terms of Article 2(f) where a provision of the Model Law, other than Articles

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[84] *Poulis v State Farm Fire and Casualty Co* 747 F.2d 863 (3d Cir. 1984).
[85] *Hicks v Feeney* 850 F.2d 152, 156 (3d Cir. 1988).
[86] WM Reisman, 'The Breakdown of the Contract Mechanism in ICSID Arbitration' (1989) Vol 1989 (4) *Duke Law Journal* 739 at 788.
[87] T Bingham, 'The Problem of Delay in Arbitration' (1990) 9 (2) *The Arbitrator* 83 – 97.
[88] Section 24 (7) (a) of the Arbitration Act of the Province of Alberta; Section 27 (4) (a) of Arbitration Act of Manitoba, Section 27 (4) of the Arbitration Act of New Brunswick.
[89] Section 26 of the Kenyan, Arbitration Act No. 4 of 1995.
[90] S Rajoo & CY Choy 'Malaysia: The Arbitration Regime in Malaysia: A De Jure Model Law Jurisdiction?' in GF Bell (ed) *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* (2018) 165.
[91] Article 25 (d) of the New Zealand, Arbitration Act, 1996.
[92] Section 25 of the Uganda, Arbitration and Conciliation Act.
[93] Section 15 (d) of the Zambia, Arbitration Act No. 19 of 2000.

25(a)[94] and 32(2)(a)[95], refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim. As a result, the of the word 'claim' in Article 25(d), as adopted and modified in Zimbabwe, applies *mutatis mutandis*, to a counter-claim.

A counter-claim is a separate and distinct proceeding, which could have been instituted by way of a separate arbitration proceedings.[96]* Father and son, Davison and Prince Kanokanga observed that:

> *"Counter-claims can be presented only by parties to the arbitration proceedings, not by third parties. The terms 'claim' and 'counter-claim' are merely an acknowledgement of the chronological order in which the actions have been brought in the arbitration.*
> *A counter-claim should be in writing and set out the dispute in sufficient detail, state the facts relevant to the dispute, be accompanied by copies of the relevant document(s), unless the rules of the arbitration institute provide for another mechanism and, most importantly, the counter-claim should set out the relief and remedy sought, including any specific performance, the amount claimed, the interest claimed, a claim for the costs of the arbitration proceedings and any interim remedy."*[97]

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[94] With regards to Article 25 (a) of the Model Law, if no statement of claim has been communicated, the proceedings cannot continue because there is no subject matter. There is no claim. This rule is however not transposable to counter-claims. If a counter-claim does not have a statement of claim, the proceedings must still continue because they still have a subject matter i.e. the original claim.

[95] *Vis-à-vis* Article 32 (2) (a) of the Model Law, where a party brings a claim which they later decide to withdraw, if that was the only claim in the proceedings then the withdrawal of the claim will lead to the termination of the proceedings as there will be no claim. Where a Respondent brings a counter-claim which they later withdraw, the arbitral tribunal is still required to decide on the original claim that has not been withdrawn. Thus, the withdrawal of the counter-claim does not lead to the termination of the arbitral proceedings.

[96] V Pavic, 'Counter-claim and Set-Off in International Commercial Arbitration' (2006) Vol 1 *Belgrade Law Review* 101 – 116.

[97] Kanokanga & Kanokanga (n) 31.

In a counter-claim, the Claimant in the initial arbitration proceedings becomes the Respondent, and the Respondent who has counter-claimed becomes the Claimant.[98] A Respondent in the main proceedings cannot claim in reconvention against any other party who is not a party to the arbitral proceedings.[99]

Pursuant to Article 25(d), a Claimant's inordinate and unreasonable delay in prosecuting its claim or counter-claim in arbitral proceedings justifies the dismissal of its claim for want of prosecution. It is worth noting that in particular proceedings, some disputes will proceed quickly, whilst others may fairly and other instances, proceedings may move slowly.[100]

There has been considerable debate[101] among practitioners and academics on the applicability of the doctrine of want of prosecution. At common law, an arbitral tribunal did not have the power the jurisdiction to dismiss a claim for want of prosecution.[102] In order bring the issue to finality with regards to a Claimant's onus to make things happen in arbitral proceedings,[103] several jurisdictions have enacted provisions which assist Respondents in arbitral proceedings where the Claimant fails, refuses or neglects to prosecute its claim.[104]

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[98] Ibid.

[99] CJM Nathan & M Barnett *Rules and Practice in the Supreme Court of South Africa* (1 ed) (1959) 49.

[100] *Transmedia Life Canada v Oakwood Associates Advisory Group Ltd* (2019) ABCA 276.

[101] Most of the debate has stemmed from the cases of *Bremer Vulkan Schiffaban Und Maschinenfabrik v South India Shipping Corporation* [1980] 1 ALL ER 420; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 QBD; *Food Corporation of India v Antclizo Shipping Corporation* [1988] 2 All ER 513.

[102] *Crawford v AEA Prowting Ltd* [1972] 1 All ER 1199 QB.

[103] *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 All ER 20 at 33.

[104] G Smith 'Dismissal of Arbitration Proceedings for Want of Prosecution' (2009) Vol 5 *Asian International Arbitration* 190 – 209.

Thus, the High Court and by analogy the Supreme Court do not in arbitration proceedings have inherent jurisdiction based on Article 5,[105] which deals with the principle of judicial non-interference in arbitration.[106]There is a great deal of case law on the doctrine of want of prosecution in litigation.[107] However, the same cannot be said about the doctrine in respect of arbitration.[108] It was until recently, that the Supreme Court of Zimbabwe had occasion to deal with a matter involving the interpretation of Article 25(d). In dealing with the matter, the Supreme Court made it clear in its judgment that the wording of Article 25(d) was clear and unambiguous, and that in deciding that particular case, there is no need for the court to resort to the tools of statutory interpretation[109] to ascertain the intention that motivated the enactment of Article 25(d), in Zimbabwe.

The Zimbabwean Supreme Court's decision in *Stonewell Searches (Pvt) Ltd v Stone Holdings (Pvt) Ltd & Others*, serves as a cautionary tale to Claimants, where it was held that:

> *What differentiates subs (c) from (d) is the claimant's conduct upon which the arbitrator's decision to either consider the evidence before him or to dismiss the claimant's claim respectively is based. It appears that Article 25(d) is invoked in the extreme situations where, as in casu, a party is present, is asked to motivate its case and fails or refuses to do so. The party would have consciously made a decision not to participate in the proceedings. It must be borne in mind*

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[105] Thus, in matters governed by the Arbitration Act [Chapter 7:15] which adopted the Model Law in Zimbabwe, the courts are limited in their intervention, supervision or assistance, to matters which are provided for in the Model Law.

[106] GB Born 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) Vol 30 *University of Pennsylvania Journal of International Law* 999 – 1033.

[107] *Ndlovu v Guardforce Investments (Pvt) Ltd & Others* 2014 (1) ZLR 25 (H).

[108] *Harrison Holdings (Pvt) Ltd v Munakiri Leaf Tobacco (Pvt) Ltd & Another* HH 834-22.

[109] For information of interpretation see *Chegutu Municipality v Manyara* 1996 (1) ZLR 262 (S)*; Zimbabwe Revenue Authority & Another v Murowa Diamonds (Pvt) Ltd* SC 41-09.

> *that that party would be the claimant and hence the dominus litis in the matter. The Article gives the arbitrator power to deal with an otherwise obstructive litigant. In casu the proceedings would have stalled were it not for Article 25 (d) of the Model Law and the applicant would have achieved its intended desire of having the matter moved forward. It has, therefore, the effect of terminating stale or unnecessarily protracted arbitral proceedings.*[110]

It is respectfully submitted that dismissal of a claim or counter claim in terms of Article 25(d) is definitive and final.[111] Therefore arbitral tribunals should be circumspect before dismissing a Claimant's claim for want of prosecution, as a Claimant would be barred from obtaining the same relief it would have sought from the arbitral tribunal, to which he or she would ordinarily would be entitled because of the inordinate delay.[112] Justice may still be done in arbitration, despite any delay having been caused by a Claimant.[113]

VI The exception to Article 25 (d) of the Model Law

There is an exception in Article 25(d), which is evident through the use of the words 'unless otherwise agreed by the parties.'[114] Consequently, Article 25(d),

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[110] SC 22-21.

[111] *Premium Brands Operating GP Inc v Turner Distribution Systems Ltd* 2011 BCCA 75.

[112] *Pathescope (Union) of South Africa Ltd v Mallinick* 1927 AD 292.

[113] *Scotfin Ltd* (n 77) 250.

[114] A Broches *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990) 97:

> *...the Working Group decided against listing in a separate article all mandatory provisions of the Model Law, but was of the view that it was desirable to express the non-mandatory character in all provisions which were intended to be non-mandatory, and decided to insert language such as "unless otherwise agreed by the parties" in several articles. It was nevertheless understood that this did not mean that all provisions which did not express their non-mandatory character were necessarily of a mandatory nature.*

as adopted and modified in Zimbabwe, is a non-mandatory[115] provision of the Model Law.[116]

Subsequently, this provision, serves as a curative buffer. It is an arbitral tribunal's first aid kit to deal with issues raising in where the parties have failed to find each other.[117] In terms of Article 25(d), as adopted and modified in Zimbabwe, parties have the freedom to agree on the powers which may be exercised by an arbitral tribunal, in a situation where a Claimant fails to timeously prosecute its claim, including the power to agree on whether or not an arbitral tribunal in such situations should dismiss a Claimant's claim for want of prosecution.[118]

VII A Claimant's Failure to Comply with Directions or Conditions

Where a Claimant in terms of Article 25(d), as adopted and modified in Zimbabwe fails to prosecute its claim, the tribunal has a discretion to render an

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[115] HM Holtzmann & JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 1120:

> *The proposal for an Article listing such mandatory provisions was initially made during the Working Group's second session on the Model Law and was subsequently adopted by the Group. The Secretariat then raised some doubts as to the wisdom of such an Article, on the ground that such a provision was not needed and was subject to drafting difficulties. It noted that the great majority of Articles that were intended to be nonmandatory had been drafted as to indicate their nonmandatory nature, and suggested that words such as 'unless otherwise agreed by the parties' be added to the few remaining articles that were thought to be nonmandatory. The Working Group adopted this approach, but with a significant caveat: it stated in its Report that 'It was understood that the decision to express the nonmandatory character of those provisions 'did not mean that all those provisions of the model law which did not express their non-mandatory character were necessarily of a mandatory nature.' The proposal for an Article to list the mandatory Articles of the Law was not revived during the Commission's session.*

[116] The non-mandatory provisions of the Model Law can be identified by the preface 'unless otherwise agreed to by the parties.'

[117] M Bramley & R Parker 'Arbitration' in R Merkin (ed) *A Guide to Reinsurance Law* (2007) 422.

[118] KK Mwenda *Principles of Arbitration Law* (2003) 82.

award dismissing the claim, or the tribunal, may give directions, with or without conditions, for the speedy determination of the claim. The tribunal has a wide discretion to make any order it deems fit for the purposes of the resolution of the dispute in a timeous manner.[119] The use of the word 'may' in Article 25(d) relates to discretion. Consequently, an arbitral tribunal, may in terms of Article 25(d), give an order or direction, prescribing a time for compliance with its order.[120]

In *EBI Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd & Another*, it was held that:

> *It seems to me that the arbitrator did not act in any manner indicative of partiality or bias in favour of the 1st respondent and as against the applicant. On the contrary, his robust approach in certain respects appears to have been necessitated by the dilatoriness of the applicant and its legal representative in bringing the matter to finality. I am of the view that his actions were not improper but generally designed to expedite the arbitral proceedings in accordance with his arbitral brief and, in particular, with the provisions of Article 25 (d) of the Model Law, which governs him to "give directions, with or without conditions, for the speedy determination of the claim.*[121]

It is submitted that guidance on Article 25(d), as adopted and modified in Zimbabwe with regards to tribunal's discretion can be found in section 26 of the Kenyan, Arbitration Act No. 4 of 1995.[122] Kenya is a Model Law jurisdiction,

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[119] Kanokanga & Kanokanga (n 5) 279 – 280.

[120] Ibid.

[121] 2009 (1) ZLR 356 (H).

[122] The Ghanaian Supreme Court in *De Simone Ltd v Olam Ghana Ltd* [2018] GHASC 22, 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.*"

which shares similar adoptions and modifications as are applicable in arbitration in Zimbabwe.[123]

In Kenya, an arbitral tribunal has the discretion to:[124]

(a) Direct that the party in default shall not be entitled to rely on any allegation or material that was the subject-matter of the order;
(b) Draw such adverse inferences from the non-compliance as the circumstances justify;
(c) Proceed to an award on the basis of such materials as have been properly provided to it;
(d) Make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the non-compliance.

VIII Conclusion

The principle aim of arbitration, as opposed to litigation, is to provide accuracy, efficiency, enforceability, expertise, choice, confidence, confidentiality, convenience, fairness, finality, flexibility, party autonomy, privacy, simplified procedure, speed and reduced cost.[125]

An arbitral tribunal, whether a sole arbitrator or a panel or arbitrators, have an obligation to ensure efficiency in the conduct of arbitration proceedings.[126] There is an implied obligation in every arbitration agreement, that the parties, will conduct the arbitral proceedings with due diligence.[127] At the heart of the question addressed in this article, it can be said that through Article 25(d), the

[123] Reliance can also be placed on the Case Law on UNCITRAL Texts (CLOUT) compiled and prepared by national correspondents designed by their governments, or by individual contributors to enable the international uniform interpretation of UNCITRAL legal texts.
[124] Section 26 of the Arbitration Act No. 4 of 1995.
[125] Kanokanga (n 4) 25 – 28.
[126] UNCITRAL Report of the Working Group on International Contract Practices on the Work of Its Third Sessions, UN Doc. A/CN. 9/216 (23 March 1982) 18.
[127] Casey (n 18) 277.

legislature in Zimbabwe adopted and modified a unique provision into the First Schedule of the Act, to deal with a Claimant's failure to prosecute its claim. The inclusion of this provision, is not only unique to Zimbabwe, but other notable Model Law jurisdictions such as Canada, Kenya, Malaysia, New Zealand, Uganda and Zambia also have similar provisions in their legislation.

Article 25 of the Model Law is a non-mandatory provision of the Model Law. Therefore, notwithstanding Article 25(d), providing for the dismissal of a Claimant's claim for want of prosecution, in arbitration, the parties have the freedom and authority to tailor-make their own procedure in terms of which they can define the scope of an arbitrator's authority to dismiss a matter for want of prosecution for failure to speedily resolve their claim.

Inspite the success of the Model Law in many jurisdictions, and notably also in Zimbabwe, its interpretation still presents new challenges.[128] Recognizing the need revision in the Model Law to conform to current practices in trade,[129] the Model Law was on the 7 July 2006 amended.[130] There is not only an urgent need for the Act to be aligned to conform to the 2006 revisions, but to also revise the modifications which were adopted in the country. In is respectfully submitted that the legislature in Zimbabwe should adopt a provision which is similar or takes into account the wording of section 26 of the Kenyan Arbitration Act No. 4 of 1995 which provides as follows:

(a) Direct that the party in default shall not be entitled to rely on any allegation or material that was the subject-matter of the order;
(b) Draw such adverse inferences from the non-compliance as the circumstances justify;

[128] Kanokanga & Kanokanga (n 5) 12.
[129] P Sanders, 'UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future' (2014) Vol 24 *Arbitration International* 443 – 482.
[130] Kanokanga & Kanokanga (n 5) 20.

(c) Proceed to an award on the basis of such materials as have been properly provided to it;

(d) Make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the non-compliance.

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Preparing for the Future: ADR and Arbitration from an African Perspective

By: Kariuki Muigua*

Abstract

The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.

1.0 Introduction

Alternative Dispute Resolution (ADR) denotes a wide range of dispute management techniques that function outside formal court processes[1]. ADR therefore entails a set of processes that are used to manage conflicts without resort to courts[2]. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration, conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others[3]. The *Charter of the United Nations*[4]

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [October, 2023].*

[1] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[2] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[3] Kerbeshian. L., 'ADR: To be Or…' *North Dakota Law Review*, Volume 70, No. 2

[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

provides the legal basis for the application of ADR mechanisms at the global level. It stipulates that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[5]. ADR mechanisms have also been recognized at the national level in some countries. The Constitution of Kenya urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6].

The growth of ADR has transformed the administration of civil justice[7]. ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice[8]. As a result it has been argued that ADR performs convenient and useful works that cannot be done, or cannot easily be done, through formal justice systems[9]. ADR mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes[10]. These features make ADR mechanisms viable in enhancing access to justice. ADR mechanisms are able to address most of the challenges which clog formal justice processes such as costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[11].

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[5] Ibid, Article 33 (1)
[6] Constitution of Kenya, 2010., Article 159 (2) (c)
[7] Main. T., 'ADR: The New Equity.' Available at *https://www.researchgate.net/profile/Thomas-Main/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-new-equity.pdf* (Accessed on 13/10/2023)
[8] Ibid
[9] Ibid
[10] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[11] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

ADR holds a special place in Africa. ADR mechanisms have been practiced in Africa for many centuries[12]. However, as a result of colonization, these mechanisms were disregarded in favour of western justice systems[13]. ADR mechanisms are now being widely embraced in Africa in addition to formal justice systems[14]. However, it has been observed that the current practice of ADR in Africa is heavily modernized and fails to fully capture African cultural values and conflict management practices[15]. On this basis, it has been argued that there is need to Africanize conflict management processes in order to fully capture the spirit of conflict management inherent in African societies[16].

The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.

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[12] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[13] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at *https://www.ajol.info/index.php/mlr/article/view/*186176 (Accessed on 13/10/2023)

[14] Muigua. K., 'The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution.' Available at *http://kmco.co.ke/wp-content/uploads/2018/12/The-Modernisation-of-Other-ADR-Processes-in-Africa-Experience-From-Kenya-and-Her-2010-Constitution-SOAS-Conference-Paper-Kariuki-Muigua-4th-DECEMBER-2018.pdf* (Accessed on 13/10/2023)

[15] Ibid

[16] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at http://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Movingfrom-Alternative-to-Appropriate-Dispute-Resolution-1.pdf (Accessed on 13/10/2023)

2.0 ADR and Arbitration in African Societies

Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines[17]. It has been observed that conflicts are a common occurrence in any human interactions due to incompatibility of goals or misalignment of interests among other causes[18]. Conflicts were therefore a common phenomenon in African societies. The major sources of conflict in African societies were land, chieftaincy, personal relationship issues, family property, honour, murder, and matrimonial fall-outs among others[19].

It has been argued that the process of conflict management is largely influenced by culture[20]. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture[21]. Culture therefore plays an important role in conflict management. African societies had their own traditional methods and mechanisms of preventing, managing and resolving conflicts[22]. It has been observed that these societies had frameworks in place for the resolution of conflicts and for preventing their escalation into violence, thus threatening the social fabric[23]. It has been pointed that the process of conflict

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[17] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf (Accessed on 13/10/2023)

[18] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

[19] Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 13/10/2023)

[20] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

[21] Ibid

[22] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

[23] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people[24].

African societies upheld norms and values geared towards promoting social cohesion and smooth running of the community[25]. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful co-existence[26]. Conflicts were therefore seen as a threat to the social fabric that holds the community together[27]. As a result, there was need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric[28]. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[29]. These mechanisms gave prominence to communal needs over individual needs[30].

African societies therefore developed conflict management strategies that were designed to uphold the values and norms that held such societies together. Conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders[31]. These techniques fitted comfortably within traditional concepts of African justice, particularly its

[24] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit
[25] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Journal of Sustainable Development in Africa , Volume 17, No.1, 2015
[26] Ibid
[27] Ibid
[28] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit
[29] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).
[30] Ibid
[31] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

core value of reconciliation[32]. The mechanisms adopted towards conflict prevention, management and resolution in African societies were largely effective and respected, and their decisions were binding on all parties, since the identity of an individual was linked to that of the community[33]. There was thus an impetus to comply with decisions for the well-being of the community[34]. In addition, social ties, values, norms and beliefs and the threat of excommunication from society provided elders with legitimacy and sanctions to ensure their decisions were complied with[35].

However, colonialism resulted in subjugation of African conflict management strategies[36]. The indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice[37]. Conflicts that were hitherto handled through traditional amicable settlements practices, with emphasis on reconciliation and the restoration of social harmony, were now being handled on the basis of punishment of the conflicting parties[38]. The introduction of western justice systems resulted in disregard for traditional dispute resolution mechanisms as evidenced by reforms such as the introduction of the repugnancy clause in Kenya[39]. Traditional justice systems could only be applied in Kenya to the extent

[32] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[33] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit
[34] Ibid
[35] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit
[36] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' Op Cit
[37] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit
[38] Ibid
[39] Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

that they were not repugnant to the western conception of 'justice and morality[40].'

However, there has been progress towards reintroduction of African conflict management strategies. The Constitution of Kenya mandates tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[41]. It has been pointed out that ADR mechanisms such as arbitration are enjoying a thriving present and a promising future in Africa[42]. ADR techniques can enhance access to justice by strengthening dispute management systems and bridging the gap between formal legal systems and traditional modes of African justice[43]. They may have particular value in stabilization and state building efforts when judicial institutions are weak and social tensions are high[44]. It has been observed that the values inherent in African societies which informed the process of conflict management remain virtually unchanged[45]. It is thus imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management envisaged by African societies.

3.0 Current Practice of ADR and Arbitration in Africa: Promises and Pitfalls

ADR in Africa has risen as an increasingly popular alternative to the formal legal channels, particularly in managing civil disputes, promising efficiency and

[40] Ibid

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

[42] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at https://hsfnotes.com/africa/2022/11/25/2022-soasarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/ (Accessed on 13/10/2023)

[43] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[44] Ibid

[45] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

increasing the perception of justice[46]. Problems such as costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow have continued to clog the formal justice systems in most African countries[47]. As a result of these problems, it has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems[48]. These problems have resulted in lack of confidence and hindered realization of the right of access to justice[49]. ADR has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice[50].

ADR mechanisms are being used in countries across Africa because the techniques used, which include negotiation, conciliation, mediation and arbitration, fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation[51]. There has been growth of institutions in Africa offering ADR services especially arbitration and mediation[52]. African countries are also becoming preferred seats for ADR processes in the international arena such as international commercial arbitration

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[46] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

[47] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

[48] Ibid

[49] Ibid

[50] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[51] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[52] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf (Accessed on 13/10/2023)

and international commercial mediation[53]. Further, there have been progress towards institutionalizing and fusing ADR mechanisms with formal justice processes in some African countries[54]. This is geared towards recognizing and affirming ADR processes and establishing a clear interface between them and the formal justice processes[55]. For example, in Kenya, mediation has been fused with the formal justice system through the Court-Annexed Mediation (CAM) programme[56]. CAM is geared towards promoting management of disputes in a reconciliatory and cost-effective manner and helping to restore broken relationships[57]. Further, in Kenya, the *Alternative Dispute Resolution Bill*[58] has been introduced into parliament. The Bill seeks to provide a legal framework for the management of civil disputes through ADR mechanisms such as conciliation, mediation and traditional dispute resolution mechanisms[59]. It seeks to achieve certain objectives inherent in the African conceptions of justice including promoting a conciliatory approach to dispute resolution, enhancing community and individual involvement in dispute resolution and fostering peace and cohesion[60].

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[53] Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration.' Available at *https://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf* (Accessed on 13/10/2023)

[54] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf* (Accessed on 13/10/2023)

[55] Ibid

[56] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

[57] Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at *https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-ofcourt-annexed-mediation-3420850* (Accessed on 13/10/2023)

[58] Republic of Kenya., 'The Alternative Dispute Resolution Bill, 2021.' Available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf* (Accessed on 13/10/2023)

[59] Ibid

[60] Ibid

Other African countries are also having a positive experience with ADR including Ghana which has been hailed for enacting the most comprehensive ADR legislation in Africa[61]. The Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration[62]. It also establishes an Alternative Dispute Resolution Centre[63]. The Act also upholds the binding nature of ADR outcomes including mediation agreements which are recognized as binding and enforceable as court judgments[64]. The Act also embraces customary arbitration a move geared towards upholding customary management of disputes in line with African conceptions of justice[65]. As a result of these measures, it has been asserted that ADR mechanisms are enjoying a thriving present and a promising future in Africa[66].

However, despite the progress towards promoting ADR mechanisms in Africa, it has been observed that most of the ADR mechanisms including arbitration, mediation and adjudication are largely influenced by the western conceptions of justice[67]. The practice of ADR as we know it today originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, historical and political conditions[68]. One of the most important

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[61] Onyema. E., 'The New Ghana ADR Act 2010: A Critical Overview.' *Arbitration International*, Volume 28, No. 1 (2012)

[62] Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at *https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010*. (Accessed on 13/10/2023)

[63] Ibid

[64] Ibid, S 82

[65] Ibid, Part III

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

[67] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[68] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at

distinctions between the institutional settings of Western societies and African societies has to do with the former's focus on the individual rather than the collective as the unit of social organization and public policy as envisaged in African societies[69]. As a result, it has been argued that the transfer of ADR can be politically driven and readily used to justify the imposition of Western values and ideals on post-colonial cultures and societies of the developing world including Africa[70]. Further, it has been argued that the current practice of ADR in Africa might be used to benefit the interests of a few including national elites and multinational corporations[71]. ADR mechanisms such as arbitration in Africa are now largely associated with formal justice systems due to the aspect of court involvement and emerging challenges of costs and delays[72]. Further, it has been argued that the institutionalizing and fusion of ADR mechanisms with formal justice processes could result in the loss of some of the key attributes of these mechanisms such as informality, confidentiality and privacy which were pivotal for their success[73].

Despite the foregoing concerns, ADR mechanisms including arbitration if properly harnessed, have the potential to enhance access to justice especially for the poor and marginalized in Africa[74]. It is therefore imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management inherent in African societies for enhanced access to justice.

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 13/10/2023)

[69] Ibid

[70] Ibid

[71] Ibid

[72] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4th Edition, 2022

[73] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[74] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf* (Accessed on 13/10/2023)

4.0 Way Forward

ADR mechanisms including arbitration have been part and parcel of the African culture since time immemorial[75]. These mechanisms were the first point of call whenever a dispute arose in African societies and were administered by institutions such as the council of elders who ensured compliance with outcomes[76]. It has been observed that conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques[77]. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion[78]. It is therefore imperative to consider and embrace ADR mechanisms in Africa as 'Appropriate' and not 'Alternative' in the quest towards access to justice[79].

It is also imperative to embrace the spirit of conflict management inherent in African societies while fostering ADR mechanisms. It has been asserted that African communities developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[80]. These mechanisms gave prominence to communal needs over individual needs[81]. The purpose of conflict management in African societies was therefore to foster peace, reconciliation and restoration of social harmony[82]. ADR techniques fitted comfortably within

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[75] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

[76] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[77] Ibid

[78] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

[79] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[80] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

[81] Ibid

[82] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

traditional concepts of African justice, particularly its core value of reconciliation[83]. However, the current practice of ADR in Africa through mechanisms such as arbitration and some forms of mediation has shifted focus from the true purpose of conflict management that was upheld in African societies[84]. Some of the ADR mechanisms such as arbitration have become coercive resulting in settlement of disputes as opposed to resolving disputes[85]. Some ADR mechanisms in their current form therefore lack the ability to foster reconciliation and restoration of parties' relationships which was the true purpose of conflict management in African societies[86]. This is due to the fact that the current practice of ADR in Africa was transplanted from the West without considering the underlying social, historical and political conditions in African societies[87]. It is therefore important to (re)focus ADR mechanisms in Africa to the true purpose of conflict management upheld in African societies which is reconciliation and restoration of parties' relationships[88].

Further, while the progress made towards legitimizing and institutionalizing ADR mechanisms in Africa including arbitration, mediation and traditional justice systems is meritorious, it is imperative to ensure that this is done in a manner which preserves the key features of these mechanisms[89]. This process is important in providing elaborate legal and policy framework and guidelines for the application of ADR mechanisms and further linking these mechanisms to

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[83] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[84] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

[85] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[86] Ibid

[87] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

[88] Ibid

[89] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

formal justice systems[90]. It is also vital in upholding ADR mechanisms as part of the justice system[91]. However, it has been pointed that this process could result in the loss of some of the salient features of ADR mechanisms such as voluntariness, confidentiality and party autonomy[92]. These features are the hallmarks of ADR and losing them will hinder the viability and efficacy of ADR mechanisms in access to justice. It is therefore crucial to preserve the key features of ADR mechanisms in modern legal practice in order to ensure their viability in promoting access to justice[93]. Further, it is essential to establish a clear interface between ADR mechanisms and formal courts through measures such as formulating clear referral systems providing for referral of disputes from courts to ADR and vice versa[94].

Finally, there is need to continue embracing ADR in Africa and putting in place measures that will foster the uptake of ADR mechanisms. Government support is vital in promoting ADR in Africa by putting in place adequate legal regimes and infrastructure to enhance the uptake of ADR mechanisms[95]. Governments can further enhance the role of ADR mechanisms in Africa by designing laws that advocate for these mechanisms and institutionalizing ADR mechanisms in a manner which preserves their key attributes such as flexibility, informality, privacy and confidentiality[96]. It is also vital to enhance the capacity of ADR practitioners including arbitrations, mediators and Traditional Dispute

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[90] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[91] Ibid

[92] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Alternative Dispute Resolution (2017): 130

[93] Ibid

[94] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[95] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf* (Accessed on 14/10/2023)

[96] Ibid

Resolution (TDR) practitioners through education, training and mentorship[97]. This will enhance their skills and ability to manage disputes through ADR mechanisms in a manner that safeguards the key concepts of justice such as human rights[98]. There is also need for continued public sensitization and enhancing access to information on ADR in order to boost support and accelerate the uptake of ADR mechanisms in Africa[99].

These measures are integral in fostering ADR and arbitration from an African perspective.

5.0 Conclusion

ADR mechanisms have been practiced in Africa for many centuries[100]. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion.[101] ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core values of reconciliation and restorative justice[102]. However, the current practice of ADR in Africa has shifted focus from the true conceptions of justice inherent in African societies[103]. This is a result of transplanting ADR mechanisms from the West into African societies without considering the underlying social, historical and political conditions in African societies[104]. Some ADR techniques have therefore become coercive resulting in settlement of

[97] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[98] Ibid
[99] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[100] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit
[101] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit
[102] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[103] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit
[104] Ibid

disputes as opposed to resolving disputes.[105] It is thus vital to embrace ADR and arbitration from an African perspective. This can be achieved by reframing ADR mechanisms as 'Appropriate' and not 'Alternative' in Africa, embracing the spirit of conflict management inherent in African societies and its focus on reconciliation and restorative justice, preserving the key attributes of ADR mechanisms while legitimizing and institutionalizing such mechanisms and promoting ADR mechanisms in Africa as an ideal avenue for enhanced access to justice[106]. The time is now to prepare for the future by embracing ADR and arbitration from an African perspective.

[105] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[106] Ibid

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Litigation Funding as Damage-Based Agreements Case Summary: *R (On The Application of PACCAR Inc and Others) (Appellants) V Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28 [1]*

By: ***Wilfred A Mutubwa****

INTRODUCTION

The appeal came up before the Supreme Court of the UK concerning a matter of statutory interpretation in the context of litigation funding. In particular, the appeal concerned itself with the question of whether the agreements to provide litigation funding in the case, known as litigation funding agreements (**"LFAs"**), constituted "damages-based agreements" (**"DBA"**), a term given a specific definition by statute. In order to be lawful and enforceable a DBA has to satisfy certain conditions. The LFAs in the appeal were entered into without satisfying those conditions, so the question of whether they constituted DBAs was critical for their enforceability.

BACKGROUND

The issue case in the context of applications to bring collective proceedings for breaches of competition law before the Competition Appeal Tribunal. The second respondent– UK Trucks Claim Ltd (**"UKTC"**), and the third respondent, Road

Haulage Association Ltd (**"RHA"**) each sought an order from the Competition Appeal Tribunal (the **"Tribunal"**) to enable them to bring collective proceedings

* *Advocate of the High Court of Kenya and the founding principal at Dr. Mutubwa Law Advocates. Senior Lecturer and Dean, Mount Kenya University School of Law. He is a Chartered Arbitrator (C.Arb) and a Fellow of the Chartered Institute of Arbitrators (FCIArb). He holds an LL.D from University of South Africa focusing on International Economic Law. He is currently one of the Kenya Representatives to the Permanent Court of Arbitration.*

on behalf of persons who acquired trucks from the appellants and other truck manufacturers. The proposed proceedings take the form of "follow-on" proceedings in which compensation is sought for the alleged higher prices paid for trucks as a result of the breach of European competition law, as found in the infringement decision of the European Commission dated 16 July 2016. To obtain a collective proceedings order from the Tribunal, UKTC and RHA needed to show that they had adequate funding arrangements in place to meet their own costs and any adverse costs order made against them should they lose. Both UKTC and RHA relied on the LFAs in an effort to meet these requirements. When the application came before the Tribunal, it held that the LFAs did not involve the provision of "claims management services". As a result, they were not DBAs and were not therefore rendered unenforceable by virtue of section 58AA (2). The Divisional Court dismissed the appeal, upholding the determination of the Tribunal. The appellants appealed under the leap-frog procedure directly to the Supreme Court.

(*The leap-frog procedure is a procedure for appealing direct to the Supreme Court from the High Court or a Divisional Court, bypassing the Court of Appeal. The procedure is only allowed in exceptional cases: all parties must consent and the case must raise a point of law of public importance, which either relates wholly or partly to the interpretation of a statute or of a statutory instrument or is one in respect of which the trial judge is bound by a previous decision of the Court of Appeal or the Supreme Court and the trial judge must certify that he is satisfied as to the importance of the case and the Supreme Court must give permission to appeal in this way.)*

The court held that litigation funding agreements that are conditional on the outcome of proceedings qualify as Damage-Based Agreements hence subject to the conditions in the DBA Regulations 2013.

APPLICABLE LAW

Section 154 of the Coroners and Justice Act 2009 (**"CJA 2009"**) inserted section 58AA into the Courts and Legal Services Act 1990 (**"CLSA 1990"**). Section 58AA (1) and (2) provide that a DBA will be unenforceable unless certain conditions are complied with. Shortly after the insertion of section 58AA, the Damages Based Regulations 2013 (the **"DBA Regulations 2013"**) came into force. These set out further requirements which must be satisfied if a DBA is to be enforceable. In the case, it was common ground that the LFAs in issue did not satisfy these conditions

The relevant part of the definition of DBA in the appeal, pursuant to section 58AA (3), was whether the LFAs involved the provision of "claims management services". This phrase is defined, under section 58AA (7), by reference to earlier legislation, being the Compensation Act 2006 (**"CA 2006"**) until 1st April 2019 and the Financial Services and Markets Act 2000 (**"FSMA 2000"**) thereafter. "Claims management services" are defined in the CA 2006 and FSMA 2000 in materially the same terms. Under section 4(2)(b) of the former, such services are "advice or other services in relation to the making of a claim" and "other services" includes, in particular, a reference to "the provision of financial services or assistance".

ISSUES FOR DETERMINATION

The only issue that arose for determination was whether the LFAs in issue were DBAs. If so, they would be subject the conditions in the **DBA Regulations 2013**.

ANALYSIS & REASONING

The appeal revolved around the definition of a DBA as derived from one legislative context i.e. the CA 2006, which has been used in a different legislative context i.e. section 58AA of the CLSA 1990. Given that the meaning of the definition had not changed it had to be determined with reference to the CA 2006.

In relation to the wording of section 4 of the CA 2006, the Court held that the words "claims management services" read according to their natural meaning were capable of covering the LFAs.

In relation to the statutory purpose, the Court held that Part 2 of the CA 2006 was intended to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of services seeking to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4 of the CA 2006, and the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme of Part 2 were strong indicators of this. Viewed in this light, the Court held that there was good reason to think that Parliament used wide language in section 4 deliberately and with the intention that the words of the definition should be given their natural meaning.

The Court rejected the use of The DBA Regulations 2013 as an aid to interpreting "claims management services", as defined in the CA 2006. It was the view of the Court that they were not introduced broadly contemporaneously in combination with the CA 2006 as part of a single coherent scheme, nor were they subject to review by the same Parliament which enacted the 2006 Act. By contrast, the Compensation (Regulated Claims Management Services) Order 2006 (the "Scope Order") were broadly contemporaneous and formed part of the same legislative scheme as, and so was a legitimate aid to interpretation of the CA 2006; as was the Explanatory Memorandum which accompanied the Scope Order. The Scope Order and the Explanatory Memorandum support the interpretation of the definition of DBA for which the appellants contend. The Court therefore decided that Regulations enacted later by the executive could not be used to interpret an earlier statute of Parliament.

On the definition of "claims management services", the respondents relied on the wording of the defined term itself to submit that the definition should be limited to services in the context of the management of a claim. This notion was referred to as "the potency of the term defined". The Court held that this notion was not relevant to the appeal and rejected it for three reasons. First, the terms explicitly used in the definition in the primary legislation and also in the Scope Order cannot be read as involving the management of claims, nor as having claims management as a unifying core of meaning. Second, "claims management services" had no established and generally accepted meaning which could lead a reader of the text of section 4 of the CA 2006 to suppose that the express language of the definition was to be treated as qualified or coloured by that meaning. Third, to read the definition in section 4 in this way would be counter to the scheme and purpose of the CA 2006.

The Court also held that the interpretation of section 4 of the CA 2006 as covering the LFAs in this case did not produce any absurdity in relation to section 58B, which section 28 of the Access to Justice Act 1999 inserted into the CLSA 1990 but which had not been brought into force, to make enforceable certain other forms of LFAs which were otherwise thought to be unenforceable. Further, the Court held that events subsequent to 2006 were not relevant to the interpretation of section 58AA.

CONCLUSION

The majority of the Court (4:1) held to allow the appeal noting that to the extent the payments due to the Respondents were "to be determined by reference to the amount of the financial benefit obtained", the LFAs were DBAs and since they did not meet the conditions as set in the DBA Regulations of 2013, they were unenforceable.

LADY ROSE'S DISSENTING OPINION

Lady Rose dissented holding that she would dismiss the appeal. She agreed with the Divisional Court and the Tribunal that the provision of financial assistance is only included in the term "claims management services" if it is given by someone who is providing claims management services within the ordinary meaning of that term. She further held that the fact that litigation funding would not naturally fall within the scope of the term "claims management services" is important pointing to the fact that claims management services include providing financial assistance, but that did not mean that all financial assistance constitutes "claims management services" whenever it related to a claim

Is an award of costs by an arbitrator a question of public policy?

By: ***Prince Kanokanga****

Abstract

Within the continent, among a dozen of countries, Kenya was the fourth country to adopt the Model Law through the enactment of the Arbitration Act, 1995 ('the Act') after Nigeria (1990), Tunisia (1993) and Egypt (1994). It has adopted the Model Law in its entirety, with some modifications to the text of the Model Law, but has kept the essence of the Model Law in its original. The drafters of the Model Law did not seek to standardize the costs and expenses of arbitration owing to the diverse principles in different jurisdictions and decided that it was best if the matter of costs was decided by the domestic laws of those countries adopting the Model Law. In adopting the Model Law in Kenya, the legislature incorporated section 32B of the Act, as a unique provision to regulate all issues concerning the costs and expenses of the arbitral tribunal, the legal and other expenses of the parties, including costs related to the arbitration. There is now a large body of jurisprudence available in Kenya on arbitration. This has simplified the law and practice of arbitration in the country. The question concerning the doctrine of public policy in arbitration and in particular whether an award of costs can be set aside as being contrary to public policy is not new in the country. However, an examination of the body of literature reveals that not much discussion has been had on the issue. Unsurprising, it has attracted little attention. In light of the aforesaid, the purpose of this article is to ignite the spark towards more discussions on this subject. The overall conclusion of this article is to the effect that, the court's power to vacate an 'award on costs' whether in a final or an additional award is closely circumscribed and only met infrequently and in clears cases.

* *Prince Kanokanga LLB, BLP is an Advocate of the High Court of Zimbabwe. He is an Associate with Kanokanga & Partners in Harare, Zimbabwe with extensive experience in commercial dispute resolution. He also serves on the panels of the Alternative Dispute Solutions Centre ('ADSC') in Harare, the African Institute of Mediation and Mediation ('AIMA') in Harare, the Commercial Arbitration Centre ('CAC') in Harare and the Law Society of Zimbabwe President's Panel of Mediators and Arbitrators. Prince Kanokanga can be reached through prince@kanokangalawfirm.co.zw*

1. Introduction

Arbitration[1] is an internationally[2] recognized method of alternative dispute resolution (ADR).[3] It is a sophisticated method of ADR[4] based on the principle of party autonomy,[5] in terms of which the parties (persons, corporations and / or organisations and sovereign states)[6] are free to decide the manner in which their disputes will be determined. It is up to them to decide when, where and how the arbitral hearings will be conducted.[7]

An arbitral tribunal is appointed by agreement between the parties,[8] failing such agreement, the arbitrator(s) may be appointed by an arbitration institution,[9] which would generally supervise the conduct of the arbitration as an 'administrator' and it may also provide the arbitration rules[10] pursuant to which the arbitration should be conducted without unnecessary delay or expense.[11] In

[1] For a detailed understanding on the law and practice of arbitration in Kenya, see G Muigai (ed), *Arbitration Law and Practice in Kenya* (2011); K Muigua, *Settling Disputes through Arbitration in Kenya* (2012); G Muigai (ed), *Arbitration Law and Practice in Kenya* (2013); K Muigua, *Settling Disputes through Arbitration in Kenya* (2015); K Muigua, *Settling Disputes through Arbitration in Kenya* (2017); K Muigua, *Settling Disputes through Arbitration in Kenya* (2022).

[2] SL Karamanian, 'Courts and Arbitration: Reconciling the public with the private' (2017) 65 (9) *Arbitration Law Review* 1, 1.

[3] For more information on alternative dispute resolution, see D Mackie, D Miles & W Marsh, *Commercial dispute resolution: An ADR practical guide* (1995).

[4] G Bottini et al, 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration' (2020) 21 *Journal of World Investment & Trade* 251, 252.

[5] *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333.

[6] N Blackaby et al, *Redfern and Hunter on International Arbitration* (2009) 1.01.

[7] For a further discussion on arbitration being an affordable, cost effective and expeditious mode of dispute resolution as compared to litigation see, *Mutanga Tea and Coffee Company v Shikara Ltd & Another* [2015] eKLR; *Kenya Ports Authority v Base Titanium Ltd* [2021] eKLR.

[8] R Bernstein et al (eds) *Handbook of Arbitration Practice* (1988) 9.

[9] *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd & Another* [2005] SGHC 91.

[10] D Sutton, J Kendall & J Gill, *Russell on Arbitration* (2003) at para 3-046.

[11] *Northwood Development Company Ltd v Shuaib Wali Mohammed* [2021] eKLR.

the event that an arbitration institution fails to perform this function, the appointment will generally be made on application by the High Court.[12]
Conventional wisdom suggests that parties choose arbitration mainly because it ensures cost savings[13] and shorter resolution times thereby exerting its importance over litigation.[14] The question of 'costs in arbitration'[15] is a contentious one,[16] partly because every arbitration dispute, domestic or international, commercial or non – commercial has a costs dimension to it.[17]

Among a dozen of countries within the African continent,[18] Kenya[19] was the fourth country to adopt the UNCITRAL Model Law on International

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[12] *Nyoro Construction Co Ltd v Attorney General* [2018] eKLR; *Pitstop Technologies Ltd v Dynamic Branding Ventures Ltd* [2020] eKLR; *Magdalene M Mjomba & Others v Information and Communications Technology Authority; Chairman Chartered Institute of Arbitrators (Interested Party)* [2021] eKLR.

[13] LA Mistelis & CM Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2 (5) *World Arbitration and Mediation Review* 83, 95; P Karrer, 'Arbitration Saves! Costs: Poker and Hide-and-Seek' (1986) *Journal of International Arbitration* 35 – 46.

[14] GB Born, *International arbitration, law and practitioner* (2012) 14.

[15] M Hodgson & JH Suh, 'The 'Problem' of Costs in Arbitration: Controlling, Allocating and Funding Costs' in CL Lim (eds) *The Cambridge Companion to International Arbitration* (2021) 441.

[16] RH Smit & TB Robison, 'Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency' (2009) 20 *The American Review of International Arbitration* 267, 267.

[17] GE Dal Pont, *The Law of Costs* (2013) vii.

[18] In *Euromec International Ltd v Shandong Taikai Power Engineering Co Ltd* [2021] KEHC 93 (KLR) para 32 it was held that:

> "*For starters, Kenya is among 85 states and 118 jurisdictions around the world where legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted. This position is underpinned by article 159 of the Constitution which plainly identifies the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration.*"

[19] For more information on the recent state of arbitration in Kenya see, D Ndolo & M Liu, 'The State of International Arbitration in Kenya' (2020) 23 (1) *International Arbitration Law Review* 40 – 69; A Ouko, 'Arbitration Act 1995: Is A Reform Overdue' (2022) 10 (1) *Alternative Dispute Resolution* 239 – 262.

Commercial Arbitration (Model Law) on the 02 January 1996, after Nigeria (1990),[20] Tunisia (1993)[21] and Egypt (1994).[22]

The Arbitration Act, 1995[23] ('the Act') repealed and replaced the Arbitration Act, 1968[24] and gave effect to both domestic and international arbitration and adopted the Model Law which seeks to promote the harmonisation and uniformity of national laws pertaining to international commercial arbitration procedures, providing a framework within which arbitration can be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy.[25]

The drafters of the Model Law did not seek to standardize the costs and expenses of international commercial arbitration.[26] They agreed that the matter of the costs and expenses of arbitration was best dealt with by the domestic law of those countries adopting the Model Law,[27] owing to the differing principles in common-law and civil jurisdictions.[28]

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[20] Arbitration and Conciliation Act 1990, Cap, A18, Law of the Federation of Nigeria. This law has been repealed and replaced by the Arbitration and Mediation Act, 2023.
[21] Code of Arbitration 1993.
[22] Law Concerning Arbitration in Civil and Commercial Matters 1994.
[23] The Arbitration Act, 1995 adopted with modifications the Model Law on International Commercial Arbitration. The modifications to the Act 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). The Arbitration Rules, 1997 supplement the Arbitration Act, 1995 and provide procedural rules with regards to the administration of arbitration proceedings.
[24] Arbitration Act, 1968. No. 53 of 1968.
[25] *Zambia Revenue Authority v Tiger Ltd & Zambia Development Agency* SZC No. 11 of 2016.
[26] Report on the Working Group on International Contract Practices, UN Doc A/CN.9/216 (1986) 99.
[27] *Casata Ltd v General Distributors Ltd* [2006] NZSC para 3.
[28] D Kanokanga & P Kanokanga, *UNCITRAL model law on international commercial: A commentary of the Zimbabwe Arbitration Act [Chapter 7:15]* (2022) 342 – 343.

It is for this reason that section 32B of the Act, was specifically inserted by the legislature to regulate the issue of the costs and expenses of arbitration.[29] Section 32B of the Act, as adopted and modified in Kenya is a non – mandatory provision, in terms of which the parties are free to agree on the issues concerning the fees, costs and expenses arising out of arbitration.[30] If the agreement under which the arbitration is conducted contains a provision on the issue of costs, then the arbitrator and the parties are bound to apply that provision. In the absence of an agreement, the provisions of section 32B of the Act apply.

The costs of arbitration, not in the least, the legal costs and other expenses, are an important element in any party's risk assessment when considering whether or not to institute or defend arbitration proceedings.[31] Such costs can be calculated by adding up the following factors: (a) emotional costs, (b) direct costs, (c) productivity costs, (d) relationship costs and (e) reputational costs.[32] Thus, the costs of instituting or defending arbitration proceedings can be significant.[33]

The present article seeks to address the concept of 'public policy and arbitration costs'.[34] Firstly the article will highlight the role and function of an arbitrator. Secondly, the article will define the term 'award'. Thirdly, the article will discuss on the different types of costs and expenses that arise in arbitration. In the fourth

[29] Section 32B of the Arbitration Act, 1995.

[30] For more information of costs in arbitration, see generally, M O'Reilly, *Costs in Arbitration Proceedings* (1997); CYC Ong & M O'Reilly, *Costs in International Arbitration*, (2013), SD Franck, *Arbitration costs: Myths and realities in investment treaty arbitration* (2019).

[31] E Robine, 'What companies expect of international commercial arbitration' (1992) 9 (2) *Journal of International Arbitration* 31 – 44; P Cavalieros, 'In-House costs and other internal party costs in international commercial arbitration' (2014) 30 (1) *Arbitration International* 145 – 152.

[32] J Brand, F Steadman & C Todd, *Commercial Arbitration in South Africa* (2016) 28.

[33] M Blome, 'Contractual Waiver of Article 52 ICSID: A Solution to the Consensus with Annulment' (2016) 32 (2) *Arbitration International* 601, 603.

[34] This article is based on the discussion which arose in the case of *Arif Ahmedali Sitafalwala v Africare Ltd (Medanta)* [2020] eKLR.

part, a detailed discussion on the doctrine of public policy will ensure, followed by an examination of whether a party to an arbitration can apply to the courts to have an award of costs set aside as being contrary to public policy. The overall conclusion is that, although dissatisfied parties are increasingly challenging arbitral awards as being contrary to public policy, Kenyan courts are properly granting relief on the basis of this public policy doctrine in very limited circumstances.[35]

2. The role of an arbitrator?

It stands to reason that the remuneration of a judge is an obligation of the State, whilst the remuneration of an arbitrator engaged by the parties to resolve a dispute is the responsibility of the parties,[36] and no doubt many clients are willing to pay the marketplace rates to secure the best services of an arbitrator[37] who is usually an expert in the field of law and or trade that is the subject of the dispute.[38]

The clear and unconditional[39] communication of acceptance of appointment by an arbitrator to the parties creates a tripartite contract[40] between the parties and the arbitrator,[41] in terms of which the arbitrator is contractually entitled to be

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[35] The High Court of Zimbabwe set aside and substituted an award of costs awarded by an arbitrator. See *Farpin Investments (Pvt) Ltd v NetOne Cellular (Pvt) Ltd* HH 28-16.

[36] The remuneration and benefits for State Officers in the judiciary is exercised by the Salaries & Remuneration Commission in terms of the Salaries and Remuneration Commission Act No. 10 of 2011.

[37] *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* [2012] ZACC 17.

[38] *Soh Beng Tee & Co v Fairmount Development Pte* [2007] 3 SLR 86 para 63.

[39] *Tradax Expoert SA v Wolkswagenwerk AG (The Loma)* [1970] QB 537; *K/S Norjarl v Hyundai* [1991] 1 Lloyd's Rep 524.

[40] See generally, E Onyema, *International Arbitration and the Arbitrator's Contract* (2010). In *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 306 it was held that:

> *"It is the arbitration contract that the arbitrators become parties to by accepting appointments under it."*

[41] *Hashwani v Jivraji* [2010] EWCA Civ 712 at 14; *ARI v WXJ* [2022] EHWC 1543 (Comm) at 22.

remunerated for his or services.[42] Put differently, an arbitrator derives his or her powers from the acceptance of a reference from the parties to an arbitration agreement.[43]

The role of an arbitrator is an important one.[44] He or she is appointed[45] either directly or indirectly by the parties to hear both sides of a dispute and to render an award in accordance with the provisions of the arbitration agreement, which the parties consent to accept as final and binding upon them.[46] An arbitral tribunal is therefore entitled to be properly compensated for the services rendered, by the parties who appointed the tribunal, unless the tribunal agrees to a waiver of fees.[47] It is unusual for arbitration, whether domestic or international, commercial or non-commercial to be conducted by an arbitral tribunal on a pro bono arbitration basis.[48]

It is routine in both domestic and international arbitration, institutional and *ad hoc* arbitrations for the parties to pay,[49] in advance, a sum of money as security for the payment of the costs and expenses of the arbitral tribunal.[50] It is an

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[42] See generally, Y Derains & L Levy (eds) *Is Arbitration Only as Good as the Arbitrator?" Status, Powers and Role of the Arbitrator* (2011).

[43] DW Butler & E Finsen, *Arbitration in South Africa: Law and Practice* (1993) 103.

[44] J Keli, 'Understanding an arbitrator as a private judge' (2022) 10 (1) *Alternative Dispute Resolution* 175 – 186.

[45] The word 'appoint' is refers not only to nominating or designating a person to act as an arbitration. The term 'appoint' is wide enough to include stipulating the terms on which an arbitrator is appointed, as well as the fees and costs payable to an arbitral tribunal. see *Sanjeev Kumar Jain v Raghubir Saran Charitable Trust & Others* (2012) 1 SCC 455.

[46] P Ramsden, *The Law of Arbitration: South Africa and International Arbitration* (1989) 5.

[47] JK Gotanda, 'Setting Arbitrator's Fees: An International Survey' (2000) 33 (4) *Vanderbilt Journal of Transnational Law* 779, 783.

[48] P Kanokanga, 'An examination of Kenya's divergent approach to the meaning of 'delivery' of an arbitral award in contrast to other Model Law Jurisdictions' (2023) 12 (1) *Alternative Dispute Resolution* 320, 323.

[49] N Kaplan 'Non-Payment of Advance on Costs: No Pay, Can Play?' in DD Caron et al (eds) *Practising Virtue: Inside International Arbitration* (2016) 330 – 346.

[50] N Elofsson, 'Immediate reimbursement of substituted advance on costs in international commercial arbitration' (2017) 33 (3) *Arbitration International* 415 – 425; A

essential principle of both *ad hoc* and institutional arbitration,[51] that once a party agrees to arbitrate and not litigate,[52] it agrees to pay its equal share of the deposit of the arbitration costs, which are applied against the future fees and costs incurred during the course of the proceedings.[53]

Some professional associations recommend that in the absence of any agreement or schedule of fees in the arbitration proceedings that its members engaged as arbitrators, charge such sums as may be fair and reasonable in all circumstances based on the applicable professional association general tariff of fees.[54]

3. What is an Award?

Arbitrators do not deliver judgments, they render awards.[55] There is no universally accepted definition of the term 'award'.[56] The definition as to what

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Durrani, U Singh & T Williams, 'The Advance on Costs in Arbitration: Reimbursement of Substituted Payment' (2021) 38 (3) *Journal of International Arbitration* 345 – 358.

[51] GB Born, *International Commercial Arbitration in the United States* (1994) 95; WL Craig, WW Park & J Paulsson, *International Chamber of Commerce Arbitration* (2000) 263; Y Derains & EA Schwartz, *A Guide to the ICC Rules of Arbitration* (2005) 343.

[52] N Darwazeh & S Greenberg, 'No One's Credit Is As Good As Cash: Awards and Orders for the Payment of the ICC Advance on Costs' (2014) 31 (5) *Journal of International Arbitration* 557, 557.

[53] The Malaysian Court of Appeal in *JKP Sdn Bhd v Anas Construction Sdn Bhd* [2023] 2 AMR 443 (HC); [2022] MLJU 3058 (HC) held that a failure by one party to the arbitration to pay a deposit for the arbitration cost would not render the arbitration agreement inoperative. Under the American Arbitration Association Rules (AAA), a failure by a party to an advance of the arbitration costs is deemed a breach of agreement to arbitrate and a waiver, consequently the other party can proceed in litigation. See generally, *Sink v Aden Enterprises, Inc*, 325 F. 3d 1197 (9th Cir. 2003); *Pre-Paid Legal Services, Inc v Cahill*, 786 F. 3d 1287 (10th Cir. 2015); *Roach v BM Motoring, LLC*, 2017 WL 931430 (N.J. Mar. 9, 2017).

[54] *Scapelox Trading (Pvt) Ltd v Mashangwa Family Trust & Others* 2014 (1) ZLR 229 (H).

[55] D Kanokanga, *Commercial Arbitration in Zimbabwe* (2020) 155.

[56] For a detailed understanding on the definition of the term 'award' see J Kirby, 'What is an Award, Anyway?' (2014) 31 (4) *Journal of International Arbitration* 475 – 484; F Bachand, 'The Legal Nature of Arbitral Awards' in S Kröll, AK Bjorklund & F Ferrari

constitutes an 'award' varies from country to country.[57] Section 3(1) of the Act defines an arbitral award as 'any award of an arbitral tribunal and includes an interim arbitral award.'[58]

One commentator analyzed the Kenyan definition of the term 'award' and correctly noted the following:

> *"Section 3(1) of the 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 us 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.*
>
> *In 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 UNCITRAL Commission were able to come up with a singular definition."*[59]

Neither the Model Law nor the New York Convention offer a definition of this important term.[60] This, however, does not mean there does not exist some consistency as to the meaning of the term 'award'.[61] It is widely accepted that, to be an award, the decision must be one that is be rendered by an arbitral tribunal which brings the parties dispute conclusively to an end.[62]

(eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (2023) 1462 - 1485.

[57] P Sanders, *Quo Vadis Arbitration??" Sixty Years of Arbitration Practice* (1999) 140; A Jan van den Berg, *The New York Arbitration Convention of 1958* (1981) 44; GB Born, *International Commercial Arbitration* (2009) 2348 – 2349.

[58] Section 3(1) of the Arbitration Act, 1995.

[59] Kanokanga (n 48) 320 – 321.

[60] HM Holtzmann & J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 154.

[61] I Bantekas, 'Article 31: Form and Contents of Award' in I Bantekas et al (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) 807.

[62] *Shell Egypt West Manzala GmbH v Dana Gas Egypt Limited* [2009] EWHC 2097 (Comm).

An award is 'final'[63] if it deals with all the matters submitted to the arbitrator or all such disputes falling within the arbitrator's terms of reference.[64] There is a partial exception in the case of an interim award.[65] This award, does not deal with all the matters referred to the arbitrator, but it deals only with the matters which the parties would have agreed to be subject to the interim award, and is final and binding in respect of those matters.[66]

An award can either be international or domestic.[67] Procedural decisions, procedural orders and peremptory orders[68] which in essence relate to the conduct of arbitration proceedings are not recognized as arbitral awards.[69] Likewise, a decision or a ruling (as opposed to an award) by an arbitral tribunal with regards to questions of jurisdiction is not considered an award.[70] It is merely a 'decision' or a 'ruling.'[71]

In order to cater to different facts and circumstances, 'awards' can bear different names such as: Consent Awards (or an Award on Agreed Terms),[72] Interim Awards (or Interlocutory Award),[73] Partial Awards,[74] Additional Awards[75] or

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[63] The ordinary meaning of the term 'final' includes conclusive, decisive, completed, that which makes an end. see, *Gilbey Distillers & Wintners (Pty) Ltd & Others v Marris NO & Another* 1991 (1) SA 648 (A).

[64] *Essex County Council v Premier Recycling Ltd* [2006] EWHC 3594.

[65] *Walenn Holdings (Pvt) Ltd v Lloyd N.O & Another* 1996 (2) ZLR 383 (H) 398F – G.

[66] Ibid.

[67] *Jambo Biscuits (K) Ltd & 3 Others v Jambo East Africa Ltd & 3 Others* [2021] eKLR.

[68] 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.

[69] JK McEwan & LB Herbst, *Commercial Arbitration in Canada* (2009) 9:30:10.

[70] For the meaning of a procedural award, see *Republic of India v Vedanta Resources plc* [2021] SGCA 50.

[71] *Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party)* [2021] eKLR; *RioZim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another* SC 30-22.

[72] Section 31 of the Arbitration Act, 1995.

[73] Section 18 of the Arbitration Act, 1995.

[74] Section 32(6) of the Arbitration Act, 1995.

[75] Section 34(5) of the Arbitration Act, 1995.

Final Awards. It is not the scope of this article to deal with the different types of awards, but only to deal with the awards referred to in section 32B of the Act.

4. What are the Costs and Expenses of an Arbitration?

The question of costs is not explicitly dealt with in the Model Law.[76] The Model Law was designed as a 'legislative template for arbitration statutes'.[77] The drafters of the Model Law agreed that the issue concerning the question of the costs and expenses of arbitration be best dealt with by the domestic law of those countries adopting the Model Law.[78]

In adopting the Model Law in Kenya, the legislature saw it desirable to include an express provision in terms of section 32B of the Act.[79] This provision sets forth an exclusive list of items that make up the costs and expenses of the arbitration, which an arbitral tribunal must fix in an 'award', or an 'additional award' in the absence of an agreement between the parties.[80]

It is unusual that an award of costs, will be made in an 'interim' or 'partial award'.[81] An arbitrator is *functus officio* once an award has been made.[82] The rule that the issuance of an award terminates an arbitrator's power is not so rigid, as section 32(B) as read with section 34(4) of the Act, allow an arbitral tribunal to make an additional award as to claims presented or falling within the terms of submission, but having been omitted from the award.[83]

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[76] *Casata Ltd* (n 27) para 124.
[77] Bantekas et al (n 61) xxxv.
[78] P Sanders, *The Work on UNCITRAL on Arbitration and Conciliation* (2004) 146.
[79] Section 32B of the Arbitration Act, 1995.
[80] Section 32B of the Arbitration Act, 1995.
[81] LW Duthie, 'The Award' in G Hanessian & LW Newman (eds) *International Arbitration Checklists* (2009) 168.
[82] *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 9.
[83] For more information on how the courts have dealt with issues under section 34 of the Arbitration Act, 1995 see *Albatross Aviation Ltd & Another v Phoenix of East Africa Assurance Company Ltd* [2015] eKLR; *Kenya National Highways Authority v Pride Enterprises Limited & another* [2020] eKLR.

This is an exception to the *functus officio* principle which binds a tribunal upon the delivery of a final award,[84] if the arbitral tribunal considers the request to be justified to make an additional award.[85] The term 'costs of arbitration' provided in section 32B of the Act simply refers to: (a) the legal[86] and other expenses of the parties,[87] (b) the fees and expenses of the arbitral tribunal[88] and (c) any other expenses related to the arbitration, are determined and allocated by the arbitral tribunal in its award,[89] or in any additional award.[90]

4.1. Arbitration fees and expenses

Arbitrators and parties to an arbitration can agree on the applicable costs and expenses of the arbitration[91] which include but are not limited to disbursements[92] such as administrative or filing fees,[93] related and or ancillary expenses to the arbitration such as hiring rooms for hearings and meetings;[94]

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[84] *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 para 347; JSJ We, 'Case Note: The Power to Remit or Grant Costs after a Setting Aside? CBX v CBZ [2022] 1 SLR 47' (2022) 34 *Singapore Academy of Law Journal* 703 – 715.

[85] Section 34(4) of the Arbitration Act, 1995.

[86] Rule 31 (1) of Nairobi Centre for International Arbitration (Arbitration) Rules 2015 provides that:

> *"The costs of the arbitration shall, except the legal or other costs incurred by the parties, be determined by the Centre in accordance with the First Schedule."*

[87] Section 32B(1) of the Arbitration Act 1995.

[88] Section 32B(1) of the Arbitration Act 1995.

[89] Section 32B(1) of the Arbitration Act, 1995.

[90] Section 32B(1) of the Arbitration Act, 1995.

[91] For detailed information on the costs and legal fees in arbitration see, CL Lim, J Ho & M Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (2021) 513 – 528.

[92] There is no statutory definition of the term 'disbursements'. However, disbursements refer to expenses actually incurred and paid out. *Ong Jane Rebecca v Lim Lie Hoa & Others* [2008] 3 SLR (R) 189.

[93] Rule 37(3)(a) of the East African Court of Justice Arbitration Rules, 2012. For more information of the East African Court of Justice, see generally, RF Oppong, 'The East African Court of Justice, Enforcement of Foreign Arbitration Awards and the East African Community Integration Process' (2019) 63 (1) *Journal of African Law* 1 – 23.

[94] M Scherer et al, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (2015) 317.

and those attached to any administrative services related to arbitration, such as transcription, interpretation and translation.[95]

There are two general forms of arbitration: *ad hoc* arbitration and institutional arbitration.[96] *Ad hoc* arbitration involves the resolution of disputes by the parties without the supervision of any designated institution such as the Nairobi Centre for International Arbitration (NCIA) and often without the designation of any established set of arbitral rules.[97]

In *ad hoc* arbitration, the parties will generally 'decide on the procedure to be followed in the arbitration and the may construct their own rules'[98] or adopt the procedural rules of a recognized arbitration institution. In contrast to *ad hoc* arbitration,[99] institutional arbitration[100] is conducted by arbitration institutions

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[95] P Kanokanga, *Law of Costs in Zimbabwe: Text, Cases & Materials* (2021) 364.

[96] For more information on the different types of arbitration, see generally, M Pryles, 'Institutional International Arbitrations' (1991) 10 (3) *The Arbitrator* 127 – 145; UG Schroeter, 'Ad Hoc or Institutional Arbitration - A Clear-Cut Distinction? A Closer Look at Borderline Cases' (2017) 10 (2) *Contemporary Asian Arbitration Journal* 141 – 200; H Samayawardhena, 'Ad Hoc or Institutional Arbitration? Choose Wisely' (2023) 3 (1) *KDU Law Journal* 31 – 42.

[97] M Shokrani, 'Institutional Arbitration versus ad hoc arbitration: Chinese and Iranian perspectives' (2018) 3 (4) *Journal of Advanced Research in Social Sciences and Humanities* 148 – 153.

[98] M Pryles (n 96) 130.

[99] For more information on institutional arbitration, see NG Ziadé, 'Reflections on the Role of Institutional Arbitration between the Present and the Future' (2009) 25 (3) *Arbitration International* 427 – 430; S Namrata & N Gandhi, 'Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries" (2011) 6 (4) *Journal of International Commercial Law and Technology* 232 – 242; B Srinivasan, 'Appointment of Arbitrators by the Designate under the Arbitration and Conciliation Act: A Critique' (2014) 49 (18) *Economic and Political Weekly* 59 – 66.

[100] For more information on ad hoc arbitration, see G Blanke, 'Institutional versus Ad Hoc Arbitration: A European Perspective' (2008) 9 *ERA Forum* 275 – 282; J Kirby, 'Insigma Technology Co. Ltd v. Alstom Technology Ltd: SIAC Can Administer Cases under the ICC Rules?!?' (2009) 3 (1) *Arbitration International* 319 – 328; KP Berger, 'Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'' (2018) 34 (4) *Arbitration International* 473 – 493.

which generally supervise the arbitral proceedings and offer the parties professional services in the conduct of the arbitration under their arbitration rules, which are often amended from time to time to reflect the current changes in practice.[101]

In *ad hoc* arbitration, the costs of the tribunal i.e., the tribunal's fees are determined by the arbitrators themselves, whilst in institutional arbitration, the tribunals fees are generally determined by the arbitrators and / or set by the arbitral institution, depending on the applicable arbitration rules.[102] There are essentially three different types of methods which are used to fix and calculate the costs and expenses of arbitration, namely, (a) ad volerem,[103] (b) fixed fees, and (c) time spent.[104]

Leading commentators Redfern and Hunter defined the different methods in the following manner:

> *"At least three methods are in current use. First, the ad volerem method, where the fee is calculated as a portion of the amounts in dispute; secondly, the "time spent" method, which establishes an hourly or daily rate for work done by an arbitrator on the case; and thirdly, the "fixed fee" method, where the sum payable to the arbitrator by way of remuneration is fixed at the outset without direct reference either to the amounts in dispute or to the time which the arbitrator spends on the case."*[105]

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[101] T Zhang, 'Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System' (2013) 46 (2) *Cornell International Law Journal* 363, 364.

[102] E Gaillard & J Savage (eds) *Fouchard, Gaillard, Goldman on international commercial arbitration* (1999) 625.

[103] AD Sharma & SV Mathangi, 'Introduction of Ad-Volerem Charges in Indian Arbitration Procedure: The New Road Ahead? (2023) 4 *Bennett Journal of Legal Studies* 28 – 38.

[104] T Cook & AI Garcia, *International Intellectual Property Arbitration* (2010) 165.

[105] A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (2004) 228.

Under the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules (CIArb Kenya Rules) the usual costs and expenses of these professionals in arbitration proceedings are calculated by reference to the work done in connection with the proceedings,[106] and such costs and expenses are charged at rates appropriate to the particular circumstances of the case, including the size, complexity, and any special qualifications of the arbitrator.[107]

The rates for arbitrators conducting arbitration under the auspices of the CIArb Kenya Rules are set by the arbitral tribunal in accordance with the CIArb Kenya guidelines and communicated to the parties at the commencement of the reference.[108] Whereas the fees and costs of arbitration, including the costs of the arbitrators fees and administrative costs under the Nairobi Centre for International Arbitration (Arbitration) Rules 2015 (NCIA Rules) are fixed in a schedule[109] which allows parties to know in advance on what to budget for concerning the arbitration.[110]

4.2. Legal and other expenses of the parties

Section 32B of the Act empowers an arbitrator to fix and allocate the costs and expense of an arbitration. It defines the costs and expenses of arbitration as also including the legal and other expenses of the parties.[111] Nowadays, commercial

[106] The Chartered Institute of Arbitrators (Kenya Branch) maintains a register of qualified arbitrators, adjudicators, dispute adjudication board members, mediators and expert determiners of various grades, professions and areas of specialization. see, Chartered Institute of Arbitrators (Kenya Branch) Remuneration Schedule, 2018.
[107] Rule 118 of Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020.
[108] Rule 118 of Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020.
[109] Part 3 and Part 4 of the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.
[110] M Buhler, 'Costs in ICC arbitration: A practitioner's view' (1992) (3) *American Review of International Arbitration* 116, 151 – 152.
[111] Section 32B of the Arbitration Act, 1995.

parties are involved in complex arbitration disputes,[112] such that, the use of legal practitioners is not only necessary but essential.[113]

Legal commentators, Kanokanga and Monyei succinctly illustrate the importance of legal representation as follows:

> *"The right to be 'legally represented' before a tribunal other than a court of law is beyond question. The denial of legal representation constitutes a gross infringement on one's fundamental right to be afforded a fair hearing.*
> *Consequently, the right to legal representation is very much a matter of considerable importance, particularly in the interests of justice and in the administration of justice, which every person enjoys the fundamental right to be legally represented.*
> *Legal practitioners are professionals who are trained in advocacy and law, and are also admitted to practice law. Advocacy is not a science. It is an art. Legal practitioners are also known by different names which include 'counsel', 'advocate', 'barristers', 'lawyer' or 'solicitor'. Legal practitioners are persons who are conversant with the law and the various rules of the courts, the rules of evidence and are often masters at cross - examination.*
> *While each person is presumed to know the law, not every has the ability to advocate on behalf of others. Thus, legal practitioners as trained professionals are equipped with the requisite knowledge, skill and temperament to conduct legal proceedings. Put differently, legal practitioners are specially trained for the task."*[114]

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[112] B Hanotiau, 'Complex – Multicontract – Multi-party – Arbitrations' (1998) 14 (1) *Arbitration International* 369 – 394; JG Frick, *Arbitration and Complex International Contracts* (Kluwer Law International, 2001); R Holt, 'Innovations for Complex Arbitration' (2015) 34 (1) *The Arbitrator & Mediator* 1 – 7.

[113] DD Caron & LM Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2013) 891.

[114] P Kanokanga & OE Monyei, 'Restricted rights of party representation and assistance in arbitration proceedings in the Federation of the Republic of Nigeria: Lessons from Zimbabwe' (2023) 18 (1) *Journal of Arbitration* 62, 64 – 65.

Arbitration has emerged as a popular and attractive mode for the resolution of complex commercial disputes.[115] It is no surprise that, parties to commercial disputes, nowadays generally spend more on 'legal representation' than in other contexts.[116] The phrase 'legal and other expenses' as envisaged in section 32B of the Act is a broad term which also includes the 'representation and assistance' non – legal assistance, but other professional services by non-advocates.[117] Leading commentators Caron and Caplan observed that:

> *"The expenses associated with a party's "legal and other costs" incurred "in relation to the arbitration" are included in the definition of the costs of arbitration. The phrase "legal and other costs" is broad, covering the cost not only of legal representation, but also of non-legal assistance, such as expert advice on the calculation of damages or scientific or other technical matters."*[118]

In the event that there is no contrary agreement by the parties to the arbitration, section 32B of the Act is instructive, that such costs and the expenses of an arbitration, are to be fixed and allocated by the arbitral tribunal.[119] It is appropriate at this juncture to note that, an award of costs are not intended to be a compensation for a risk to which one has been exposed,[120] neither is an award of costs designed to be a punishment or a deterrent.[121]

Under the aegis of the CIArb Kenya Rules in terms of which most arbitration matters arise, the costs of arbitration are borne by the unsuccessful party or

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[115] *CVV & Others v CWB* [2023] SGCA(I) 9 para 1.
[116] *B2C2 Ltd v Quoine Pte Ltd* [2019] 5 SLR 28 para 14; *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2022] SGHC(I) 6 para 66.
[117] J Castello, 'UNCITRAL Rules' in F Weigand (ed) *Practitioner's Handbook on International Commercial Arbitration* (2009) 1525.
[118] Caron & Caplan (n 113) 845.
[119] Section 32B of the Arbitration Act, 1995.
[120] *Payen Components South Africa Ltd v Bovic Gaskets CC & Others* 1999 (2) SA 409 (W) 417D.
[121] *Brampton Investment Ltd v Attorney General & Others* [2013] eKLR; *Martha Wangari Karua v Independent Electoral & Boundaries Commission & Others* [2018] eKLR.

parties.[122] This accords with the internationally accepted rule that, unless otherwise agreed, the costs follow the event[123] i.e., the loser pays.[124]

Prior to the enactment of the Act in 1995, which Act repealed and replaced the Arbitration Act 1968, a Taxing Officer was empowered to tax advocates costs arising out of or in connection with an arbitration as if the arbitration proceedings were proceedings in the High Court, and the court had discretion to make declarations and orders accordingly.[125] Had the legislature sought to maintain the status quo that a Taxing Officer in the High Court could continue tax costs arising from arbitration in terms of the Act it was free to do so. But it did not! It is, thus, within the competence and province of an arbitral tribunal to decide on the submissions on costs, and to evaluate and analyse the submissions, together with any authorities on the law and to arrive and their own reasons for such decision and to fix and allocate the costs in its award.[126]

Naturally the arbitral tribunal will determine and apportion the costs in its award,[127] or any additional award,[128] after assessing the disputing parties' written submission of statement on costs.[129] The process entails an inquiry by the arbitrator on whether the claimed costs were reasonable incurred and are reasonable in amount.[130] Usually, the memorial or statement on the issue of

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[122] Rule 123 of Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020.
[123] For more information on the costs follow the event doctrine, see *Jasbir Singh Rai & Others v Tarlochan Rai & Others* [2014] eKLR; *Cecilia Karuru Nganga v Barclays Bank & Another* [2016] eKLR; *Haraf Traders Limited v Narok County Government* [2022] eKLR.
[124] P Bernardini, 'International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences' in DD Caron et al (eds), *Practising Virtue: Inside International Arbitration* (2015) 65.
[125] Section 19(5) of the Arbitration Act, 1968.
[126] *Agrimex Ltd v Tradigrain SA & Others* [2003] 2 Lloyd's Rep 537; *Kenfit Ltd v Consolata Fathers* [2015] eKLR.
[127] Section 32B(1) of the Arbitration Act 1995.
[128] Section 32B(1) of the Arbitration Act 1995.
[129] Caron & Caplan (n 113) 842.
[130] *Lin Jian Wei & Another v Lim Eng Hock Peter* [2011] 3 SLR 1052; *Yusuf Mtengerenji v Kamanga & United General Insurance* Civil Cause No. 537 of 2013; *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10.

costs, includes information on the nature and the description of the service rendered,[131] the name of the legal representative(s) and the charge(s) and expenses. Normally this will be dated and itemized; that is specified and charged in separate columns stating precisely what service was performed; that is providing a description of the tasks, name(s) of the person(s) performing same, the duration of the tasks well as the amount charged[132] in chronological order.[133]

5. What is public policy?

An arbitral award, be it an interim or final award may be set aside if it is contrary to public policy.[134] The term 'public policy' as it appears in section 35 and 37 of the Act is not defined.[135] It is an elusive concept which is often invoked by a losing party in order to reopen the merits of a case already determined by the arbitrators.[136] The term refers to an award which is belligerent and detrimental to the public. An award which is intolerable and one which violates the basic norms of society.[137] Section 35 and 37 of the Act permits but does not require a court to set aside an arbitral award. The courts retain a discretion to set aside arbitral awards.[138]

The *locus classicus* on public policy is *Christ for All Nations v Appollo Insurance Co Ltd*, where it was held that:

> *"Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being*

[131] *Council of the Queensland Law Society v Roche* [2004] 2 Qd. R 574.
[132] Kanokanga (n 95) 242.
[133] Ibid 246.
[134] *Walenn Holdings (Pvt) Ltd (Pvt) Ltd* (n 65); *City of Harare v Univern Enterprises (Pvt) Ltd t/a South Region Trading Co* HH 346; *ZESA Holdings (Pvt) Ltd v Clovegate Elevator Company (Pvt) Ltd & Another* SC 32-23.
[135] *Capture Solutions Ltd v Nairobi City Water and Sewerage Company Ltd* [2020] eKLR.
[136] *BCB Holdings Ltd v The Belize Bank Ltd v The Attorney General* [2013] CCJ 5 (AJ) para 25.
[137] *Rwama Farmers Co-Operative Society Ltd v Thika Coffee Mills Ltd* [2012] eKLR.
[138] *Dajen (Pvt) Ltd v Durco (Pvt) Ltd* 1998 (2) ZLR 255 (S).

> *inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."*[139]

Father and son, Davison and Prince Kanokanga observed that:

> *"The concept of public policy is adaptive. Its nature can be likened to that of a chameleon, because of its ever-changing nature. The public policy defence is therefore a safety value concerned with safeguarding the state's most essential and fundamental interests and principles, which must be applied in all forms.*
> *The concept of public policy in Zimbabwe covers fundamental principles of law and justice in substantive law and procedural law and comprises a series of rules or principles concerning a variety of domains, having a varying strength of intensity. These rules or principles form or express a kind of 'hard core' of legal or moral values, the evidence of which can be found in the total body of the Constitution, statutory law and stare decisis as it reflects the local sense of justice and public welfare.*
> *Therefore, any act which is contrary to the interests of the community is, in general, construed as an act contrary to public policy. Such acts include those which are contrary to the common law and instances which are contrary to the moral sense of the community."*[140]

Under section 35 and 37 of the Act,[141] the courts do not exercise appellate or review powers.[142] This accords with the principle of judicial minimal curial

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[139] [2002] 2 EA 366. This definition of public policy has been applied consistently by the courts in a plethora of cases, such as *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR; *Castle Investments Company Ltd v Board of Governors Our Lady of Mercy Girls Secondary School* [2019] eKLR; *Dartstar Ltd v Kilifi Boatyard Ltd* [2022] eKLR.

[140] Kanokanga & Kanokanga (n 28) 394.

[141] *SGS Kenya Ltd v Tracer Ltd* [2020] eKLR is instructive on the meaning of recognition and enforcement of awards and the grounds for refusal of recognition or enforcement in Kenya.

[142] See generally, V Sebayiga, 'The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in Nyutu Agrovet v Airtel

intervention.[143] An award of an arbitral tribunal will not be set aside by the courts merely on the grounds of public policy because the reasoning or conclusion of an arbitrator is wrong in fact or in law.[144]

An arbitrator has the right to be wrong on the merits of the case.[145] In arbitral proceedings, parties have the ability and advantage to nominate and appoint an arbitral tribunal best suited to the case at hand, unlike in civil proceedings before the state courts, wherein a judge or a panel of judges are appointed to determine the parties cause.[146] The presumption is that an arbitrator is appointed by the parties (or a third party, including an arbitration institution or court) to determine a dispute based on certain qualities or information in terms of which the tribunal would be best placed to know and resolve.[147] Consequently parties who opt for arbitration instead of litigation, as the agreed dispute resolution mechanism bind themselves by agreement to honour the arbitrator's award.[148]

Networks Limited (2019) eKLR' (2021) 6 (1) *Strathmore Law Review* 137 – 166; OJ Alela, 'An appraisal of the right of appeal of a High Court's decision to set aside an arbitration award' (2022) 2 (1) *NCIA Journal* 101 – 117, M Georgiadis, 'Second bite of the cherry: appeals against arbitral awards in Kenya' (2022) 10 (1) *Alternative Dispute Resolution* 225 – 238.

[143] *Easy Properties Ltd & Another v Express Connections Ltd & Another* [2021] KEHC 39 (KLR).

[144] *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) 466E – H.

[145] *Mahan Ltd v Villa Care Ltd* [2019] eKLR.

[146] JDM Lew, LA Mistelis & SM Kroll, *Comparative International Commercial Arbitration* (2003) 232.

[147] B Legum & C Motin, 'The Essential Qualities for an Arbitrator' (2023) 38 (2) *ICSID Review – Foreign Investment Law Journal* 441 – 452.

[148] *Kenya Oil Co Ltd & Another v Kenya Pipeline Co* [2014] eKLR.

On this basis, not every fault or bona fide mistake of an arbitrator, be it of law or fact,[149] falls with the ambit of the expression contrary to public policy.[150] The intention of the legislature in this regard is clear, that parties who opt for arbitration should abide by the decision of the arbitrator as the courts in terms of the Act are restricted in their involvement in arbitration proceedings.[151]

The bar for invoking the public policy exception in terms of section 35 of 37 of the Act is a high one that is met only infrequently and only in clear cases.[152] An arbitral award would be contrary to public policy, if it concerns public good and public interest[153] and promotes illegalities.[154]

It would be inconsistent with the public policy of Kenya if an arbitral award is immoral and runs counter to the entrenched socio-cultural,[155] political and economic values of the people in Kenya.[156] An arbitral award which violates the basis fundamental principles of law and justice[157] in substantive law and procedure law[158] which is regarded by either the legislature and / or the courts as being fundamental to the society is in general, construed as an being inconsistent with the public policy of Kenya.[159] To protect the reverential

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[149] E Finsen, 'The case for Arbitration' (1988) *De Rebus* 636 at 637 observed that:

> *"Experienced arbitrators usually have a fairly good working knowledge of the law, particularly as it affects their particular professional fields and, where more abstruse legal concepts are involved, are generally sufficiently intelligent to be capable of following a carefully presented argument."*

[150] *Pioneer Transport (Pvt) Ltd v Delta Corporation & Another* 2012 (1) ZLR 58 (H); *Nyutu Agrovet Ltd v Airtel Network Ltd* [2015] eKLR.

[151] *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at para 52.

[152] *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10.

[153] *Evangelical Mission for Africa & Another v Kimani Gachuhi & Another* [2015] eKLR.

[154] *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR; *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC).

[155] *Open Joint Stock Zarubezhstroy Technology v Gibb Africa Ltd* [2017] eKLR.

[156] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

[157] *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H).

[158] Holtzmann & Neuhaus (n 60) 914.

[159] *Glencore Grain Ltd v TSS Grain Millers* [2002] eKLR.

institution of arbitration this, pro-arbitration approach does not, however mean, that the courts should adopt or turn a blind eye approach in setting aside applications.[160]

In order to succeed to set aside an award and or refuse enforcement and recognition, parties must rely on the exclusive grounds set out in section 35 and 37 of the Act.[161] For this reason, an award must be substantially incontestable, such that it does not depend upon idiosyncratic inferences of a few judicial minds.[162] It is not every departure from a binding precedent that amounts to a violation of public policy.[163] It is incumbent on a party alleging that an award is inconsistent with public policy to show that the award is indeed plainly improper and unconscionable or unduly harsh and oppressive.[164] For the avoidance of doubt and without limiting the generality of the term public policy,[165] an award is contrary to the public policy of Kenya if in the making of the award was induced or effected by fraud[166] or a breach of the rules of natural justice occurred in connection with the making of the award.[167]

In Kenya as with other country the defence of public policy is construed very restrictively so that the objective of finality[168] to arbitration is achieved.[169] A party that seeks to challenge an award on the ground of public policy under section 35 or section 37 of the Act cannot generalize the public policy argument.

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[160] We (n 84) 703 – 704.
[161] Ibid.
[162] *Olsen v Standaloff* 1983 (1) ZLR 67 (S) 1983 (2) SA 668 (ZSC) 673G.
[163] *George Wanjohi v Steven Kariuki & Another* [2014] eKLR.
[164] *Zimbabwe National Water Authority v Kadoma Municipality* 2013 (1) ZLR 64 (H).
[165] AA Asouzu, *International commercial arbitration and African states: Practice, participation and institutional development* (2001) 199.
[166] For a detailed account of fraud in connection with arbitration proceedings, see *BVU v BVX* [2019] SGHC 69; *Bloomberry Resorts and Hotels Inc & Another v Global Gaming Philippines LLC & Another* [2021] SGCA 94.
[167] *Giya v Ribi Tiger Trading* 2014 (1) ZLR 103 (H) 107G.
[168] *Micro-House Technologies Ltd v Co-operative College of Kenya* [2017] eKLR.
[169] *Husaihwevhu & Others v UZ-USF Collaborative Research Programme 2010* (2) ZLR 111 (H) 116G – 117B.

It is incumbent upon a party that invokes the public policy exception to: (a) identify the public policy which the award allegedly breaches, (b) show how it was breached, (c) illustrate the manner in which the alleged breach was connected with the making of the award; and (d) how the breach prejudiced the applicant's rights.[170]

6. Whether a party to an arbitration can set aside an award of costs?

The parallels between arbitration and court proceedings as dispute resolution mechanisms are well – trodden and have been highlighted herein. The twin hallmarks of arbitration are that it is based on consent (an agreement between parties who consent to a process by which the decision of an arbitrator is binding on them).[171] It is private and confidential nature i.e., independent of statutorily established adjudicatory institutions,[172] in terms of which the parties waiver their rights *pro tanto* to a public hearing.[173] When parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have their dispute(s) determined by a court.[174] They are merely seeking to have the dispute(s) determined by an arbitrator of their own choice.[175]

By voluntarily submitting to arbitration,[176] parties consent to bear the risk; for better or worse, to be bound by the decision of their appointed arbitrator, knowing that the award of this experience (honourable, respectable and multi-disciplined) professional,[177] may have uncorrectable legal or factual errors,[178]

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[170] *Mall Developments Ltd v Postal Corporation of Kenta* [2014] eKLR.
[171] *Lufano Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) para 196.
[172] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).
[173] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
[174] *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (South Africa) (Pty) Ltd & Another* 2002 (4) SA 661 (SCA) para 24 – 25.
[175] *Lufano Mphaphuli & Associates (Pty) Ltd* (n 171) para 201.
[176] *Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti* [2020] eKLR.
[177] HF Roth, 'Choosing an Arbitration Panel' (1979) 6 (1) *Litigation* 13 – 15.
[178] WW Park, 'Arbitrators and Accuracy' (2010) 1 (1) *Journal of International Dispute Settlement* 25 – 53.

which ordinarily are capable of being removed by an appellate process in the courts, in return for a cost effective, expeditious and conclusive resolution to their dispute by means of arbitration with all its well-known advantages and drawbacks.[179]

The issues determined by the tribunal, become *lis pendens* and *res judicata*[180] and neither party may reopen those issues in a refresh arbitration or court action.[181] In any case, the question concerning public policy considerations in arbitration, in respect of the costs of arbitration is not new.[182] Neither is the legal threshold with regards to the setting aside of arbitral awards.[183]

Unless the parties agree otherwise, an arbitrator has a responsibility in terms of section 32B of the Act to fix and allocate the costs of arbitration in its award.[184] What this means is means is that the parties have the freedom to agree on the issue of costs. Failing that agreement an arbitrator is obliged in terms of section 32B of the Act to fix and allocate the costs.[185] The four cornerstones of the law of contract are the freedom to contract,[186] the sanctity of contract, good faith and

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[179] *Parsons Whittemore Overseas Co Inc v Societe Generale de l'Industries du Paper (RAKTA)* 508 F.2d 969 (2d Cir. 1974); *McKelvey v Abrahams & Another* 1989 (2) ZLR 251 (SC) 264C-D.

[180] C Oetiker, 'The Principle of Lis Pendes in International Arbitration: The Swiss Decision in Fomento v. Colon' (2002) 18 (2) *Arbitration International* 137 – 145; A Kalantzi, 'Parallel Arbitral Proceedings: An Analysis of the Issue of Parallel Arbitrations in International Commercial Arbitration within the European Legal Space' (2023) 3 (1) *The Italian Review of International and Comparative Law* 1 – 27.

[181] *Ropa v Reosmart Investments (Pvt) Ltd & Another* 2006 (2) ZLR 283 (S) 286B – C.

[182] HSU Locknie, 'Public policy considerations in international arbitration: Costs and other issues – a view from Singapore' (2009) 26 (1) *Journal of International Arbitration* 101 – 131.

[183] *Patrick Muturi v Kenindia Assurance Company Ltd* [2016] eKLR; K Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (2021) 9 (2) *Alternative Dispute Resolution* 21 – 43.

[184] Section 32B of the Arbitration Act, 1995.

[185] Section 32B of the Arbitration Act, 1995.

[186] *Printing & Numerical Registering Company v Sampson* [1875] LR 19 Eq 462.

privity of contract, which are the foundation principles or the 'public policy' considerations upon which contracts are based.[187]

Section 32B of the Act is a non – mandatory provision of the Act in terms of which the parties may agree on the determination of the costs and expenses arising out of the arbitration.[188] It is very common, if not the norm in Kenya for arbitration to be conducted under the auspices of the CIArb Kenya Branch. In terms of the CIArb Kenya Rules the costs of arbitration are borne by the unsuccessful party or parties.[189] This accords with the internationally accepted rule in arbitration, that, unless otherwise agreed, the costs follow the event[190] i.e., the loser pays.[191]

If an agreement under which the arbitration is conducted is conducted incorporates the rules of another arbitral institution, then the agreed upon rules would equally apply with regards to the costs of the arbitration. The courts will not descend into the arena of apportionment of costs, as the parties usually vest the tribunal with the authority to fix and allocate the costs in the award.[192] It is a cardinal principle of law, that contracts entered into by parties out of their free will are sacrosanct.

As a matter of public policy, the courts will not interfere with lawful contracts but will give effect to the parties' wishes.[193] There is no public interest regarding the legal costs of parties to arbitration.[194] Such matters are private and

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[187] *Olsen* (162) 668.
[188] Section 32B of the Arbitration Act, 1995.
[189] Rule 123 of Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020.
[190] *Jasbir Singh Rai & Others* (n 123).
[191] Bernardini (n 124) 65.
[192] *Golden Homes (Management) Ltd v Mohammed Fakruddinn Abdullai & Another; Golden Homes Ltd [Interested Party]* [2019] eKLR; *Match Electricals Company Ltd v Libyan Arab African Investments Company Ltd & Another* [2021] eKLR
[193] *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H).
[194] *VV & Another v VW* [2008] 2 SLR(R) 929 para 31.

confidential in nature such that the awards do not set any precedent nor do they bind anyone apart from the parties to the arbitration.[195]

In terms of section 32B of the Act, an arbitrator has the exclusive jurisdiction to determine the costs arising from the arbitration.[196] Where an award does not specify otherwise, each party is responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal[197] and any other expenses related to the arbitration.[198] This includes the costs and expenses of the tribunal, namely, (a) ad volerem,[199] (b) fixed fees, and (c) time spent.[200]

The courts will not in general, set aside an award of costs concerning an arbitrator's fees.[201] The tripartite contract established by an arbitrator and the parties upon his or her acceptance of the appointment, entitles them to remuneration for their services.[202]

Where the arbitration costs are less than the deposits made by the parties, an arbitrator will generally refund the costs in proportion as to the amounts as the parties may agree,[203] or failing agreement, in the same proportions as the deposits were made by the parties to the arbitrator or to the arbitration institution.[204]

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[195] Ibid.
[196] Ibid.
[197] Section 32(B)(2) of the Arbitration Act, 1995.
[198] *Transworld Safaris Ltd v Eagle Aviation Ltd & 3 Others* [2012] eKLR.
[199] Sharma & Mathangi (n 103) 28 – 38.
[200] Cook & Garcia (n 104) 165.
[201] *Castle Investments Company Ltd* (n 139).
[202] *Clear Water Industries Ltd v Electrowatts Ltd & Another* [2018] eKLR.
[203] Rule 31(10) of Nairobi Centre for International Arbitration (Arbitration) Rules 2015.
[204] *Mistry Jadva Parbat & Company Ltd v Grain Bulk Handlers Ltd* [2016] eKLR; *Teejay Estates Ltd v Vihar Construction Ltd* [2022] KEHC 121 (KLR).

An arbitral tribunal has the right to withhold the delivery of an award[205] until he or she receives full payment of their fees and expenses arising from the arbitration.[206] In the event that a tribunal withholds the delivery of an award, any party to the arbitration may make payment to the court with regards to the fees and expenses 'requested' by the tribunal, and apply for an order for directions with regards to the manner in which the fees and expenses are to be determined.[207]

It must be borne in mind that an award of costs is simply a refund of expenses actually incurred so as to indemnify the successful party for the expenses to which they have been put through having been unjustly compelled to defend or institute proceedings, as the case may be.[208]

It is the function of the tribunal to fix and allocate costs where the arbitration agreement is silent on the question of costs. He or she acts as the gatekeeper of fairness, equity and justice in the determination of costs.[209] He cannot delegate his or her decision making functions including the duty to decide any question of costs to a third party, such as the Registrar or Deputy Registrar of the High Court as a Taxing Officer.[210] Resultantly, the Registrar of the High Court as a Taxing Officer does not at present, have the authority to fix and allocate costs

[205] *Kenya Medical Women's Association* (n 71).
[206] S Greenberg, C Kee & JR Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (2011) 8.41 – 8.42.
[207] *Simon Saili Malonza v Gaspra International Ltd* [2020] eKLR.
[208] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 – 488.
[209] F Moosa, 'Taxation of Litigation Costs under Uniform Rule 70: Attorneys Acting as Counsel are Entitled to Equal Reimbursement for Equal Work by Advocates' (2023) 26 *Potchefstroom Electronic Law Journal* 1 – 27.
[210] See generally, C Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 (2) *Arbitration International* 147 – 163; JO Jensen, 'Secretaries to Arbitral Tribunals: Judicial Assistants Rooted in Party Autonomy' (2020) 11 (3) *International Journal for Court Administration* 1 – 17.

arising out of arbitration proceedings[211] unless the arbitration agreement says otherwise.[212]

An arbitral award is deemed to be final and binding upon the parties to it, and no recourse is available against an award otherwise than in a manner provided for by the Act.[213] It is incumbent upon the applicant seeking to challenge an award of costs to identify the public policy which the award alleged breaches and show which part of the award conflicts with that public policy.[214]

The applicant must show how the decision of the tribunal negatively affects, impacts and or infringes the rights of third parties and offends public policy as the courts have no appellate jurisdiction over arbitral awards.[215] An arbitrator has the right to be correct or wrong, and the fact that his decision is wrong, is not a ground for the vacation of an award as being contrary to public policy.[216] The courts will not set aside an arbitral award on the basis that it is in conflict with the public policy for the failure by the tribunal to award interest or costs.[217] Even if an arbitrator were to misinterpret the law on costs or fail to properly apply the law on costs,[218] the courts remain reluctant to set aside an award of costs of an arbitral tribunal. This approach is consistent with that obtaining in

[211] *Honda Motorcycle Ltd v Gerick Kenya Ltd*, Misc App E515 of 2019; *Match Electricals Company Ltd* (n 192).
[212] *Rugsan Land Development Ltd v Faith Agnes Maumoh*, Misc Civil App 455 of 2019.
[213] *Tanzania National Roads Agency v Kudan Sigh Construction Ltd*, Misc Civil App No. 171 of 2012; *Maurice Oduor Nyakone v Diamond Property Merchants Ltd* [2020] eKLR.
[214] *Dinesh Construction Ltd & Another v Aircon Electra Services (Nairobi) Ltd* [2021] eKLR.
[215] *Continental Homes Ltd v Suncoast Investments Ltd* [2018] eKLR.
[216] *Mahan Ltd* (n 145).
[217] *EPCO Builders Ltd v South Development Company Ltd* [2023] KEHC 19855 (KLR).
[218] *Kenya Ports Authority v Base Titanium Ltd* [2022] KEHC 265 (KLR).

other leading Model Law jurisdictions which include, but are not limited to: India,[219] Singapore[220] and South Africa.[221]

The courts may, however, move to vacate an award of costs if it is 'clear' that it is excessive.[222] It is submitted, that an award of costs which is manifestly excessive and wrong may be set aside as being contrary to public policy and therefore subject to challenge under section 35 or 37 of the Act.

7. Conclusion

The purpose of the Act is to bring finality to the disputes between parties. It is not within the province of the courts in matters relating to the Act to 'revaluate' the decisions of an arbitral tribunal, when the court is called upon to determine a challenge in terms of section 35 or 37 of the Act.[223]

To interfere with a final award of costs or an additional award of costs would place the court in the position of an appellate court with respect to arbitral proceedings, something which is contrary to the spirit of the Act.[224] The courts when dealing with applications based on section 35 or 37 of the Act should

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[219] *National Highways Authority of India v D.S Toll Road Ltd & Others* 2015 III Ad (Delhi) 296; *National Highways Authority of India v Gayatri Jhansi Roadways* 2017 SCC Online Del 10285.

[220] *VV & Another* (n 194).

[221] *Leadtrain Assessments (Pty) Ltd & Others v Leadtrain (Pty) Ltd & Others* 2013 (5) SA 84 (SCA).

[222] *Davis v First, S.A. Starr - Bowkett Building Society* [1908] TS 1109; [1908] TH 177 at 1109 it was held that:

> *"It is probable that if (arbitrators) fees were fixed which were so manifestly excessive and wrong as to call for the interference of the Court then we should find some appropriate machinery for redressing the grievance and relieving the complaining party."*

[223] *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR.

[224] *Mahican Investments Ltd & 3 Others v Giovanni Gaida & Others* [2005] eKLR; *Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd* [2015] eKLR.

adopt a pragmatic approach.[225] Parties who submit to arbitration, agreeing that the decisions of the arbitrator shall be final and binding upon them, should desist from footling litigation, the moment that the outcome is not favourable to them.[226]

The courts now find themselves inundated by endless such applications are generally informed, not by a desire to obtain justice, but merely by an unwillingness to commit to what parties would have agreed upon. It will be no surprise that in future, the courts will admonish such litigants with an award of costs on a punitive scale.[227]

A party which seeks to challenge an award on the ground of public policy under section 35 or section 37 of the Act cannot generalize the public policy argument. It is obligatory for the party to: (a) identify the public policy which the award allegedly breaches (b) show how it was breached (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the applicant's rights.[228]

[225] *CAJ & Another v CAI & Another Appeal* [2022] 1 SLR 505 para 2; *CFJ v CFL* [2023] SHGC(I) 1 para 2.
[226] *Gold Driven Investments v Willemse Farming Enterprises (Pvt) Ltd & Another* HH 138-15.
[227] *Kolber & Another v Sourcecom Solutions (Pty) Ltd & Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber & Another* 2001 (2) SA 1097 (C).
[228] *Manara Ltd v Britania Foods Ltd* [2021] eKLR.

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Review: Journal of Conflict Management and Sustainable Development, Volume 11, Issue 1

By: ***Anne Wairimu Kiramba***[1]

The Journal of Conflict Management and Sustainable Development 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. The Journal interrogates and offers solutions to some of the current concerns in the Sustainable Development Agenda. It also explores the role of Conflict Management in the attainment of Sustainable Development. The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information. To achieve this aim, the Journal draws from the experience and expertise of highly qualified and competent internal and external reviewers. CIArb African Trustee Emeritus and Member of Permanent Court of Arbitration Hon. Dr. Kariuki Muigua, OWG, PhD, the recipient of the Order of Grand Warrior (OGW) Presidential Award in 2023 for exceptional leadership, scholarship and practice in dispute resolution, is the founder and editor-in-chief of the Journal.

Journal of Conflict Management and Sustainable Development, Volume 11, Issue 1, contains papers covering relevant and emerging issues on the themes of Conflict Management, Sustainable Development and related fields of knowledge. The first article, "Strengthening Environmental Rule of Law for Sustainability," by Hon. Dr. Kariuki Muigua, OGW, PhD critically discusses the concept of environmental rule of law and the progress made towards promoting

[1] [1] *IT Support Specialist, Digital marketer and web administrator; she holds a Bachelor degree in Business Information Technology, St Paul's University; Diploma Business Information Technology, St Paul's University; Diploma Digital Marketing; (Certified Digital Marketing Professional (DMI); Certified Professional Mediator (Mediation Training Institute, East Africa (MTI)); A+ and ITIL Foundation 4. Associate member of Chartered Institute of Arbitrators (ACIArb).*

environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability. Stephen Chege Njoroge in "The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions" examines the role of different State institutions in order to ascertain their role and effectiveness in addressing the problem of forced evictions. The paper evaluates and investigates the role of institutions created by the Constitution and legislation in protection against forced evictions and proposes institutional reforms that can make these institutions more effective in protecting people against arbitrary evictions.

In "Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward" Dr. Kenneth Wyne Mutuma, PhD examines the complicity of transitional justice in the preservation and perpetuation of racial injustice, both in theory and practice. It explores the ways in which race and racism have shaped transitional justice as a discipline and a practice and drawing from the legacies of the transatlantic slave trade, colonialism, and their contemporary manifestations, he critically analyzes the literature on transitional justice and its treatment of racial injustice. Michael Sang in the article "Revisiting the legal debate on Genetically Modified Organisms (GMOs) in Africa: Which way for Kenya?" examines the status of genetically modified organisms (GMOs) in Africa, with a specific focus on Kenya, and explores the regulatory frameworks and approaches employed in various African countries. The paper analyzes international and regional treaty instruments, including the Convention on Biological Diversity and the Cartagena Biosafety Protocol, and their implications for GMO regulation and regulatory reforms that have shaped the GMO landscape in Africa.

Hon. Dr. Kariuki Muigua, ODW, PhD in "Greenwashing: A hindrance to Achieving Sustainability?" critically discusses the concept of greenwashing as a strategy used by the corporate world and other players to create the impression that they are compliant with Environmental, Social and Governance (ESG)

while hiding the true level of compliance, through marketing. He argues that it is necessary to ensure that all corporations and businesses, whose operations have the potential to impact the environment, are included and held accountable for any detrimental consequences on both human beings and the environment, through stricter enforcement of corporate governance and environmental legislation aimed at curbing violation of ESG rules and greenwashing in particular.

In "Promoting Urban Resilience and Sustainability in Kenya's Cities and Towns" Caroline Jepchumba Kibii makes a case for improving the overall status of informal settlements as they are an integral part of all urban areas and neglecting them leads to farreaching problems for the urban inhabitants within and away from these settlements. In "Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication" Lucky Philomena Mbaye critically examines the existing legal framework on construction adjudication in Kenya, identifying its inherent shortcomings. Drawing comparisons with jurisdictions possessing well-established legal frameworks for construction adjudication, such as England, she further explores the differences and similarities between the two systems, and provides recommendations for the development of a robust legal framework in Kenya to ensure the effectiveness of construction adjudication.

In "Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance" Michael Sang delves into the legal debate on the constitutionality of life sentences in Kenya's criminal justice system. He provides an overview of the national and international legal context surrounding life imprisonment, exploring domestic provisions and the evolution of views on criminal justice sanctions from the abolition of the death penalty to the rejection of life sentences as human rights violations. In "Renewable Energy, The Promised Land: Obligations Under The UNFCCC (1992) & Steps Towards Fulfilling Kenya Vision 2030 On Renewable Energy," Andrew Derrick discussed the progress Kenya has made towards attaining substantial utility of renewable energy with a goal to fulfil the Kenya Vision

2030 Plan as well as recommendations to fulfil this milestone. Further, the paper also discusses Kenya's obligations under the UNFCCC (1992), which is one of the vital and progressive conventions averring on ecofriendly energy utility.

Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts By: Michael Sang Abstract This paper delves into the doctrine of separation of powers and the notion of judicial overreach in the Kenyan context. It explores legal safeguards against the usurpation of parliamentary powers by the courts, emphasizing the need to strike a balance between judicial independence and judicial overreach. It does this by examining a number of case law and legislations. The Journal concludes with a Book Review of "Achieving Climate Justice for Development" authored by Hon. Dr. Kariuki Muigua. The book "Achieving Climate Justice for Development" is informed by the need to achieve climate justice as a prerequisite for sustainable development. It explores the idea of climate justice and discusses the efficacy of the measures adopted towards achieving climate justice for development. The Journal concludes with a review of the inaugural issue of the Journal of Appropriate Dispute Resolution (ADR) and Sustainability also founded and edited Hon. Dr. Kariuki Muigua, OGW, PhD.

Magic Eye Developers PVT. Ltd. V Green Edge Infrastructure PVT. Ltd. Others

By: ***Wilfred Mutubwa****

BACKGROUND

By way of an arbitration petition, the Respondents approached the High Court of New Delhi to determine the validity of an arbitration clause and refer the matter to arbitration. It was their argument before the High that the three agreements involved were interconnected and thus the existence of an arbitration clause in one of them was enough to refer the matter to arbitration. The agreements were; **SHA-1, SHA-2, MOU-1** & **MOU-2.** It was the Respondents argument that since SHA-1 had an arbitration clause and all the agreements were interlinked by virtue of MOU-2, the dispute ought to have been referred to arbitration. This position was objected to by the appellants who submitted that the disputes were not arbitrable.

The High Court eventually ruled to refer the matter to arbitration observing that the arbitrability of the dispute raised vis-à-vis the arbitration clause 27.3 of SHA-1 were involved issues and the learned Arbitral Tribunal could address the same given the complexity of the transaction involved. The Court therefore appointed an arbitrator and referred the dispute. The Appellants were unsatisfied with the judgement and appealed to the Supreme court of India.

The Court held that *the referral court must conclusively decide the issue of the existence and validity of the arbitration agreement at the pre-referral stage, as it goes to the root of the matter.*

* *Advocate of the High Court of Kenya and the founding principal at Dr. Mutubwa Law Advocates. Senior Lecturer and Dean, Mount Kenya University School of Law. He is a Chartered Arbitrator (C.Arb) and a Fellow of the Chartered Institute of Arbitrators (FCIArb). He holds an LL. D from University of South Africa focusing on International Economic Law. He is currently one of the Kenya Representatives to the Permanent Court of Arbitration.*

ISSUE FOR DETERMINATION

The issue raised for determination before Supreme Court concerned the jurisdiction of the court sitting in pre-referral under Section 11(6A) of the Arbitration and Conciliation Amendment Act, 2015. In particular, the court framed the issue as *whether the court should decide the issue of the existence and validity of the arbitration agreement at the pre-referral stage or leave it to the arbitral tribunal.*

RELEVANT LAW

The relevant provision of law was found to be Section 11(6A) of the Arbitration Act which had been added through Arbitration and Conciliation Amendment Act, 2015. The Section provides:

> **The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.**

ANALYSIS & DETERMINATION

The appellants submissions before the Supreme court revolved around the distinction between the existence and validity of an arbitration clause and non-arbitrability of the dispute. They submitted that so far as the issue with respect to the existence and validity of an arbitration agreement at the stage of prereferral jurisdiction under Section 11(6) of the Act was concerned, the Court had a to give a specific finding finally on such issue and such an issue should not be left to the Arbitral Tribunal. It was therefore their submission that a finding under Section 11(6) had to involve an inquiry into whether the arbitration clause met the conditions of Section 7 of the Act.

In opposition, it was submitted for the Respondents that once the Court found that the agreements were interlinked, then the existence of the arbitration clause in one agreement was enough to refer the case to arbitration as the court did in the case.

The Court allowed the appeal finding that pre-referral jurisdiction under the relevant section entailed two inquiries. The primary inquiry being the existence and the validity of an arbitration agreement where the court had to make findings as to the parties to the agreement and the applicant's privity to the said agreements. The court further held that this issue has to be conclusively decided by the court as the same went into the root of the matter.

The secondary inquiry that the court would have had to consider at the reference stage would have been with respect to the non-arbitrability of the dispute. The court was of the opinion that this inquiry was distinct from the primary one and the duty of the court was a *prima facie* review 'to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage.'

CONCLUSION & DISPOSAL

The court therefore quashed the High Court's decision holding that it had a duty to decide the said issue conclusively in order to protect the parties from being forced to arbitrate when there did not exist any arbitration agreement and/or when there is no valid arbitration agreement at all. It found that by decreeing that the Arbitrator decide the issue, the court had absconded this duty. The court further refused to pronounce itself on whether the agreements were interconnected opting to refer the petitions back to the High Court for disposal.

Book Review: Promoting the Rule of Law for Sustainable Development

By: James Njuguna*

The newly installed Professor of Environmental Law and Dispute Resolution Hon. Prof. Kariuki Muigua's latest book brings together a collection of papers touching on the theme: Promoting Rule of Law for Sustainable Development. According to him, the notion of the Rule of Law is essentially an ideal where all citizens and institutions within a country, state or community are accountable to the same laws – No one is above the law.

He posits that Sustainable Development thrives well in an atmosphere of effective application of the rule of law. At the global level, Sustainable Development Goals represent a shared blueprint towards achieving sustainability through measures such as combating climate change, promoting access to affordable clean energy, clean water and sanitation. The papers covered in this book volume mainly focus on sustainability, access to justice, Environmental Governance, Climate Justice against the backdrop of the theme Promoting the Rule of Law for Sustainable Development. The book is aimed at researchers, students and academics who have an interest in Sustainable Development and the Rule of Law discourse.

Prof. Kariuki Muigua, OGW, PhD, one of African's leading Environmental Law Scholar and Academic is a Professor of Environmental Law and Dispute Resolution at the University of Nairobi. He has a unparalleled reputation for consistent scholarship, prolific authorship and publishing, world-class intellectual rigour and selfless mentorship. Recently, he was recognized and feted by H.E. the President with Order of Grand Warrior (OGW) for excellence in scholarship and leadership in environmental law and scholarship. He has also been awarded leading arbitrator and ADR practitioner in Kenya and Africa

* *LLM, MCIArb (Advocate), Lecturer of Law at University of Embu Faculty of Law*

and is highly rated by international bodies including Chambers and Partners among others.

The first Paper "*Embracing the Rule of Law for Sustainability"* critically discusses the role of the rule of law in Sustainable Development. It posits that the rule of law is a critical enabler of Sustainable Development. The paper highlights ways through which the rule of law can foster Sustainable Development. It also examines some of the challenges facing the rule of law in the quest towards Sustainable Development. The paper further proposes reforms towards embracing the rule of law for sustainability. "*Enhancing Access to Justice for Sustainable Development in Kenya"* critically discusses the role of access to justice in the Sustainable Development agenda. It argues that access to justice is vital in achieving Sustainable Development. The paper explores how access justice can foster the Sustainable Development agenda in Kenya. It highlights some of the challenges facing the attainment of access to justice and offers suggestions towards enhancing access to justice for Sustainable Development in Kenya.

In "*Implementing Circular Economy for Sustainability"* Prof. Kariuki Muigua critically examines the role of circular economy in the Sustainable Development agenda. Further, he discusses the progress made towards embracing circular economy at the global, regional and national levels. The paper also explores the challenges facing realization of circular economy and suggests reforms towards implementing it for sustainability. The Paper "*Strengthening Intra African Trade for Sustainable Development"* critically discusses the role of Intra African trade in the Sustainable Development agenda. It defines Intra African Trade and examines progress made towards strengthening it. The paper further explores the challenges facing Intra African trade. It also suggests reforms towards strengthening Intra African trade for Sustainable Development.

Prof. Kariuki Muigua in the paper "*Mediating Natural Resource Based- Conflicts for Peace and Prosperity"* critically explores the role of mediation in managing natural resource-based conflicts. He examines the progress made towards mediating natural resource- based conflicts and challenges thereof. The paper

further puts forward suggestions towards enhancing the role of mediation in managing natural resource- based conflicts for peace and prosperity. The paper *"Actualizing Agenda 2063 for Sustainable Development in Africa"* examines the role of Agenda 2063 in fostering Sustainable Development in Africa. It discusses the salient provisions of Agenda 2063 and their efficacy in spurring Sustainable Development. The paper further explores the progress and challenges facing the realization of Agenda 2063. It also suggests measures towards actualizing Agenda 2063 for Sustainable Development in Africa.

"Building Capacity for Sustainability in Africa" explores the role of capacity building in the Sustainable Development agenda in Africa. The paper discusses the progress made and challenges faced towards building capacity for sustainability in Africa. It also highlights interventions that are necessary towards building capacity for sustainability in Africa. The paper *"Third Party Funding in International Arbitration- A Reflection"* critically reflects upon the emerging concept of third-party funding in international arbitration. The paper further highlights the advantages of third-party funding in international arbitration and the key concerns about third party funding in international arbitration and proposes reforms in light of such concerns. *"Adopting Environmental, Social and Governance Tenets for Sustainable Investment in Africa"* critically examines the role of ESG in fostering sustainable investments in Africa. The paper highlights some of the factors hindering the realization of sustainable investments in Africa. It further proposes reforms aimed at adopting ESG tenets for sustainable investments in Africa.

In *"Realizing the Governance ('G') tenet in ESG for Sustainability"* Prof. Kariuki Muigua examines the role of governance in sustainability. He explores ways through which governance can enhance sustainability. It also highlights some of the governance challenges that are hindering the ideal of sustainability. The paper concludes by making proposals towards realizing the Governance 'G' tenet in ESG for sustainability. The Paper *"Embracing Sound Environmental Governance in Africa"* critically explores the need to embrace sound environmental governance in Africa. It examines the progress made towards

realizing good environmental governance in Africa. It also discusses some of the challenges facing the attainment of sound environmental governance in Africa. In addition, the paper also suggests reforms towards embracing sound environmental governance in Africa for sustainability.

"Enhancing Food Security in Africa" critically interrogates the need to enhance food security in Africa. It argues that achieving food security is vital if Africa is to realize the Sustainable Development agenda. The paper explores the progress made towards enhancing food security in Africa. It also examines some of the obstacles facing the realization of food security in Africa. The paper further suggests initiatives which can be adopted towards enhancing food security in Africa. *"Building Peace in Africa through Alternative Dispute Resolution"* interrogates the need for peace in Africa and the efficacy of various initiatives adopted towards realizing this ideal. The paper argues that ADR mechanisms can play a fundamental role in building peace in Africa. The paper further posits that ADR mechanisms are able to enhance sustainable peace in Africa due to their focus on reconciliation and restorative justice. It proposes solutions towards building peace in Africa through ADR.

"Managing Energy Disputes in Africa" makes a case for effective management of energy disputes in Africa. It discusses the nature and causes of energy disputes in Africa. The paper further explores the efficacy of the current framework on managing energy disputes in Africa and proposes reforms towards effective management of energy related disputes in the Continent in order to foster energy justice and accelerate the energy transition. *"Eradicating Poverty for Sustainable Development in Africa"* argues a case for eradicating poverty in Africa. It examines the causes and effects of poverty in Africa. The paper further examines the efficacy of some of the measures adopted towards eradicating poverty in Africa. It also offers suggestions towards eradicating poverty for Sustainable Development in Africa.

"Fostering Energy Justice in Africa" explores the concept of energy justice in Africa. The paper conceptualizes energy justice and highlights its salient

components. It further discusses the idea of energy justice in Africa and the promises and pitfalls facing its realization. The paper also suggests reforms towards fostering energy justice in Africa. *"Mainstreaming Alternative Justice Systems in Africa"* discusses the need to mainstream Alternative Justice Systems (AJS) in Africa. It defines Alternative Justice Systems and highlights their advantages in enhancing access to justice in Africa. The paper further examines the progress and challenges made towards mainstreaming AJS in Africa. It further proposes reforms towards mainstreaming AJS in Africa in order to promote access to justice.

"Conquering the Resource Curse in Africa" discusses the resource curse in Africa. It argues that the resource curse is a major hindrance to the attainment of Sustainable Development in Africa. The paper discusses the causes and consequences of the resource curse in Africa. It further suggests measures towards conquering the resource curse in Africa. *"Fostering Sustainable Transport and Infrastructure in Africa"* argues that sustainable transport and infrastructure can help Africa meet its climate and development targets. It explores some of the initiatives adopted towards embracing sustainable transport and infrastructure in Africa and challenges thereof. The paper further offers solutions towards fostering sustainable transport and infrastructure in Africa for sustainability.

"Preparing for the Future: ADR and Arbitration from an African Perspective" discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective. *"Strengthening Ethics in Arbitration in Africa"* critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical concerns in

arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

"Upholding Ethics, Integrity and Best Practice in Mediation" critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It is also explores measures adopted towards fostering best practices in mediation at both the global and national level and suggests recommendations aimed at upholding ethics, integrity and best practice in mediation. The paper *"Promoting Green and Sustainable Procurement in Kenya"* examines the progress made towards realizing green and sustainable procurement in Kenya. It also explores challenges facing the attainment of green and sustainable procurement in Kenya and makes recommendations towards promoting green and sustainable procurement in Kenya. *"Managing Environmental Conflicts through Alternative Dispute Resolution"* critically explores the viability of ADR mechanisms in managing environmental conflicts noting to highlight the advantages and drawbacks thereof. The paper argues that ADR mechanisms can be a viable tool in managing environmental conflicts and fostering sustainability. It proposes initiatives towards strengthening the role of ADR mechanisms in managing environmental conflicts.

"Climate Finance beyond COP 28: Operationalizing the Loss and Damage Fund" The paper critically discusses the role of the Loss and Damage Fund in the climate finance agenda. It examines the progress made towards actualizing the Loss and Damage Fund at COP 28. It argues a case for operationalizing the Loss and Damage Fund in order to enhance the future of climate finance. *"Transitioning from Fossil Fuels to Clean Energy"* examines the role of fossil fuels in the global threat of climate change. The paper further discusses the efficacy of initiatives adopted at national, regional, continental and global levels towards transitioning from fossil fuels to clean energy. It also highlights the challenges facing the global transition from fossil fuels to clean energy. The paper further proposes reforms aimed at accelerating the transition from fossil fuels to clean energy.

"Achieving Good Health and Well-Being for All" examines the legal framework on the right to health at the global, regional and national levels and its efficacy in fostering good health and well-being for all. The paper further discusses some of the key challenges hindering the realization of the right to health and offers proposals towards achieving good health and well-being for all. *"Embracing Trade Policy Instruments for Climate Action"* highlights examples of trade policy instruments and discusses how they can foster effective response towards climate change. It also discusses the progress made towards embracing trade policy instruments for climate action and challenges thereof. The paper further offers recommendations towards embracing trade policy instruments for climate action.

"Placing Health at the Centre of Climate Action" critically discusses the link between climate change and health. It argues that climate change is a major threat to human health and well-being. It examines the impacts of climate change on human health and well-being as well as global health systems. The paper proposes measures towards placing health at the centre of climate action in order to ensure good health and well-being for all. *"Tackling Climate Change through Science and Technology"* examines ways through which countries have embraced science and technology to combat climate change. It further explores some of the problems hindering effective use of science and technology in the global response to climate change. Finally, the paper proposes reforms towards enhanced use of science and technology in tackling climate change.

"Towards Climate Justice: Embracing Just Transition" critically discusses the role of just transition in the climate justice agenda. The paper defines just transition and discusses how this concept can foster climate justice. It also examines challenges facing the realization of just transition and suggests solutions towards embracing just transition for climate justice. *"Reflections on Conflict Management and Culture"* highlights some of the cultural influences in conflict management in Africa. It further points out some of the opportunities and challenges in relation to conflict management and culture in Africa. The paper argues a case for embracing culture towards effective conflict management in Africa.

A Critical Analysis of the ChatGPT's Arbitration Clause

By: Paul Ngotho [*] ***HSC, C. Arb***

Abstract

The author contends that arbitration agreements should be simple and certain for the benefit of the parties, arbitral institutions, arbitrators and courts. Any ambiguity causes litigation, which it was meant to avoid in the first place, and much grief to all involved. In this short article, he comments broadly on the place of information technology (IT) and artificial intelligence (AI) in third world countries and then zeroes in on a detailed analysis and discussion of the dispute clause which operates between the owners and users of ChatGPT, a world leader in AI.

Background

Starting with a disclosure would be in order. I use OpenAI's ChatGPT in my arbitration classes. Typically, I ask students a query and, to their amusement, request them to find out what my friend ChatGPT has to say. The answer forms the basis of our discussion. I also alert them in advance that after the exam I would post the questions to ChatGPT to compare the typically clinical answers to their own to detect AI usage.

Arbitration conferences held the last couple of years and in the foreseeable future are incomplete without at least one session on artificial intelligence (AI) AI. I ventured into AI and robotics discourse in a recent arbitration conference[1].

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[*] *The author holds a Master of Laws (LL.M) degree in International Dispute Resolution from the University of London. He is the author of numerous arbitration books and articles, some of which are available at www.ngotho.co.ke. He is on the panel of the American Arbitration Association's International Centre for Dispute Resolution (ICDR). This is one of his series of articles on arbitration agreements.*

[1] The author's 2022 Chartered Institute of Arbitrators Kenya Branch international arbitration conference presentation titled "Artificial Intelligence and Robots In Arbitration in Africa: Today and Tomorrow" is available at https://youtu.be/Bu1-HOcV1ww

I knew that some of the participants had no idea what robots were and were capable of doing. One of my highlights of my presentation was a video demonstration of Samantha, a sex robot. I stopped the clip at a critical moment and still remember the audience's palpable relief.

Judicial officers and arbitrators have been warned that their jobs were under imminent threat from AI. I am equally open and skeptical about the place and pace of AI and robotics in arbitration especially in Africa, where the uptake of IT, AI and robots has been extremely slow. The Lands Registry in Nairobi has been a House of Babel since digitisation two years ago. After attempting to transfer a car to my name in the NTSA[2] portal a couple of time several months ago, I engaged a consultant do it, for a fee. She was unable to do so online and eventually made about 5 trips to the NTSA office accompanied by "someone who understands the system". The NTSA system was later not available at all for several days to facilitate an upgrade.

About 10 Kenyans travelled to Lagos in Nigeria to attend an arbitration conference in November 2023. Some, out of past experiences and abundance applied while in Nairobi and spent hours at the Nigerian High Commission, where confusion reigned. I personally chose to do the waiting in Lagos. And wait I did. The WiFi in the brand-new international airport was not working, yet the application had to be done online. A kind immigration official was at hand with his personal modem. He did not ask for a fee or a bribe for the use of his personal gadget, but you can be sure he was tipped handsomely, in USD, by exhausted but grateful international travellers.

The last example is from the Kenya Judiciary. On 19th December 2023, I received a notice by email from the Supreme Court of Kenya informing me of the ruling date of a certain civil case in which I have an interest. Three things caught my eye. First, the email came from a Gmail account, with a copy to

[2] Kenya's National Transport and Safety Authority

supremeregistry@court.go.ke. The apex court in Kenya was using Gmail after decades of "transformation" and having spending billions of shillings on IT. Second, the court required me and all the counsel involved, to be in attendance physically without the option of virtual participation. In fact, no attendance at all was required as the ruling was dished out and not read. The ruling could have been sent by email.

ChatGPT's Dispute Clause

OpenAI, which owns or operates ChatGPT, sent an email to me at 2.30 AM on 19th December 2023 informing me about some upcoming changes to its terms of use and privacy policy from 31st January 2024. It promised that the changes would make ChatGPT easier to use and understand. One of the changes was in an updated dispute resolution procedure**.** I didn't need to take any action in response to that update. By continuing to use ChatGPT after the effective date, I would be deemed to have agreed to the revised terms. To be fair, I have the option of closing my account if I do not agree.

Out of curiosity, I asked ChatGPT how many disputes regarding its use had been referred to arbitration. I expected a short simple and crisp numerical answer. A figure. What I received was information that ChatGPT did not have the data as at its last update in January 2022 and did not have access to real-time or updated information on specific arbitrations related to ChatGPT.

ChatGPT unhelpfully added that details about arbitration cases is typically private and confidential unless the involved parties or the arbitration award itself become publicly disclosed. It advised me to check with OpenAI or to review any public disclosures they might have made, blah-blah-blah.

Turns out that the New York Times had sued[3] ChatGT for billions of dollars for allegedly having copied, without permission, millions of Times articles to train ChatGPT. It seems like a tort suit under which an arbitration clause in the

[3] *https://nation.africa/kenya/news/world/media-house-sues-microsoft-and-chatgpt-for-billions-of-dollars--4476350* accessed on 28th December 2023.

contract might not apply, unless the Times is a user of ChatGPT. Copyright is becoming a major battleground for the much-hyped generative AI sector, with publishers, musicians and artists increasingly lawyering up to get paid for their inputs. With lawsuits piling up, Microsoft and AI player Google have announced they would cover the legal fees of corporate customers sued for copyright infringement over content generated by their AI.

The outgoing OpenAI dispute clause was a fairly simple one made up of 85 words:

> "The parties agree that any dispute, claim, or controversy arising out of or relating to the use of ChatGPT shall be resolved by binding arbitration. The arbitration shall be conducted by a single arbitrator in accordance with the rules of the American Arbitration Association. Each party shall bear its own costs associated with the arbitration, including attorney fees, unless otherwise awarded by the arbitrator. The arbitration shall take place in the state of California, and the decision of the arbitrator shall be final and binding."

The revised one is longer at 123 words and more elaborate:

> "The parties understand and agree that any dispute, claim, or controversy arising out of or relating to the use of ChatGPT shall first attempt to be resolved through good faith negotiations. If the parties are unable to resolve the dispute through negotiation within a reasonable period, the dispute shall be submitted to mediation administered by the American Arbitration Association. If mediation fails to resolve the dispute, then it shall be resolved by binding arbitration in accordance with the rules of the Association. Each party shall bear its own costs associated with the arbitration, including attorney fees, unless otherwise awarded by the arbitrator. The arbitration shall take place in the state of California, and the decision of the arbitrator shall be final and binding."

The revised multi-tier dispute clause requires negotiation and mediation, which were not in the earlier version, prior to arbitration. The omission is glaring as multi-tier dispute clauses have been in use for ages.

The first 6 words "the parties understand and agree that" are redundant as the clause is clear without them. The phrase that "each party shall bear its own costs associated with the arbitration, including attorney fees, unless otherwise awarded by the arbitrator" gives and takes at the same time and so adds no value such that its omission would not affect the arbitration clause in any way.

The words "shall first attempt" are themselves grammatically correct and the intention is clear. However, the phrase is poorly placed, making it necessary for someone to re-read the muddled-up sentence to understand the meaning.

The unspecified "reasonable period" within which negotiations are to take place is odd as different parties could have different interpretations and expectations. When it comes to mediation, there is no indication how long that stage would take before arbitration kicks in. That creates a window for a party to delay the commencement of arbitration by weeks or months by insisting that a mediation was taking place even when there is no prospect of a settlement and can potentially lead to a jurisdictional challenge to the arbitral tribunal.

The statement that the "arbitration shall take place in the state of California" shows that OpenAI is a little confused and confusing regarding the seat of arbitration as legally defined and the hearing venue. Virtual arbitral proceedings with some parties or participants not being physically located "in" California are apparently not contemplated in this post-Covid era clause. Of course the American Arbitration Association (AAA) has been conducting arbitrations virtually for a number of years.

The clause is explicit that the AAA mediation rules would apply. When it comes to arbitration, AAA is named as the administering institution but there is no

mention of the applicable rules. The AAA has numerous arbitration rules[4]. It would have been helpful to be specific.

Presumably, naming AAA as the appointing authority communicates the intention that its AAA Consumer Arbitration Rules 2014[5] would apply as such are the disputes which are contemplated in those rules. Furthermore, no self-respecting arbitral institution would administer an arbitration using the rules of another institution, even if that was the express intention of the parties. Once the rules of an arbitral institution are chosen, that organisation becomes the default appointing and administering authority unless a different intention is expressly stated or if that institution does not provide administration service as is the case of the Chartered Institute of Arbitrators. Whatever the case, the applicable rules should not be left to parties' guesswork or the discretion of a third party especially in international arbitrations.

Incidentally, there is some ambiguity regarding the seat of arbitration in the subject clause. California has been mentioned obtrusively. One has to check the applicable rules and in default leave it for the arbitral tribunal to determine.

It is not necessary to say that negotiations with the phrase "good faith" since that is the essential nature of the process and there is no gauge of good faith anyway. The fact that "good faith" is not prescribed in the clause with respect to mediation is further demonstration that the phrase is superfluous.

The clause states once that the arbitration would be "final" and twice that it would be "binding". That is probably a necessary notice to the US users of ChatGPT. The AAA Consumer Arbitration Rules 2014 state that, "(A)n award is usually binding on the parties". A non-binding arbitral award is inconceivable in other jurisdictions. The finality of arbitral award is a matter of public policy and is usually provided for in the state or national arbitration legislation.

[4] https://www.adr.org/active-rules

[5] Accessible at www.adr.org

The catch-all nature of the arbitration clause is noteworthy in at least three aspects. First, the clause says that even a "controversy" can be subjected to the dispute clause. That has to be the most useless provision in this dispute clause. AI itself is ridden with controversies, every day.

Second, the clause is not restricted to disputes between OpenAI and ChatGPT users. Technically, disputes and controversies between users themselves can be referred to AAA mediation and arbitration even though that cannot have been the intention of the drafters.

Third, potentially, even a dispute over 1 Iranian Rial (372,000 of them make 1 USD) could end up in arbitration if unresolved amicably. This is a very difficult area in drafting as putting a minimum limit of disputes which are eligible for arbitration might not be appropriate. Rule R-9 of the AAA Consumer Arbitration Rules 2014 allows the parties to refer qualifying disputes to the small claims court, of California in this case, directly. The AAA could terminate reference if either party applies to refer the case to that court while the arbitrator, if already appointed and faced with an appropriate application, decides whether to proceed with the matter or to close the case for reference to that court.

This opt-out innovation applies to arbitration and does not negate the negotiation and AAA mediation requirements. It saves time and costs for the parties and ensures that state courts, which are publicly funded, deal with the small claims.

At face value, the provision might appear anti-arbitration. However, it is an honest admission that low-value disputes are not suited for even the much touted fixed cost and expedited arbitration procedures. It gives the parties the option of public-funded courts instead of remaining unhappily in arbitration. It is impossible to predict the quantum of the dispute at the stage of entering a consumer contract but the challenge is present also in high-value contracts. Providing the parties with a conditional "U-turn" makes commercial sense for parties, arbitrators and arbitral institutions.

OpenAI's deliberate choice of leaving the mediation and arbitration of its disputes to real human beings, otherwise known as *homo sapiens*[6], and not to ChatGPT, alternative AI solutions in case of conflict of interest or robots, is noteworthy. It is a much-needed vote of confidence.

OpenAI, clearly, does not have confidence in the capacity of ChatGPT, or another AI or any robot currently available, to mediate or arbitrate disputes. This leader and international player in the field of AI has made the mistake thousands of people and organisations make worldwide: not giving enough attention to the dispute clause. It has certainly not harnessed its advanced AI to prepare or perfect its disputes clause.

Occasionally a friend requests me help in drafting or reviewing a dispute clause. My friend ChatGPT has not asked for my help – I suspect it does not know what I do for my other friends so I cannot fault it for not asking. In the human spirit of being a friend indeed to a friend in need, I ask OpenAI to consider the following as its dispute clause:

> "Any dispute arising between OpenAI and a ChatGPT user shall be subjected to negotiations within 14 days of the dispute arising otherwise after which it shall be referred to mediation under the American Arbitration Association (AAA) Mediation Rules. All and any issues which are outstanding within 30 days after the mediator appointment shall be referred to a sole arbitrator under the AAA Consumer Arbitration Rules. The state of California shall be the seat of arbitration, which shall be final and binding"

All in 81 words. Alternatively, AAA has a ready-made arbitration agreement in addition to a digital tool for the preparation of an arbitration agreement.

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[6] According to Australin Museum means 'wise human'. *Homo* is the Latin word for 'human' or 'man' and *sapiens* is derived from a Latin word that means 'wise' or 'astute'. Source; *https://australian.museum/learn/science/human-evolution/homo-sapiens-modern-humans/*

Conclusion

In conclusion, the OpenAI new dispute clause is ridden with numerous and inexcusable gaps, ambiguities, uncertainties and redundant clauses. Open AI's choice of human beings as dispute resolvers is a vote of confidence in human capacity.

The threat is real and remains but AI has a long way to go before replacing human beings in judicial and quasi-judicial roles. The celebration might be short-lived. Advances in AI are so fast that its capabilities could be multiplied a thousandfold in a week.[7] Whatever the case, the application of innovations in AI and robotics will, in Africa and elsewhere in the 3rd World, remain in the realm of science fiction for now and soon. For now let's celebrate. AI has chosen *us!*

[7] Neal M, AI is Advancing Faster Than We Can Fathom - My Mind is Blown! Accessible at https://www.linkedin.com/pulse/ai-advancing-faster-than-we-can-fathom-my-mind-blown-neal-mitra-qiblc/

Cross-Border Insolvency and Arbitration: An analysis of *Fotochrome Inc. v. Copal Company Limited*

By Shalom Bright Omondi[*]

Abstract

This short case analysis discusses the intersection of arbitration and cross-border insolvency using the case of Fotochrome Inc. v. Copal Company Limited as an example. It highlights the clash between party autonomy in arbitration and the collective statutory nature of cross-border insolvency. The case involves a U.S. corporation filing for bankruptcy while an arbitration proceeding was ongoing in Japan. The U.S. court's attempt to stay the arbitration raised jurisdictional issues, ultimately leading to the U.S. Court of Appeals Second Circuit's decision that the bankruptcy court lacked territorial jurisdiction over the foreign parties, rendering the arbitration award enforceable. The commentary notes the potential conflict between bankruptcy courts' assertion of jurisdiction and the intentional choice of arbitration by parties for dispute resolution, emphasizing arbitration's role in fostering equitable relationships and ensuring the neutrality of the arbitral forum in international transactions.

Introduction

Arbitration and Cross-border insolvency are both integral processes that embody to an extent contrasting legal persona.[1] On one end, arbitration encapsulates the idea of party autonomy and decentralization of private dispute resolution.[2] On the other hand, cross-border insolvency is a collective statutory

[*] *Bachelor of Laws (LLB) at Jomo Kenyatta University of Agriculture and Technology, a research associate at AfricaHealthLaw, a Legal Trainee at Transparency International, an ADR legal writer, a student member of CIArb-Kenya, Blockchain Association of Kenya member, and a Young ICCA Member. President of Young Arbiter Society- JKUAT Karen Chapter. Email: Shalombright362@gmail.com*

[1] Nidhi Thakur and Akshita Tiwary, 'Cross-Border Insolvency and International Commercial Arbitration: The Need for Legislation' (cbcl.nliu.ac.in) *https://cbcl.nliu.ac.in/arbitration-law/cross-border-insolvency-and-international-commercial-arbitration-the-need-for-legislation/* accessed 29 January 2024.

[2] Ibid

proceeding for that involves the public centralization of disputes in order to achieve the best economic efficiency and returns for creditors.[3] There are many within the world of cross-border insolvency who have been trying to find ways to rationalize them, however, solutions proposed so far are not having the pronounced effect that they would have.[4]

Fotochrome Inc. v. Copal Company Limited

In 1966, the United States corporation, Fotochrome, Inc., entered into a contract which called for Copal Company Ltd to produce cameras according to certain specifications made by Fotochrome who was then to distribute the cameras in the United States.[5] During this time a dispute arose between the parties which was then referred to arbitration in Tokyo at the Japanese Commercial Arbitration Association (JCAA) as was indicated in the contract.[6] While a decision was still being decided on at the Japanese board, Fotochrome suddenly filed a chapter XI bankruptcy petition in the United States.[7]

In this instance, all creditors of Fotochrome were barred by the Referee to the U.S. bankruptcy proceedings from "commencing or continuing any actions, suits, arbitrations or the enforcement of any claim in court against the debtor…"[8] which in this instance was Fotochrome. The Japanese Commercial Arbitration Association however continued with the proceedings, determining that the stay

[3] Ibid

[4] Dancia Pen and Barry Leon, 'Using International Arbitration for Cross-Border Insolvency Disputes and Restructurings' (ifcreview, 2021) International Financial Centres Review *https://www.ifcreview.com/articles/2021/june/using-international-arbitration-for-cross-border-insolvency-disputes-and-restructurings/* accessed 29 January 2024.

[5] Theresa Lawler, '*Fotochrome, Inc. v. Copal Company Limited*' [1976] Maryland J Int Law 263.

[6] Ibid

[7] Ibid

[8] *Fotochrome, Inc. v Copal Company Limited* [1974] 1 F Supp 26 (E.D.N.Y).

was legally ineffective.[9] They then issued an award shortly after which was in favor of Copal.[10] Fotochrome later went on to file an award with the Tokyo District Court in order to seek enforcement and then produced a proof of claim under the United States Bankruptcy proceedings to which Fotochrome was a party.[11]

The Japanese award was however rejected by the Referee to the U.S. bankruptcy proceeding and it was declared the award would not be regarded as a final judgement during bankruptcy proceedings and that the United States court could not examine the underlying dispute.[12] The Court of Appeal for the Second Circuit was of a different view and affirmed the district court's reversal of the Referee's decision.[13]

In order to have prevented a potential conflict between the UN Convention on the Enforcement and Recognition of Arbitral Awards and the U.S. Bankruptcy Act, it was determined by the court of appeal that even if the Bankruptcy Court had the power to stay local arbitration, the stay issued by the Referee had no valid legal effect on the JCAA or Copal because the Bankruptcy Court did not have territorial jurisdiction of them.[14]

This viewpoint was noted by Judge Weinstein in his holding that that the Bankrupty Courts did not enjoy personal jurisdiction over Copal until October 22, 1970 when Copal's claim was filed, for Copal did not have the minimum contact requirements with the United States as required under *Hanson v.*

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[9] Theresa Lawler, '*Fotochrome, Inc. v. Copal Company Limited*' [1976] Maryland J Int Law 263.
[10] Ibid
[11] Ibid
[12] Ibid
[13] *Fotochrome, Inc. v Copal Company Limited* [1974] 1 F Supp 26 (E.D.N.Y).
[14] Theresa Lawler, '*Fotochrome, Inc. v. Copal Company Limited*' [1976] Maryland J Int Law 264

Denckla[15] and as a result, its stay of proceedings was not binding as against Copal.[16] Because of this decision, the arbitral award issued by the JCAA was legally enforceable regardless the decision of the Referee.[17]

Commentary

The Position taken on by the U.S. Court of Appeal Second Circuit in Fotochrome set challenge to the power of U.S. Courts to stay international arbitral proceedings. In *re Springer-Penguin,* a U.S. bankruptcy court had granted an opposing order staying a foreign arbitration proceeding that was commenced before the U.S. debtor filed for bankruptcy.[18] However, it clear to see that the assertion of jurisdiction by bankruptcy courts would inadvertently sabotage the intention of parties who choose arbitration as a means of dispute resolution.[19] Arbitration clauses are a deliberate and autonomous decision made by parties to a dispute whereby they relinquish the opportunity to bring disputes before the national courts.[20] Arbitration plays a crucial role in nurturing mutually beneficial relationships by effectively resolving disputes in a manner perceived as equitable by both parties.[21] Moreover, in cases where a national government is closely tied to the contract, arbitration serves as a strategic choice to mitigate the risk of bias within the state's courts.[22]

A fundamental assumption underlying international contracts is that parties opting for arbitration as a dispute resolution method rely on the impartiality of

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[15] *Hanson v Denckla* [1958] 357 US 235, 251.

[16] '*Fotochrome, Inc., v. Copal Company, Ltd*., May 29, 1975, United States Court of Appeals, Second Circuit' [1975] International Lawyer Volume 9, Number 4, Article 21.

[17] Theresa Lawler, '*Fotochrome, Inc. v. Copal Company Limited*' [1976] Maryland J Int Law 264

[18] *Springer-Penguin, Inc., Debtor* [1987] USBC SDNY 10.

[19] Melinda J. Massoff, 'Authority of United States Bankruptcy Courts to Stay International Arbitral Proceedings' [1987] Fordham Int'l LJ Volume 11, Issue 1 148

[20] Ibid

[21] Melinda J. Massoff, 'Authority of United States Bankruptcy Courts to Stay International Arbitral Proceedings' [1987] Fordham Int'l LJ Volume 11, Issue 1 158

[22] Ibid

the arbitral forum.[23] This principle of neutrality becomes particularly significant in the context of international transactions where inconsistenciess in the laws of different countries could potentially lead to more substantial prejudices than in domestic scenarios.[24] Consequently, ensuring the neutrality of arbitration remains an important objective.[25] When parties explicitly specify certain substantive and procedural laws to govern the arbitration, it reflects their clear intention to exclude any interference from other legal frameworks in the proceedings.[26]

In this line of thinking, it is therefore reasonable to conclude that the consensual process in arbitration which allows parties that are in dispute to choose arbitrators on one end does not on the other allow them to control the procedure of fairness and then avoid the principles of justice and ethical considerations under national or international law.[27]

As highlighted by Figueroa Valdes and Juan Eduardo, trust forms the foundation of arbitration and as a result, the adherence of arbitrators to professional ethics becomes crucial for upholding the integrity of the arbitral institution as a viable alternative for dispute resolution.[28]

It is therefore important for parties to understand the full nature of a contract completely before entering into it.

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[23] Melinda J. Massoff, 'Authority of United States Bankruptcy Courts to Stay International Arbitral Proceedings' [1987] Fordham Int'l LJ Volume 11, Issue 1 159

[24] Ibid

[25] Ibid

[26] Ibid

[27] Bruno Manzanares Bastida, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' [2007] Revista e–Mercatoria 6(1) 1.

[28] Juan Eduardo Figueroa Valdés, 'La Ética en el Arbitraje Internacional' (XXXIX Conference, Inter-American Bar Association, New Orleans, June 2003).

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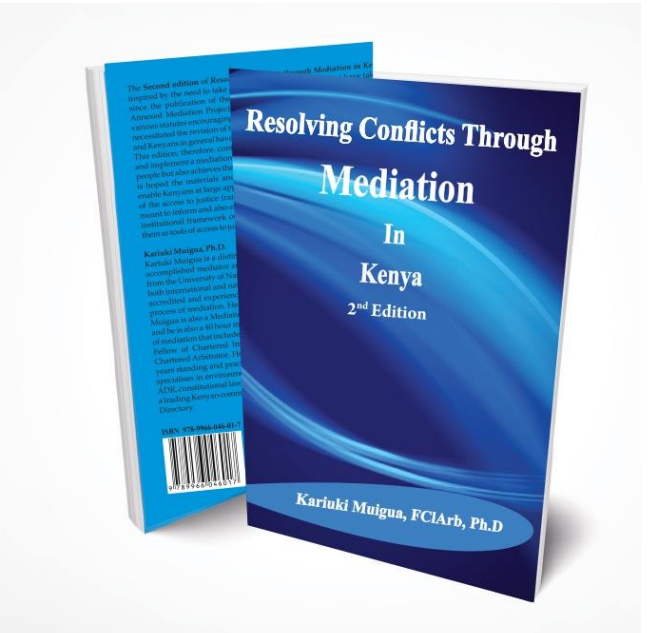

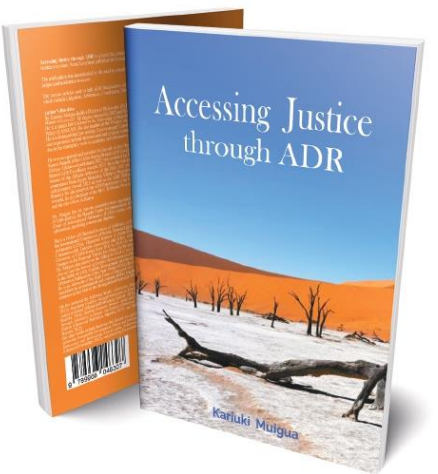

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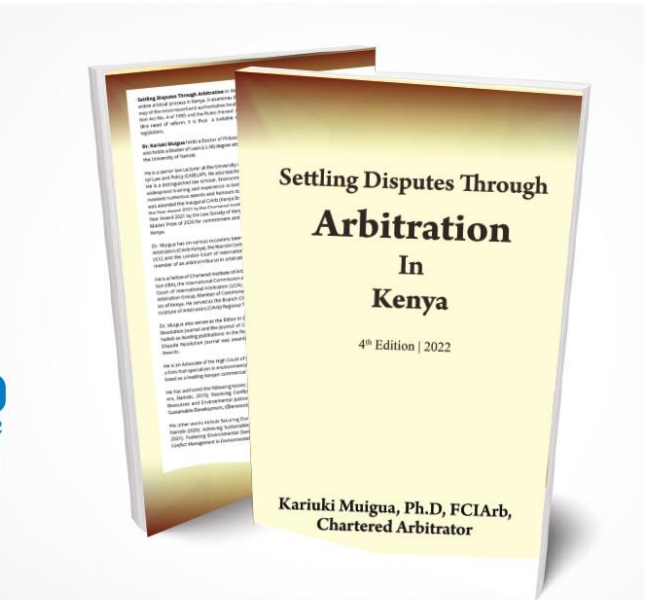

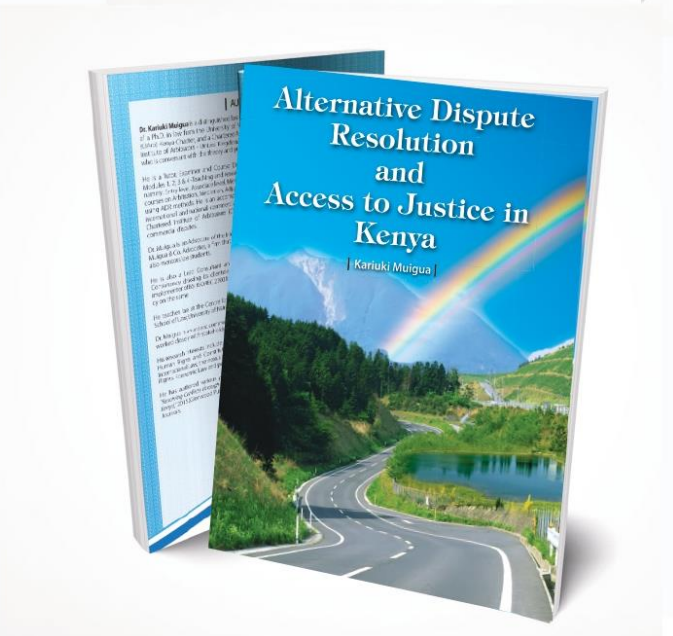

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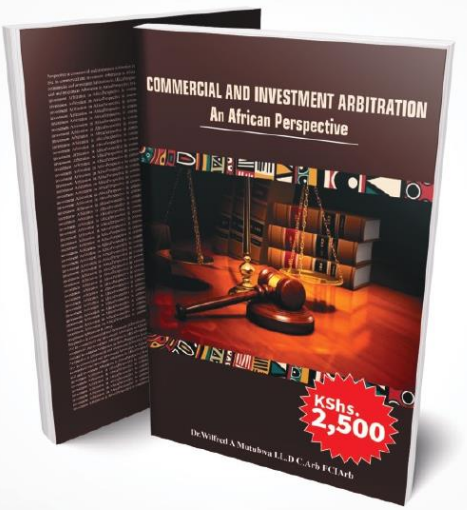

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Fax: 2720912 Mobile 0734-652205 or 0722-200496
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